Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09488/2019

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 6th March 2020

Decision & Reasons Promulgated
On: 1st June 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AN + 7
(anonymity order made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Saifolahi, Counsel instructed by Makka Solicitors Ltd**
For the Respondent: **Mr Tan, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born in 1974. His dependents are his wife and six children. He appeals with permission against the decision of the First-tier Tribunal (Judge Trent) to dismiss his appeal on protection and human rights grounds.

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Background and Matters in Issue

2. The Appellant claimed asylum on arrival in the United Kingdom on the 18th May 2019. The basis of his claim was that he had a well-founded fear of persecution in Afghanistan for reasons of his imputed political opinion. The Appellant averred that he had worked as a supervisor at a firm with a contract with the Afghan government and that as a result he had received death threats, both direct and indirect, from the Taliban. Fearing assassination the Appellant sold his home and fled Afghanistan with his family.

3. The First-tier Tribunal found the Appellant's account to contain material inconsistencies such that his evidence could not be accepted as true, even to the lower standard of proof. It rejected his evidence that he had worked as a contractor, or that he had been threatened by the Taliban. It found there to be no risk of harm to the Appellant in his home city of Kandahar. The Tribunal further rejected the Appellant's claim to have sold his home and so to face destitution. It noted in this regard that his parents and brother all remain in Kandahar and found that he could look to these family members for support. The protection appeal was dismissed on this basis.

4. In respect of the Appellant's human rights the Tribunal acknowledged his claim that it would be a disproportionate interference with his Article 8 rights to refuse to grant him leave. Under this heading the Tribunal considered the best interests of the children, and found these to be that they remain with their parents. It then considered whether the Appellant or his wife could meet the relevant test under paragraph 276ADE(1)(vi) of the Rules: it found that there were not very significant obstacles to their integration in Afghanistan. They both have family there, speak the language and are familiar with the culture and operation of society. The Appellant could work there. On that basis they could not succeed on Article 8 grounds with reference to the Rules. The Tribunal went on to consider whether there were circumstances 'outside of the rules' such that would render removal of this family disproportionate and finding there to be none, dismissed the appeal on human rights grounds.

5. On the 9th January 2020 the Appellant was granted permission to appeal to the Upper Tribunal on three discrete grounds:

   i) In respect of the protection claim it is submitted that the decision is vitiated for unfairness, the Tribunal having declined to adjourn proceedings so as to enable the Appellant's wife to give oral evidence;

   ii) In respect of the claim to humanitarian protection the Appellant submits that the Tribunal failed to take material evidence into account such that would demonstrate that Kabul was not a place of safety and/or that it would be unreasonable to expect this family to relocate there;

   iii) In respect of the human rights claim it is further averred that the Tribunal erred in failing to take material country background into account in its assessment of the "very significant obstacles" test.

6. At a hearing on the 6th March 2020 I heard submissions from the parties on the merits of the appeal. There has since then been a delay in the promulgation of this decision for which the parties have my apologies. I was on leave immediately after the hearing and I was then unable to return to Field House because of the measures taken to combat Covid-19. Having now had the file returned to me I confirm that it contains a full note of the submissions made by the parties such that I am able to determine the appeal. I note that since the hearing the Upper Tribunal has promulgated its decision in AS (Safety of Kabul) Afghanistan CG [2020] 00130 (IAC). Given that the matter before me is confined to whether the decision of the First-tier Tribunal is flawed for any material error of law I have not had regard to that decision in my deliberations.

Ground (i): the Failure to Adjourn

7. It is submitted on the Appellant's behalf that he had applied for the First-tier Tribunal hearing to be adjourned so that his wife could have given crucial evidence. She was able to corroborate his claim to have worked for the company in question, and could further testify to the threats received from the Taliban. It is submitted that the First-tier Tribunal acted unfairly in refusing to grant that adjournment request.

8. The Tribunal's decision acknowledges that an adjournment application was made, and sets out the reasons why it was refused [at FTT §24]:

> "The Appellant applied to adjourn the hearing on the ground that no witness evidence had been produced from his wife. He acknowledged that he had previously instructed his representatives that she was not able to give evidence as a result of stress, but his position was now that she could do so if it was sufficiently important. He was unable to clarify whether her evidence was likely to cover issues not already covered in his two witness statements. The Respondent had refused the Appellant's claim on 18 September 2019 and the Appellant had not raised this issue at a Case Management Review Held on 22nd October 2019. No written statement had been prepared by his wife. I declined to adjourn the proceedings. In light of the procedural history failure to prepare a written statement and the Appellant's previous comments as to his wife's inability to give evidence I considered that he had had ample opportunity to adduce evidence from his wife and without any suggestion that her evidence would go beyond that already covered in his own statements, I considered that it would be fair and just, considering the overriding objective, to proceed to hear the claim on the evidence before me".

9. Ms Saifolahi candidly accepted that many of the Judge's observations here were true. There had been plenty of time to proof the Appellant's wife, and to advise that she was to give evidence. She explained that the lady in question was believed to be suffering from Post-Traumatic Stress Disorder and that as a result those instructing Ms Saifolahi had not thought it appropriate to take a

statement from her. It was only when Ms Saifolahi herself met with the family at court, on the morning of the hearing, that she advised that it would have been better to have had the additional evidence adduced. In respect of the overriding objective Ms Saifolahi agreed that this was an important consideration for the judge but pointed out that she was only seeking a very short adjournment – this was not a matter which had been affected by any delay thus far and the Respondent would have suffered no prejudice.

10. Mr Tan submitted that it was inappropriate for Ms Saifolahi to be telling me what had happened at the hearing. If she wanted to be a witness she should have prepared a witness statement and the Appellant should have different counsel: BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). Mr Tan stressed that there had been plenty of time for the Appellant to prepare his case, and that the evidence from his wife had always been available.

11. The 'overriding objective' is set out at Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008: "the overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly". The rule explains that dealing with a case fairly and justly includes

    (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

    (b) avoiding unnecessary formality and seeking flexibility in the proceedings;

    (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

    (d) using any special expertise of the Upper Tribunal effectively; and

    (e) avoiding delay, so far as compatible with proper consideration of the issues

12. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) the then President Mr Justice McCloskey held that the focus for any review of a decision to refuse an adjournment was whether the aggrieved party had been deprived of a fair hearing:

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH

(Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284".

13. I deal first with Mr Tan's submission that the manner in which this ground has been advanced was inappropriate. Whilst Mr Tan was quite right to bring my attention to the principles in BW (Afghanistan) I am not satisfied that they need to be applied here. The fact that an adjournment application had been made, and the reasons for it, are all set out in the decision of the First-tier Tribunal, and nothing Ms Saifolahi told me goes beyond those facts. The principals in BW have important application where some dispute has arisen about what happened in court, but that is not the case here.

14. Turning to the reasons given by the First-tier Tribunal for refusing the adjournment I agree with Ms Saifolahi that at least one is difficult to understand. The Tribunal explained that it was not prepared to wait to hear evidence from the Appellant's wife because she would only be covering the same ground as he had done in his statements. As Ms Saifolahi submits, the point of the wife's evidence was to *corroborate* what her husband had said, not to expand upon it: it is *possible* that the wife's evidence could therefore have added weight to the Appellant's case.

15. I am not however satisfied, having regard to the full reasoning of the First-tier Tribunal, that the Appellant was in any way deprived of his right to a fair hearing. That is because it is clear from the reasoning at §33-40 of the First-tier Tribunal decision that the 'missing' evidence would have had little to no impact upon the final decision. Let us assume for the sake of argument that the Appellant's wife averred that her husband was employed by the contractor as he claimed (this being the primary issue that she could speak to). It is very difficult to see how her confirmation of her husband's claims would have gone any way to meeting the Tribunal's concerns. The account of the Appellant working for a contractor with links to the Afghan government was fundamentally contradicted by the information he provided to an Entry Clearance Officer in 2013. Applying for a visa then he said that he ran his own business, and presumably produced evidence to that effect. His connection with the contractor was not even mentioned in his screening interview, when he was asked to lay out the basis of his claim: he then told an immigration officer that he was a property dealer who also sold cooking wares. The explanation offered by the Appellant for these discrepancies made no sense to the Tribunal, since it did not accord with the chronology: the application for entry clearance was made in 2013 and yet the claimed threats did not start until 2015. The Tribunal further noted that there was a significant delay in the family leaving the country after the threats were said to have been made, and there were other discrepancies in the account given. Having had regard to all of that I cannot be satisfied that the additional weight that the Appellant's wife could have added to his claim – even taken at its highest – would have made any material difference to the outcome of this appeal.

16. I would further note that the Tribunal was entitled, in its refusal of the adjournment application, to have had regard to the fact that the Appellant had been represented throughout, and had had ample opportunity to submit evidence from his wife. The explanation for the decision not to draft a statement from her was that she was suffering from 'stress', or as Ms Saifolahi put it to me, PTSD. There was no medical evidence adduced to support that contention and I would note that the Appellant himself was deemed able to give evidence notwithstanding his own stress, which he refers to in his asylum interview [at Q50] as well as in his statement [at §6]. In fact the reason for the late change in tack was simply this: that Counsel took a different view from those instructing her. The Tribunal was entitled, having regard to the overriding objective, to have regard to that case history when considering whether it would be just and fair to adjourn.

Ground (ii): Kabul

17. At the date that the First-tier Tribunal heard the appeal in this case the country guidance was in flux. Although the Upper Tribunal had promulgated the decision in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) by the time that the matter came before Judge Trent in December, the Court of Appeal had, on the 24th May 2019, handed down judgment in AS (Afghanistan) v Secretary of State for the Home Department [2019] EWCA Civ 873 in which it had quashed the decision of the UT and remitted it for further consideration. The Appellant submits that in its approach to the prevailing country guidance conditions the First-tier Tribunal here failed to have regard to the fact that the UT decision in AS had been quashed, and the Court had ordered the decision to be remade. As such the extant country guidance was AK (Article 15(c)) Afghanistan CG [2012] UKUT 163. It is further submitted that the First-tier Tribunal failed to have regard to specific country background material, including the most recent UNHCR guidelines, which demonstrated that the conditions there had worsened since that last consideration by the UT. The Appellant avers that he had specifically asked the First-tier Tribunal to depart from the country guidance, and that his submissions had required consideration which, on his submission, they did not receive.

18. In response Mr Tan questioned whether the latter submission had been made. He pointed to the Skeleton Argument that had been before the First-tier Tribunal and noted that it said nothing about departing from the findings in AS (Safety of Kabul) or indeed AK (Article 15(c)). He further submitted that it is evident that the First-tier Tribunal did have regard to the materials mentioned in the grounds: the UNHCR guidelines are for instance referred to at its §48. There was nothing to suggest that the Appellant and his family had any particular vulnerability which might expose them to a greater degree of risk than any other civilians in Afghanistan.

19. At its §12 the First-tier Tribunal says this:

> "As to the risk on return to Afghanistan generally in the sense of Article 15(c) of the Qualification Directive I have taken into account the guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 to the effect the level of indiscriminate violence in Afghanistan, taken as a whole, and even in the provinces worst affected by violence, is not at such a level as to mean that a civilian faces a real risk within the meaning of Article 15(c) solely by being present in the country. That guidance was specifically preserved by the Upper Tribunal in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118, is not affected by the Court of Appeal's remission of part of the decision in AS to the Upper Tribunal, and it was not argued before me that it should not be followed. The argument before me related to the viability of the internal relocation to Kabul, a question to which I return briefly below".

20. That direction is somewhat perplexing. First, I am not clear what the First-tier Tribunal meant by its comment that the UT's guidance on Article 15(c) was not affected by the Court of Appeal decision in AS. Insofar as the conditions in Kabul were concerned, the Court's decision expressly quashed the UT's findings on Article 15(c), based as they had been on a fallacious recording of the statistics. The position, at the date of the appeal, was that AK continued to apply, but it was incumbent upon the Tribunal to examine the up to date evidence about conditions on the ground to see if anything had changed. Second, the note that the argument in the appeal had been concerned only with internal flight to Kabul is inexplicable. If one accepts that the family's 'home area' for the purpose of the protection analysis was Kandahar, there would have to be a finding of risk pertaining there before internal flight to Kabul would be at all relevant. I note in this regard the somewhat conflicting evidence on this matter – the Appellant himself states that he was a resident of Kabul: if that its indeed the case then the question of internal flight to the city had even less application.

21. That said, I can find no material error in the UT's approach. Its overall credibility findings on the Appellant's account of persecution are detailed, cogent and unimpeachable. Its findings on Article 15(c) were plainly open to it on the evidence. Even if I am wrong about that, there would be no benefit to the Appellant in having this element of the appeal remade, since the applicable country guidance is today the decision in AS (Safety of Kabul) Afghanistan CG [2020] 00130 (IAC), which conclusively finds that Article 15(c) is not engaged in the city. I can see nothing in the personal characteristics of this family which might give risk to any enhanced *Elgafaji* risk.

Ground (iii): very significant obstacles

22. As regards the Article 8 private life test, set out at paragraph 276ADE(1)(vi) of the Immigration Rules, Ms Saifolahi submitted that the Tribunal had failed in

its assessment of whether there were "very significant obstacles" to the family's integration in Afghanistan, to consider the prevailing security situation and the country background materials to which she referred in her submissions on ground (ii).

23. There is no merit in this submission. The First-tier Tribunal gives specific consideration to the family's circumstances on return at its §50, where it notes that close family members continue to work and live in Kandahar, and that these relatives could assist the Appellant and his family with any practical needs that they might have. As to the Appellant's ability to integrate, it was of course the case that he had lived in Afghanistan all of his life, and at the date of the appeal before the First-tier Tribunal had only very recently left that country. It would have been perverse to conclude that he would have any difficulty at all in re-establishing a private life for himself there.

Anonymity Order

24. This appeal concerns a claim for protection involving children. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision

25. The decision of the First-tier Tribunal contains no material error of law and it is upheld. The appeal is dismissed.

26. There is an order for anonymity.

Upper Tribunal Judge Bruce
25th May 2020