Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07614/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th February 2018	**On 24th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

[W S]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Appiah, Counsel instructed by Vine Court Chambers
For the Respondent: Mr J McGill, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by [WS] against a decision of First-tier Tribunal Judge Plumptre, promulgated on 2nd October 2017, to dismiss his appeal against refusal of his protection and private and family life claims.

2. The brief background to the Appellant' protection claim is as follows.

3. The Appellant was born and raised in a place called Tagab in Afghanistan. His father and two of his brothers worked for the Taliban, as did a paternal cousin.

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Sometime prior to 2008, one of his brothers and his paternal cousin were seen by a taxi driver called Barryal to be planting a roadside bomb. Barryal reported what he had seen to the authorities with the result that his brother and paternal cousin murdered him. The Appellant knows of this because his mother told him. One of his grounds for fearing return to Afghanistan is that the family members of Barryal will avenge his death by killing him. In 2008, the family home was raided by government and allied national troops. The Appellant's father ([HG]), his brother (Dr [S]) and his paternal cousin (Commander [BS]) were all killed during the raid. Again, the Appellant knows of this because he has been told of it by his mother. The Appellant also had some limited involvement with the Taliban through a commander called Mullah Ataullah. The appellant was not involved in any fighting but he did assist the Taliban to transport people and weapons on his motorcycle.

4. It was accepted by the Home Office, and therefore by the judge, that the above events had indeed occurred. The judge nevertheless found that the Appellant was not at risk on return. This was because she concluded that the Appellant's claimed fear of the authorities – both by reason of his own association with the Taliban and that of his family members - was founded on speculation. There was no rational basis for that fear given that the authorities had raided his house as long ago as 2008 but had nevertheless not taken any steps either to apprehend or harm him in the period of 8 years that had elapsed since that time. The judge also concluded that the Appellant had been inconsistent as to whether or not he feared the Taliban. In his screening interview he had said he had a problem with the Taliban and claimed to fear that they would catch and kill him on return to Afghanistan, whereas in his main asylum interview he said that he had no problem with the Taliban and that he would be able to live in a Taliban-controlled area. Finally, in relation to his claim that his removal to Afghanistan would contravene his right to respect for private and family life under Article 8 of the Human Rights Convention, the judge concluded that his primary family life was with his close family members; that is to say, with his mother and sister who continue to live in Afghanistan. Any family life that the Appellant had enjoyed in the UK with his adult paternal cousin ([HS]) had been of short duration.

5. I deal with the Grounds of Appeal in turn.

6. The first ground (drafted by Counsel other than Mr Appiah) is difficult to follow. It appears to suggest that given the accepted facts the judge was bound to conclude that the Appellant would be at risk from either Afghan government forces or the Taliban on return to Afghanistan. This ground places reliance upon a Home Office Country Policy and Information Note. The relevant passages of this document are not quoted in the grounds and were not cited to me at the hearing. They are said to state that the risk on return is not dependent upon whether a person is a high or low-ranking member of the Taliban. However, whatever its precise terms may be, that information was not placed before the judge. This ground would thus appear to be predicated upon it being an error of law for a judge not to have regard to all relevant information that is in the public domain. If that were the case, judges would be placed in the impossible position of having to seek out for themselves information

that might conceivably be considered relevant to the issues in an appeal with the possibility of having thereafter to reconvene the appeal in order to give the parties an opportunity to address it. I do not believe that this represents the law. I am in any event unable to follow the logic of this ground of appeal, and it is right to observe that Mr Appiah did not seek to explain or elaborate upon it at the hearing.

7. Ground 2 argues that the judge failed to consider whether the Appellant would be at risk on return because of his family profile with the authorities given that it was accepted that the Appellant's father, brother, and cousin, were all active members of the Taliban. The ground continues:

> "He therefore has a profile of a person whose majority male family members were part of the Taliban. The failure to consider the risk of the family member of known persons within the Taliban and the risk to the Appellant from the authorities in Afghanistan amounts to a decision which is flawed."

However, this is simply a restatement of the Appellant's case that the judge rejected for entirely sustainable reasons at paragraphs 37 and 38 of her decision. In summary, the Appellant had by his own account continued to live in the same village in Afghanistan since the time of Barrayal's murder and subsequent raid on the family home in 2008 by the authorities, without having since come to the adverse attention of either the authorities or Barrayal's family.

8. I turn to the third ground. This suggests that there is no cogent reason why the Appellant's photograph would not be with "the local district" (a reference, I think, to the local district police). However, this ground is predicated upon a reversal of the burden of proof. The position at the hearing was that there was no evidence to suggest that the Appellant's photograph <u>was</u> with the local district. The third ground thus appears to suggest that, absent a reason for not doing so, the judge ought to have <u>assumed</u> that the Appellant's association with the Taliban had of itself proved sufficient to draw him to the adverse attention of the Afghan authorities. Whilst the standard of proof in Protection Claims is low, it does not in my judgement extend to making such unsubstantiated assumptions.

9. The fourth ground is somewhat stronger than the other three, and Mr Appiah unsurprisingly therefore concentrated upon it in his submissions.

10. I have previously noted that the Appellant had claimed in his screening interview that he feared being captured and killed by the Taliban whereas in his asylum interview he had stated that he had no difficulty with the idea of living in a Taliban-controlled area. This was a clear discrepancy. To place it in context, the Appellant's settled position at the hearing that he was <u>not</u> at risk from the Taliban. The relevance of his statement to the contrary in his screening interview was thus relevant only to his overall credibility rather than to any claimed risk of harm from the Taliban on return to Afghanistan.

11. The judge considered the Appellant's explanation for the discrepancy at paragraph 42 of her decision:

> "In rejecting the appellant's claim that as he is now of age, he would be forced to join the Taliban on return and would be at risk from the government authorities for this reason, I have considered his answer at Q4.1 of his screening interview: 'I got a problem with the Taliban, if they catch me they will kill me. One of my brothers was in the Taliban and was killed'. I have considered this explanation at paragraph 3 of his witness statement that the reason for mistakes in his screening interview was because it was done through a Farsi interpreter, whereas his main language is Pushtu and that he speaks only a little Farsi and Dari, but give weight to the fact that it is clearly recorded by the Respondent on page A that the screening interview was conducted in Dari and not Farsi as the appellant has stated."

12. The fourth ground makes two points. Firstly, that "general online research" shows that the word Farsi is the Persian name for the language known in modern times as Dari in Afghanistan. The difference in the languages is that Farsi is known more in modern times as the language used in Iran and Dari in Afghanistan, as a way to distinguish between the two. Both are born from the same origin and are described as two accents of the same language. It was therefore wrong for the judge to suggest that, by stating the language spoken was Farsi when the IO described the language as Dari, the Appellant's explanation was not credible. Secondly, it is of note that the Appellant stated that he spoke a little Farsi and Dari and thus, it is reasonable to assert that the Appellant would not have been able to fully understand either language. Thus, it is argued, the judge's rejection of the Appellant's explanation for the discrepancy is without basis and is flawed.

13. The problem with the first point is that it once again relies upon information that was not placed before Judge Plumptre (see, also, paragraph 6 above). Indeed it was also not before me. The judge cannot therefore be criticised for assuming that Dari and Farsi were different languages or, at least, different dialects of the same language. Indeed, it was the Appellant himself who first made reference to Farsi, as opposed to Dari, by way of explanation for his discrepant accounts. He has thus only himself to blame if this led to confusion in the mind of the judge. However, this was not the only reason that the judge gave for rejecting his explanation. She gave a further reason at paragraph 43:

> "I find that the discrepancy of fearing the Taliban/having a problem with the Taliban as recorded in his screening interview to the complete reversal in his oral evidence that he has no problem with the Taliban and could live in a Taliban controlled area is too great a change in his asylum claim to be explained by lack of a proper interpreter about whom he did not complain and whom he stated he had understood at the end of the interview. In addition I find given his claim that he had assisted the Taliban in a modest way in Afghanistan that his claim in his screening interview that he would be killed by the Taliban has no foundation at all."

14. The judge thus makes the point that whatever the language may have been (Farsi or Dari) this could not account for the Appellant saying on the one hand that he feared being captured and killed and, on the other, saying that he had no such fear. Moreover, in order to explain away what the judge fairly characterised as "a

complete reversal of his position", the problem would have had to lie, not in his understanding of what was being asked of him, but in a fundamental mistranslation of his reply. The judge was thus perfectly entitled to conclude that it was not credible that the Appellant's words had been mistranslated to that extent, whatever the original language may have been.

15. I turn to Ground 5. Prior to the hearing there had been a written application to adjourn. This was renewed at the hearing by Counsel. The application to adjourn was made because the Appellant's representative had made a formal request to the Home Office to disclose the reasons and information that had been provided to the French authorities leading to an agreement with the UK authorities that the Appellant's protection claim would be determined by the United Kingdom rather than in France where he was residing at that time. It was said at the hearing that the question of the circumstances in which the UK authorities had agreed to handle the Appellant's asylum claim were, "at the heart of the appeal and could give rise to further additional grounds which ought to be considered by the Tribunal". [See paragraph 10 of the decision]. Moreover, Counsel submitted to the Tribunal that there might be additional information which he had give to the French authorities about the circumstances in which he left Afghanistan.

16. In opposing the application, the Presenting Officer is recorded as saying (at paragraph 11) that it was not known what information, if any, the Appellant had given to the French authorities and whether he had been formally interviewed or not. Moreover, such information would not add anything to that about which the Appellant could give oral evidence concerning his reasons for leaving Afghanistan and his claimed fear of the Afghan Government and non-state actors.

17. The judge may have been well advised to have based her decision on the grounds advanced by the Presenting Officer, namely, that the adjournment application was based entirely upon speculation. There were no reasonable grounds to suppose that the reasons why the UK authorities had agreed to deal with the Appellant's asylum claim had any bearing upon whether the Appellant was able to substantiate his asylum claim. Indeed, the primary facts were not in any event disputed. Moreover, it is widely known that the UK government reached agreement with the French authorities that they would process claims by minors who had an adult relative in the United Kingdom. The Appellant met both these criteria. That was in my judgement sufficient reason to refuse the application. It is therefore perhaps regrettable that the judge chose to refuse the application on the basis that the Appellant may find himself in a difficult position if the information he gave to the French authorities proved to be different to that which he had given to the UK authorities. That too was based upon speculation. It did not however affect the fairness of the ultimate decision.

18. In developing this ground, Mr Appiah referred to what he characterised as the Secretary of State's 'duty of candour'. The Respondent is no doubt under a duty to disclose evidence to the Appellant which is capable of either undermining her own case or reasonably assisting that of the Appellant. However, this does not extend to

the Respondent being obliged (to borrow a phrase from the criminal jurisdiction) to "hand over the keys to the warehouse". There was in this case no basis for suspecting that the Respondent had been breach of her duty of candour, and it could not therefore provide a basis for the adjournment that was being sought.

19. I turn to Ground 6. Before considering this, it may be helpful to quote in full the fairly brief reference that the judge made to the Appellant's claim under Article 8 of the Human Rights Convention at paragraph 51:

> "I was asked to deal with Article 8 but find that the appellant's primary family life is with his family members i.e. his mother and sister as a minimum who continue to live in Afghanistan. I find that any family life with the adult paternal cousin [HS] is of short duration and that the appellant can rely at best on private life only. I give weight to the fact that he has been in the UK for less than one year and that Article 8 is not engaged on the facts of this appeal. Clearly he cannot meet any of the requirements of paragraph 276ADE."

20. Ground 6 complains that the judge was not entitled to assume that the Appellant's primary family life continued to be with his mother and sister or that they continued to live in Afghanistan given that the Appellant had said in his witness statement that he did not know where they were. However, that argument is in my judgment based upon an artificial construct. In reality all that the Appellant could say was that his mother had been living in his village in Afghanistan on the last occasion that he had seen her. Similar considerations equally applied to his sister who was last known to be living elsewhere in Afghanistan with her husband. Given that the burden of proof rested upon the Appellant, it seems to me that the judge was entitled to conclude that they remained at their last known addresses in the absence of any evidence that the Appellant had made reasonable efforts to trace them. There was, as I understand it, no evidence before the Tribunal that the Appellant had made any attempt to trace his mother and his sister, or that he had sought the assistance of the Home Office or of a non-governmental organisation (such as the Red Cross or Red Crescent) to do so.

21. On the other side of the coin, there were the Appellant's private and family life ties to the United Kingdom. Given the relatively brief period during which the Appellant had resided in the United Kingdom at the date of the hearing, it was entirely open to her to conclude that those ties were minimal. I therefore find that the judge did not make any error of law in relation to her Article 8 assessment.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Kelly

Date: 26th March 2018