



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

Appeal Number: PA/13758/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 2 October 2018**

**Decision & Reasons Promulgated
On 3 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[I M]

Respondent

Representation:

For the Secretary of State: Ms J. Isherwood, Home Office Presenting Officer

For Mr [M]: Ms A. Childs, Counsel instructed by CK Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against the determination of First-tier Tribunal Judge Devittie promulgated on 27 July 2018 in which he allowed the appeal of Mr [M] against a decision to refuse him asylum and the associated claims for humanitarian protection under the ECHR. I shall refer to Mr [M] as 'the appellant' as he was before the First-tier Tribunal.
2. The appellant is an Afghan National who was born on 7 January 2000 and had already reached his majority when the appeal was heard on 26 June 2018. The nature of his claim was that, as a result of a gangster known as Rustum being killed by the police, the appellant was believed to have been

responsible for informing of his whereabouts. He claimed he fled to Pakistan where he was traced by the group and then travelled to Iran where he was kidnapped by the same group or persons under their direction.

3. The Secretary of State refused the claim largely because the decision-maker did not believe it was true. In the refusal letter, summarised by the judge in paragraph 3 of the determination, the decision-maker provided at least 8 reasons why he rejected the claim.
4. On its face, it is apparent from the foregoing that there was no Convention reason advanced by the appellant in support of his claim. These were non-state actors and an asylum claim could not properly be advanced unless there was an insufficiency of state protection. Notwithstanding this, the judge made no attempt to bring the claim within one of the Convention reasons nor to make findings on the sufficiency of protection. Nevertheless, he allowed the appeal on asylum grounds.
5. In paragraph 7 of his determination, the judge recited the appellant's comments in answer to the adverse credibility findings made by the Secretary of State. These are found in sub-paragraphs (1) to (6). At the hearing neither party submitted whether these were, or were not, a direct answer to each of the 8 reasons advanced by the Secretary of State. The judge, however, concluded in paragraph 8 that the appellant's evidence was broadly consistent with the evidence he gave in his interview and a supplementary statement gave further explanations. The judge concluded in paragraph 10 of his determination that the matters raised by the respondent turned largely on plausibility and that, given the appellant's explanations, it could not be said that his account was false.
6. The judge made a reservation in relation to the claim that the gang were able to trace him in Pakistan, commenting somewhat opaquely that this element '*leans heavily towards a degree of embellishment on his part.*' Since the judge plainly did not accept it, he must have rejected it on credibility grounds although he makes no express adverse credibility finding. Nor does he deal with whether, had he made an adverse credibility finding, this would have impacted upon the reliability of his claim about the other events in Afghanistan.
7. The First-tier Tribunal Judge made no findings in relation to the appellant's allegation that he was kidnaped in Iran. It is difficult to see how he could have accepted it if he had rejected the appellant's claim of events in Pakistan. On the other hand, paragraph 10 appears to suggest the claim of events in Pakistan had '*a degree of embellishment*' whilst finding the remainder of the claims '*could not be said to be false*'.
8. In addition, the First-tier Tribunal Judge had before him a report by Dr Antonio Giustozzi whom the judge does not name but who is a well-known expert on Afghanistan. He clearly accepted the contents of the expert report which was to the effect that the appellant would be at risk in his

home area, Kabul, and that he would not be able to relocate beyond the reach of the gang.

9. In his report, Dr Giustozzi is quoted as saying that this was a blood feud but the appellant himself made no such claim although it may be a matter of inference arising from the circumstances. A blood feud is capable of placing a victim within a particular social group, thereby triggering the necessary element to form an asylum claim. See *EH (blood feuds) Albania* CG [2012] UKUT 348 (IAC). The judge makes no such finding.
10. Dr Giustozzi concluded that the gang, of which Rustum formed part, was one of the latest in Afghanistan. Clearly this was a significant factor in an assessment of whether this particular gang had sufficient reach to place the appellant, on return, at risk. It was not altogether easy for me to trace how Dr Giustozzi linked Rustum with this larger group. However, on a detailed examination of the report, that link is made.
11. I have highlighted a number of difficulties raised by the manner in which the First-tier Tribunal judge dealt with this claim. Nevertheless, no challenge is made to the judge's findings of fact or to his apparent acceptance of the entire contents of Dr Giustozzi's report. Such a challenge is crucial in the context of this appeal. The combined effect of the appellant's accepted account of being at risk in Kabul from members of a large Mafia group and Dr Giustozzi's unchallenged evidence that such groups have the reach to locate those upon whom they wish to take out revenge is not challenged. It follows that whatever the outcome of an error of law hearing, the remaking of the decision cannot properly be conducted upon any other basis other than the findings of fact made by the First-tier Tribunal Judge.
12. The grounds of appeal are limited in scope. First there is a challenge to the finding made by the judge that he allowed the appeal on asylum grounds without identifying a Convention reason. It is true that the judge does not identify a Convention reason. However, for the reasons I have stated, the evidence of a blood feud was capable of amounting to a Convention reason even though the judge made no such finding. It might reasonably be inferred that revenge attacks by an Afghan gang take the form of a blood feud. That inference is supported by what Dr Giustozzi stated. Secondly, it is not necessarily damaging to the appellant's claim for protection that there is no Convention reason if the judge has made a sustainable finding of fact that the appellant is at risk of being seriously harmed or killed. Whilst it may not be an asylum claim, it opens the way for a claim for humanitarian protection or protection provided under Articles 2 or 3 of the ECHR. It may, therefore, be a distinction without a difference.
13. Ground 2 concedes that it was open to the judge to accept the appellant's account of problems with the local Mafia group in Kabul and that he would be at risk in his home area. The ground proceeds to assert that the judge failed to give adequate consideration to the issue of internal relocation.

However, since the appellant comes from Kabul and will be returned there, there is no viable internal relocation option. The report of Dr Giustozzi makes it plain that such gangs have the ability to trace those whom they target.

14. Finally, the grounds submit that the judge failed to make any findings on the issue of sufficiency of protection. I have already pointed out that no such findings were made. Yet the evidence, which the judge accepted, refers to the activities of the local police. However poorly the link was made in the evidence as to the complicity of the local police, it appears to have been accepted by the judge. In any event, whilst the State cannot guarantee the protection of its nationals against the activities of local mobsters, the judge also found that the appellant would be at risk of harm from them, notwithstanding the presence of a police force. In those circumstances, the legal concept of a sufficiency of protection did not provide the appellant with the protection he required.
15. The grounds of appeal, in short, are not capable of identifying an error which will have a material outcome upon this appeal if the appeal were to be re-made. A judge on re-making this decision would be bound to accept the undisturbed findings of fact and the unchallenged evidence of the expert report and these, alone, are sufficient to make out a claim.

DECISION

The grounds of appeal fail to disclose material errors in the decision of the First-tier Tribunal whose decision shall stand.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL
2 April 2019