**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/09967/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 11 April 2019** | **On 17 April 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**ALIFKHAN [A]**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr B Bedford of Counsel instructed by Central England Law Centre
For the Respondent: Ms S Cunha, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge E M M Smith promulgated on 11 January 2019 dismissing on protection grounds the appeal against a decision of the Respondent dated 28 July 2018.

2. The Appellant is a citizen of Afghanistan whose date of birth is recorded as 1 January 2000.

3. The primary issue before the Upper Tribunal is in respect of the First-tier Tribunal Judge's apparent failure to have any regard to an expert report filed by the Appellant in support of his appeal.

4. The report, dated 2 September 2018, was prepared by Dr Antonio Giustozzi (Appellant's bundle before the First-tier Tribunal, pages 5-46). Dr Giustozzi has been acknowledged as an expert in many cases before the Tribunal, perhaps most recently and notably as a witness in the country guidance case of **AS (Safety of Kabul) (Afghanistan) CG [2018] UKUT 00118**. Whilst not every aspect of his evidence and opinion was accepted by the Tribunal in **AS (Afghanistan)**, nonetheless it is evident from the detailed consideration of his evidence there that he was considered to be an individual whose evidence carried a degree of significant weight.

5. Dr Giustozzi's report in the instant case speaks to something of the country situation relevant to the particular account of the Appellant, and also offers an evaluation of, and an opinion on, the risk to the Appellant in the event of return to Afghanistan.

6. The basis of the Appellant's case is helpfully set out at paragraphs 8 and 9 of the Decision of the First-tier Tribunal in these terms:-

> "*8. A year before the appellant left Afghanistan the appellant was taking his animals to an area he had not been to before some 30 minutes from his home. There he noticed a cave and when he entered the cave he saw a number of firearms. When he returned home his father was not in so he spoke with the village elder and explained to him what he had seen. The elder informed the authorities and the following day the ANA came to the appellant's home and told him to take them to the cave. As they were heading towards the cave and were some 10 minutes away, the Taliban began firing on the ANA. The appellant ran home leaving the fighting to continue for over two hours.*
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> *9. The appellant was then accused by the ANA of leading them into an ambush and later the Taliban accused him of informing the ANA of the whereabouts of the cave. The following night the Taliban came to the home. They were told by the appellant's mother that he was not at home so they took the appellant's father. Two nights later his body was left lying outside the village. The appellant had gone to stay with his sister and was then told by his brother-in-law that he must leave Afghanistan.*"

7. I pause to note that the reference to "*the village elder*" appears to be in error. The Appellant's narrative account refers to him speaking to *an* elder of the village without it specifically being indicated that he was in some way '*the* village elder', or head of the village. It should also be noted that the suggestion that the Appellant had taken his animals to an area that he had not been to before did not initially emerge in his initial witness statement (dated 28 April 2017, Respondent's bundle, Annex B), but emerged subsequently when asked at interview why he had not seen the cave previously in circumstances where he had been grazing his animals in the same area for several years (interview record at q.45 – Respondent's bundle, C13).

8. The First-tier Tribunal Judge rejected the Appellant's narrative account, essentially for the following reasons:

> (i) The Judge did not accept that the Appellant would not have known of the cave previously: "*Whilst possible I find it implausible that this appellant had not examined every area that he was returning to every day with his animals and his claim he had not seen this cave before all was unaware of it is improbable*" (paragraph 23). (The words 'possible' and 'implausible' are uncomfortably juxtaposed; 'improbable' does not obviously echo the applicable standard of proof; however such matters are not at the core of the challenge herein, and are ultimately peripheral.)
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> (ii) There was no evidence that the attack by the Taliban on the ANA was related to the cache of weapons. In this context the Judge observed that the attack had taken place approximately 20 minutes into a 30 minute journey and inferred that it would not have been apparent where the army and the Appellant were headed. In this context the Judge also noted that the Appellant's evidence suggested that fighting between the Taliban and the ANA was frequent in the area. "*I do not accept that the appellant has established that the ambush had anything to do with the cave. I do not accept the Taliban knew the ANA were heading for the cave if they were still 10 minutes away. This may simply have been the usual fighting between the Taliban and the ANA unconnected to the appellant's claim that he had found a cave with an arms cache*" (paragraph 23).
>
> (iii) The Judge thought that there was no basis for the Taliban to believe that the Appellant was an informer. In part because it would not have been clear that the ANA was headed for the cave (as per (ii) above), and in part because it was the elder to whom the Appellant had spoken who had contacted the ANA, not the Appellant. (See paragraph 24.)
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> (iv) The Judge did not consider it credible that the ANA would have targeted the Appellant without also targeting the elder who had been

the conduit of information between the Appellant and the ANA: "*… it would make no sense not to accuse the elder who carried the information to them but instead he has not been sought by either the Taliban or the ANA*" (paragraph 25).

(v) The Judge suggests that the Appellant does not complain of any threats from the ANA: "*I accept that it is possible that if these events did occur that the ANA may have thought the appellant had led them into a trap, however, he makes no complaint of the ANA making any threats towards him or his family prior to him leaving so it is highly unlikely that the ANA had believed him responsible*" (paragraph 25).

(vi) The Appellant was not seemingly pursued by either the Taliban or the ANA, notwithstanding that he spent a period of about 9 days at his sister's home - a location close to the family home. The Judge effectively considered that had the Appellant been the subject of serious interest on the part of either the Taliban or the ANA his whereabouts could have been traced without any difficulty. "*In that time he… was unaware of any attempt by either the Taliban or the ANA to trace him…. The appellant confirmed that his sister lived some 45 minute walk from his own home and her house was in the same village. I am satisfied that if the Taliban or the ANA wanted to trace this appellant they could*" (paragraph 27).

(vii) The Judge also found that section 8 of the Asylum and Immigration (Treatment of Claimants et cetera) Act 2004 applied in respect of the Appellant's failure to pursue an asylum claim prior to entering the UK notwithstanding a considerable period of time in Europe including having come into contact with the authorities in France and having made an asylum claim there – the outcome of which he did not await. (See paragraph 22.)

9. In my judgement, looked at in isolation, there is no real basis for criticism of the Judge's reasoning summarised at sub-paragraphs (i), (ii), (vi) and (vii) above. Further, irrespective of any other issues regarding the narrative account, sub-paragraph (vi) cannot be seen as anything other than of significant adverse weight.

10. In the context of sub-paragraph (i) I note that some criticism is advanced in the Appellant's grounds that comments of Dr Giustozzi at paragraph 5 of his report that wee 'on point' had been disregarded. At paragraph 4 of the report Dr Giustozzi refers to the existence of numerous caches of weapons and their discovery from time to time by Government forces. At paragraph 5 Dr Giustozzi states in respect of the Appellant's claimed discovery of a cache - "*The cave might have been covered normally hence the Appellant would not have noticed it until for some reason the cover was removed*". It seems to me that that observation is not something that

falls particularly within Dr Giustozzi's expertise; accordingly, for the Judge not to have expressly addressed that single sentence does not seem to me to be of any material concern.

11. I also note that the Judge's analysis under section 8 of the 2004 Act is criticised on the grounds that the Appellant was only 16 years old when in France and under the control of an agent. However, the Judge clearly took into account the Appellant's age in this context – "*I am satisfied that despite his age...*", and "*Despite his age I am satisfied...*" (paragraph 22). The Judge also noted that the Appellant was not under the control of the agent when he was in direct contact with the authorities in France and made his claim for asylum (also paragraph 22). There is no error of law raised here – only disagreement.

12. Be that as it may, it seems to me that there are matters that are problematic in respect of the Judge's reasoning summarised at sub-paragraphs (iii), (iv), and (v).

13. The Appellant pleads that irrespective of what the Taliban might have thought about where he was headed with the army, he was nonetheless seen by the Taliban to be with the army, and that would be sufficient to put him at risk as a perceived collaborator. I accept that the Judge does not in terms consider this possible circumstance when evaluating credibility.

14. Ms Cunha frankly and properly acknowledges that there is a difficulty with the logic of the Judge's reasoning in respect of sub-paragraph (iv). On the Appellant's account, irrespective of the actual (unknown) details of the elder's discussion with the authorities, or his motivations, it was plainly the case that the elder had told them that the information about the cave and the cache had originated with the Appellant because it was to the Appellant they came to be guided to the cave. In such circumstances I cannot follow the logic of the First-tier Tribunal Judge's reasoning – "*it would make no sense not to accuse the elder*".

15. In respect of point (v), it is inherent in the Appellant's claim that he considered the ANA's visit to the family home after the firefight constituted a threat towards him. For example, see his witness statement of 28 April 2017 at paragraph 12 - "*Shortly after the fighting had stopped the ANA fighters came to my house. ... They were asking for me. ... The ANA were very angry. They told my mother that I must have been a spy as I had lured them to a place where the Taliban would attack them. They believed I had done this on purpose and I was a liar*" (Respondent's bundle, B2); and paragraph 21 – "*I am scared of both the authorities and*

*the Taliban.... They both blame me for what happened. ... If I am returned to Kabul I would be definitely arrested straightaway by the authorities...*" (B3).

16. It is against this background that I consider the materiality, or otherwise, of the failure of the First-tier Tribunal Judge to refer to Dr Giustozzi's report - or any aspect of it - in the course of setting out his reasons in the decision.

17. In this context Ms Cunha is again properly frank in acknowledging the absence of any reference at all to the expert evidence in the First-tier Tribunal's Decision. She is also open in acknowledging the potential difficulty that such omission presents in resisting the challenge to the decision of the First-tier Tribunal. Nonetheless, she argues that looked at in the round the omission is ultimately immaterial.

18. However, it seems to me that in substance Ms Cunha's submission is that the outcome in the appeal would have been the same even if the Judge had articulated reasons displaying a consideration of Dr Giustozzi's report. In particular in this regard she emphasises that even if the Appellant's account were to be accepted the country guidance is such that he would not be able to succeed in establishing that he could not safely be returned to Kabul where the risk from the Taliban would not reach the threshold to entitle him to international surrogate protection.

19. The first difficulty with such a submission is that it does not address the potential risk from the ANA. In Dr Giustozzi's report evidence and opinion is offered to the effect that if the Appellant was indeed identified by the ANA as a person of interest there may well be a risk to him on return, even if that return is to Kabul: see in particular at paragraphs 50, 58 and 60.

20. The second difficulty is that 'materiality' is not to be measured by the simple metric of whether the outcome would inevitably be the same or different.

21. Moreover, there is a problem in respect of procedural fairness here. The Appellant presented in support of his claim significant and relevant evidence from an acknowledged expert; he was entitled to have such evidence considered and taken into account by the judicial decision-maker; necessarily, in my judgement, as part of that entitlement he was also entitled to some form of reasoned consideration so that he could understand what approach had been taken to his supporting evidence.

There is no such reasoned consideration in the decision of the First-tier Tribunal.

22. In all such circumstances – and notwithstanding the weight that the reasoning summarised in my sub-paragraph (vi) must inevitably carry - I am persuaded that there is a material error of law that requires that the decision of the First-tier Tribunal Judge be set aside.

23. The consequence of the error of law is that the Appellant has not had a full and fair hearing in respect of credibility. Accordingly the appropriate remedy is that he should have a further hearing before the First-tier Tribunal with all issues at large.

24. No specific direction are sought by either party; standard directions will suffice.

**Notice of Decision**

25. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

26. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge E M M Smith with all issues at large.

27. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed: Date: **13 April 2019**

**Deputy Upper Tribunal Judge I A Lewis**