IAC-BH-PMP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10695/2019

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business	**Decision & Reasons Promulgated**
On the 22nd July 2020	**On 03 August 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AM
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J. Holt, Counsel instructed on behalf of the respondent
For the Respondent: Ms. R. Petterson, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a citizen of Afghanistan appeals with permission against the decision of the First-tier Tribunal (Judge Andrew) (hereinafter referred to as the "FtTJ") who dismissed his appeal in a decision promulgated on the 23 January 2020.

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2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The hearing took place on 22nd July 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video. Although there was an intermittent issue regarding sound, no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means. I am grateful to Mr Holt and Ms Petterson for their clear oral and written submissions.

Background:

4. The appellant's immigration history is summarised in the decision of the FtTJ at paragraphs 2-8. The appellant arrived in the United Kingdom on 23 August 2011 as an unaccompanied minor. He applied for asylum on 20 September 2011 and the claim was refused on 22 November 2011, but he was given discretionary leave expiring on 1 March 2012.

5. The appellant made an application for further discretionary leave on 1 March 2012 which was refused in a decision issued on the 14 September 2012.

6. The appellant appealed against this decision and it was dismissed by the First-tier Tribunal (Judge Baker) in a decision promulgated on the 7 December 2012.

7. In that decision FtTJ Baker rejected his claim to have been at risk of persecution or serious harm from the Taliban in his home area. The judge did not find that the core of his count was credible and did not accept his claim that he would have been left living in the home with other family members if he was in any danger from the Taliban as a result of his father's death (see paragraph 17). The judge concluded that this was a "made up account" (see paragraph 19). The judge concluded that he would be able to return to his home province in Afghanistan would not be at risk of persecution, or serious harm on return.

8. The appellant applied for permission to appeal the decision, but permission was refused on 7 December 2012 it is recorded that the appellant became "appeal rights exhausted" on 18 January 2013.

9. Judicial review proceedings were issued challenging the removal directions and a claim for unlawful detention was issued on 7 May 2013. However, the proceedings were withdrawn on 19 September 2014.

10. Further submissions were submitted on 23 August 2019 which were refused in a decision letter of 15 October 2019. The appellant appealed that decision to the FtT.

11. The basis of the case advanced before the FtTJ summary of the appellant's claim before the FtT was "whether the appellant can return to his home province of Laghman or whether this would breach Article 15 (c). If he can, it was accepted that the appeal failed. If not, is an internal relocation reasonable? (see paragraph 9).

12. The analysis of the evidence and the findings of fact made by the FtTJ are set out at paragraphs 18 – 35. The judge directed himself to the decision in Devaseelan at paragraph 19 on the basis of the previous decision made by Judge Baker where the judge concluded the appellant had not given a credible account and that he had not demonstrated that there was a reasonable likelihood or real risk that he was in danger from the Taliban. The judge also concluded that he could return to Laghman province because he did not have a profile which would make him of any interest to any group and that he could relocate.

13. On the first issue identified by Counsel on behalf of the appellant and whether the appellant could return to his home area or whether Laghman Province was in such a state of indiscriminate violence that to require him to do so would bring about a breach of Article 15 (c), the judge considered the matters set out in the decision letter at paragraphs 14 – 21 and the country guidance referred to (AK and AS). The judge also considered the EASO report contained within the respondent's bundle at paragraphs 22 – 24. At page 28 of that report the judge noted the following:

> "Provinces where "mere presence" in the area would not be sufficient to establish a real risk of serious harm and Article 15 (c) QD, however, indiscriminate violence reaches a high level and, accordingly a lower level of individual elements is required to show substantial grounds for believing that a civilian, return to the territory, would face a real risk of serious harm within the meaning of Article 15 (c) QD. This includes the following provinces: Laghman."

14. At paragraph 24, the judge made reference to Laghman province and pages 107 – 108 of the EASO report which concluded that "looking at the indicators it can be concluded that mere presence in the area would not be sufficient to establish a real risk of serious harm however indiscriminate violence reaches a high level and accordingly a lower level of individual elements is required to show substantial grounds for believing that a civilian, return to the territory would face a real risk of harm within the meaning of Article 15 (c) QD."

15. The FtTJ then went on to consider the submission made by Counsel that the appellant would fall into the group of those who had a "lower level of individual elements". Two submissions were made, the first one was advanced on the basis that the appellant was "westernised" and that this was a risk factor.

16. The FtTJ considered the issue of those who are perceived as "westernised" due to their behaviour, appearance and expressed opinions which may include those who return to Afghanistan having spent time in Western countries (as set out at page 65 of the EASO report). For the reasons set out at paragraphs 27 – 28 the judge did not find that there was any evidence before the Tribunal in his specific individual case which would lead to any difficulties for this appellant.

17. I observe that the grounds of appeal to the Upper Tribunal do not seek to challenge the FtTJ's assessment of this issue.

18. As to the second issue which related to his mental health difficulties, the judge considered those at paragraphs 29 – 33.

19. The FtTJ therefore dismissed his appeal. Permission to appeal was issued on two grounds on 6 February 2020 and on 2 March 2020 permission was granted by FtTJ Neville.

The hearing before the Upper Tribunal:

20. Following the grant of permission, the matter was to be listed for an oral hearing. However, this did not take place in the light of the COVID-19 pandemic and the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a hearing and inviting submissions on that issue and also the error of law in issue.

21. Mr Holt, Counsel on behalf the appellant responded to those directions indicating that notwithstanding the current difficulties that the appeal should be listed for an oral hearing and that this could take place via Skype.

22. Consequently, as a result of those submissions the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

23. Mr Holt, Counsel on behalf of the appellant and who had appeared on his behalf before the First-tier Tribunal relied upon the written grounds of appeal. Whilst the directions sent by the Upper Tribunal made provision for further written submissions, Mr Holt had confirmed at paragraph 4 of his reply that he did not seek to make any further written submissions. Ms Petterson on behalf of the respondent relied upon the Rule 24 response filed. I also heard oral submission from the advocates as summarised below. I am grateful for their assistance and their clear oral and written submissions.

Ground 1:

24. Dealing with ground 1, it is submitted that the FtTJ failed to consider the risk of stigmatisation (due to the poor mental health) as a relevant "individual element" that would increase the risk of Article 15 C harm, and therefore the FtTJ gave insufficient reasons for finding against an Article 15(c) risk.

25. It is further submitted that as the appellant originated from Laghman province which was one that entailed a risk of indiscriminate violence. The ESAO report entitled "country guidance, Afghanistan" at page 28 stated that the province was not such that "mere presence" would be sufficient to establish a risk of Article 15 C violence but that indiscriminate violence did reach a "high level" and a lower level of "individual elements" would be required to show substantial grounds to establish a real risk of serious harm to a civilian. Thus, the appellant relied upon "individual elements" that placed him at a heightened risk of harm. The individual element was the risk of stigmatisation as referred to at page 67 of the EASO report.

26. The grounds submit that the risk of stigmatisation which was documented in that report could at least arguably amount to an individual element that exposed the appellant to a heightened risk of Article 15 C harm.

27. It is submitted in the written grounds that whilst the judge considered the appellant's mental health, the judge had failed entirely to consider the arguments regarding stigmatisation. At paragraph 7 of the written grounds it is stated that it is important to note the difference: there is a specific risk that arises from the appellant's mental health but an entirely different risk that arises from stigmatisation as a result of perceived mental health issues. Thus, it is submitted that by failing to consider the issue of stigmatisation the judge had failed to provide adequate reasons for finding that there was an absence of "individual elements" that would increase the Article 15 C risk for this appellant.

28. In his oral submissions, Mr Holt identified that the centre of his grounds was whether or not the judge gave sufficient regard to what could arguably amount to "an individual element" and to whether this appellant returning to Laghman province would face a slightly higher risk of indiscriminate violence so that in his case the individual element would mean that he would be at risk of the Article 15 C threshold being reached . In the appellant's case it is submitted that the fact that was not given proper consideration was not the appellant's mental health but the fact of stigmatisation that he would face as a result of mental health problems.

29. He referred the Tribunal to page 67 of the EASO report in this regard.

30. In respect of the rule 24 response at paragraph 5, he submitted that the reference to the decision of AK and the argument set out therein was not the one that was relied upon on behalf of the appellant. He submitted that he

accepted what had been set out in the respondent's rule 24 response at paragraph 5 and that there was little evidence of the appellant becoming destitute, but that this was not the argument. He submitted that which was relevant was the issue of stigmatisation due to his mental health which could therefore amount to an individual element to raise the issue of risk.

31. Insofar as the respondent's rule 24 response referred to there being no evidence of stigmatisation, this is wrong as the ESAO report does refer to those with mental health difficulties facing stigmatisation. He therefore concluded his submissions on ground 1 by stating that the risk has to be considered and that in the absence of this Article 15 C had not been given proper and lawful consideration.

32. Mr Holt made it plain that ground one was his "principal ground of appeal".

33. Ms Petterson on behalf of the respondent relied upon the rule 24 response dated 24th of April 2020.

34. It was submitted that as the judge had recorded, there was scant evidence as to what support the appellant had been receiving in the UK at paragraph 31.

35. The judge had clearly engaged with background evidence and analysed the EASO report contained in the bundle at some length. At [27] he noted that the report stated that in general the risk of persecution to men perceived as "westernised" is minimal and observed in the same paragraph that he was provided with no evidence of any specific individual circumstances in the specific context of the appellant being westernised or even perceived as such.

36. Dealing with the assertion that the appellant would be stigmatised, the respondent relied upon the country guidance decision AK (Article 15 (c) Afghanistan CG [2012] UKUT 163 which remains a CG decision. Paragraph 20 of AK refers to 60% of the population suffering from mental health problems. The unemployment rate in the same paragraph is given as 35% and that 36% of the population live below the poverty line. Paragraph 2 to 5 of AK refer to there being little evidence of significant numbers of people which include those with mental health problems in Kabul suffering destitution or inability to survive at subsistence levels. Paragraph 2 to 4 refer to assistance provided to returnees. Consequently, based on that decision it was submitted on behalf of the respondent that there were no grounds to suggest that the appellant would be stigmatised in view of his mental health problems.

37. Thus, the written response submits that the determination was not materially affected by any errors of law.

38. In her oral submissions Ms Petterson on behalf of the respondent submitted that the judge properly assessed the appellant's position on return to Afghanistan having noted from the medical report dated 1/8/19 that the appellant was not in receipt of any support in the UK neither medication or

treatment and referred to the report at page 5. She submitted that when looking at the documents there was no evidence of any ongoing treatment, therapy or assistance provided for the appellant for any mental health difficulties which was a relevant consideration. This was also position from the letter dated 20 December 2009 exhibited at pages 6 – 7 of the appellant's bundle.

39. Ms Petterson submitted that the judge properly considered Article 15 (c) in the context of the previous decision of the FtTJ in 2012 who did not accept that the appellant faced any problems upon return to Laghman province as a result of any problems from the Taliban. The judge rejected his account of events in Afghanistan and did not accept that they were truthfully made. This was the starting point of the analysis and FtT Judge Andrews was entitled to conclude that there would be no individualised risk based on his history.

40. Furthermore, in the light of the material before the First-tier Tribunal (the medical report) it was not clear how the appellant would be identified as someone with mental health difficulties given that he was not accessing medication or therapy at the present time.

41. Mr Holt by way of reply submitted that the central point made on behalf the respondent was that there was a lack of evidence concerning the appellant's treatment for mental health. However, the evidence relating to treatment could go to the quality of the mental health issue but that the judge in his consideration did not say that the appellant's mental health was not severe enough to reach the threshold and that this reasoning is absent from the decision. Consequently, this argument could not defeat ground 1. As the judge made a positive finding that he had mental health issues, the judge was then required to assess whether it would lead to stigmatisation.

<u>Decision on error of law:</u>

42. I have carefully considered the submissions made by each of the advocates are set out above.

43. The summary of the appellant's claim before the FtT is set out at paragraph 9. Mr Holt of Counsel confirmed that the issue in the case was "whether the appellant can return to his home province of Laghman or whether this would breach Article 15 (c). If he can, it was accepted that the appeal failed. If not, is an internal relocation reasonable? A mental health issue arises in relation to both limbs and the length of the appellant's residence in the United Kingdom is also a factor. Paragraph 276 ADE (vi) is reliant on the same factors. There is no separate Article 8 claim."

44. It was not argued on behalf of the appellant that he would be at risk of persecution or serious harm based on his earlier account relating to events in Afghanistan. Therefore, the findings of fact made by Judge Baker remained as the basis of the factual assessment of the circumstances in relation to the appellant's home area. In other words, notwithstanding the opinion set out in

the psychologist's report that he had not been manufacturing his account previously (see page 4 of the report) the FtTJ was not asked to reconsider or make any further findings in relation to those issues. I observe that the psychological report was based in part of the acceptance of his previous factual account, that he had been the subject of early trauma, he feared persecution by the Taleban and had been was forced to leave his family home. It is not clear whether the psychologist had seen the earlier decision of Judge Baker, but in any event, it was not argued that the previous judge's findings were undermined by any other evidence, including the psychological report. I also observe that it is plain from the FtTJ's decision that he was critical of the report for the reasons set out at paragraph 30 – 31 as he concluded that there was no evidence to support the claim that specialist mental health support had been engaged with by the appellant given that there was no evidence in support and that the appellant himself had said he had no treatment.

45. What had been argued before the FtTJ was that there would be an Article 15 (c) risk in Laghman Province and it was submitted that on the facts of the appellant's case, in the light of the risk of " perceived westernisation" and his mental health which would led to his stigmatisation that he would succeed by reason of special factors particular to his personal circumstances (see the "sliding scale" approach in *Diakite v Comissaire general aux refugies et aux apatrides* (CJEU -C-285/12) at [32] and *Elgafaji v Staatssecretaris van Justite* [2009] ECR 1-921 at [39]40]).

46. Mr Holt on behalf the appellant submits that the FtTJ failed to consider the argument relating to risk of stigmatisation and that it was not the risk which arose from his mental health but the risk of stigmatisation as a result of his mental health.

47. It is plain from reading the decision of the judge at paragraph [25] that there were two elements that the judge went on to consider at [25 – 33] of the decision, by the use of the word "firstly" in relation to the issue of perceived "westernisation" and the second in relation to his mental health.

48. The assessment made by the FtTJ as to the risk arising from "perceived westernisation" was set out at paragraph 26 – 28 of the decision. The grounds do not challenge that assessment. The FtTJ dealt with the second point raised relating his mental health and concluded at [33] that when weighing the matters together, that he was unable to find that the appellant fell into the category of a "lower level of individual elements" (see paragraph 33).

49. In my judgement it is noteworthy that when rejecting the appellant's case on the basis of risk of being perceived as westernised, the judge's reasoning is based on the lack of evidence from the appellant to support such a submission. At [27] the FtTJ did not consider that there was any evidence as to the appellant's behaviour if returned to Afghanistan; or what it was about his appearance or opinions which would lead him to be considered as

"westernised". Whilst the judge also noted that the report had stated that in general the risk was minimal, the judge concluded that he had "no evidence of any specific individual circumstances in the context of the appellant being westernised or even perceived as such."

50. At [28] the judge also found that he had not been provided with evidence as to what behaviour had been adopted by the appellant which would lead to difficulties for him nor had he heard any evidence that the appellant would be able unable to readjust to Afghanistan's social restrictions(see [28]).

51. Counsel submits that the judge did not consider the issue of stigmatisation, however in my judgement whilst the judge did not expressly use the term "stigmatisation" at paragraph 28 the reference made to the lack of evidence concerning the appellant's behaviour which would lead him to difficulties for him or that he would be unable to readjust to the social restrictions, can also be viewed as part of the holistic assessment undertaken by the FtTJ which included his mental health which he went on to consider at paragraph 29 – 31.

52. Whilst Mr Holt relies upon the risk of stigmatisation it is important to consider the evidential basis upon which that submission was made. The FtTJ accepted that the appellant had "some mental health difficulties" (at [29]).

53. The only objective country material relied upon by Mr Holt in support of the submission before the FtTJ was that which he has identified in his grounds and in his submissions before me, as contained at page 67 of the European Asylum Support Office report "Country Guidance; Afghanistan -Guidance Note and Common Analysis (June 2018) ("EASO").

54. Under the heading Section 15 "Persons living with disabilities and persons with severe medical issues" it makes reference to "this profile refers to people with disabilities, including mental disabilities, as well as those who have severe medical issues, including for example, people with HIV, mental health issues, medical issues related to drug addiction et cetera." This was followed by information concerning the lack of funds to operate and sustain healthcare facilities and went on to state:-

> "In Afghanistan, people with mental and physical disabilities are often stigmatised. Their condition is at times considered to have been caused by an "offence against God". Mistreatment of those people by society and/or by their families has occurred. Women, displaced persons and returned migrants with mental health issues are particularly vulnerable…"

55. However, there is no further elucidation given as to the type of mistreatment, its prevalence nor any indication of in what circumstances such stigmatisation would arise or provide any consideration of the type of behaviour which would lead to such a risk.

56. Mr Holt did not direct the First-tier Tribunal or this Tribunal to any other material in this regard.

57. In the section entitled "risk analysis" it makes reference to those living with mental and physical disabilities, the individual assessment whether or not discrimination in mistreatment by society and/or by the family could amount to persecution should take into account the severity and/or repetitiveness of the acts or whether they occur as an accumulation of various measures. It also states, "not all individuals under this profile would face a level of risk required to establish well-founded fear of persecution." It makes reference to there being an individualised assessment which includes the nature and visibility of the mental or physical disability.

58. In my judgement the difficulty with Mr Holt's submission is that there was no evidence advanced before the FtTJ to demonstrate how the appellant would act on return or how his mental health would impact on his behaviour or how he would be perceived by others as a result of any mental health difficulties that he had. What was lacking was evidence in support of the individualised risk which the FtTJ had found earlier relating to the risk relating to perceived westernisation and also that referred to at paragraph 28.

59. The FtTJ recorded at paragraph 29 the summary made by the psychologist set out at pages 4 – 5 and that whilst the report referred to trauma suffered by the appellant at an early age, it seemed that the first two years that he was in the United Kingdom the appellant did well and that it was after the refusal of his application for asylum, his detention and near deportation which the appellant found "extremely traumatising". The effect on the appellant's behaviour was described in the report as "him living in underground existence fearing and avoiding authorities as well as accessing practical psychological and financial support". This was in relation to his life in United Kingdom. There was no link made to any mental health difficulties and how he would behave outside of the UK that would lead to a risk of stigmatisation.

60. In general terms I would accept that there is little understanding of mental health problems in Afghanistan and as the respondent set out in the rule 24 response (relying on the decision in AK) it is recorded that 60% of the population suffer from mental health problems as a result of the prolonged conflict and lack of treatment. However, as demonstrated above, the evidence before the FtTJ was far from demonstrating that the appellant would be at an individualised risk of stigmatisation as a result of his mental health difficulties.

61. I am therefore satisfied that there is no material error of law in the decision of the FtTJ relating to this issue and therefore his conclusion at paragraph 33 where he weighed all the matters together and found that the appellant would not be at risk of a breach of Article 15 (c) risk on return to Laghman province was one reasonably open to him on the evidence before him and the limited

nature of the submission that was made. I therefore find that ground 1 is not made out.

62. Dealing with ground 2, the grounds at paragraphs 9 to 11 submit that the same failure to consider the risk of stigmatisation applied to his consideration of the reasonableness of internal relocation. The grounds submit that whilst the judge rightly considered the appellant's mental health, the judge had failed to consider at all whether or not the appellant would face a risk of stigmatisation as a result of how his health would be perceived.

63. As this was the basis upon which ground 2 was advanced, and no reliance was placed on any other aspect of the issue of internal relocation, it must follow that in light of my assessment of ground 1, ground 2 cannot succeed when relying on the same basis. In any event, as there is no error in the judge's assessment that he could return to his home area and that it would not be in breach of Article 15 (c), the issue of internal relocation does not arise.

64. For those reasons, I am not satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law. I therefore dismiss the appeal. The decision of the FtTJ shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

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. 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 *Upper Tribunal Judge Reeds*

Dated 23 July 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.