



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/10234/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 January 2019

Decision & Reasons Promulgated  
On 4 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

M N A  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Sajid, Legal Representative of Shehzad Law Chambers Limited

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Afghanistan who was born on 25 March 1990. He is appealing against the decision of Judge of the First-tier Tribunal Robertson promulgated on 24 October 2018 to dismiss his appeal against the respondent's decision dated 2 August 2018 to refuse his protection and human rights claim.

## **Background**

2. The appellant entered the UK in 2007 and applied for asylum shortly thereafter. He claimed to be at risk because of a feud where his father was suspected of arranging the killing of a Taliban member. The application was refused and subsequent appeal dismissed. However, that decision was set aside and on 15 July 2010 the Upper Tribunal allowed the appellant's appeal to the limited extent of directing the respondent to grant a period of leave, taking into account *AA (Afghanistan)* [2007] EWCA Civ 12.
3. On 6 February 2013 the appellant applied for further leave and this was refused. The appellant's appeal of that decision was heard by Judge of the First-tier Tribunal Snape who, in a decision promulgated on 24 July 2013, found the appellant's account to not be credible. The decision of Judge Snape was not successfully appealed.
4. On 19 July 2018 the appellant made further submissions. He repeated his claim that he would be at risk because of his father being suspected of killing a Taliban leader. He also claimed to be at risk from indiscriminate violence such that Article 15(c) of the Qualification Directive would be breached by returning him to Afghanistan.
5. The respondent rejected the asylum claim because the appellant's account had already been found not credible by Judge Snape.
6. With respect to Article 15(c) the respondent, following the Country Information and Guidance - Afghanistan: Security and humanitarian protection issued April 2018, along with the Country Guidance cases of *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC) and *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 118 (IAC), found that there was no general Article 15(c) risk in Kabul and that it was neither unsafe nor unreasonable for the appellant to relocate within Kabul.
7. The respondent also rejected the appellant's claim that removing him from the UK would be contrary to Article 8 ECHR. The respondent's position was that the appellant was unable to satisfy any of the routes to leave to remain under the Immigration Rules and there were not exceptional circumstances to warrant a grant of leave to remain under Article 8 outside the Immigration Rules.

## **Decision of the First-tier Tribunal**

8. Applying *Devaseelan* [2002] UKIAT 00702, the judge rejected the appellant's asylum claim on the basis that there was nothing before him relevant to the alleged blood feud that was not before Judge Snape.
9. Having rejected the appellant's asylum claim, the judge proceeded to assess the appellant's fear of indiscriminate violence. The judge stated that he was guided by *AS* which confirmed that the security situation in Kabul is not at such a level as to render internal relocation unreasonable or unduly harsh.

10. In respect of the appellant's Article 8 claim, the judge found that the requirements of Appendix FM and of Paragraph 276ADE were not met. He found that the appellant would not face very significant obstacles to integration in Afghanistan as he had spent his formative years in that country. The judge also found that the appellant was in a relationship with a partner in the UK but that they were unmarried and there was little supportive evidence of them living together akin to marriage.
11. The judge also found that the appellant does not speak English, is not financially independent and that any family life he has established in the UK has been whilst his status was precarious.

### **Grounds of Appeal and Submissions**

12. The first argument advanced in the grounds of appeal is that the judge misapplied Devaseelan by taking the 2013 decision of Judge Snape as a starting point rather than the 2010 Upper Tribunal decision referred to above in paragraph 2.
13. The second argument in the grounds of appeal is that the judge failed to address the fact that following the 2010 Upper Tribunal decision the appellant was granted a six month period of leave which was not in line with the Home Office policy at that time. The grounds contend that the appellant suffered so many legal wrongs from the respondent he should be granted indefinite leave on the basis of policies pertaining to the remedy for injustice caused by past illegality.
14. A further argument made in the grounds is that the judge followed *AS* without having regard to the appellant's argument that it should be departed from in light of a UNHCR Report dated 30 August 2018 ("the 2018 UNHCR Report") which concluded that internal relocation is generally not appropriate in Kabul given the current situation. The grounds note that the panel in *AS* relied on an earlier UNHCR Report ("the 2016 UNHCR Report") which has now been superseded by the 2018 UNHCR Report.
15. At the error of law hearing Mr Sajid submitted that the judge had not dealt with all of the submissions made at the First-tier Tribunal hearing and had failed to appreciate that the compelling circumstances of the appeal meant that it should be allowed outside the Immigration Rules. He highlighted that the appellant had mistakenly been treated as an adult when he entered the UK in 2007 and maintained that there had been a litany of mistakes in the treatment of the appellant by the respondent. He also argued that the judge erred by following on the decision of Judge Snape given that the position had materially changed.
16. With regard to Article 8 ECHR, Mr Sajid contended that the judge had failed to appreciate that the little weight provision under Section 117B of the Nationality, Immigration and Asylum Act 2002 requires, in accordance with *Rhuppiah*, a flexible approach and that, following *Agyarko*, where circumstances are sufficiently compelling, a precarious family life can outweigh the public interest in removal. He also argued that the judge had erred by finding the appellant could not speak English when there was evidence in the bundle that he had passed a test in respect of

the English language. He also contended that the judge erred by finding that the appellant was not financially independent given that he had worked from time to time earning 'cash in hand'.

17. Mr Sajid took the position that Judge Snape's decision was not the relevant starting point and repeated the contention made in the grounds of appeal that the starting point should have been the 2010 Upper Tribunal decision. Mr Sajid also argued that the judge had failed to acknowledge the appellant's vulnerability and that even if Judge Snape's decision could reasonably have been treated as a starting point it should not have been treated as the end point.
18. Mr Sajid also argued that the judge fell into error by failing to consider the 2018 UNHCR Report which reached a different conclusion on the viability of internal relocation and Article 15(c) risk to that in the 2016 UNHCR Report, which had been given substantial weight in *AS*.
19. Mr Tarlow maintained that the decision does not contain an error of law. He argued that *AS* had been promulgated only six months before this case was heard and that the analysis contained within the 2018 UNHCR Report was not sufficient to depart from it.

### Analysis

20. The applicable Country Guidance case on the issue of risk of indiscriminate violence in Afghanistan is *AK*, where it was concluded that the level of indiscriminate violence in Kabul did not meet the Article 15(c) threshold. Although *AK* is over six years old, it was recently affirmed as still applicable in the 2018 country guidance case of *AS*, where the safety of Kabul was considered in the context of internal relocation. *AS* determined that the security situation in Kabul is not at such a level as to render internal relocation unreasonable or unduly harsh for a single adult made in good health.
21. As they are Country Guidance cases, the judge was required to follow *AK* and *AS* - and therefore find that the risk from indiscriminate violence in Kabul does not meet the Article 15(c) threshold - unless there were strong grounds supported by cogent evidence to justify not doing so. The appellant contends that the 2018 UNHCR report, which was published after *AS*, is the necessary cogent evidence to justify such a departure.
22. The 2018 UNHCR report, which supersedes the 2016 UNHCR report that was taken into account in *AS*, considers at pages 103 and 104 eligibility for subsidiary protection under the Qualification Directive. It states that in light of the ongoing armed conflict applicants originating from, or previously residing in, conflict affected areas may, depending on the individual circumstances of the case, be in need of subsidiary protection under Article 15(c).
23. The 2018 UNHCR report also addresses the issue of internal flight and relocation to Kabul, concluding on page 114 that given the current security, human rights and

humanitarian situation, internal relocation to Kabul is “generally not available”. This conclusion is reached on the basis, inter alia, that there has been a negative trend in the security situation for civilians with 993 civilian casualties in Kabul province reported in the first six months of 2018 by UNAMA, and it is noted that civilians who partake in day to day economic and social activities in Kabul are exposed to a risk of falling victim to the generalised violence in the city.

24. The 2018 UNHCR report is evidence that post dates both *AK* and *AS* that is relevant to the assessment of whether the violence in Kabul reaches the Article 15(c) threshold. It was therefore incumbent upon the judge to consider it alongside the Country Guidance cases. His failure to do so was an error of law. However, I am satisfied, having carefully reviewed the 2018 UNHCR report, that the error was not material.
25. The threshold for Article 15(c) is high. In order for it to be met the degree of indiscriminate violence must be such that substantial grounds are shown for believing that the appellant, upon being returned to Kabul, would face a real risk of violence solely on account of his presence. The purpose of the Article is to prevent the return of unsuccessful asylum seekers to war zones and situations of armed anarchy where there is a serious threat of real harm from indiscriminate violence.
26. It is clear from *AS* and *AK* that as of mid 2018 this threshold was not met in Kabul.
27. The 2018 UNHCR report describes Kabul as a city where there is violence and poverty. But the description of Kabul, in terms of the risk of violence faced by civilians purely as a consequence of being present within the city, does not differ markedly from that in *AS* or *AK*. I acknowledge that the 2018 UNHCR report states that there has been a deterioration in the circumstances in Kabul. However, in my view, there is nothing within the substance of the report which warrants the conclusion that the risk of indiscriminate violence has increased such that the Article 15(c) threshold is now met. The 2018 UNHCR report, therefore, is not, of itself, evidence that justifies a departure from the Country Guidance case law.
28. Mr Sajid argued that it would be unreasonable to expect the appellant to relocate to Kabul. The difficulty with this argument is that the appellant originates from the Kabul province and therefore the issue of internal relocation does not arise. The issue before the first-tier Tribunal was indiscriminate violence in, not the reasonableness of relocating to, Kabul.
29. I now turn to consider the appellant’s arguments that the judge misapplied *Devaseelan*.
30. *Devaseelan* is a starred decision which sets out guidelines on how a judge should approach the decision of a judge who previously heard an appeal by the same appellant. It requires that the first judge’s decision should always be a starting point and that it is “the authoritative assessment of the appellant’s status at the time it was made.”

31. In his decision promulgated on 24 July 2013 Judge Snape considered the details of the appellant's asylum claim and his account of a family feud. Judge Snape rejected the appellant's account and found it not credible. This represents the authoritative assessment of the appellant's status at that time. There was no new evidence in relation to the appellant's account before the First-tier Tribunal and no new facts had arisen since Judge Snape's decision that were relevant to the claimed blood feud. In these circumstances it was consistent with *Devaseelan* for the judge to treat as authoritative the conclusions of Judge Snape in respect of the credibility of the appellant's account.
32. Mr Sajid argued that rather than follow the findings of Judge Snape, the judge ought to have applied the findings of the 2010 Upper Tribunal decision. However, the 2010 decision did not contain any consideration of the appellant's account of being at risk in Afghanistan. It is therefore not relevant to the judge's assessment of the credibility of the appellant's account.
33. Mr Sajid's claim that the appeal should be allowed because of the respondent's procedural errors is unable to succeed. The appellant appealed under section 82 of the Nationality, Immigration and Asylum Act 2002 on the basis that his removal from the UK would breach the UK's obligations under the Refugee Convention and would be unlawful under section 6 of the human rights act 1998 (with reference to Article 8 of the ECHR). The appeal was not brought – and could not be brought – on the basis that the respondent had acted unlawfully. Mr Sajid has not explained how the claimed procedural errors are relevant to whether the violence in Kabul meets the Article 15(c) threshold or whether the appellant is eligible for asylum. Nor has he established a link between the claimed procedural errors and the appellant's Article 8 claim. Moreover, even if the judge ought to have given weight to the claimed procedural errors in the Article 8 proportionality assessment, the outcome of that assessment would not have changed.
34. The judge applied Section 117B of the 2002 Act and found that the appellant does not speak English, is not financially independent, and established his private life in the UK when his status was precarious. The judge also found that there was little supportive evidence of the appellant living together with his partner and that in any event they had only been living together since December 2016. The judge also found that the appellant spent his formative years in Afghanistan would be able to establish a life for himself on return. Given these findings, it was clearly open to the judge to find that removal of the appellant would not be disproportionate.
35. Mr Sajid argued that the judge was wrong to find the appellant does not speak English. I disagree. The burden of proof lies with the appellant. The appellant gave evidence through a translator. Given that the only evidence of English language ability produced by the appellant was a single certificate showing that he had passed an English language test, the judge was entitled to conclude that he does not speak English for the purposes of Section 117B. Mr Sajid also argued that the judge should not have found that the appellant was not financially independent. There was no

evidence of financial independence and I can see no basis in the evidence for the judge finding other than that the appellant is not financially independent.

36. For the reasons I have given, I am satisfied that the decision does not contain a material error of law and should stand.

**Notice of Decision**


The appeal is dismissed.

The decision of the First-tier Tribunal does not contain a material error of law and stands.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 31 January 2019