



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

Appeal Number: PA/07524/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House (by remote video means)
On 20th September 2021**

**Decision & Reasons
Promulgated
On 9th November 2021**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**SA
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji of Counsel, instructed by Ata & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no audio or visual difficulties during the course of the hearing. A face to face hearing was not held to take precautions against the spread of

Covid-19 and as all issues could be determined by remote means. The file contained the papers in hard copy.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Graves promulgated on 3 December 2019, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 19 July 2019 was dismissed on protection grounds and allowed on human rights grounds (Article 8 of the European Convention on Human Rights).
3. The Appellant is a national of Afghanistan, born on 3 April 1996, who was first encountered in the United Kingdom on 30 September 2009. The Appellant's asylum claim was refused on 19 November 2009 but he was granted leave to remain as an unaccompanied asylum seeking child to 19 November 2012. An application for further leave to remain was made on 19 November 2012 and refused on 19 September 2014. The Appellant's appeal against that refusal was dismissed on 3 April 2014 and he was appeal rights exhausted on 19 May 2015. The Appellant was next encountered working illegally on 30 September 2017, following which he was served with a notice of liability to removal. The Appellant made further submissions on 30 October 2017 and it is the refusal of those on 19 July 2019 which is the subject of this appeal.
4. The Respondent refused the application the basis that the Appellant was not at risk on return to Afghanistan from the Taliban based on the previous findings of the Tribunal and that there would be no risk under Article 15(c) of the Qualification Directive. There was a lack of evidence that the Appellant had established family life in the United Kingdom and he did not meet any of the requirements of paragraph 276ADE of the Immigration Rules for a grant of leave to remain on private life grounds.
5. Judge Graves dismissed the appeal on protection grounds, allowing it on Article 8 grounds, in a decision promulgated on 3 December 2019. In summary, the First-tier Tribunal found that the Appellant would not be at risk on return to his home area, where he could return to family and he could safely be returned to Kabul where there was no Article 15(c) risk. Further, the Appellant's removal would not be in breach of Article 3 of the European Convention on Human Rights, however given all of his circumstances, including his poor mental health, it was accepted that the Appellant would face very significant obstacles to his reintegration on return to Afghanistan such that his appeal was allowed on human rights grounds.

The appeal

6. The Appellant appeals against the dismissal of his protection claim on two grounds. First, that the First-tier Tribunal failed to consider whether the evidence before justified a departure from the then country guidance in AK (Article 15(c)) Afghanistan CG [2012] 00163 (IAC) that there would be no breach of Article 15(c) of the Qualification Directive, and secondly, that the

First-tier Tribunal erred in finding that there was no Article 15(c) risk in Kabul, contrary to the evidence before it of a deterioration in the situation there. The two grounds are linked and clearly raise the same common issue on the evidence before the First-tier Tribunal.

7. At the oral hearing, Mr Dhanji relied on his skeleton argument and made further oral submissions. The Appellant's evidence before the First-tier Tribunal included a report from Dr Giustozzi, the UNHCR Eligibility Guidelines dated 30 August 2018 and the EASO report dated June 2019. In its decision, the First-tier Tribunal only considered humanitarian protection in paragraph 44 and dismissed the appeal on the basis of the country guidance in AK without any express consideration of the Appellant's evidence which post-dated that decision. Mr Dhanji submitted that the First-tier Tribunal had simply failed to engage with the evidence relied upon or consider whether there should be any departure from the then country guidance. This was said to be a material error because it was possible that had the First-tier Tribunal engaged with the evidence, an Article 15(c) risk could have been found such that the appeal would have been allowed on humanitarian protection grounds.
8. On behalf of the Respondent, Ms Everett accepted that the First-tier Tribunal did not expressly engage with the evidence but submitted that in light of the subsequent decision in AS (Safety of Kabul) [2020] UKUT 130 such an error could not be material as there was no basis upon which the First-tier Tribunal could have reached a different conclusion on essentially the same evidence as was available in the country guidance case.

Findings and reasons

9. In the present appeal, it is not in dispute that the First-tier Tribunal failed to engage with the Appellant's evidence in support of his humanitarian protection claim that there would be a breach of Article 15(c) of the Qualification on return to Kabul. The decision on this point is very short and relies almost exclusively on the country guidance in AK without any express consideration of whether the Appellant's evidence justified a departure from the country guidance or more generally whether the Appellant was entitled to humanitarian protection following what he claimed was a deterioration in conditions in Kabul.
10. However, the error by the First-tier Tribunal was not material to the outcome of the appeal. Whilst the First-tier Tribunal did not have the benefit of the country guidance in AS which followed its decision, for the reasons given therein, no First-tier Tribunal could rationally conclude at the time of the decision of Judge Graves that there would be an Article 15(c) risk on return to Kabul. The evidence before the First-tier Tribunal in this appeal included evidence which was the same as that before the Upper Tribunal in AS, with expert evidence in both from Dr Giustozzi as well as the UNHCR guidelines and EASO report. Although it was theoretically possible that a different conclusion could have been reached, on the evidence in this case it could not rationally have been concluded on

the evidence before the First-tier Tribunal that the Appellant faced any Article 15(c) risk. There is therefore no material error of law in the decision of the First-tier Tribunal.

11. This decision is on the basis of whether there was an error of law in the decision of the First-tier Tribunal made on 3 December 2019 and therefore no account has been or could have been taken of the much more recent events in Afghanistan with the Taliban effectively taking control of the country in August 2021. The Respondent's position following those events is awaited, however, the change in country conditions is a matter which the parties can address either by internal review or by further submissions being made by the Appellant. It is not a matter which could be considered in the context of an error of law decision pre-dating these events.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal on protection grounds and allow the appeal on human rights grounds is therefore confirmed.

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 G Jackson
2021

Date 21st September

Upper Tribunal Judge Jackson