Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10613/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 March 2019	**On 3 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

A S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr B Bundock, Counsel, instructed by Ata and Co Solicitors

DECISION AND REASONS

The Respondent, to whom I shall refer as the Claimant, is a national of Afghanistan, born on 5 August 2000. He arrived in the UK on 16 February 2018 and claimed asylum.

The basis of his claim is that he is from a village in the Sorkh Parsa district of Parwan province and he is a member of the Hazara ethnic minority group and a Shia Muslim. His parents were killed in a car accident in 2009 or 2010. Following the death of his parents, the Claimant and his sister moved to live with his aunt, [G] and her family members. His aunt died of natural causes in 2016, following which he was looked after by his cousin, [AM]. However, he

was not treated well by [A]'s wife and during this period of time he was at risk from the Taliban, who were very active in his home area. This was in the village of [~]. He would sometimes visit Kabul with his cousin in order to get supplies for the shop his cousin ran and they would be stopped by the Taliban from time to time, who would be abusive due to the fact that they were Hazara Shias and the situation worsened and was unsafe. Consequently, he fled the country.

The Claimant had three brothers who were killed in the war when he was younger. He has one older brother, [N], who is in the UK, and a sister, [F], who has been living in Canada for some time.

The Claimant's asylum application was refused in a decision dated 16 August 2018. The Claimant appealed against this decision and his appeal came before Judge of the First-tier Tribunal Herbert for hearing on 4 December 2018. In a Decision and Reasons promulgated on 28 December 2018, the judge allowed the appeal on the basis of asylum, Articles 2, 3 and 8 of the European Convention on Human Rights and under the Immigration Rules.

Permission to appeal was sought in time by the Secretary of State on the basis that the judge had erred materially in law

in failing to identify any Convention risk specific to the Claimant;

in failing to take into account and/or resolve conflicts of fact or opinion on material matters. This related to the expert report of Tim Foxley;

in failing to give reasons and the judge conflated his reasons at [49] to [71] with those that were more appropriate for the grant of humanitarian protection, and

in allowing the appeal on Article 8 grounds absent any reasoning or assessment of the public interest or proportionality as per section 117B of the NIAA 2002 and Razgar [2004] UKHL 27.

6. Permission to appeal was granted by Judge of the First-tier Tribunal Foudy in a decision dated 18 January 2019, on the basis that the grounds disclose arguable errors of law.

Hearing

7. At the hearing before the Upper Tribunal, Mr Bramble submitted that at the heart of the Secretary of State's argument was that his position that he accepted that the Claimant was a Hazara and a Shia Muslim but he has not been targeted by the Taliban and thus he would not be at risk in his home area in Parwan province or in Kabul. Mr Bramble submitted that the judge had essentially cherry-picked from the expert report of Mr Foxley, which was balanced, and had focused on some aspects but had not considered it as a whole.

8. At [71] the judge concluded that the Claimant satisfies the Convention criteria but fails to say why this was his finding. Mr Bramble submitted that the judge had ignored material elements of the expert report, e.g. [25] at

page 20 of the supplementary bundle, [36] at page 25, [45] at page 31, [71] at page 44, [56] at page 36 and see also [55]. Mr Bramble accepted that the judge appeared to find that there was a general risk to the Claimant in an Article 15 sense but the judge failed to engage properly with this evidence and his findings were not sufficient to show that Hazaras *per se* are at a well-founded fear of persecution or a real risk in the home area.

9. Mr Bramble submitted that in the context of what is said by the expert about the Hazara community in Kabul, the Claimant does have money potentially from his brother in the UK and connections with the Hazara community through his brother's marriage, his brother's wife continuing to live in Kabul. Although he could not be expected to live with his sister-in-law, he could obtain support from the community. Those were Mr Bramble's submissions in respect of the first two grounds of appeal.

10. In respect of the third ground of appeal, the failure by the judge to give proper or adequate reasons for his decision, *cf.* MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), Mr Bramble submitted that the judge had treated this more like a humanitarian protection case, but his findings were not sufficient so as to depart from the country guidance case on humanitarian protection.

11. In relation to the fourth ground of appeal, Mr Bramble submitted that the judge had not directly dealt with Article 8 and if errors were found in respect of the judge's approach to the Refugee Convention then his findings in respect of Article 8 were also flawed.

12. In his submissions, Mr Bundock for the Claimant asserted that the Secretary of State's position was essentially no more than an extended disagreement with the reasons and findings of the First-tier Tribunal Judge and that there had been no articulation of an error of law. He sought to rely on the judgment of Lord Hoffmann in Piglowska v. Piglowski, [1999] 1 WLR 1360 at 1372, cited at [20] of his rule 24 response. He submitted that the judge was experienced and one should not assume that an error has been made. Mr Bundock submitted that the Secretary of State's position seemed to be that a Convention claim cannot succeed absent an individualised risk, albeit that Mr Bramble was not specifically pursuing that point. He submitted that the Convention basis is clearly that the claimant is a Hazara and a Shia and this would put him at heightened risk in Afghanistan.

13. In relation to ground 2 and the assertion that the judge had cherry-picked from the expert report, Mr Bundock submitted that this did not constitute an error of law and it had not been asserted in this respect that the judge had provided insufficient reasons for his findings. He submitted it was clear the judge took the relevant passages of the expert report into account and that he had cited it extensively, for example [32]-[34] and [55] –[57] of the judge's findings.

14. Mr Bundock further submitted that in relation to the issue of the Claimant's home province and the expert's findings at [45], *"it is difficult to*

be confident about the level of risk specific to your client", the expert had also gone on to say as follows at [46]:

> *"A chance encounter, however, at a checkpoint or travelling through an area where the Taliban operate such as Parwan province could put your client at risk if his background became known, i.e. that he was a Hazara Shia Muslim and had fled to the UK, perhaps through being searched or questioned."*

Mr Bundock submitted that the judge had taken the expert report fully into account, including points that were not in the Claimant's favour. It was agreed that there was no risk to the Claimant from the authorities and that he had not been targeted or threatened before he left and the judge recorded that. Therefore, he submitted, there was no sustainable argument that the judge had failed to take material considerations into account.

15. In respect of ground 3, which is a reasons challenge, Mr Bundock submitted that the judge had given clear and sustainable reasons for his findings. He did not find that the Claimant would be at risk of persecution in Kabul, but rather that it would be unduly harsh to expect him to relocate there. In relation to [62] of the judge's findings, where there was reference to the fact there was no family to turn to in the area for support, Mr Bundock submitted it was clear the judge was here referring to the Claimant's home area because he thereafter went on to deal with the issue of support in relation to Kabul further down in [62]. Notably, the Claimant was only 18 at that time and the skeleton argument dealt fully with the internal relocation risk.

16. In relation to the fourth ground of appeal, in terms of the Article 8 assessment, Mr Bundock sought to rely on what is set out at [22] and [23] of his Rule 24 response, which is in essence that any omissions in relation to the Article 8 assessment were immaterial if the decision is upheld under the Refugee Convention. Mr Bundock emphasised that the judge had provided adequate reasons for his decision, which should be upheld.

Findings and Reasons

17. In respect of the first ground of appeal, that the Judge erred in failing to identify any Convention risk specific to the Claimant, I find that is not made out on the findings of the Judge, read holistically. Whilst at [71] the Judge found simply that the Appellant satisfied the material criteria of the 1951 Convention to the lower standard of proof, it is clear from [51]-[69] that the Judge clearly considered the appeal from the perspective that the Claimant is an unaccompanied young man of 18 who claimed it would be unsafe for him to return to his home area because there is a high level of violence against ethnic Hazaras of the Shi'a faith: see eg. [51].

18. At [56] the Judge noted the expert, Tim Foxley's conclusion, that the Claimant's home district of Parwan has become increasingly dangerous due to Taliban and Islamic State activity and at [62] the expert's conclusion

that return to his home area would carry a significant degree of risk, given the Claimant has no family to turn to in the area for support. It is thus tolerably clear that the Refugee Convention reason is the Claimant's ethnicity and/or religion.

19. The second ground of appeal asserts that the Judge erred in failing to take into account and/or resolve conflicts of fact or opinion on material matters, in particular that there was no specific risk to the Claimant of being targeted on return, which the Respondent asserts was the position set out in the expert report of Tim Foxley. The Respondent further took issue with the findings at [18]-[31] and [67] that the judge accepted the evidence of the Claimant and his brother that there is no family to support the Claimant in Kabul, when his brother's wife lives there and his brother has visited. The grounds submitted that the finding at [20] that it would be culturally improper for the Claimant to live with his sister in law's family was a "*conveniently self-serving explanation*."

20. I accept the submission on behalf of the Claimant by Mr Bundock that the first aspect of Ground 2 is misconceived, because as a matter of law it is established that an applicant is not required to demonstrate that he would necessarily be specifically targeted or "singled out| for persecution, in light of the judgment in R v SSHD ex parte Jeyakumaran [1994] Imm AR 45, which was followed by their Lordships in R v SSHD ex parte Adan [1999] UKHL 15, per Lord Lloyd. The issue is whether the Claimant could show that he would face a real risk of persecution if returned to Afghanistan on account of his protected characteristics. It is clear and I find that the judge's findings were not inconsistent with the expert report of Tim Foxley, but rather were properly based upon his conclusions at [55]-[59].

21. As to the second aspect of Ground 2, this is no more than a disagreement with the judge's acceptance of the credibility of the Claimant and his brother, which was open to him on the evidence before him and properly reasoned: see [49] where the judge found that the Claimant gave a cogent and credible account of his flight from Afghanistan and further found the Claimant's evidence to be consistent and not subject to any exaggeration and provided an example of this at [50]. Further, contrary to the assertion in this ground of appeal, the Judge found at [66] that it would not be "viable" for the Claimant to live with his sister in law or her family in Kabul. This finding was based on the evidence of the Claimant's brother to that effect, recorded at [22]. Given that the cultural tradition is that upon marriage women move in with their husband and his family, the Judge's finding was clearly open to him on the evidence before him, including that of the expert, Tim Foxley at [59] that: "*It is very problematic, culturally, for a single adult male to share the same house with non-related women and girls."* The assertion in the grounds of appeal that this was a "*conveniently self-serving explanation*" is unwarranted in light of the evidence.

22. The third ground of appeal asserts that the judge erred in failing to give adequate reasons for allowing the appeal on asylum grounds *cf.* MK (duty to give reasons) [2013] UKUT 00641 (IAC) and conflated his reasons at

[49] to [71] with those that were more appropriate for the grant of humanitarian protection. I find, for the reasons already provided above, that there is no substance in the first element of this ground of appeal. The judge found the Claimant to be credible and gave reasons for his finding at [49] and [50] and gave clear and adequate reasons at [52] through to [71] as to why he considered that the Claimant would be at risk on return to Afghanistan, including findings that internal relocation to Kabul would be unreasonable or unduly harsh. It is further clear and I find that the Judge's findings were clearly made in the context of the fact that the Claimant is a young, unaccompanied Hazara Shi'a muslim i.e. in the context of the Refugee Convention and not simply on the basis of a generalised risk to him *viz* humanitarian protection. The fact that he is Hazara will be apparent from his physical appearance.

23. The fourth ground of appeal asserts that the Judge erred in allowing the appeal on Article 8 grounds absent any reasoning or assessment of the public interest or proportionality as per section 117B of the NIAA 2002 and Razgar [2004] UKHL 27. I find that this ground of appeal succeeds in that, whilst the judge allowed the appeal in general terms at [73] on the basis of Articles 2, 3 and 8 of ECHR, he made no findings in respect of Article 8 to substantiate this finding. Nor, as the ground of appeal identifies, did the Judge consider the statutory public interest considerations set out at section 117B of the NIAA 2002 or apply the test set out in Razgar [2004] UKHL 27. Similarly, although this particular ground was not pleaded, there are no findings to substantiate his decision to allow the appeal with regard to Articles 2 and 3 of ECHR.

24. However, read as a whole, the Secretary of State's first three grounds of appeal are essentially an attempt to re-run the arguments put before the First tier Tribunal Judge, which were rejected for reasons which are adequate and were based on the evidence before him, including the expert report of Tim Foxley. Those grounds of appeal do not disclose any errors of law in the decision and reasons of the First tier Tribunal Judge.

Notice of Decision

The First tier Tribunal Judge erred in failing to provide reasons for allowing the appeal on human rights grounds. However, the appeal by the Secretary of State in respect of the Judge's findings in respect of the Claimant's asylum claim is dismissed, with the effect that the decision of the First tier Tribunal to allow the appeal on asylum grounds is upheld.

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

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

Signed Rebecca Chapman Date 31 March 2019

Deputy Upper Tribunal Judge Chapman