



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

Appeal Number: PA/11937/2017

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On 16th November 2018**

**Decision & Reasons Promulgated
On 2 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MSS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Samra (Solicitor)

For the Respondent: Miss H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Dean Kershaw, promulgated on 9th January 2018, following a hearing at Birmingham on 15th December 2017. In the decision, the judge dismissed the appeal of the Appellant, following which the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan, and was born on 15th May 1990. He appealed against the decision of the Respondent dated 3rd November 2017 refusing his claim for asylum and for humanitarian protection, pursuant to paragraph 339C of HC 395.

The Appellant's Claim

3. The essence of the Appellant's claim is that he joined the Afghan Territorial Forces (ATF), after attending an open day for recruitment, and he was placed in training barracks. He finished his training in July 2012. He was based in Helmand. He worked alongside the British Army, but not for them. He did not have any direct contact with senior British officers (paragraphs 7 to 9). In 2013 he was moved to Logar Province, close to his family. He was subsequently attacked by the Taliban. He was beaten up. Some of his family members (brother's wife's cousins) were actively involved with the Taliban. He has been falsely accused by them for being involved in murders (paragraph 13). He had provided an identification card for the armed forces which has a photograph of him on it (paragraph 22).

The Judge's Findings

4. The judge accepted the Appellant's credibility on a number of issues (see paragraphs 46 to 48) and also accepted the evidence from the Ministry of Interior Affairs, containing a photograph of the Appellant, such that he concluded that, "I am prepared to accept his claim that he was part of the Afghan Army or ATF" (paragraph 50). The judge's conclusion was that the Appellant "falls into a potential risk category" (paragraph 63). However, he had not been affected and he had left the country for entirely personal and economic reasons (paragraph 63). A return to Kabul did not involve a general risk and the Appellant could be returned there (see paragraphs 64 to 65). He had not established that he was at risk when he was in Afghanistan and is not at risk now (paragraph 66).

The Grounds of Application

5. The grounds of application state that the judge made a number of findings of fact in the Appellant's favour, and these included a photograph of the Appellant in a uniform of the Afghan Territorial Forces, alongside the British Army. The judge had also accepted (at paragraph 50) the ID document that the Appellant had produced from the Ministry of Interior Affairs. Accordingly, the judge made an error of law in failing to assess the risk to the Appellant arising from the Taliban on account of these two factors.
6. On 12th February 2018 permission to appeal was granted.

Submissions

7. At the hearing before me on 16th November 2018, Mr Samra, appearing on behalf of the Appellant, made the following submissions. First, that there had been a number of findings of fact made by the judge in the Appellant's favour (paragraphs 46 to 48) and also the acceptance that the Appellant was in a uniform standing alongside British Army officers (paragraph 50). However, what the judge did not do, was to address the risk to the Appellant arising from his employment in the ATF. Yet, the judge's attention had been taken (see the grounds at paragraphs 4 to 5) to case law demonstrating risk in this respect. The case of **RQ (Afghan National Army - Hizb-i-Islami - risk) Afghanistan CG [2008] UKAIT 00013**, which it was said was before the judge in the Appellant's bundle, makes it quite clear that "It is not difficult to track people down in Afghanistan, although it might take time" (see paragraph 28.08). However, the judge had said (at paragraph 56) that there would have been greater repercussions for the Appellant's brother on return to Afghanistan (the brother having left Afghanistan in 2006 and secured asylum in this country long before the Appellant), if what the Appellant was saying was true, however, in so saying the judge failed to appreciate the case law that states that it would be a matter of time that the Taliban are able to track people down.
8. Second, the case of **RQ** also makes it clear (at paragraph 101) that:

"where an individual was 'wanted' by the Taliban or Hizb-i-Islami, then the evidence was that the situation in Afghanistan remains sufficiently lawless that if he were found, there would be nothing to prevent them dealing with him as they thought fit".
9. The judge did not have regard to this. In the same way, the judge did not have regard to the case of **PM & Ors (Kabul, Hizb-i-Islami) Afghanistan CG [2007] UKAIT 0089** which was placed before the judge (at page 212), and confirms the risk to the Appellant from the Taliban due to his association of being a perceived supporter of the Government.
10. Third, Mr Samra submitted that, given that the Appellant comes from Kabul, he cannot really be internally relocated to any other part of Iraq, given that the general position in the country guidance cases is that only Kabul is safe, and the rest of the country is unsafe for people in the Appellant's position. Sufficient protection, therefore, cannot be shown to him in any other part of the country. However, if the Appellant can only be sent to Kabul, then there is a risk to him because he is at high risk of persecution on account simply of his profile. Mr Samra submitted that the recent case of **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118**, which had only been handed down on 18th April 2018, makes it clear that risk attaches on the basis of the profile of a person. The judge did not consider the Appellant's profile as a soldier in the ATF, and as a person who had been working alongside British Army officials, such as to place him at risk. The matter needed consideration. Without it being

considered, it could not be said that the Appellant could safely return, even to the capital city in Kabul.

11. For her part, Miss Aboni relied upon the fact that the judge did not accept that the Appellant was at continuing risk, although it was accepted that he had been in the Afghan Army. The Appellant's account, however, had been comprehensively rejected in many respects, with the judge observing at one point that:

"I find it incredible that he did not seek help from the army himself. He was a serving officer with them at the time. He would have been obliged to report what took place it seems to me. He was already fighting against the Taliban. I did not accept on the evidence given by him that he was attacked in the way he claims" (paragraph 53).

12. In reply, Mr Samra submitted that no finding was ever made with respect to the Appellant's profile as a serving officer in the ATF. His brother had left Iraq more than a decade ago in 2006 and had secured asylum in the UK. The judge could well have concluded that the Appellant was simply a low-level official, in his occupation, and that there would be no risk to him on account of his employment. However, no such findings were made. Given that no such findings were made, there had to be an error of law. This was particularly given the positive findings made in their favour, against which there had been no cross-appeal by the Respondent Secretary of State.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision. My reasons are as follows.
14. First, the judge did not consider the risk to the Appellant on account of his being a serving officer in the Afghan Army or ATF. Nor was there a consideration of the risk to him on the basis that there was an ID card produced, and a Ministry of Interior Affairs photograph submitted on his behalf. This was an Appellant who, had made it quite clear that "he was saying he worked for the Afghan Army but worked alongside the British forces" (paragraph 46). He had produced photos of his official position in Afghanistan which was accepted by the judge (paragraph 47). The judge was clear in his finding that, "I am prepared to accept, looking at the photos, that they are of British army fighters. To what level he worked alongside them I am unable on the evidence to conclude to any degree" (paragraph 48).
15. This brings one to the second reason for why this appeal must be allowed. This is that in these circumstances, the Appellant's profile as a serving officer in the ATF, working alongside the British Army, needed to be assessed, with a view to evaluating the risk to him from the Taliban, were he to be returned back to Afghanistan.

16. Third, the judge did not address the risk to the Appellant on account of his being wanted by the opposing forces as is clear from the cases in **RQ** and **PM**. In the same way, the recent case of **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118**, now also falls to be considered, in the light of the errors that I have identified above.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, other than Judge Dean Kershaw, pursuant to Practice Statement 7.2(a) of the Practice Directions.
18. An anonymity direction is made.
19. The appeal is allowed.

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 his 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

Date

Deputy Upper Tribunal Judge Juss

18th December 2018