Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01957/2012

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Sent**
On 30 May 2013	**On 28 June 2013**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MALYAR ASIF NIAZAI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Brakaj, Counsel instructed by Iris Law Firm
For the Respondent: Mr C Dewison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan, claiming to be born on 1 January 1978.

2. The appellant claims to have left Afghanistan in mid 2008, travelling to Pakistan, thence to France and onward to the United Kingdom, he being arrested on 29 April 2009 and claimed asylum shortly thereafter.

3. The respondent, by a decision of 3 February 2012, refused to grant the appellant asylum or other protection in the United Kingdom.

4. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Sacks on 2 April 2012. He was found not to be a credible witness as to the circumstances of his claim and not to be at risk of ill-treatment upon return for a Convention reason. The Judge went on to consider in the alternative Article 1F(a) concluding that the appellant's activities had placed himself in any event outside the protection of the Refugee Convention.

5. The appellant seeks to appeal against that decision, which appeal has been granted.

6. Thus the matter comes before me in pursuance of that leave.

7. Miss Brakaj, who represents the appellant, addressed me at length as to the grounds of appeal and invited me to find that there were material errors of law in the approach taken by the Judge to the issues in this case. She invited me to set aside the decision. Mr Dewison, who represents the respondent, invited me to find that so far as the decision relating to asylum is concerned that that was properly open to be made in all the circumstances. He agreed that the Judge's conclusions as to Article 1F(a) were not sustainable, given that the Judge had taken little account of the risk factors as set out in **JS (Sri Lanka) v SSHD [2010] UKSC 15**. He submitted, however, that although that finding was in error and should not stand it did not adversely affect the overall finding that was made as to asylum.

8. In summary, it is the case for the appellant that he comes from a family who gave wholehearted support to Hezb-e-Islami. His father, brothers and uncle were all active supporters of that party. He produced a membership card for the party, saying that that was obtained for him by his father when he was around 14 to 16 years old. Over the years he has lost his father, brother and uncle in the conflict. He himself was involved with three battles on behalf of Hizb-e-Islami, receiving shrapnel injuries on the last occasion.

9. He was arrested by the authorities and detained but subsequently released on bail. He was permitted to cross the borders between Afghanistan and Pakistan, particularly for treatment, on a number of occasions.

10. He contends that because of his political profile with Hizb-e-Islami he will be at risk upon return from the Afghan authorities. It is his case that he has been charged with committing war crimes against the Afghanistan authorities.

11. Essentially, the Tribunal Judge did not find the appellant to be credible as to that claimed profile. The findings as to credibility were essentially those as set out in some detail in paragraph 43(a)-(o). The Judge found that the appellant's evidence was inconsistent as to the involvement of himself and members of his family. He noted the ignorance of the appellant as to the Kalashnikov rifle and inconsistencies in the evidence as to the appellant's involvement in the three battles were noted. The Judge did not find it credible that the appellant received no formal training. He did not find that the account of his detention, bail and treatment was credible in the light of the allegations which the appellant maintained were being made against him. There are other matters also that were considered, undermining credibility.

12. The first criticism made of the Judge is that his criticisms of the appellant, as having given inconsistent evidence and vague evidence, was ill-founded because there had been a significant difficulty encountered by the appellant at the hearing in terms of interpretation. It was a matter of some concern that such a feature was not acknowledged by the Judge in the determination. Such difficulties may well have contributed to the impression of vagueness or inaccuracy.

13. A request had been made in advance of the hearing for the Judge's Record of Proceedings to be examined to detect whether or not possible interpretation difficulties had been recorded. Examination of such records in the file did not reveal any reference at all to interpretation difficulties.

14. It was stated in the course of correspondence on behalf of the appellant, particularly in a letter, that indeed the appellant's representative at the hearing had made an application to adjourn the case on that basis.

15. It is a matter of concern that if such an application was made it was not duly recorded.

16. It is however a matter of some concern that no mention of any request for an adjournment is made in the grounds of appeal. Any reference to interpretation difficulties is that set out in paragraph 10 which reads as follows:-

> "The appellant raised concerns regarding his ability to understand the court interpreter. No reference is made to the alleged interpreter difficulties experienced by the appellant within the determination. It would have been in the interest of justice for the hearing to be adjourned in light of this."

17. Mr Dewison most helpfully assisted in that regard by reference to the detailed notes of his colleague who represented the respondent at the previous hearing. It was acknowledged that from time to time the issue of interpretation difficulties was raised. It was said by the appellant that on occasions he did not fully understand the interpreter who spoke with a

different accent. Questions were raised, in particular by the appellant, as to where the interpreter was from.

18. From the note Mr Dewison was able to detect that the question of interpretation difficulties was raised on several occasions in the course of cross-examination. When the matter was raised the Judge made further enquiries and sought to resolve the particular problem of translation. The Judge had indicated that, generally speaking, there had been little difficulty with interpretation.

19. As Mr Dewison submitted, many questions were asked of the appellant in the course of the hearing. There was only a relatively few occasions when difficulties with interpretation or accuracy of what was interpreted was raised. Overall he submits the interpretation difficulties as alleged were not such as to have made any material difference to the accuracy of what was recorded.

20. Miss Brakaj also had the notes of Miss Rasoul who had represented the appellant. She agreed that the note as outlined by Mr Dewison was generally correct. I invited her to indicate what details of evidence as set out in the determination were inaccurate by reason of faulty interpretation. She was unable to give any particular example from her note and indeed none has been cited in the grounds of appeal. Nevertheless the burden of her argument was to the effect that it would be unsafe to consider that the Judge's comments about vagueness and inconsistencies should stand in the light of potential interpretation problems.

21. The difficulty of course facing both Miss Brakaj and Mr Dewison is that they were not present at the hearing itself but were operating from notes made by colleagues.

22. Clearly it was an error of the Judge not to record in the Record of Proceedings the interpretation difficulties which were raised. Nevertheless, there is no evidence that such interpretation difficulties have led the Judge to fundamentally misunderstand aspects of the appellant's evidence. It would seem that there were relatively few occasions when the difficulties with interpretation were raised and seemingly the Judge addressed that problem at the time. It was clearly in the mind of the Judge that overall there was proper interpretation. In the absence of any clear indication that there were material errors arising from that difficulty I do not find that that factor by itself renders the findings of the Judge unsafe.

23. The other matter which is strongly relied upon by Miss Brakaj is the failure of the Judge to give adequate weight or attention to the expert report of Peter Marsden of 26 March 2012. It is a report of some 79 folios.

24. The Judge deals with that report at paragraph 43(k). It may perhaps be convenient to set out that paragraph which reads as follows:-

> "I have not ignored the very detailed report of the expert in this matter which runs to 80 pages. I have read that report carefully and I do not ignore the expert's knowledge of the situation within Afghanistan. However his report is to a large extent based upon what he has read within the documentation that has been presented for him to enable him to prepare the report. I have had the opportunity of taking direct evidence from the appellant and whilst I respect the conclusions that the expert has come to I consider that my ability to assess the appellant's evidence on a face-to-face basis enables me to be able to assess his credibility more accurately than is contained in a report based upon what the expert ha been told rather than what he has been able to extract by way of observations and questioning of the appellant direct."

25. Miss Brakaj submits that that is a wholly inadequate approach to take to that lengthy report.

26. It is right to note however that the bulk of the report is indeed reviewing the historical background within Afghanistan speaking as to the nature of the conflict.

27. At paragraphs 28 to 33 in particular there is a discussion as to the role of Hizb-e-Islami with the relevant dates and activities of that particular party.

28. A number of reports are considered in the course of that report.

29. Perhaps the passages which are more closely aligned to the appellant's case are those at paragraphs 57 to 65 of the report.

30. Such speaks of the fact that the ill-treatment referred to by the appellant at the hands of the police and that the National Directorate of Security is consistent with the practice of actively targeting members of the Taliban and the Hizb-e-Islami. It said that if the appellant had joined Hizb-e-Islami at the age of 15 or 16 he would have been regarded as too young to be an active fighter and at best would have played a support role. The opportunity to be a fighter would arise more in 2001 and in 2005-2006. The expert says that he would expect the absence of documentation to lead the appellant to be questioned by the police or intelligence service, if deported to Kabul Airport. He said that the appellant would come under pressure arising from his previous membership of Hizb-e-Islami and that his father, to play an active role again and to be approached indeed by the Taliban.

31. Largely the report is a generic report, seeking to comment upon the risks to the appellant were he indeed to be that which he claims to be, namely an active member of Hizb-e-Islami.

32. Miss Brakaj invites me to find that it is a report that is supportive of what the appellant had to say as to his involvement and that with his family, such that greater weight should have been placed upon it by the Judge.

33. One matter of particular importance in the report is highlighted, namely what is said at paragraph 61 in relation to the likelihood or otherwise of a bail arrangement with the police in the manner which the appellant describes. The expert comments, "it should be noted, in this regard, that the Afghan National Police, operating at the local level, are closely linked to local power interests. The police referred to in Malyar Niazai's account may, therefore, have felt a degree of obligation to respond positively to pressure from local elders, albeit on the basis of a national bail arrangement.

34. Dealing with that matter specifically Mr Dewison invites me to find that that is speculation. The operative word in that is "may". It may provide one view of how the appellant gained bail but is not determinative of the situation. He invites me to find that the Judge is best placed, having regard to all the evidence, to make a proper evaluation of that evidence on that point which indeed he has done at paragraph 43(f). It defies commonsense Mr Dewison submits that if the appellant is suspected of committing war crimes that they will permit that person frequently to leave Afghanistan across the border to Pakistan and return. Particularly if someone was on bail it would be surprising indeed that they would be allowed to leave the jurisdiction as claimed by the appellant. Mr Dewison invites me to find that the conclusions of the Judge, on a central feature of the appellant's whole case, were properly made and that the report at paragraph 61, even if being considered would only present one view and not the definitive view.

35. As I have indicated it is a very lengthy report and for the most part is seen by the Judge to be giving an assessment of the overall situation.

36. That report, together with the background material which was presented in abundance at the hearing, are of course matters that must be borne in mind by a Judge in coming to a conclusion. There is nothing to indicate from the determination, and indeed from the passage to which reference has been made at paragraph 43(k), that the Judge has not borne such matters in mind. Often indeed credibility arises from the details given at a hearing and the way in which the claim is presented. I do not interpret the Judge in that passage to be saying anything other than that.

37. Issue was taken at the Judge's rejection of the appellant's experience on the basis that he knows little about the Kalashnikov because it was clear that the appellant knew that it held 30 bullets. Whether that is so the Judge noted that he seemed to be ignorant as to its range or its operation, which would be surprising if he had indeed been used to it in combat.

38. There would seem to be a matter raised in the grounds that at the interview the appellant had stated that his cousin and brother were killed during the war with the Russians whereas in fact it was not correct, it was his uncle. The appellant indicated that it was either a mistake in interpretation or that the answer was recorded inaccurately. It is contended that it was wrong for the Judge in those circumstances to pick up that matter to the detriment of the appellant.

39. It is clear from paragraph 43 that the Judge looked at a number of matters in the assessment of credibility. Such included the nature of the identity card and the failure to claim asylum en route to the United Kingdom as well as other matters more particular to the evidence which were given. Central to the appellant's appeal was of course his claimed membership of Hizb-e-Islami and of his contention that he was a fighter for it and also that he was accused by reason of his activity of committing war crimes in Afghanistan.

40. The Judge, having considered the evidence as a whole, concluded that the appellant was not so involved as claimed and was not somebody who had been arrested or was wanted on the aspect of his terrorist activities.

41. Although the report by Mr Marsden speaks of the plausibility of the account, essentially it is for the Judge, having heard all material matters to come to that conclusion in the analysis of the evidence. Central to the matter, argues Mr Dewison, is the stark fact that if the appellant were wanted accused of what he claims to have been, it defied commonsense for him to have been released on bail and more so to be allowed to come and go without hindrance across borders.

42. Having considered the opposing arguments I do not find there to be a material error of law in the assessment as to the asylum claim itself. Due regard has been had by the Judge to the expert report and to other background material. It was clearly an error for the Judge not to have recorded the issues of problems of interpretation. I accept what Mr Dewison says from his note that such were isolated matters and were resolved in the course of the hearing. Without any particular examples to be presented, it is difficult to conclude that problems of interpretation lay at the heart of inconsistency or inaccuracy.

43. Thus I do not find that the Judge's conclusion that the appellant was not a refugee to be fundamentally flawed or inaccurate to a material extent.

44. Clearly as has been accepted that the Judge was in error in the approach to Article 1F(a). That particular finding should not stand. That does not, however, undermine the overall finding that the appellant is not a refugee and can be safely returned.

45. Thus the decision of the Judge will stand, namely that the appeal on asylum grounds is dismissed and that in relation to humanitarian protection is also dismissed as is the appeal in relation to human rights.

Signed Date

Upper Tribunal Judge King TD