Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/04012/2012
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THE IMMIGRATION ACTS

Heard at : Field House

On : 12 June 2013

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

B H M
A S M

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Akther, instructed by Malik & Malik Solicitors
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. These appeals come before me following the grant of permission to appeal on 25 October 2012.

2. The appellants are nationals of Afghanistan, born respectively in January 1951 and January 1979, and are mother and son. The first appellant travelled to India and applied for, and was issued with, a visitor visa for the United Kingdom. The second appellant was issued with a six month medical visa for the United Kingdom. They then travelled to the United Kingdom. After three and a half months, in September 2011, they travelled to Belgium and claimed asylum there, but were sent to the United Kingdom by the Belgian authorities for their asylum claims to be considered here. They arrived in the United Kingdom on 19 January 2012 and were interviewed on 22 February 2012. Their claims were refused on 4 April 2012 and they were refused leave to enter the United Kingdom the same day.

The Appellants' claim

3. The appellants claim to be at risk on return to Afghanistan because of their relationship to Ahmad Shah Massoud, founder of the Northern Alliance, and Ahmad Zia Massoud, Chairman of the Afghanistan National Front. The first appellant said that Zia Massoud was her step-son, the son of her husband from another of his wives. She left Afghanistan because of the security situation and she referred to a bomb attack by the Taliban four years previously where Zia Massoud was the target. The attack was on his home, where she was living at the time with the second appellant. Her son, the second appellant, had previously visited the United Kingdom for medical treatment for his epilepsy but it had become worse since he had returned to Afghanistan and so he obtained another medical visa for the United Kingdom and she had accompanied him here. They went to Belgium from the United Kingdom and, whilst there, Ahmed Zia's father-in-law, Burhanuddin Rabbani, the former president of Afghanistan, was killed and Ahmed Zia called to tell them that he could no longer protect them and advised them to claim asylum. The second appellant claimed that he was the step-brother of Ahmed Zia Massoud and Ahmad Shah Massoud and that he had been threatened by the Taliban and Al Qaeda, since 2001, with being kidnapped and killed. The Taliban had previously announced that they intended to kill any family members of Ahmad Zia Massoud and he also referred to an assassination attempt against his brother when he was staying at his house, two to three years previously. He had previously been protected by bodyguards paid for by his brother, but when his father-in-law was killed, Ahmad Zia Massoud had told him that he could no longer guarantee his safety.

4. The respondent accepted that the appellants were related to Ahmad Zia Massoud but considered that they would have sufficient protection in Afghanistan and would not be at risk on return. It was considered, with respect to the second appellant, that it was his brother and not himself, who was the target of the assassination attempt and that there was no evidence that the Taliban had been targeting him. Two of his other brothers, Ahmad Wali Massoud and Yahya Massoud, had never been targeted whilst living in Afghanistan and that was evidence that the Taliban were not targeting all the family members. The respondent considered that the appellants' removal

would not breach their human rights and refused their claims and made a decision to refuse them leave to enter United Kingdom.

5. The appellants' appeals against that decision came before Judge Hembrough in the First-tier Tribunal on 21 May 2012. Judge Hembrough heard oral evidence from the appellants and found them to be credible witnesses who had a genuine subjective fear of serious harm if returned to Afghanistan. However he concluded that their fear was not objectively well-founded, since they had never been involved in any political activity themselves and neither had they been targeted previously. He accordingly dismissed the appeals on asylum, humanitarian protection and human rights grounds.

6. Permission to appeal that decision was sought on the grounds that the judge had erred in law in his findings on risk on return, sufficiency of protection and humanitarian protection.

7. Permission to appeal was initially refused, but was subsequently granted upon a renewed application on 20 July 2012 on the grounds raised.

Appeal hearing

8. The appeal came before me on 12 June 2013 and I heard submissions on the error of law.

9. Ms Akhter expanded upon her grounds of appeal, submitting that the judge had failed to consider that membership of the Massoud family was sufficient to place the appellants at risk and that the risk was continuing. All the family members lived outside Afghanistan because it was too dangerous for them in the country. The judge was wrong to equate protection from Ahmad Zia Massoud with state protection and did not consider the state's inability to protect. The Country of Origin Information report that was before the First-tier Tribunal referred to the inability of the police to provide a sufficiency of protection.

10. Mr Parkinson submitted that the judge had not erred in law as he properly found that Ahmad Zia Massoud had provided protection in the past and would do so in the future. All those subjected to failed assassination attempts were high profile and the appellants were not. The letter from the police showed that the police would provide protection. It was clear on what basis the judge had come to his conclusions and he was entitled to reach the conclusions that he did. The facts of the case did not show that the appellants were at enhanced risk.

11. Ms Akhter, in reply, submitted that the judge had erred in his application of the test in Horvath v SSHD [2000] UKHL 37 since that case referred to the availability of state protection, whilst he was relying upon protection from a family member. The background information showed that the police were unable to protect the appellants. The appellants were at enhanced risk.

12. Both parties agreed that if an error of law were found, the decision could be re-made on the evidence before me and they made further, short submissions. Ms Akhter referred to a news article concerning recent threats of attack against Ahmad Zia Massoud and to the more recent COI report for February 2013. Mr Parkinson submitted that the article was relevant only to prominent people. He submitted further that the country guidance cases for Somalia made it clear that sufficiency of protection did not just arise from the state.

Consideration and findings.

13. In my view the judge made errors of law in his determination such that the decision has to be set aside and re-made.

14. It is indeed the case, as Mr Parkinson submitted and as the judge found, that the appellants' situation cannot be compared to those who have been the subject of attempted assassinations, given that they have had no political involvement themselves, they are not high-profile and they have never previously been threatened or targeted. However, it is the appellants' case that there are also risks to those whose only profile is being a family member of such people, and that such risks substantially increased following the assassination of the former president of Afghanistan, Burhanuddin Rabbani.

15. Judge Hembrough recognised, at paragraph 37 of his determination, that the reason given by the appellants for that increased risk was that as a result of the deteriorating security situation leading to the assassination of the former president, the person who had previously been able to protect them, Ahmad Zia Massoud, would no longer be able to do so. Indeed, it appears to be implicit in his findings at paragraph 38 of his determination that he accepted that the absence of previous risk arose as a result of the availability of protection from Ahmad Zia Massoud. What he did not accept, however, was that that protection would no longer be available to them, and it was on that basis that he found that they could safely return to Afghanistan. It is with those findings that I consider the judge to have erred in law.

16. In the latter part of paragraph 38, the judge found that Ahmad Zia Massoud would be able to provide such protection if he were so minded and he did not accept that he would deny the appellants such protection. However, it seems to me that such a finding was speculative and was not consistent with, or open to him upon the evidence before him. The appellants' case was that he had specifically told them that he could no longer protect them and could not even protect himself (question 85 of the first appellant's interview and question 74 of the second appellant's interview). They produced a letter from Ahmad Zia Massoud, which appeared at Annex D in the respondent's appeal bundle, advising them of the "gloomy security conditions". There was background material before the judge about the assassination of Rabbani and the security situation in Afghanistan at the time which supported such a claim. Both appellants had been found to be wholly credible by the respondent before the First-tier Tribunal and by the judge himself and there is thus no reason why

their evidence, in regard to Ahmad Zia Massoud's inability to provide further protection, was not accepted, nor were any findings made to that effect. In the circumstances I do not consider that Judge Hembrough was entitled to make the findings that he did at paragraph 38.

17. In any event, as submitted by Ms Akther, what the judge ought to have considered, in line with the principles in Horvath, was sufficiency of protection available to the appellants from the State, rather than from a family member. Mr Parkinson's submission in response was that, following the country guidance cases for Somalia, protection available from other parties was a relevant matter. However that submission failed to recognise that Somalia has no government, whereas Afghanistan has a functioning government and state apparatus. Although the judge gave consideration to state protection at paragraph 39 of his determination, his findings in that regard were limited and appeared to focus upon the state's willingness to protect. It was not the appellants' case, however, that the state was unwilling to protect them, but the relevant issue was their ability to do so. In that regard they relied upon the letter of 24 September 2011 from the national police quarters, at page 36 of the appeal bundle before the Tribunal. Mr Parkinson submitted that that letter was evidence of the ability of the police to provide protection, but I do not read it as stating such. In my view the letter provides a clear indication of the state's willingness to protect but is not evidence of their ability to do so.

18. Ms Akther submitted that there was before the First-tier Tribunal background information about the security situation in Afghanistan and the role of the police and she referred in particular to sections of the UKBA COI report for 11 October 2011. Indeed, paragraph 8.05 of that report refers to the increasing number of suicide attacks in Kabul at that time and the killings of civilians and police and section 10 deals with the security forces in general, including the police and the army, providing details of corruption and lack of proper training within the police and their lack of effectiveness when faced with the growing threat from the Taliban. None of that was considered by the judge in his findings as to sufficiency of protection.

19. It seems to me, therefore, that the judge erred in law in his approach to the issue of sufficiency of protection. Having considered the willingness of the police to protect the appellants, he failed to go on and make any proper findings on their ability to do so. Instead, he placed reliance on the availability of protection from the appellants' relative Ahmad Zia Massoud, such reliance being, for the reasons given above, misplaced. As such, I find that Judge Hembrough's decision has to be set aside and re-made.

20. In my view the evidence before the First-tier Tribunal, namely the advice from Ahmad Zia Massoud, his letter of warning to the appellants and the letter from the national police headquarters specifically referring to the family members of Ahmad Shah Masood and naming the second appellant as being under serious threat from the Taliban and Al-Qaida, when taken together with the background information referring to the security situation and the security apparatus in Kabul, was more than sufficient to discharge the lower standard of

proof to demonstrate a risk on return to Afghanistan. The circumstances remain the same since the hearing before the First-tier Tribunal and, if anything, there has been a deterioration in the security situation in the country and in Kabul, as evidenced by the more recent COI report for 2013, referred to by Ms Akther. I take note also of the more recent evidence of threats to Ahmad Zia Massoud, in the news report at page 24 of the appeal bundle, which further supports the claim that the security and protection previously relied upon the appellants may well not be available to them on return.

21. Accordingly, in re-making the decision, I find that the appellants have demonstrated, to the lower standard of proof, that they would be at risk in Kabul as a result of their close connection to their very high-profile family members and that there would not be a sufficiency of protection available to them.

22. I consider that the appellants have a well-founded fear of being persecuted in Afghanistan for one of the reasons set out in paragraph 6 of the 2006 Regulations and that they are therefore entitled to protection under the Refugee Convention. On that basis, I conclude that they cannot be considered as entitled to humanitarian protection. I find that their removal to Afghanistan would breach Article 3 of the ECHR.

DECISION

23. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision and re-make it by allowing the appellants' appeals on asylum and Article 3 human rights grounds.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed

Date

Upper Tribunal Judge Kebede