Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08184/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2020	**On 29 January 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Fazli, Sohaib Fatimi Solicitors
For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, MM, is a citizen of Afghanistan, born on 15 November 1996. He appeals against a decision of First-tier Tribunal Judge Louveaux promulgated on 2 October 2019 dismissing his appeal against a decision of the respondent dated 2 August 2019, refusing his fresh claim under paragraph 353 of the Immigration Rules.

Factual background

2. The appellant arrived in the United Kingdom illegally and claimed asylum on 8 March 2011. His claim was refused by the respondent, but he was granted discretionary leave as an unaccompanied asylum seeking child until 15 May 2014, when he would have been 17 and a half years of age.

3. The appellant claims his father and eldest brother were both members of the Taliban. They were killed in battle, but the authorities will be interested in the appellant on a "guilt by association" basis, he contends. The appellant also claims that his father killed a man during Eid celebrations, and that the family of the victim would now seek to kill him, the appellant, to avenge the death. When the police came looking for the appellant's father in connection with the murder, the appellant was detained, first in a police station, and then in prison, but that he escaped from prison when there was a bomb explosion which destroyed the prison walls, enabling him to escape.

4. The appellant's uncle arranged for him to leave the country with the use of an agent. His father and eldest brother later died fighting for the Taliban. He claims that he will be wanted by the Taliban upon his return, as the next in line in the family to replace his late father and brother. He also claims that he will continue to be sought by the authorities. Finally, he claims that, since his arrival in this country, he has become "Westernized", such that his new identity will lead to persecution on account of having refuted Afghan and Islamic culture.

5. The appellant made a fresh claim to the respondent on the basis of additional documents which, he claimed, demonstrated that he was at risk, particularly from the Taliban.

Procedural history

6. There is a relatively complex procedural background to this matter. In the time that has followed since the appellant first claimed asylum in March 2011, the appellant has had two appeals before the First-tier Tribunal, and this is his second appeal before the Upper Tribunal.

7. The appellant initially appealed against the refusal of his asylum decision to the First-tier Tribunal in August 2011. In a decision and reasons promulgated on 8 September 2011, Judge Higgins dismissed the appellant's appeal on credibility grounds. The appellant's appeal was also rejected on humanitarian protection grounds.

8. The appellant obtained permission to appeal against that decision to the Upper Tribunal on the basis that Judge Higgins' decision was arguably not "in accordance with the law", having regard to the published policy of the respondent in relation to unaccompanied minors. The judge had not considered that that policy. The asylum and humanitarian protection conclusions of Judge Higgins were not challenged. Upper Tribunal Judge

King set aside the decision of Judge Higgins in its entirety in a decision and reasons promulgated on 15 February 2012, remitting the decision to the respondent in order for consideration to be given to the issue of discretionary leave. Judge King appears to have dealt with the matter on the papers. In the meantime, on 23 November 2011, the respondent had written to the appellant conferring leave to remain as an unaccompanied minor, from 3 November 2011 until 15 May 2014. It appears that Judge King did not know that the respondent had already reconsidered her decision in that way before he promulgated his decision.

9. Shortly before the expiration of that leave, the appellant submitted an application for further leave to remain. The basis of that application was that the appellant had no one to return to in Afghanistan; he had lost contact with his family, and the Red Cross had been unable to assist. The situation in Afghanistan had not improved, and anyone perceived to be an associate of the Taliban would be treated as a suspect.

10. On 6 March 2015, the respondent refused to grant further leave to the appellant, resulting in an appeal before First-tier Tribunal Judge Shand, promulgated on 19 January 2016. Judge Shand dismissed the appellant's appeal. Her decision is relevant to these proceedings because the nature of the appellant's application for leave to remain required Judge Shand to consider and evaluate the protection-based submissions he had originally relied upon. She expressly considered the issue of asylum as though she were hearing a protection appeal.

The decision under consideration

11. The appellant's fresh claim relied on new documents obtained by the appellant which, he claimed, originated from the Taliban. Judge Louveaux noted that the appellant's claimed fear of the Taliban was not an issue before Judge Shand, although the appellant had referred to it in his original asylum witness statement. By the time the fresh claim was made, the appellant claimed that his father and eldest brother had been killed fighting, and that he was now sought for forced recruitment by the Taliban. The appellant relied on threat letters he received from the Taliban addressed to him and his surviving elder brother, imploring them to join the ranks. The first letter promised a financial reward. The second letter threatened punishment.

12. The appellant provided two reports from Dr Giustozzi, a well-known country expert on Afghanistan. The first report, dated 8 September 2019, considered the authenticity of the Taliban letters ("the first Giustozzi report"). Dr Giustozzi prepared the report with the assistance of his researcher based in Afghanistan. The researcher is said to have passed the threat letters to the relevant geographical Taliban commander in Afghanistan who, in turn, is said to have confirmed that the letters sent to the appellant were authentic.

13. Dr Giustozzi's second report, dated 18 September 2019, analysed the appellant's claim against the background information concerning the security situation in Afghanistan, and the author's perceptions of the Taliban's likely actions ("the second Giustozzi report").

14. The judge took into account Judge Shand's credibility findings but accepted that the Taliban threat letters were genuine. At [26], the judge found that the appellant's father and eldest brother had been members of the Taliban, and that the appellant was being pressured into joining the Taliban.

15. The judge did not accept, however, the appellant's claim that he would be killed, or face being persecuted for failing to join the Taliban. He noted extracts from Dr Giustozzi's second report, analysing the threat the appellant claimed to face, concluding that the Taliban would not seek to use lethal force against the appellant if he sought to resist their advances. At [28], the judge noted that Dr Giustozzi had opined that the Taliban did not "normally" use coercion and were "not likely" to use it in relation to the appellant. The judge said that Dr Giustozzi:

> "does not explicitly state that [the appellant] would be at risk from the Taliban on return or identify any specific features about the appellant's case that would cause the telephones to depart from the 'normal' or 'likely' practice."

16. The judge noted at [29] that the appellant's remaining elder brother had not left home upon receipt of the Taliban threat letters, which had targeted him also. Although his brother later did leave Afghanistan for Pakistan, the reason given by the appellant was that his brother feared the authorities, rather than the Taliban. The brother fled in August 2017. The judge found that, if the Taliban were likely to punish the appellant and his brother in any way amounting to persecution, it was not credible that his brother waited for so long after receiving the threat letters before leaving Afghanistan. A letter from the Taliban dated 25 April 2017 only gave the appellant and his brother a few days to report the Taliban; it was not credible, therefore, that the appellant's brother would wait several months in the family home to which the letters were addressed before fleeing, and even then he left the country for ostensibly different reasons, namely fear of the authorities, rather than the Taliban.

Permission to appeal

17. Permission to appeal was granted by First-tier Tribunal Judge Appleyard on the basis that, first, the judge's finding that the threat of coercion from the Taliban did not amount to persecutory treatment was arguably an error of law. Secondly, that the judge arguably made inadequate findings on the reports of Dr Giustozzi. Thirdly, that the accepted interest of the Taliban meant that the judge arguably fell into error for the purposes of paragraph 276 ADE(1)(vi) of the Immigration Rules ("very significant obstacles"). It was also said that the judge had made various mistakes of fact in relation to the evidence that was before him.

Discussion

18. There was no rule 24 response and Mr Fazli relied on the grounds of appeal which had been drafted by a colleague.

19. The first ground of appeal has two strands. One strand is that the judge made "inadequate findings" concerning the contents of the two reports from Dr Giustozzi, considering them in isolation of the entirety of their contents.

20. At [27], the judge said:

> "I reject the appellant's claim that the Taliban would kill him for failing to join them. The expert evidence of Dr Giustozzi is that '*even if coercion is not normally used in these cases, the Taliban offer financial incentives to recruit and employ psychological pressure: 'your father was a hero of the jihad and you have to join him too*', '*your family always participated in the jihad and you have too*' [*sic*]. This is consistent with the two letters supplied by the appellant in evidence: the first offering a financial reward to join the Taliban, the second threatening unspecified punishment for failing to join the Taliban. Later in his report, Dr Giustozzi makes the same point again: *'In sum, the Taliban are able to pursue and track Mr M Countrywide, including in Kabul, but as the son of a former member who was killed fighting for the Taliban, they are not likely to use extreme coercion against him.'*"

21. The relevant extract from the second Giustozzi report is at [32.e]. It must be read in context. Dr Giustozzi was addressing the general practice of the Taliban in relation to forced recruitment. He said:

> "32. With a few exceptions, there is no evidence that the Taliban as such actually practice forced recruitment. Interrogation of prisoners by ISAF and my own interviews with village elders have failed to produce any evidence of forced recruitment by the Taliban as an organisation. **The only known cases of Taliban forcing children to act against the will of their families are:**
>
> […]
>
> e. Relatives of Taliban are targeted for recruitment and even if coercion is not normally used in these cases, the Taliban offer financial incentives to recruits and employ psychological pressure: '*'your father was a hero of the jihad and you have to join him too*', '*your family always participated in the jihad and you have too* [sic]' , etc. many young men have been brought up in the myth of their fathers or relatives as heroes of the 1980s jihad and are often vulnerable to this type of arguments [sic].
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> 33. [The appellant's] case falls under 32.e, as the Taliban believe he should replace his dead relatives." [Emphasis in bold added]

22. Dr Giustozzi also noted at [34] that the Taliban have "undoubtedly wide reach", observing how they have a total manpower which exceeded 200,000 men in 2016, with an additional number of sympathisers and unpaid supporters that was impossible to estimate. At [36], Dr Giustozzi

noted that the Taliban deploys execution squads to hunt down and engage known enemies. At [37], he noted the extensive information exchange deployed across the Taliban in order to share intelligence about wanted targets and their known locations. At [38], quoting a former Taliban commander, Dr Giustozzi noted that Taliban's intelligence operations have grown "increasingly sophisticated", and their ability to track down individuals as "very sophisticated". The Taliban have secret informers throughout Afghan society, writes Dr Giustozzi. At [39], the report states that the police are known to collaborate with the Taliban frequently.

23. Against that background of the general practice and procedure of the Taliban, Dr Giustozzi addresses the likely risk to the appellant personally at [41]. He writes:

> "Taliban efforts to bring [the appellant] back into their ranks would not extend far from his home area, where their presence is pervasive. Laghman province is now seriously affected by violence. Qarghayi started being affected in 2005, and Alingar Alisheng, the two northernmost districts of Laghman, even earlier. Hizb-i-Islami is also active in all these districts, but mainly in Alingar and Alisheng. These are remote areas where the reach of the state was already very weak..."

24. As the paragraph continues, Dr Giustozzi details a number of known acts of Taliban violence which have taken place over the decade to 2015.

25. At [42] and [43], Dr Giustozzi outlines the infiltration of Kabul by the Taliban, and the steps they take to target known enemies located there. He concludes at [49] in these terms:

> "In sum, the Taliban are able to pursue and track [the appellant] countrywide, including in Kabul, but as the son of a former member who was killed fighting for the Taliban, they are not likely to use extreme coercion against him."

26. The above conclusions must be read in the context of Dr Giustozzi's earlier report, dated 8 September 2019, concerning the verification of the claimed threat letters from the Taliban. The judge accepted the report's conclusions that the threat letters were genuine. The respondent has not sought to cross-appeal against those findings. At [8], Dr Giustozzi quoted the Taliban intelligence official who had, at Dr Giustozzi's researcher's request, verified the letters against Taliban records. At [9], Dr Giustozzi writes:

> "[The Taliban intelligence official] also added that the Taliban are looking for [the appellant's brother] and [the appellant] cross [sic] 34 provinces for punishing them of their disobedience [sic]."

27. In his second report, Dr Giustozzi did not address the impact of the Taliban intelligence official's statement that the Taliban are searching for the appellant not only in his home province, but across all 34 provinces of Afghanistan. Nor did the judge.

28. Weight is a matter for the judge. Appeals to this tribunal lie only in relation to decisions of the First-tier Tribunal that involved the making of an error of law. However, in some circumstances, findings of fact can amount to errors of law, for example where they are irrational, or fail to resolve a material conflict.

29. However, I consider that the judge fell into error with his treatment of the two Giustozzi reports. The judge failed to reconcile a key tension between Dr Giustozzi's conclusions in his second report that the appellant would not be sought by the Taliban beyond his home province, on the one hand, and the quoted remark from the Taliban intelligence official in his first report, that the Taliban are actively looking for the appellant across all 34 provinces of Afghanistan.

30. This is a key tension, and a key omission in the judge's reasoning.

31. Given the judge relied on the verification report in order to reach his finding that the appellant received genuine threat letters from the Taliban, it was necessary for the judge to explain why he did not accept the contents of [9] of the verification report, quoted above in paragraph 26. There may, of course, have been cogent reasons that were open to the judge as to why he was able to accept some parts of the verification report's underlying source of information, and not others. The difficulty is, however, that the judge did not explain what those reasons were. On the face of his decision, this appears to be a factor that he simply has not considered. Indeed, at [28], the judge said that Dr Giustozzi had not identified, "any specific features about the appellant's case that would cause the Taliban to depart from their 'normal' or 'likely' practice." The difficulty with that statement is that Dr Giustozzi had identified precisely such characteristics in his verification report at [9], as outlined above: the Taliban itself had said that they would pursue the appellant across Afghanistan. By failing to resolve the tension, the reader of the decision is left wondering whether the judge had overlooked [9] of the verification report, or, alternatively, whether he had reasons for distinguishing, or otherwise not accepting that paragraph, that he did not give.

32. I have some sympathy for the judge, as Dr Giustozzi appears to have drafted his main expert report in a vacuum, without referring to this material feature that was specific to this appellant from his own verification report, dated only 10 days prior. However, it is the role of judges to resolve such conflicts where they have the ability to impact the findings of fact which underlie the decision before them, which the judge failed to do.

33. The judge did, of course, consider the second report of Dr Giustozzi in relation to the likely interest of the Taliban on the appellant's return to Afghanistan. In his analysis of [32] of the second of Giustozzi report, the judge focused on [32.e] without recalling on the contents of the introductory paragraph, at [32]. The subparagraphs listed by Dr Giustozzi are the exceptions to the rule that the Taliban does not normally practice

forced recruitment. It is relevant that the subcategories of exceptions are introduced as "*the only known cases of the Taliban forcing children to act against the will of their families…*" by Dr Giustozzi (see the emboldened text in paragraph 21, above). Accordingly, while the judge has relied on [32.e] of the report to support his conclusion that the appellant would not be at risk from the Taliban because he is only sought as a "replacement" for his late father and eldest brother, the judge does not appear to have considered that that category itself was specified by Dr Giustozzi as being one of the "known cases of the Taliban forcing children to act against the will of their families…" Again, there is a tension in the report Dr Giustozzi. On the one hand, at [32.e], Dr Giustozzi appears to suggest that there will be no "extreme" coercion on the part of the Taliban told the appellant, whereas, on the other, in the root paragraph at [32], he had specifically introduced the subcategories as examples of the Taliban forcing children to act. Again, this is a tension the judge failed to reconcile, and in doing so relied on one aspect of the report in isolation, at the expense of considering both documents together, in the round. I consider this to be an error of law.

34. The judge had other credibility concerns. Those concerns were properly open to him on the evidence that he heard. For example, the judge was concerned that the appellant's surviving elder brother only left Afghanistan upon receiving the adverse interest of the authorities, rather than in response to the threat letters: see [29]. That is a valid concern, within the range of concerns properly open to the judge. The question for my consideration is whether the errors of law identified above are such that the decision must be set aside, despite some of its findings that have not been impugned. I will return to this point.

35. The second strand to ground one is that the judge erred when concluding that the absence of threat of "extreme coercion" on the part of the Taliban meant that the appellant would not be at risk of being persecuted upon his return. Mr Fazli submits that there is a distinction between the likely attempts on the part of the Taliban to coerce the appellant back into their ranks, on the one hand, and their likely punishment for the appellant, were he to refuse to cooperate. I do not consider this to be a distinction of significant merit, primarily because the judge erred by concluding that the threat of "mere" coercion from the Taliban would not engage the Convention.

36. The primary issue for the judge's consideration was whether the threat of coercion, even if not "extreme", would be capable of amounting to persecution for the purposes of the Refugee Convention. The judge was dealing with the accepted interest of a well-known and well-established terrorist organisation in the appellant which, as documented in the background materials before the judge, was willing and able to resort to extreme violence on a highly sophisticated basis. Although there was a suggestion that, as a person related to two fallen Taliban soldiers, the appellant would somehow be immune to the Taliban's most murderous potential, I do not consider that that is a conclusion capable of being

sustained on the evidence. After all, at [9] of the document verification report, Dr Giustozzi noted the Taliban intelligence official as commenting that the appellant remains a sought person in all 34 provinces.

37. In principle, I do not consider that it was a conclusion rationally open to the judge to find that a person sought by the Taliban for the purposes of (as he accepted) fighting for them would only be subject to "mere" coercion not amounting to persecution. At the very least, if the judge was minded to find that a lower category of attention on the part of the Taliban would not amount to the appellant being persecuted, it was incumbent upon the judge to address the steps the appellant could be expected to take to resist such coercion, the impact that that would have upon him, and the extent to which he would be successful in resisting their efforts, were they to track him down. The judge should have also addressed whether "mere" financial pressure and emotional manipulation from the Taliban is something an individual can be expected to resist, given the well-known ability of the Taliban to cause loss of life. This the judge failed to do.

38. As Mr Tarlow submits, this is a case which, properly analysed, turns on the issue of internal relocation. The judge did consider the ability of the appellant to relocate to Kabul. Before internal relocation to Kabul would be a potential option, however, it was necessary for the judge to satisfy himself that the appellant would not continue to be at risk even were he to relocate there.

39. I have outlined above how Dr Giustozzi's first report noted that the Taliban said they would pursue the appellant across Afghanistan. His second report detailed the extensive infiltration of Kabul by the Taliban. The difficulty with the judge's conclusions on this point at [31] to [35], where he concluded that internal relocation would enable the appellant to evade the threat of the Taliban, is that it takes the background information available to the judge, from both the second Giustozzi report and AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC), and fails to analyse it in the context of the first Giustozzi report at [9], and the findings of fact the judge reached which accepted the appellant's family connections to the Taliban.

40. Again, I have some sympathy for the judge's reliance on [41] of the second Giustozzi report, where Dr Giustozzi states in terms that the Taliban's efforts to bring the appellant back into their ranks would not extend far from his home area. The difficulty with this aspect of the second Giustozzi report is that the reasons given by Dr Giustozzi at [41] appear to bear little relation to the proposition Dr Giustozzi seeks to establish at the outset of the paragraph. Dr Giustozzi outlines a series of insurgent attacks in provinces close to the appellant's home area between 2005 and 2015. Again, he does not consider the contents of his own verification report at [9], but, more significantly, the documented activities of insurgents which Dr Giustozzi proceeds to outline in the paragraph appear to bear little relation to the likely intentions of the Taliban in

relation to this appellant individually, or those fitting his profile generally. It appears as though Dr Giustozzi is attempting to draw a parallel between heightened insurgent activity in areas close to the appellant's home province and the likelihood of someone in the appellant's position being sought for forced recruitment, perhaps in order to assist with the heightened insurgent activity. If that is what Dr Giustozzi meant, it would have been helpful if he said so. Instead, Dr Giustozzi cited a series of seemingly unconnected events which have affected the overall security situation in particular parts of Afghanistan, rather than referring to the quite separate activity of forced recruitment to the Taliban.

41. The judge approached the issue of internal relocation pursuant to his earlier flawed analysis of the extent of the threat faced by the appellant. He placed selective reliance on the second Giustozzi report and did not subject that report to sufficient scrutiny which, had he done so, would have revealed some of the flaws inherent to the reasoning adopted by Dr Giustozzi. I find that the judge's findings concerning the appellant's ability internally to relocate to Kabul involved the making of an error of law.

42. The grounds of appeal also contend that the judge failed properly to assess the likely risk faced by the appellant from the authorities in Afghanistan. At [44], the judge accepted that the appellant would be likely to be questioned by the authorities upon his return but found that that would be only the routine questioning to which all failed asylum seekers are subject. Dr Giustozzi in his second report stated at [17] that the appellant would be assumed to have links with the Taliban. The judge did not consider the fact that the appellant could not be expected to lie or otherwise attempt to conceal the basis upon which he had unsuccessfully claimed asylum, namely that he was a family member of two Talibs and was sought for conscription, as the judge had found. While the judge was right to draw upon AS (Afghanistan) for the purposes of assessing the typical profile of those likely to be targeted for additional questioning, the operative reason he gave for rejecting Dr Giustozzi's opinion that the appellant would be at risk personally was his age. The judge said that there was no indication that Dr Giustozzi had considered the age of the appellant upon his departure from Afghanistan, and concluded that, "given he left Afghanistan when he was so young, I find that there is no real risk that the appellant would be assumed to have had any prior involvement with the Taliban or have any information of interest to the authorities…" The basis upon which the judge reached that conclusion is not clear. Dr Giustozzi noted at the outset of his second report that he had a number of immigration documents relating to the appellant, which would have confirmed his age. The focus of the operative analysis of his second report was the risk faced by the appellant, as the *child* of a deceased Talib. Clearly, Dr Giustozzi was aware of the appellant's age.

43. The above errors of law are such that I need to set the decision of Judge Louveaux aside. I remit the case to the First-tier Tribunal to be reheard by a different judge, with no findings of fact preserved.

44. I maintain the anonymity order made by the First-tier Tribunal.

Notice of Decision

The decision of Judge Louveaux involved the making of an error of law and is set aside, with no findings of fact preserved.

This matter is to be remitted to the First-tier Tribunal to reheard by a judge other than Judge Louveaux.

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 *Stephen H Smith* Date 21 January 2019

Upper Tribunal Judge Stephen Smith