



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

Appeal Number: IA/00922/2020 (V)  
(PA/51385/2020 (V))

**THE IMMIGRATION ACTS**

**Heard at Field House via Microsoft Teams  
On Tuesday 16 November 2021**

**Decision & Reasons  
Promulgated  
On Tuesday 23 November  
2021**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**-and-**

**MR A K**

**[Anonymity direction made]**

Respondent

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Respondent 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 both parties. Failure to comply with this direction could lead to contempt of court proceedings.

**Representation:**

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer

For the Respondent: Mr J Greer, Counsel instructed by Batley Law solicitors

## **DECISION AND REASONS**

### **BACKGROUND**

- 1.** This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge T Jones dated 29 January 2021 (“the Decision”). By the Decision, the Judge allowed the Appellant’s appeal against the Respondent’s decision dated 15 July 2020 refusing his protection claim.
- 2.** The Appellant who is a national of Afghanistan had previously claimed asylum in December 2017. That claim was refused on 12 June 2018 and his appeal was dismissed in a decision of First-tier Tribunal Judge John Hillis promulgated on 29 August 2018 (“the First Decision”). Permission to appeal the First Decision was refused and the Appellant was appeal rights exhausted in December 2018.
- 3.** Further submissions were made on 11 November 2019 leading to the Respondent’s decision under appeal. The core of the Appellant’s asylum claim was the same as previously. He claimed to be at risk from the Taliban. On this occasion, the Appellant relied on two letters said to have come from the Taliban (“the Threat Letters”) which were verified via an expert, Dr Giustozzi using a researcher in Afghanistan who authenticated the Threat Letters as genuine. The Judge accepted that evidence and concluded that the Appellant would be at specific risk from the Taliban both in his home area and in Kabul. He allowed the appeal for that reason.
- 4.** The Respondent appeals the Decision on essentially two grounds. The first ground set out at [1] to [3] of the application for permission to appeal is that the Judge failed to have due regard to the First Decision which should have formed his starting point (per the Devaseelan guidance). Paragraphs [2] and [3] set out factors which are said to bear out the materiality of the error. The second at [4] of the application is that the Judge has placed significant weight to the evidence of Dr Giustozzi without adequate reasons and based on the acceptance of his evidence in other appeals rather than in the instant appeal.
- 5.** Permission to appeal was granted by First-tier Tribunal Judge Chohan on 9 April 2021 in the following terms so far as relevant:
  - “... 3. In my view the third ground has substance. There is nothing to suggest that in the findings made by the judge, the previous judicial decision was considered as a starting point, which is a well-established principle. This must be explored further.
  4. There is an arguable error of law.”
- 6.** The appeal came before me at a hearing via Microsoft Teams in order to consider whether there was an error of law in the Decision and if I so concluded either to re-make the decision or remit the appeal to the First-tier

Tribunal in order for it to do so. There were no technical difficulties affecting the conduct of the hearing before me. I had before me the Appellant's bundle before the First-tier Tribunal, the Appellant's skeleton argument and supplementary skeleton argument before the First-tier Tribunal and the Respondent's bundle (referred to as [RB/annex/page]). I heard oral submissions from Mr Tan and Mr Greer. Following those submissions, I reserved my decision and indicated that I would issue that in writing which I now turn to do.

## **DISCUSSION AND CONCLUSIONS**

### **Ground One: 'Devaseelan' and the First Decision**

- 7.** In order to consider this ground it is necessary to look at the First Decision. The Appellant's core claim then was as it is now. He claimed that he had been abducted by the Taliban and managed to escape. He also claimed that the Afghan army held him responsible for the death of his brother who it is claimed was murdered by the Taliban when he returned home to assist the Appellant to leave the country.
- 8.** In addition to his own testimony, the Appellant relied on threats made by the Taliban to the elders of his village and a letter said to have come from the Afghan army. The Judge did not accept the Appellant's account as credible for reasons given at [40] to [43] of the First Decision (which appears at [RB/B/1-14]). The Judge considered the documents at [44] to [47] of the First Decision but gave them little weight for the reasons there given. Those documents did not include the Threat Letters but merely a letter confirming that threats had been made.
- 9.** Judge Jones made reference to the First Decision at [1] of the Decision. He noted at [8] and [9] of the Decision the Respondent's case as set out in the decision letter under appeal based on the First Decision and the parts of the First Decision said to be relevant to this appeal. At [32] and [33] of the Decision, Judge Jones says this:

"32. In reaching this decision [to find the Appellant credible], I trust I have fairly summarised and taken of the Respondent's position in the appeal, as set out in the refusal letter and Miss Hopkinson's submissions following her cross examination of the Appellant. I have taken full account of the Tribunal decision from August 2018 as my starting point.

33. Clearly since then, as has been underscored more than once in the presentation of the Appellant's appeal, there is further evidence concerning the provision of original documents to the Respondent fair copies of which have been attested to by a reliable associate acting on the behest of an acknowledged country expert."
- 10.** In her pleaded grounds, the Respondent submits that in departing from the credibility findings of the previous Judge, Judge Jones has failed to take into account that the Appellant's credibility is damaged by two matters. First, the Appellant in his first appeal had relied on a letter said to have been

narrated by his father whereas he had claimed that his parents were killed in 2013. Second, Judge Jones failed to take into account that the previous Judge found that the letter from the Afghan army said to show that the Appellant was at risk from that source identified no such risk. In other words, it is said that Judge Jones failed to take into account relevant findings made in the First Decision.

- 11.** The difficulties with those submissions are as follows. First, I can find nothing in the First Decision which takes a credibility issue about the letter written by the Appellant's father based on the date of his death. Second, I can find nothing in the Respondent's decision under appeal on this occasion which draws attention to that claimed inconsistency. In any event, as I understand it, the letter which it is said to have been written by the Appellant's father is not itself the letters written by the Taliban. Those letters were said by the Appellant to have been sent to the village elders. So far as I can see, the letters themselves were rejected in the First Decision based on what was said in the father's letter but not on the basis of a consideration of the letters themselves.
- 12.** In relation to the second point, Judge Jones' findings are that the Appellant is at risk from the Taliban and not the Afghan army. The finding by the previous Judge at [44] of the First Decision has no bearing on that issue.
- 13.** The way in which Mr Tan developed this submission though was subtly different. He reminded me that the Devaseelan guidance is not simply that the previous Judge's decision must be taken as a starting point but also that evidence which could have been but was not before the previous Judge should be treated with circumspection. He submitted that, when considering the Threat Letters, it was incumbent on Judge Jones to consider the Respondent's challenge to the genuineness of that evidence based on the dates of the letters (from 2013) and the way in which the Appellant said he obtained them. It was also relevant to consider that evidence in the context of the earlier findings made about the credibility of the Appellant more generally.
- 14.** The Respondent in her decision letter under appeal took issue with the genuineness of the Threat Letters (see [9] to [16] of the decision). Those objections are based on the documents being copies, translation not being properly authenticated, failure to explain how the Appellant's uncle (who sent him the Threat Letters) had come by them and challenges to the report of Dr Giustozzi (with which I deal in more detail below). Mr Tan's submission is that the Judge has failed to take account of what is there said and to consider all the evidence about the Threat Letters taking into account those points. The difficulty with that submission is that Judge Jones did take into account the points there made. They are referred to at [9] to [12] of the Decision. Those include the previous findings about credibility and the provenance of the documents. Similarly, the Judge at [19] to [21] of the Decision records the Respondent's submissions in this regard. The Judge expressly says at [32] that he has taken "full account" of the First Decision

and the Respondent's submissions. That includes what is said in those previous paragraphs.

- 15.** For those reasons, although Judge Jones did not set out the findings of the previous Judge in any detail, I am not persuaded that the Respondent has identified any error based on the Judge's failure to consider relevant findings from the First Decision.

### **Ground two: the Expert Report**

- 16.** The documents relevant to this ground are as follows:
- (1) Appellant's witness statement dated 11 November 2019 at [RB/D1-2] explaining how the Threat Letters came into his possession (via his maternal uncle);
  - (2) The Threat Letters and translation thereof at [RB/E1-2 and F1-3];
  - (3) Report of Dr Giustozzi dated 26 September 2019 ("the Expert Report") at [RB/G1-16];
  - (4) CV of Dr Giustozzi's researcher (SS) at [RB/H1-2].
- 17.** Judge Jones dealt with this evidence specifically and the risk to the Appellant generally at [34] to [39] of the Decision as follows:

"34. I attach weight to Dr Giustozzi's report written with a duty to the Tribunal.

35. I have also noted the basis of the instructions to his associate and am prepared to accept that in similar circumstances this associated, has when getting documents considered by persons within the police or the Taliban who we could approach, made it plain the documents were unreliable. This is not so in his report before me.

36. I have considered Ms Hopkinson's measured cross examination and helpful submissions carefully. It may be said that the comment attributed to the Taliban's official indicating to the associate that the letters are genuine that the Appellant would be sought out were [sic] ever he might be, may be an embellishment. However, in the particular circumstances and the relevant burden of proof here (a reasonable degree of likelihood) I am unable to find facts which would gain say this comment having been made. I asked whether in the particular circumstances bearing in mind the basis of the Appellant's problems in his home area because of his family associations the army - applying the appropriate standard, I cannot, though the Taliban are known to work in the shadows or in the dark in the absence of the authorities these days, discount risk to the Appellant in home area or Kabul, as has been submitted by Mr Greer, and supported by the country expert opinion.

37. When I reflect upon the submissions Mr Greer made based on the appeal skeleton argument and the country expert report, applying the appropriate standard, I find myself aligning with the same with an overview of the appeal.

38. It is clear, though per se I do not find that the Appellant is at risk of indiscriminate violence (Article 15(c) risk) if returned to Kabul - in the particular circumstances of his appeal - having been threatened by the Taliban and it been said that he clearly would be of interest if discovered, I am prepared to accept the evidence and the representations made (which

were otherwise unchallenged) that a person would need to identify themselves in some measure – so as to be trusted to get work shelter – that the Appellant’s whereabouts and origins would over the passage of time become known to those he fears on return to Afghanistan. It is acknowledged within the country guidance decision (AS) the state may not be able to afford such a person a sufficiency of protection.

39. When I reflect upon the respective positions of the parties, I find for the Appellant considered the appeal in the round, taking particular note of the earlier determination that there is little, if indeed, any suggestion of inconsistency. I found none before me I found the Appellant at time struggling and I was mindful of the information before me as to his depressive state and ongoing GP treatment, he did not contradict himself, he asked reasonably using an interpreter for two questions to be repeated, or required further explanation of these points, and little else. I did not find him evasive. I find that the information, before me now as highlighted within the country expert report, are all such that I find for the Appellant, in line with his Counsel’s submissions, and for these reasons.”

- 18.** The pleaded challenge on ground two is that Judge Jones failed to give adequate reasons for accepting the Expert Report and has based his reasoning on Dr Giustozzi’s position as an accepted expert when the evidence in reality comes from his researcher. Mr Tan developed this ground based on an inadequacy of reasons. He again submitted that Judge Jones had failed to have regard to the challenge to the Expert Report found in the Respondent’s decision under appeal. He said that the Expert Report was in reality merely a recording of evidence received from the Afghan researcher.
- 19.** Mr Tan also added two points which he described as sub-issues. Whilst Mr Greer objected to those points being raised as they were not pleaded, I take them into account as they are fairly encompassed within the general complaint of an inadequacy of reasons. The first of those points is that, whereas at [36] of the Decision, the Judge appears to rely on the expertise of Dr Giustozzi as to risk, there is no such statement in the Expert Report. The second point relates to the Judge’s finding at [38] of the Decision that the Appellant would also be at risk in Kabul. Mr Tan submitted, based on the country guidance then in force (AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC) -“AS (Afghanistan)”), the Appellant’s profile as found would be insufficient to reach a finding that the Appellant would be of interest to the Taliban in Kabul. If Judge Jones intended to depart from AS (Afghanistan) he had to provide reasons for doing so.
- 20.** Mr Greer submitted that the Respondent’s complaints were merely a disagreement with the Judge’s findings. Whilst he accepted that the Judge’s reasoning was both brief and at times hard to follow, it was sufficient justification for the outcome and sufficient for the Respondent to know why she had lost.
- 21.** Mr Greer took me to the Expert Report. At [5] to [7] of the Expert Report (RB/G/14), Dr Giustozzi says the following:

“5. I passed on the copies of the documents to my researcher, [SS], based in Kunar. Mr [S] is a journalist and researcher, who has participated in projects with me in the past, carrying out interviews with police and Taliban in the area. He always performed satisfactorily and reliably in his tasks. In verification, Mr [S] often found that documents or the fact that he was asked to verify were not genuine, adding to my trust for his work. He used his contacts with the police, developed during past projects, to arrange a meeting for the verification.

6. Mr [S] sought to verify the Taliban threat letters with [QR], member of the Taliban’s Military Commission for Surkhrud district of Nangahar province. He met him on 25 September 2019.

7. [QR] saw the two letters and reviewed them. He then informed Mr [S] that both letters were effectively issued by his commission. He added that the Taliban are looking for [A] son of [R] all over the country, as his details have been shared with the other Taliban.”

- 22.** I begin by expressing some sympathy with Mr Tan’s submission (as accepted by Mr Greer) that the Judge’s reasoning is at times hard to follow. However, with the benefit of both sides’ submissions to me, it has become much clearer. In effect, the Judge gives significant weight to the Expert Report in determining that the Appellant would be at risk in both his home area and Kabul. The issue therefore becomes whether in so doing he has had regard to the Respondent’s position about the Expert Report, the other evidence and AS (Afghanistan) and whether he has provided adequate reasons to justify his conclusions. I am satisfied that he has for the reasons which follow.
- 23.** First, there is no merit to the submission that the Judge has ignored the Respondent’s criticisms of the Expert Report. Those are recorded in relation to the decision under appeal at [12] of the Decision and in relation to the oral submissions made at [20] of the Decision. The Judge expressly takes into account in particular the oral submissions at [36] of the Decision. The Decision has to be read as a whole and it cannot be assumed that the Judge has ignored the criticisms in the decision under appeal as recorded earlier in the Decision.
- 24.** Second, the Judge does consider the other evidence. He notes at [11] of the Decision the challenge to the authenticity of the Threat Letters based on their provenance and the lack of originals. Similarly, at [19] and [20] of the Decision, the Judge records the submissions made about the evidence regarding how those were obtained and the reliance which can be placed on them. I do not repeat the point made about the cross-reference to the submissions within the findings.
- 25.** Third, in relation to risk, having placed reliance on the Expert Report in relation to the authenticity of the Threat Letters, as Mr Greer submitted, those became “self-standing”. It was not therefore necessary for Dr Giustozzi to express a separate view as to risk or for the Judge to rely on one. This is, as Mr Greer submitted, an issue of semantics because the Judge’s reliance is placed on the conclusions of Dr Giustozzi in relation to

the authenticity of the Threat Letters and not his opinion as to risk. That risk was self-evident based on the Threat Letters.

**26.** Fourth, in relation to risk also in Kabul, the Judge records at [13] of the Decision the reference to persons of low profile being unlikely to be at risk more generally. The submission made by the Respondent's Presenting Officer based on the Expert Report centres on the comment made at [7] of the Expert Report said to have been made by [QR] the Taliban official. It was suggested that this was an embellishment. However, the Judge did not accept that this was so (see [36] of the Decision). It is for that reason that, in this appeal, the Judge did not have to look to the country guidance in AS (Afghanistan). Mr Greer also pointed out that were I to find an error in this regard it could not now sensibly be suggested that the error could be material given that the Taliban is now in de facto control of the whole of Afghanistan. In any event, based on the Judge's finding at [36] of the Decision, I do not accept that there is any error made.

**27.** Overall, whilst the Judge's reasoning is brief, it is so only because the Judge was prepared to place significant weight on the Expert Report about the risk to the Appellant from the Taliban. The issue of what weight should be placed on particular items of evidence is not generally open to criticism on grounds of error unless the finding is perverse, evidence has been wrongly left out of account or there is an inadequacy of reasons. Here, the Judge had regard to the other evidence but it was reasonably open to him to place significant weight on the Expert Report and to accept therefore that the Threat Letters were genuine and indicated that the Appellant would be at risk on return to Afghanistan from the Taliban not just in his home area but also throughout Afghanistan. His reasoning whilst brief adequately identifies his reasons for preferring the Appellant's evidence.

**28.** I am therefore satisfied that ground two whether as pleaded or developed in submissions does not disclose any legal error.

## **CONCLUSION**

**29.** For the foregoing reasons, I am satisfied that the Respondent has failed to show that the Decision contains any legal error. I therefore uphold the Decision.

## **DECISION**

**The Decision of First-tier Tribunal Judge Jones dated 29 January 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision.**

Signed: L K Smith

**Upper Tribunal Judge Smith**

Dated: 16 November 2021