



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-004860

First-Tier Tribunal No: PA/50424/2023  
LP/00796/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 5 September 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROOM**

**Between**

**AKZ  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P Draycott, Counsel, instructed by Pristine Law, Solicitors  
For the Respondent: Ms E Blackburn, Senior Home Office Presenting Officer

**Heard remotely at Field House on 8 August 2024**

**DECISION AND REASONS**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court.**

1. The appellant, an adult citizen of Afghanistan, appeals with the permission of the First-tier Tribunal against a decision, dated 25 October 2023, of Judge of the First-tier Tribunal Rhys-Davies (“the judge”) dismissing the appeal brought by the appellant on the grounds that

removing him to Afghanistan would breach the Refugee Convention, the United Kingdom's obligations to grant humanitarian protection and the Human Rights Convention (Article 8).

2. The First-tier Tribunal made an anonymity direction. No submissions were made to me either to maintain or lift it. I shall maintain it given this is, essentially, a protection appeal.

### **The factual background**

3. The appellant left Afghanistan in 2008 and arrived in the United Kingdom the following year as a minor. His asylum claim was refused but he was granted a period of discretionary leave. He appealed against the refusal and his appeal was heard by Immigration Judge R A Cox in Birmingham in October 2011. Judge Cox noted concessions made by the respondent that the Taliban had approached the appellant's madrassa with a view to recruiting its pupils, including the appellant. The judge accepted that it was fear of recruitment by the Taliban which led to the appellant's flight from Afghanistan. He also accepted that, by reason of this, the appellant had upset the local mullah and local Taliban elements, which could put him at risk in his home area of Baghlan. However, he rejected the appellant's evidence of events since his departure, notably his claim that his mother died in September 2010 as a result of action by the Taliban. He found the appellant did not have a profile which would place him at risk from the Taliban outside his home area and that he could therefore safely relocate to Kabul.
4. It is common ground that the appellant returned to Afghanistan voluntarily in 2018 (having left the United Kingdom and travelled to France in 2016) and that he married there before returning to the United Kingdom in 2022.
5. The appeal now under consideration arose from a decision of the respondent, made on 11 January 2023, refusing the appellant's application for refugee status. He claimed he had been targeted on return to Baghlan and forced to relocate to Kabul before returning to the United Kingdom.

### **The judge's decision**

6. The appeal was heard by the judge remotely at the request of the parties on 7 September 2023. The appellant did not give oral evidence but his friend, AZK, did. The appellant was represented by counsel, Mr Draycott. The issues identified for determination were (1) the appellant's account of events since he returned to Afghanistan in 2018; (2) his claim to be at risk as a "Westernised" individual; (3) the risk of a breach of Article 3 due to destitution; and (4) whether there were very significant obstacles to the appellant's integration in Afghanistan. The judge directed himself to apply

the civil standard of proof in accordance with section 32 of the Nationality and Borders Act 2022.

7. Having considered the documents and the oral evidence of AZK, the judge dismissed the appeal on all grounds. He treated Judge Cox's findings as his starting-point and noted the appellant started his appeal with some matters in his favour. However, he concluded these were outweighed by matters casting doubt on the claim. His assessment of the appellant's claim is lengthy and detailed and runs from [29] to [51].

### **The issues on appeal to the Upper Tribunal**

8. The grounds of appeal were settled by Mr Draycott, counsel, who had represented the appellant at the hearing in the First-tier Tribunal. Ground 1 argued the judge erred in his assessment of risk on return because he failed to engage with the respondent's earlier concession that the appellant had upset the Taliban and local mullah in Baghlan by resisting efforts to recruit him. The April 2022 CPIN stated that people who had previously resisted or opposed the Taliban were likely to be at a risk of persecution. It followed that the judge's findings concerning the appellant's return to Afghanistan in 2018 were irrational. Ground 2 argued the judge erred by applying the balance of probabilities test to the entirety of the protection claim and he should have applied the lower standard to the appellant's humanitarian protection claim.
9. Permission to appeal was granted on all grounds. The respondent has not uploaded a rule 24 response.
10. Mr Draycott submitted a refined version of the grounds of appeal, headed 'Appellant's Additional Grounds of Appeal' shortly before the hearing. Ms Blackburn, having read them, confirmed she had no objection to the late submission and agreed it might be helpful for her to have some time to discuss the case with Mr Draycott. Having done so, she confirmed that the respondent conceded the judge erred for the reasons explained in Mr Draycott's submissions, although there was no agreement as to how to dispose of the appeal. Mr Draycott argued I should substitute a decision allowing the appeal, whereas Ms Blackburn argued the appeal should be remitted for findings to be made again.

### **Decision on error of law**

11. Mr Draycott's refined grounds pray in aid the Upper Tribunal's guidance on section 32 given in JCK (s.32 NABA 2022) Botswana [2024] UKUT 00100 (IAC) which, of course, had not been promulgated when the judge reached his decision in this appeal or when permission to appeal was granted. Mr Draycott's principal objection to the judge's approach in the light of the guidance in JCK was that he erred in his rejection of the appellant's

account of events in 2018 by applying the balance of probabilities test. Question 4 in JCK (whether the claimant does in fact fear persecution) does not involve an assessment of whether past events occurred (see [15] to [18]). It simply requires an assessment of whether the appellant does in fact fear in the light of the background evidence.

12. Ms Blackburn accepted that the judge had not applied this approach but had assessed the credibility of past events on the civil standard rather than the lower standard.
13. In the circumstances, I find the judge erred in law and set aside his decision dismissing the appeal on protection grounds.

## Disposal

14. As said, the issue which divided the parties was how I should now dispose of the appeal. Having considered the respective submissions of the representatives, I have decided that the appropriate outcome is to remit the case back to the First-tier Tribunal to be heard again by a different judge. My reasons are as follows.
15. Mr Draycott argued that the findings of Judge Cox, which were based on the respondent's concession, regarding the appellant's risk in his home area brought him squarely within the respondent's CPIN: Afghanistan: Fear of the Taliban, Version 3.0, April 2022, which states in relevant part as follows:
 

“2.4.4 There are reports of human rights abuses, including targeted killings, torture, threats and intimidation, against civilians associated with, or perceived to have supported, the former government or international community, former members of the security forces (which may depend on their previous role), women (particularly in the public sphere), LGBTQ persons, ethnic and religious minorities, journalists, human rights defenders, members of the judiciary, persons deemed to have transgressed cultural or religious mores (which may include those perceived as “Westernised”), and persons deemed to have resisted or opposed the Taliban.” (*my emphasis*)
16. I note the category of persons deemed to have resisted or opposed the Taliban is not materially expanded upon in later sections of the CPIN and the brief section on people who resist recruitment by the Taliban is non-committal.
17. For my part, I consider paragraph 2.4.4 to be a rather flimsy platform from which to argue that the outcome of the appeal is inevitable. Plainly, the meaning of “resisted or opposed the Taliban” is open to a wide degree of interpretation and the actions of a minor who was sent abroad by his mother and uncle after receiving a letter from the Taliban might realistically not fall within the risk category now even though it is common ground he was at risk when he left. The CPIN discusses the Taliban's “general amnesty” for those who fought against them. Whilst

acknowledging that some groups, such as social activists, former military and government officials, those who worked with foreign forces and former members of the security services continue to be targeted, this is still a relevant factor which would potentially reduce the risk to a person in the appellant's position.

18. Furthermore, whilst it is conceded the judge applied the wrong standard of proof, he nonetheless potentially exposed some evidential weaknesses of appellant's account of events in 2018 and unanswered questions, such as why he would have returned to his home areas in first place. It is important to note that Judge Cox's findings were not all positive. What he accepted he accepted due to the concession made to him. In summing up at [35] he said he seriously doubted whether the appellant had any abiding individual profile in his own village and he did not accept there had been any consequences as a result of his leaving his village to avoid recruitment by the Taliban. This was as much part of the starting-point for the judge as the positive findings made as a result of the concession. Whilst not intending to suggest any particular outcome, it is clear that another judge applying Devaseelan principles and directing themselves correctly in the light of JCK might also find themselves dismissing the appeal.

## **NOTICE OF DECISION**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be re-heard by a different judge.

## **DIRECTIONS:**

- 1 The appeal will be heard again but not by Judge Rhys-Davies.
- 2 The issues remain those identified by Judge Rhys-Davies at [11] of his decision, save that issue (iv) (very significant obstacles to integration/Article 8) has not been appealed.
- 3 Section 32 of the Nationality and Borders Act 2022 applies to the Refugee Convention ground of appeal.
- 4 The positive findings made by Judge Cox and adopted by Judge Rhys-Davies, as regards the circumstances which led to the appellant's flight from Afghanistan, are preserved and shall be the starting-point for consideration of the appellant's appeal.

5 The extent to which the appellant remains at risk in his home area notwithstanding the passage of time will have to be determined on the evidence against the CPIN and any other relevant background evidence which the parties adduce.

6 If the appellant is found to be at risk in Baghlan, then the issue of internal flight to Kabul will have to be determined on all the evidence, bearing in mind that the Taliban have taken control of the whole of Afghanistan since AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC) was heard.

7 The appellant should inform the tribunal at the earliest time whether he or anyone else wishes to give oral evidence and, if so, whether they require an interpreter.

Signed: N Froom

**Deputy Upper Tribunal Judge Froom**  
August 2024

Dated: 12