



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

Appeal Number: PA/07803/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 7th January 2020**

**Decision & Reasons Promulgated
On 14th January 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**MS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton, Counsel instructed by Fisher Jones Greenwood Solicitors

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction was made by the First-tier Tribunal (“FtT”), and as this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, MS is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies

amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a national of Afghanistan. He arrived in the UK on 29th November 2013 and claimed asylum. His claim was refused by the respondent for the reasons set out in a decision dated 27th June 2016. The decision of 27th June 2016 gave rise to an appeal that was most recently heard by FtT Judge Malcolm (“the judge”) on 20th August 2019. The appeal against the decision to refuse the claim for asylum and humanitarian protection was dismissed for the reasons set out in a decision promulgated on 16th October 2019. The appeal was however allowed on Article 8 grounds.

The decision of FtT Judge Malcolm

3. It is uncontroversial that the appellant is a Afghan National who lived with his mother and two brothers in the Kapisa Province in Afghanistan. The background to the claim for international protection and the appellant’s evidence is set out at paragraphs [15] to [46] of the decision.
4. The First-tier Tribunal judge found the appellant to be a credible witness, and found the appellant has given a consistent account of why his mother decided that he should leave Afghanistan. At paragraph [124], the judge stated:

“In summary I accordingly accept the evidence given by the appellant of his brother’s involvement with the Taliban and his brother’s death and the events thereafter of visits made to the appellant’s home by members of the Taliban seeking return of weaponry and suggestions that the appellant should become involved with the Taliban.”
5. In the submissions made on behalf of the parties, the judge had been referred to the Country Guidance decisions and in particular the decision in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 in which the Upper Tribunal held that a person who was of lower-level interest for the Taliban (i.e. not a senior government or security services official, or a spy) is not at real risk of persecution from the Taliban in Kabul. The

appellant had also referred the Tribunal to the UNHCR Eligibility Guidelines for assessing the international protection needs of asylum seekers from Afghanistan, dated 30th August 2018.

6. The judge accepted the appellant's home area is in an area which is controlled by the Taliban and noted the respondent's claim that the appellant could return to Kabul. At paragraph [129], the judge stated:

"I consider however that if the appellant was to return to Afghanistan and in particular if he was to return to Kaul (*sic*), it is unlikely that he would have any family support in Kabul and consequently would not have assistance in obtaining employment, housing, education or integration and note the conclusion of the UNHCR is that given the current security, human rights and humanitarian situation in Kabul, internal relocation is generally not available in the city, however I do require to observe the country guidance cases."

7. The judge noted the submission made on behalf of the appellant that the background evidence demonstrates that the situation in Afghanistan, and in Kabul has deteriorated, but concluded, at [132], that having taken into account the Country Guidance, the appellant could not succeed on either asylum or humanitarian protection grounds.

8. The judge went on to consider the appellant's Article 8 claim, and concluded that the difficulties that the appellant would face, if required to return to Afghanistan, are relevant to the consideration of the Article 8 claim. The judge stated at paragraphs [133] and [134] as follows:

"133. I do however consider that given the appellant's lack of contact with his family and lack of familial support if he was to return to Kabul that there would be difficulty for him reintegrating into life in Afghanistan.

134. The report provided by Mr Jawad Hussan Zadeh sets out the difficulty for the appellant in finding a safe place to reside given his lack of family members or relations who would be able to support him further setting out that for the appellant it would be near impossible for him to find a job that pays for subsistence, costs of accommodation and transportation again given the lack of relatives, close family members or co-tribesman who would be willing or capable of supporting him. For these reasons I consider that the difficulties which the appellant would have in reintegrating into life in Afghanistan meets the test of very significant obstacles and consider that the appellant does meet the requirements of paragraph 276ADE(1)(vi) of the immigration rules."

9. The Judge found that there would be very significant obstacles to integration into Afghanistan and the appellant's removal would be disproportionate. The appeal was therefore allowed on article 8 grounds.

The appeal before me

10. The appellant claims the judge misdirected herself as to the Country Guidance insofar as it is relevant to the question of internal relocation in Kabul. Insofar as the judge relied upon the decision in AS (Safety of Kabul) Afghanistan CG, the appellant claims the judge erred because the Court of Appeal in AS (Afghanistan) -v- SSHD [2019] EWCA Civ 873 acknowledged the existence of the updated UNHCR Guidelines on returns to Afghanistan, that had been relied upon by the appellant, and invited the Upper Tribunal to consider whether its Afghanistan Country Guidance required revision.
11. It is said that the judge accepted the expert evidence of Mr Jawad Hussan Zadeh as the basis for her conclusion that there would be very significant obstacles to the appellant's integration into life in Afghanistan such that the appeal was allowed on Article 8 grounds. The appellant submits similar considerations are relevant to the question whether it would be unduly harsh for the appellant to internally relocate.
12. Permission to appeal was granted by Upper Tribunal Judge Smith on 27th November 2019 and the matter comes before me to determine whether the decision of the FtT judge is tainted by a material error of law, and if so to remake the decision.
13. On behalf of the appellant, Mr Eaton submits the judge had found at paragraph [129], that upon return to Kabul, the appellant is unlikely to have any family support and would not have assistance in obtaining employment, housing, education or integration. He submits they are matters equally relevant to a proper consideration of whether it would be unduly harsh to expect the appellant to internally relocate. In the same paragraph, the judge refers to the conclusion of the UNHCR that the current security, human rights and humanitarian situation in Kabul,

is such that internal relocation is generally not available in the City. However, the judge erroneously considered herself bound by the country guidance set out in AS (Safety of Kabul) Afghanistan CG. The judge said at paragraph [126] that she is required to observe the country guidance cases, and in the closing sentence in paragraph [129] the judge again said that that she is required to observe the country guidance cases. He submits the judge failed to have any proper regard to the updated information set out in the UNHCR guidelines that were relied upon by the appellant and extensively referred to in the appellant's skeleton argument. It was those guidelines that were before the Court of Appeal in AS (Afghanistan). The guidelines unequivocally recommend that internal relocation should not be made available in Kabul, and the Court of Appeal invited the Upper Tribunal to consider whether its Afghanistan Country Guidance required revision.

14. In reply, Ms Isherwood submits the country guidance set out by the Upper Tribunal in AS (Safety of Kabul) Afghanistan CG, remains the relevant country guidance and the judge was right to consider whether it is open to the appellant to internally relocate to Kabul based upon that country guidance. The Upper Tribunal held that it would not generally be unreasonable or unduly harsh to order the "internal relocation" of a single adult male in good health to Kabul, even if he had no specific connections or support network there.
15. Ms Isherwood submits the Court of Appeal had done nothing more than to say the Tribunal would need to consider whether to revise its Afghanistan country guidance following the more recent guidelines issued by the UNHCR. That is not to say that the Country Guidance was wrong or should not be followed. She submits the judge was plainly aware of the UNHCR guidelines that were relied upon by the appellant. The judge had referred to the guidelines at paragraphs [91] and [103] of her decision. The judge was plainly aware that the UNHCR considers that given the current security, human rights and humanitarian situation in Kabul, internal flight is not generally available in the city.

Discussion

16. I record from the outset that the judge found the appellant would face very significant obstacles to integration into Afghanistan and concluded that the removal of the appellant to Kabul would be disproportionate and in breach of Article 8. The decision to allow the appeal on Article 8 grounds is not challenged.
17. It is readily apparent from the decision that the First-tier Tribunal Judge had reservations as to the position that the appellant would find himself in, upon return to Kabul. At paragraph [129], the Judge found that it is unlikely he would have any family support in Kabul, would not have assistance in obtaining employment, housing, education or integration. The judge noted the conclusion of the UNHCR that internal relocation is generally not available in the city.
18. The internal relocation alternative is an assertion that although the appellant may risk persecution or breach of fundamental rights in his home area, he could find safety somewhere else in Afghanistan. Here, the question of internal relocation remained a two-part question. First, are there risks of serious harm or persecution in the appellant's home area. The judge found the appellant's home area is controlled by the Taliban and on the findings made, the appellant would be at risk upon return to his home area. Second, is it unduly harsh expect the appellant to relocate to Kabul.
19. I accept the submission made by Ms Isherwood that the country guidance set out by the Upper Tribunal in AS (Safety of Kabul) Afghanistan CG, remains the relevant country guidance. A Country Guidance case stands until it is replaced or found to be wrong in law and a failure to follow the Country Guidance without good reason, will ordinarily disclose a material error law. Insofar as the guidance is undermined by the decision of the Court of Appeal in AS (Afghanistan), the Court of Appeal has remitted the matter to the Upper Tribunal on a limited basis only. The UNAMA statistic for death and injury resulting from armed conflict and security incidents in Kabul was 0.1%, which represented one in 1,000 people. The Upper Tribunal had erroneously expressed the risk of harm as being 0.01%, which represented one in 10,000 people. That, the Court of Appeal held, was an error of law and

the case was remitted for reconsideration on the basis of the correct figure. The matter was remitted to the Upper Tribunal only on the question of the extent of the risk to returned asylum-seekers from security incidents of the kind considered at paras. 190-9 of its reasons.

20. Equally however, where a reason for not following a country guidance case is put forward, a decision maker is bound to consider it, and a failure to do so can also amount to an error of law. Here, after the Upper Tribunal's decision in AS (Safety of Kabul) Afghanistan CG, the UNHCR produced further guidelines on returns to Afghanistan which, unlike its 2003 and 2016 versions, unequivocally recommend that internal relocation should not be made available in Kabul. At paragraph [82], Underhill LJ stated:

"Those limits on the scope of the remittal are subject to one important qualification. We were told that last year, after the decision of the Upper Tribunal, UNHCR produced further Guidelines on returns to Afghanistan, which, unlike the 2016 version, unequivocally recommend that "given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city". It will be for the Tribunal, no doubt after hearing submissions, to consider whether that assessment requires a reconsideration of its country guidance on a more extensive basis than is required by the remittal of this appeal. If it decides that it does, it is likely to make sense either for the scope of hearing to be increased or (which may be procedurally more correct) for the remittal in this case to be heard along with whatever appeal is the vehicle for that wider consideration."

21. In my judgement, although the judge obliquely refers to the updated UNHCR guidelines, upon a careful reading of the decision of the FtT judge, it is clear that notwithstanding the concerns the judge had as to the difficulties the appellant would experience in Kabul, the judge reached her decision to dismiss the asylum claim, because she considered herself bound by the Country Guidance. In my judgement, the judge failed to engage with the submissions made on behalf of the appellant that the Country Guidance decision could be distinguished following the publication of the latest UNHCR Eligibility Guidance relating to Afghanistan in August 2018. The judge found it is unlikely the appellant would have any family support in Kabul. The Judge found the appellant would not have assistance in obtaining employment, housing,

education or integration in Kabul. The judge also accepted the report provided by Mr Zadeh, that set out the difficulty for the appellant in finding a safe place to reside, and setting out that for the appellant, it would be near impossible for him to find a job that pays for subsistence, costs of accommodation and transportation.

22. In my judgement, the decision of the FtT judge to dismiss the appeal on asylum grounds discloses a material error of law and is set aside.
23. The parties agree that I should remake the decision in the Upper Tribunal, and I do so upon the basis of the unchallenged findings set out at paragraphs [129] and [134] of the decision. I note the Upper Tribunal held in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 that it would not generally be unreasonable or unduly harsh to order the "internal relocation" of a single adult male in good health to Kabul, even if he had no specific connections or support network there. That must however be considered in light of the UNHCR Eligibility Guidance relating to Afghanistan, issued in August 2018 which states that given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city.
24. The issue is whether taking account of all relevant circumstances, it is reasonable to expect the appellant to relocate or whether it would be unduly harsh to expect him to do so. The appellant arrived in the United Kingdom in November 2013 when he was 13 years old. Upon the facts as found by the FtT Judge, and for the reasons given by the judge for her conclusion that there would be very significant obstacles to the appellant's integration in Afghanistan, I find that it would be unduly harsh for the appellant to internally relocate to Kabul.
25. I allow the appeal on Asylum grounds.

Notice of Decision

26. The appeal against the decision of FtT Judge Malcolm to dismiss the appeal under the Refugee Convention is set aside.

27. The appeal is allowed on asylum grounds

Signed

Date

7th January 2020

Upper Tribunal Judge Mandalia

FEE AWARD

No fee is payable and there can be no fee award

Signed

Date

7th January 2020

Upper Tribunal Judge Mandalia