Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: PA/00239/2019

THE IMMIGRATION ACTS

Heard at Field House, London
On the 1st August 2019

Decision & Reasons Promulgated
On the 16th August 2019

Before:

DISTRICT JUDGE MCGINTY

SITTING AS A DEPUTY UPPER TRIBUNAL JUDGE

Between:

MR SAJAD YAQUBI

(No Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Heidar (Counsel)

For the Respondent: Mr Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Chana promulgated on the 7th March 2019.

2. At the Upper Tribunal hearing before me, the Appellant was represented by Miss Heidar of Counsel, and the Secretary of State was represented by Mr Melvin, the Senior Home Office Presenting Officer.

3. The appeal before First-tier Tribunal Judge Chana was the second asylum appeal brought by the Appellant. The Appellant's first asylum appeal had been dismissed by First-tier Tribunal Judge Mays in a decision dated the 6th October 2015 who found that there was no active blood feud which would put the Appellant at risk upon return to Afghanistan and that he could be returned safely to that country.

4. Judge Chana noted at paragraph 29 of her decision that "*the basis of the Appellant's claim before the First-tier Tribunal was that he feared persecution and ill-treatment in Afghanistan because of a blood feud, he has no relatives in Afghanistan, he is a Shia Muslim and because of the general country situation. This is the very same claim in this appeal. The First-tier Tribunal Judge stated that the murder took place and the person suspected of the murder was arrested and detained. After a thorough investigation of the evidence, the objective evidence and the documents provided by the Appellant about the blood feud, the First-tier Tribunal Judge found that the killing took place in October 2013 and it was the last and indeed the only killing. The Judge found that the Appellant is not a member of a family involved in an active blood feud and therefore will not come to any harm on these bases*".

5. Judge Chana found that in paragraph 30 that

> "*30. I therefore find that the Appellant is essentially relying on the same facts which have already been the subject of the previous determination of the First-tier Tribunal who found at the date of the First-tier Tribunal's decision, that the Appellant does not have a well-founded fear of persecution*

> *in Afghanistan and could be returned safely. I take as my starting point that this is the authority of assessment of the Appellant's status as at the time of the First-tier Tribunal Judge's decision which was heard on the 11th September 2015.*
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> *31. I find that the question that I now have to decide is whether at the present point in time, after the First-tier Tribunal's decision, the situation is such that, taking into account the current situation in Afghanistan, the United Kingdom would be in breach of its obligations under the Refugee Convention and Humanitarian Protection if it were to return the Appellant to Afghanistan*".

6. The Judge noted at paragraph 33 that the Skeleton Argument argued that the core of the Appellant's claim had been accepted in the Respondent's refusal letter and that the First-tier Tribunal Judge previously had refused the Appellant's appeal on the ground that she believed that he could relocate to Kabul on the basis that there is no evidence to show the Appellant had initiated contact with the Red Cross and he had a paternal uncle living in Afghanistan. Judge Chana noted that within the Skeleton Argument it was said that the Appellant's fear was based on fears on his integration based upon being a Shia Muslim was not considered by the First-tier Tribunal and that the Respondent had between paragraphs 14 and 17 of the refusal letter stated that Shia Muslims are targeted in Afghanistan. She noted that it was argued on behalf of the Appellant that the First-tier Tribunal's decision was now three years old and that there was evidence and factors which were not considered by the previous Judge and that the Appellant had now tried to contact his family through the Red Cross who confirmed that his family could not be traced. She noted it was being argued that the Appellant had no contact with his paternal uncle and therefore he would be at risk upon return. The Appellant was arguing that the Respondent had not

carried out any attempts to trace the Appellant's family as set out in the case of KA and the Respondent's duty did not end when the Appellant turned 18.

7. However, Judge Chana found at paragraph 36 onwards that there was no background evidence which stated the fact that the Appellant was returning from the United Kingdom would put him at risk and that he is now an adult and in good health. She found that he does in fact have an uncle in Kabul and that the previous First-tier Tribunal was of the same opinion that the Appellant did have an uncle in Kabul and had not found his evidence credible that he would not be able to contact him upon return. Judge Chana stated that the previous Judge had found that that business partner would be able to assist the Appellant upon returning to Afghanistan. Judge Chana also found that the Appellant's sister's husband had been supporting the Appellant in the United Kingdom and could continue to do so until he settled down and found a job in Afghanistan.

8. At paragraph 37, Judge Chana stated

> "37. *The Appellant's sister returned to Afghanistan in 2012 for a holiday. I do not find it credible that she would go to Afghanistan for a holiday, a country which the Appellant claims is dangerous, if she and her husband had no family in that country to visit. I find that the Appellant does have family and others in Afghanistan who will assist him in settling down. I have considered the evidence that the Appellant went to the Red Cross who said that they cannot trace his family. That does not mean that he does not have any family there. Even if he does not have any family in Kabul, the Appellant will be able to find employment and settle down.*
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> *38. As to the issue of sufficiency of protection, I bear in mind that in general if a person cannot establish a real risk of serious harm, the question of whether there is a sufficiency or insufficiency of protection against that harm does not arise. I find that it would be reasonable and not unduly harsh for the Appellant to do so. The Appellant is an Afghanistan national,*

is educated to GCSE level and in good health. He speaks the local language and has worked in this country and this will assist him to reintegration into his home country".

9. Judge Chana was therefore not satisfied that if returned to Afghanistan the Appellant would face a real risk of persecution, death or torture or inhuman or degrading treatment or punishment and dismissed his asylum, Humanitarian Protection and Human Rights claims.

10. Permission to appeal against that decision has been granted by Upper Tribunal Judge Owens on the 28th June 2019. She stated that the Respondent had accepted the core of the Appellant's claim in issue related to the reasonableness of relocation. She found it was arguable that the Judge had not given adequate reasons for concluding the Appellant has family in Kabul in light of the evidence before her from the Red Cross, the Appellant and his sister and that it was further arguable when assessing whether it was reasonable for the Appellant to return to Kabul the Judge had failed to properly apply the guidance in the country guidance case of AS (Afghanistan) CG [2018] UKUT 00118 (IAC) by failing to take into account the Appellant's age, the fact that he had been in the UK since he was 15 years old, the fact that his family had also left Afghanistan and that he is of a minority religion. She said that she took account of the fact that AS (Afghanistan) had been remitted to the Upper Tribunal however the issues were still pertinent. She further found it was arguable that the Judge had failed to assess whether or not the Appellant met the requirements of paragraph 276ADE(vi) of the Immigration Rules and stated that all grounds may be argued.

11. I am grateful to Mr Melvin for having produced a Rule 24 Reply dated the 31st July 2019 which I have fully taken into account.

12. In considering this appeal, I have considered all of the documents, including inter alia the reasons for refusal letter, the decision of First-tier Tribunal Judge

Chana, the previous decision of First-tier Tribunal Judge Mays, the Grounds of Appeal, the Rule 24 Reply, together with the oral submissions of both legal representatives at the appeal hearing. I have also considered all of the documents within the file. Even if I do not mention any particular piece of evidence, submission, or document within this decision, that does not mean that I have failed to consider the same, as I have considered all of the arguments and all of the documentation before reaching any decision.

13. Within the first ground of appeal it is argued that the Judge has given insufficient findings in respect of the Appellant's refugee claim, it was argued that the Respondent had accepted the Appellant's claim to be credible and the core of his account had been accepted but that Judge Mays originally found that the Appellant could internally relocate on the basis that it was said that there was no evidence to show the Appellant had initiated contact with the Red Cross and he had a paternal uncle in Afghanistan. It was argued that the Appellant's fear of integration based on being a Shia was not considered. It is argued that the First-tier Tribunal Judge made no findings in respect of the Appellant's claim that he was a Shia and that there was evidence that the Appellant had in fact initiated contact with the Red Cross and confirmed his family could not be traced and letters from the Red Cross appear in the Respondent's bundle. It is argued that the Judge found that the Appellant had an uncle, without considering the evidence of the Red Cross and she had made no findings in respect of the Appellant's evidence and that of his sister in respect of the fact that the Appellant had no contact with his uncle. It is argued that the Judge's finding that the Red Cross had said that they could not trace his family was contradictory to a finding that "that does not mean that he does not have family there". It is argued that the Judge's findings at paragraph 37 when relying upon the sister's visit in 2012 to show there were family there failed to take account of the fact that her visit was prior to the events that took place that led to the Appellant's family leaving

Afghanistan as the sister's visit was in 2012, whereas the killing took place in October 2013.

14. In the second ground of appeal regarding the reasonableness of return, it is argued that although the First-tier Tribunal Judge found that the Appellant was a fit male she had not considered the facts present in the Appellant's circumstances as outlined at paragraph 230 of the country guidance case of AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 IAC where it was stated:

> "*our findings above show that it is not generally unsafe or unreasonable for a single healthy man to internally relocate to Kabul. However, we emphasise that a case by case consideration of whether internal relocation is reasonable for a particular person is required by Article 8 of the qualification directive and domestic authorities including Januzi and AH (Sedan). When doing so, we consider that there are a number of specific factors which may be relevant to bear in mind. These include, individually as well as cumulatively (including consideration that the strength of one factor may counteract and balance a weakness of another factor):*
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> *(i) age, including the age at which a person left Afghanistan;*
>
> *(ii) nature and quality of connections to Kabul and/or Afghanistan;*
>
> *(iii) physical and mental health;*
>
> *(iv) language, education and vocational skills*".

15. It is said that the Judge inadequately assessed whether the Appellant had family to return to and failed to consider factors such as he was a minor when he left aged only 15 and that he would not be familiar and only just turned 18 he would be vulnerable upon return. It is argued that there is no bright line rule at the age of 18 when a person in the United Kingdom is considered to be an adult and that there are different views as to becoming an adult, in particular to achieving manhood in Afghanistan society, which is not specifically linked to age but

marital status. It is argued that the Appellant has acquired skills in the UK which are not relevant to jobs that would be offered to him in Afghanistan and he has no experience of living in Kabul and has very poor prospects of finding stable work and the Judge's findings in regards employment are unsupported. It is further argued that the Judge has failed to consider the facts that returning as a Shia would put him at further risk. It is further argued the Judge has not considered paragraph 276ADE(vi) at all in her determination and that there would be very significant obstacles given the fact he has no family to return to, his claim was found to be credible, his origin as a Shia he has never lived in Kabul and has no experience of living alone and being absent since he was a minor.

16. It was further argued in respect of Article 8 the Judge erred in finding that the Appellant had no family life in the UK and the Judge made no findings in respect of his family life with his sister in the UK with whom he had lived since he was a minor and the Judge had made no findings in respect of his private life and has not considered the factors set out in Section 117 of the Nationality, Immigration and Asylum Act 2002.

17. Within the Rule 24 Reply it is argued that the Judge properly assessed the evidence in relation to the Appellant having a paternal uncle in Kabul, as well as having a father's business partner, who had a house there and it was open to the Judge to make that finding in light of the oral evidence at the hearing. It is argued that the Appellant and his witness wished to distance themselves from any family contact with relatives in Afghanistan for obvious reasons and that the Judge had dealt with the Red Cross letter at paragraph 37 of the Judgment. It is argued that the Judge however proceeded to take the appeal at its highest such that even if he did not have family in Afghanistan the Appellant was able-bodied, country and language aware and a citizen of Afghanistan and would be able to reintegrate back there. It is argued that the Judge did consider whether it

was reasonable for him to relocate to Kabul and made findings that it was reasonable for him to so relocate. It is argued that 20% of the Afghan population are Shia and without more, that is not a stand-alone ground of appeal which has any prospect of success and there is no country guidance to say that Shia Muslims are per se persecuted. It is further argued that having found the Appellant can reintegrate at paragraph 38 it was not incumbent on the Judge to reiterate this finding for the purpose of paragraph 276ADE of the Immigration Rules. It is argued that the Judge has considered the new claim and considered it through the lens of the current country guidance and reached findings open to her and directed herself appropriately.

18. In her oral submissions, Miss Heidar, inter alia, argued that the question as to whether or not the Appellant had family members to return to in Afghanistan was relevant to his ability to reintegrate for the purposes of AS and that the Appellant and his sister had said that they were no longer in contact with the uncle and that the sister had given specific evidence on that point, but the Judge had made no findings on that evidence. She argued that the sister had been asked detailed questions in cross-examination, and the Judge had not taken account of that evidence. Miss Heidar further argued that the Judge clearly erred in her findings at paragraph 37 that the Appellant had family to go back to based upon the sister having returned to Afghanistan in 2012, as that was before the killing. She further argued that following the case of KA (Afghanistan), the duty on the Home Office to make enquiries as to the location of the Appellant's family did not end when he was aged 18. She argued that the Judge erred for the purposes of the case of AS in that she had not considered that the Appellant left when he was still a minor, had no family there and never lived in Kabul and that he was a Shia. She agreed that that alone was not a sufficient ground on the basis of him being Shia but said it was not the only ground but was one factor

the Judge could have taken into account for the purposes of AS in determining whether he can relocate to Kabul.

19. She argued that the Judge had not made any findings in respect of the Appellant's private life or paragraph 276ADE, or in respect of his family life. She argued that the definition of very significant obstacles for the purposes of paragraph 276ADE was different from that applied in the asylum claim. She argued that the Appellant had lived with his sister in the UK since he had come here and there were more than emotional ties involved as argued in the Skeleton Argument. She accepted that although the Appellant had a fiancée that was not the strongest part of his articled claims as they were not married.

20. Mr Melvin relied upon his Rule 24 Reply. He further argued that there was no material error in this case, and if the Judge made her error regarding the visit in 2012 of the sister, that error was not material. He argued the Judge at paragraph 37 had taken the case at its highest and made findings that even if there was no family there the Appellant would be able to get employment and settle down. He reminded me that in paragraph 2 of the head note of AS it was found that it was not generally unduly harsh for an able-bodied male to be able to return and live in Kabul. He argued that Judge May had previously found that the Appellant was able to contact his uncle in Afghanistan and that was the starting point for the case of Devaseelan. He argued that the Red Cross letter was just in respect of the Appellant's father and not in respect of the business partner, the uncle or aunt and that the Judge was entitled to make findings that the Appellant did have family in Afghanistan. He argued that the Supreme Court had now made clear that the Home Office did not have a duty to trace family members in the way suggested by Miss Heidar.

21. Mr Melvin argued the Appellant was financially independent and working and there was no evidence of emotional dependency for the purposes of establishing

a family life based on the case of Kugathas and argued that the Judge made findings in respect of Article 8 which were open to her and that the findings were adequate. He argued that the Appellant is now a 20-year-old male who does have connections to Kabul and would be able to integrate and for the first 15 years of his life he had spent his life in Afghanistan and knows the culture and language and was not at risk upon return. He argued there was no country guidance or expert evidence to show that Shia Muslims per se were at risk of persecution upon return and 15 to 20% of the population are Shia Muslims.

22. He argued that the Judge needed to assess what had happened since Judge May made her decision and she had properly assessed the new evidence and found it reasonable for him to return to Kabul. He argued that the Appellant himself had not attempted to contact his father's business partner or aunt who were all living in Afghanistan and there was not a duty on the Respondent to try to trace them. He argued there was no material error.

My Findings on Error of Law and Materiality

23. Although Miss Heidar placed reliance on the case of KA (Afghanistan) [2012] EWCA Civ 1014 to argue that the Respondent's duty to trace family members not stopping when the Appellant turned 18 and was not discharged by giving them leave until they reach the age of 17½ and point them in the direction of the Red Cross offices, the Supreme Court in the case of TN and MA (Afghanistan) v The Secretary of State for the Home Department and AA (Afghanistan) v The Secretary of State for the Home Department [2015] UKSC 40, made it clear that an asylum appeal should be determined by reference to the situation at the time of the Appellant's decision rather than by reference to the situation at the time of the original decision in respect of the tracing issue and that in deciding whether or not to accept the Appellant's account the Tribunal must act on the evidence before it, with no presumption of credibility. The Supreme Court found that the

failure by the Respondent to properly discharge a tracing obligation did not affect that and the appeal should not have been allowed by the reason of the Respondent's breaching the tracing obligation. It was found that the purposes of tracing a child's family is for the child's welfare and promoting reunification not for the purposes of gathering evidence, although that may be the result. The question therefore as to whether the Respondent had failed to attempt to trace the Appellant's family, would not have given rise to any presumption of credibility or been a factor counting in the Appellant's favour for the purposes of consideration of the asylum claim. There was no material error on the part of the Judge in failing to refer to the question of tracing by the Home Office.

24. Although it was argued by the Appellant that he had made contact with the British Red Cross who confirmed that his family could not be traced by the date of the decision, which had not been properly taken into account by Judge Chana, the letters from the British Red Cross contained within the Respondent's bundle, dated the 22nd September 2014 and the 2nd October 2015, both referred to tracing enquiries regarding Ghulam Hussain Yaqubi, the Appellant's father, rather than his uncle. There was then an appointment letter dated the 15th April 2016, and a further letter from the Red Cross dated the 25th April 2016, again relating to Ghulam Hussain Yaqubi, confirming that the Red Cross had been unable to obtain any information regarding the present location of Mr Ghulam Hussain Yaqubi. The letters from the Red Cross do not relate to other family members and do not relate to the uncle that both First-tier Tribunal Judge Mays and thereafter First-tier Tribunal Judge Chana found was living in Kabul in Afghanistan, his aunt who was found by Judge Mays to have been living north of Kabul, or in respect of the business partner of his father. The fact that First-tier Tribunal Judge Chana did not refer to the letters from the Red Cross would not in any way have affected her findings in respect of whether or not the Appellant still had family in Afghanistan, given that it was not being argued that his father

was in Afghanistan, the argument related to whether or not his uncle and his father's business partner were still in Afghanistan and whether he had contact with them. The Red Cross letters did not refer to them. There was no material error in Judge Chana's failure to refer to that evidence.

25. Further, although it does appear that Judge Chana did err at paragraph 37 of her decision in taking account that the Appellant's sister returned to Afghanistan in 2012 for a holiday when finding that it was not credible that she would go to Afghanistan for a holiday in a country which the Appellant claims is dangerous if she and her husband did not family in that country to visit, as at that time it was before the shooting which was agreed had taken place, and before it is said that the Appellant and his parents had left Afghanistan. However, Judge Mays had found that the Appellant did have an uncle in Afghanistan, and that was a starting point for the purposes of Devaseelan. There was no evidence before Judge Chana to say that that uncle had left, and it was therefore open to her in light of the previous findings to find that the Appellant did still have an uncle in Afghanistan who was living in Kabul. The error in that regard is therefore not material.

26. Further, it is clear that the First-tier Tribunal Judge did take account of the evidence of the Appellant's sister Miss Yaqubi and that she had not spoken to her uncle or aunt since 2012, as this was recorded in paragraph 25 of her Judgment. The Judge also took account at paragraph 18 of his decision of the Appellant's evidence that he said that he had last spoken to his uncle in 2011/12. Judge Chana was entitled to take account of the fact that previously Judge Mays did not find the Appellant's evidence credible that he would not be able to contact his uncle upon return. Despite the Appellant and his sister's evidence that they had not been in contact with the uncle and aunt, previously Judge Mays had found that the father's business partner could help trace the Appellant's uncle and that he also had an aunt residing in Mazar-e-Sharif. Judge Mays also

found that the Appellant's sister or her husband could also help the Appellant locate his uncle and aunt. As that was the factual basis for the decision in October 2015, although over three years had passed since the date of the decision by Judge Chana, it was still open to her to find, as she did, that not only did the Appellant have an uncle in Kabul but that she did not find his evidence credible that he would not be able to contact him upon return. That was a finding open to her having heard the evidence from the Appellant. There is no material error of law in that regard.

27. In respect of the argument that the Judge had misapplied the country guidance case of AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC) the point being made in the case was that it will not, in general, be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul, even if he does not have any specific connections or support network in Kabul. However, the particular individual circumstances of an Appellant must be taken into account in connection with the conditions of the place of relocation including the person's age, nature and quality of support, network connections with Kabul and Afghanistan, their physical and mental health, their language, educational and vocational skills, in order to determine whether a person fell within the general position.

28. Judge Chana made findings which were open to her that the Appellant did have family members to return to in Afghanistan including an uncle in Kabul who could be traced by him upon return. Judge Chana was clearly aware that the Appellant left Afghanistan when he was just 15, but noted that he was now an adult, and the Judge noted specifically that she accepted that he was a minor when he left Afghanistan at paragraph 27 of the Judgment and the Judge did properly consider the factors set out in AS including the fact that he is an Afghan national and educated to GCSE level and in good health and he spoke the local language and had worked in the United Kingdom which she found would help

him reintegrate into the home country. The argument that that would not be useful in obtaining jobs in Afghanistan was in fact an attempt to relitigate the argument run before the First-tier Tribunal, and does not reveal any material error of law. The Judge has explained why the Appellant on her findings would be able to settle down and find employment in light of the fact that he had family in Kabul in the form of his uncle, his education and work history.

29. In respect of the argument regarding Article 8, the Judge has explained why he did not consider the Appellant's relationship with his sister, brother-in-law and niece not to be family life for the purposes of Article 8 and that prior to coming to the United Kingdom he had lived apart from her in Afghanistan. This was therefore not a sister who he had lived with throughout his life, and in those circumstances it was open to the judge to conclude there was insufficient evidence to justify the First-tier Tribunal Judge finding that there was sufficient dependency now the Appellant is an adult to amount to family life in the Kugathas sense. The Judge has made findings open to her that there was not family life for the purposes of Article 8 in that regard.

30. The Judge has also considered the Appellant's private life at paragraph 51 of the decision and although not specifically referencing Section 117B, had noticed that little weight should be given to a private life established at a time when the immigration status was precarious. He therefore has considered that section, although not referring to the same specifically. Having found that the Appellant did have family to return to in Afghanistan and that he would be able to find employment there, the Judge has not materially erred in failing to consider specifically paragraph 276ADE(vi) as a consideration of that paragraph would have led to the same outcome, in light of the Judge's findings in respect of his ability to return to Afghanistan and his ability to reintegrate there and live safely without undue hardship. The failure to consider separately paragraph 276ADE(vi) is therefore not a material error of law in this case.

31. In respect of the argument regarding the Appellant being a Shia Muslim not having been dealt with by the Judge, clearly, although there was reference to Shia Muslims being targeted within the refusal letter, as Miss Heidar concedes, that in itself was not going to be sufficient for the Appellant to succeed in his asylum, Humanitarian Protection or Human Rights claim. As Mr Melvin indicates between 15 and 20% of the population are Shia Muslims, there is no country guidance case to indicate that in fact Shia Muslims are at risk upon return. The Judge having made perfectly adequate findings which were open to her in respect of the other issues, the fact that she has not dealt with that issue therefore cannot amount to a material error of law.

32. The decision of First-tier Tribunal Judge Chana does not reveal any material error of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Chana does not contain a material error of law and is maintained.

No Order is made for anonymity, no such Order having been sought before the First-tier Tribunal and no such Order having been sought before myself.

Signed

District Judge McGinty

District Judge McGinty sitting as a Deputy Upper Tribunal Judge Dated 6th August 2019