



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/09552/2017

**THE IMMIGRATION ACTS**

**Heard at Cardiff CJC  
On 30 May 2019**

**Decision & Reasons Promulgated  
On 13 June 2019**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**H A  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr E Fripp instructed by Hoole & Co, Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.
2. The appellant is a citizen of Afghanistan who was born on 1 July 1999. He arrived in the United Kingdom on 19 September 2014 and on 4 November 2014 he claimed asylum. His claim was refused but, as the appellant was an unaccompanied minor, he was granted limited leave until 31 December

2016. The appellant brought an 'upgrade' appeal under the then s.83 of the Nationality, Immigration and Asylum Act 2002 against the refusal of his claim for asylum. On 8 December 2015, the First-tier Tribunal (Judge O'Rourke) dismissed the appellant's appeal.

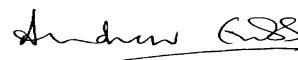
3. Further submissions were made and on 5 September 2017, the Secretary of State again refused the appellant's claim for asylum as well as refusing his claim for humanitarian protection and human rights claim under the ECHR. The appellant appealed that decision to the First-tier Tribunal. In a decision sent on 14 February 2018, Judge Frazer dismissed the appellant's appeal on all grounds. The appellant subsequently successfully appealed to the Upper Tribunal. In a decision sent on 14 August 2018, DUTJ Farrelly concluded that Judge Frazer's decision could not stand as she had materially erred in assessing whether the appellant could safely and reasonably relocate to Kabul.
4. The remitted appeal was heard by Judge Lever in the First-tier Tribunal. In a decision sent on 9 January 2019, he dismissed the appellant's appeal finding that it was reasonable for him to relocate to Kabul in the light of the country guidance decision in AS (safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC).
5. The appellant sought permission to appeal on a number of grounds. On 8 February 2019, the First-tier Tribunal (Judge Scott-Baker) granted the appellant permission to appeal.
6. On 12 March 2019, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.
7. At the outset of the hearing before me, Mr Fripp, who represented the appellant, raised a preliminary point as to the scope of the grant of permission to appeal. This arose because Judge Scott-Baker had observed that the first of the appellant's four grounds of appeal was not arguable. However, Mr Howells, who represented the Secretary of State accepted that in the light of the Upper Tribunal's decision in Safi and Others (permission to appeal decisions) [2018] UKUT 00388 (IAC), the appellant was entitled to rely on all four grounds.
8. Further, Mr Fripp sought permission to add a further ground. This ground reflected the fact that on 24 May 2019, the Court of Appeal ([2019] EWCA Civ 873) had set aside the Upper Tribunal decision in the country guidance case of AS on the basis that it had materially erred in law in reaching its assessment of the risk to (and therefore safety of) an individual returned to Kabul. Mr Fripp pointed out that Judge Lever's decision had applied the UT's country guidance decision in AS and that now that that decision had been set aside and remitted to the Upper Tribunal to reach a fresh conclusion on the issue of risk on return, Judge Lever's decision based upon it was similarly legally flawed.

9. Mr Fripp invited me to permit the appellant to amend his grounds in order to add this new ground which had only arisen as a result of the Court of Appeal's decision on 24 May 2019.
10. Mr Howells, accepted that the appellant should be entitled to amend his grounds to reflect the fact that the Court of Appeal had set aside the country guidance decision in AS and further he accepted that in the light of that Judge Lever's decision could not stand as it was based upon the UT's decision in AS as to the reasonableness of the appellant relocating to Kabul. In particular, at para 27, Judge Lever concluded: "I do not find applying the tests in AS [2018] that he is at risk of persecution in Kabul and it will be reasonable for him to relocate to Kabul."
11. In the light of the representative's common position, I granted permission to amend the appellant's grounds of appeal so as to reflect a challenge to Judge Lever's decision based upon his reliance upon the (then) extant country guidance decision in AS which has subsequently been set aside by the Court of Appeal on the basis that the UT had materially erred in law in reaching its assessment of the reasonableness of relocating to Kabul. I also agree with the common position of the representatives that, as a result, Judge Lever's decision cannot stand because of his reliance upon a country guidance decision which has been set aside on the basis that the conclusions were legally flawed.
12. For those reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of a material error of law and is set aside.
13. Mr Fripp raised a further point at which he indicated he did not invite me to decide but which would be an issue for the judge in remaking the decision. The point essentially arose from his first ground of appeal. It was that the adverse credibility finding made by Judge Frazer, and which the DUTJ Farrelly directed should stand, was based upon the adverse credibility finding made earlier by Judge O'Rourke. Mr Fripp informed me that the appellant had not attended the hearing before Judge O'Rourke and that that was not as a result of any fault by him. Mr Fripp accepted that the judge in re-hearing the appeal would look at the earlier adverse credibility finding in the light of the guidance in Devaseelan v SSHD [2003] Imm AR 1. He indicated that it would be the appellant's position that there was good reason not to base any future assessment of the appellant's credibility on the earlier finding of Judge O'Rourke (because of the appellant's excusable non-attendance) which had been, itself, relied upon by Judge Frazer. As I have indicated, Mr Fripp did not invite me to reach any conclusion upon this as it will be a matter for the judge remaking the decision. It would appear that Mr Fripp would seek to bring the appellant's circumstance within guideline (7) in Devaseelan (see [42](7)).

## **Decision**

14. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of a material error of law. That decision is set aside.
15. In the light of the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal to remake the decision in respect of the appellant's asylum and humanitarian protection claims. It does not appear that the appellant now (or before Judge Lever) relied upon the ECHR. The appeal should be heard by a judge who has not previously been involved with this appeal, namely not Judges O'Rourke, Frazer and Lever.

Signed



A Grubb  
Judge of the Upper Tribunal

11, June 2019