Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09398/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8th September 2014	**On 8th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SAKA
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Heywood, instructed by Paragon Law Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan born on 1st January 1983. He appealed against the decision of the respondent dated 25th September 2013 to remove him from the UK following a refusal to grant him asylum, humanitarian protection and protection under the European Convention.

2. The appellant claimed that his father was a commander for the Itihad Islami for fifteen years, he fought against the Russians and after they left the Taliban approached his father and asked him to join. His father did not wish to but was threatened by them. His father joined the Taliban as a commander and was put in charge of 65 men. After his father joined he asked the appellant to assist him as his bodyguard and the appellant did so as he was afraid someone would kill his father.

3. During his time with the Taliban he saw a leader, MD, behead a man because he believed him to be a spy. After this incident his father decided to leave the Taliban. He and his father and the three elders under his father's command left.

4. Whilst crossing the desert the appellant and his father were arrested and placed in detention. The appellant was accused of killing MK, the son of the governor of Herat. The appellant claims he then spent four years in Sarpoza Prison in Kandahar and was never formally convicted or tried. He claimed he was tortured and his head was covered and he was beaten.

5. He managed to escape from the prison and went with a fellow Taliban member to his home in Kunduz where he remained with him for six months in hiding.

6. His father was shot dead whilst trying to escape from the prison.

7. After six months he returned home to Kunar Province where he stayed for one night before he fled as the Taliban came to his house looking for him.

8. The next day his mother told him that the government were coming for him and he ran away and stayed with his maternal uncle for two months. His uncle's house was bombed and he decided to leave Afghanistan.

9. There was considerable correspondence between the respondent and the appellant's solicitors as to whether the appellant had been convicted of a final judgment of a particularly serious crime and further whether his continued presence in the UK constituted a danger to the community. Not least there was consideration as to whether the appellant should be excluded from protection in line with Articles 1F(a) and (c) of the Geneva Convention.

10. It was submitted by the appellant's representative in a letter of 24th August 2013 further to **Al-Sirri & DD (Afghanistan) v the Secretary of State for the Home Department [2012] UKSC 54** that the appellant had never been convicted of an offence in a court of law despite being held by the Afghan authorities for some four years and that he had consistently denied having any knowledge of the crime of which he was verbally accused but never charged with (the killing of the son of the governor of Herat, MK). It was submitted that his involvement with the Taliban disclosed nothing to seriously suggest that he had personally

committed an act that would constitute a crime against peace, war crime, or a crime against humanity (Article 1F(a)), nor one that could be classed as being contrary to the purposes and principles of the United Nations (Article 1F(c)).

11. It was submitted that there were not sufficiently serious reasons for considering Articles 1F(a) and (c) applied to the appellant particularly in view of the higher standard required following **Al-Sirri** which identified that the exclusion clauses in the Refugee Convention should be restrictively interpreted and cautiously applied and there must be serious reasons to consider the exclusion clauses applied based on clear and credible or strong evidence and further the decision maker should be "satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations" and in effect "the decision maker can be satisfied on a balance of probabilities that the applicant is guilty.

12. In the event the refusal letter of the Secretary of State dated 25th September 2013 did not indicate that the appellant was considered to be excluded from the protection of either the Refugee Convention or humanitarian protection and it is on this basis that Judge Obhi proceeded and in a determination promulgated on 15th January 2014 dismissed the appellant's appeal in respect of asylum, humanitarian protection and protection under the Human Rights Convention.

13. An application for permission to appeal was made by the appellant's representatives on the following grounds. The judge failed to address Article 3 and the prospect of the appellant facing inhuman or degrading treatment and conditions in prison if he were returned. The judge made various positive findings and at paragraphs 36 and 37 the judge stated "he may be wanted by the authorities in relation to his escape from prison but that would not place him in need of international protection".

14. No account was taken of the objective evidence in particular the respondent's own evidence of the Country of Origin Information Report at 3.16.10 and 3.1.6.12 which states that prison conditions in Afghanistan were likely to reach the Article 3 threshold. The matter was before the judge and it was incumbent upon her to address the matter. The expert opinion of Dr Giustozzi paragraphs 8 and 9 evidenced that he would be at risk of mistreatment and physical harm if he were arrested on account of merely being a suspected Taliban.

15. A second ground challenging the determination was that there was an irrational or insufficiently reasoned rejection of credibility. Whilst the judge accepted that the appellant was imprisoned as a Taliban combatant it was not accepted that he was tortured whilst in detention prior to escaping prison and did not accept that the father was killed during the breakout from prison.

16. This was irrational as the judge accepted the Medical Foundation Report by Dr Bennett whom the judge recorded at paragraph 30 confirmed "that the injuries to the feet could have been caused by falaka and in his opinion are more likely to have been caused that way and that the flashbacks and general mood of the appellant is attributable to PSTD".

17. It was asserted that Dr Bennett was careful to use the Istanbul Protocol and categorised the injuries to the soles of the feet to the second highest degree of certainty within the Istanbul Protocol classification. The use of typical meant "this is an appearance that is usually found with this type of trauma but there are other possible causes". The judge failed to have regard to the significance of the term typical.

18. The judge also gave an irrational rejection of torture owing to a purported lack of evidence of torture at Sarpoza Prison.

19. The principal reason the judge gave for rejecting the appellant's account of torture at Sarpoza was that the appellant's claims of torture were not supported by objective evidence. In fact there was evidence of torture at Sarpoza Prison at page 201 of the appellant's bundle from the United Nations Assistance Mission in Afghanistan, UNAMA, Treatment of Conflict-Related Detainees in Afghan Custody: One Year On dated 21st January 2013. This referred to torture in the prison in Sarpoza which documented 48 sufficiently reliable and credible cases of torture.

20. It was thus not rational of the judge to conclude that the appellant was not credible due to the alleged absence of such evidence which in any event was based on a mistake of fact.

21. Similarly the judge erred in failing to take account of the evidence regarding the incidents of falaka in several parts of the evidence.

22. The judge was also mistaken in implying that Sarpoza Prison was actually controlled by Canadians and there was no evidence of the same. The prison was in control of Afghan wardens and employees.

23. It was also irrational of the judge to find that the appellant was not tortured and that his father was not killed at the point of prison breakout because there was no objective evidence, it was a misdirection to hold that such corroboration was required.

24. The third ground was that there was an irrational rejection of the expert report in relation to the reasons for the appellant's detention. The judge had accepted Dr Giustozzi's evidence that it was plausible that the appellant had been accused of the murder of MK. Dr Giustozzi evidenced at paragraphs 7 (p44) and 9 (p47) that although it was unlikely the authorities believed he had any role such an accusation was useful in seeking to justify his detention.

25. The judge stated, however, as the appellant was a member of the Taliban actively engaged in combat with the Afghan army and allies there was

reason enough for him to be imprisoned. The reasoning was perverse as it assumed without evidence the authorities had sufficient evidence against him that he was a Taliban combatant to justify holding him rather than mere suspicion.

26. The fourth ground was that the judge was mistaken that Dr Giustozzi did not have the SEF interview before him when the judge thought he did not and secondly that the judge assumed that Dr Bennett did not have the reasons for refusal letter before him when he did.

27. Application for permission to appeal was granted by First-tier Tribunal Judge Ievins. He found that it was arguable that the judge did not attach sufficient weight to the experts' reports, those being of Dr Giustozzi and Dr Bennett, and further it was arguable that the judge made a mistake of fact when she found that claims of torture at Sarpoza Prison were not supported by objective evidence.

28. The judge had a difficult task when required to make credibility findings in an asylum appeal where the appellant did not give evidence.

29. At the hearing I raised the issue of the possibility of exclusion of the appellant from the protection of the Refugee Convention and humanitarian protection. Mr Bramble submitted that the appellant was a low level member of the Taliban and the Secretary of State had chosen not to pursue this aspect. The case had been placed before the war crimes section and they had chosen not to take the matter further.

30. Mr Heywood submitted that if this once again became a live issue as it was not taken by the judge the matter would have to be re-canvassed.

31. In the event Mr Heywood submitted that there was a material error outlined as above in the written application for permission to appeal.

32. The judge had accepted that the appellant had symptoms of torture from the use of falaka. There was controversy in Canada about the problems in the prisons but nonetheless within the evidence before the First-tier Tribunal there was evidence of torture in the Sarpoza Prison. In the light of the clear findings made by the judge there was an error of law.

33. Mr Bramble agreed that the judge had found at various points of the determination that the appellant was imprisoned and it did not matter the basis on which he imprisoned but she had failed to address the Article 3 detention conditions. Dr Bennett had recorded the injuries to the appellant and she had accepted his report was measured and balanced. Dr Giustozzi's report had been given insufficient weight bearing in mind the positive findings.

34. Mr Bramble confirmed that there was no challenge to the judge's findings within the Rule 24 response.

35. If the appellant's representative was arguing that the judge's findings regarding whether the appellant was associated with the murder of MK and the father was shot in attempting to escape there would need to be a de novo hearing.

36. If not pursuing those aspects the sole issue was whether in the light of the findings that had been made regarding the prison and that he was wanted by the authorities the matter should be considered with respect to Article 3.

37. Mr Heywood submitted that humanitarian protection should also be considered and he should not be excluded from the protection of the Refugee Convention.

38. Under the UNHCR guidelines the appellant would be protected as someone who was involved in a group like the Taliban.

Conclusions

39. At the outset I make it clear that I pursued the issue of the appellant's exclusion from the protection of the Refugee Convention and humanitarian protection but Mr Bramble confirmed that this matter was not taken forward by the Secretary of State although it was explored and indeed the reasons for refusal letter do not appear to challenge the appellant's right to such protection albeit that he was a low level Taliban combatant.

40. As a second point the respondent did not challenge the certain credibility findings made by Judge Obhi and for clarification I set out those findings which she made in her determination and I will at this stage note that Judge Obhi had a difficult task ahead of her bearing in mind the appellant did not give evidence. The judge accepts that the appellant was a member of the Taliban and there was reason enough for him to be imprisoned. The judge also accepted that he may be wanted by the authorities. At paragraph 28 the judge records that the appellant considered the appellant would be at risk if he returned to Afghanistan because of the rise of insurgency.

41. The judge at paragraph 27 stated that Dr Giustozzi did not have the appellant's Asylum Interview Record before him and this it would appear was a mistake of fact on the part of the judge. It is clear that at paragraph 27 that the judge recorded that the authorities held the appellant on the basis of the accusation that he had murdered MK and the judge noted that Dr Giustozzi considered "it plausible that the appellant could have been arrested by the government because they suspected him of holding useful information, and that there is evidence that they tend to arrest large numbers of people in order to interrogate them". That seems logical. Dr Giustozzi is a well respected expert who has given numerous balanced reports to the Tribunal in respect of Afghanistan and weight should be given to his report.

42. In particular the judge recorded that Dr Giustozzi believed there could be a risk to the appellant from the Taliban who had a sophisticated intelligence system in existence in Afghanistan and that the police were known to collaborate with the Taliban. Although at paragraph 29 the judge appeared to reject Dr Giustozzi's account on the basis that he did not have an asylum interview that in fact was an error as indicated because as indicated above he did have it.

43. More tellingly at paragraph 31 the judge states "I accept on the basis of the two expert reports that the appellant's account seems plausible". Nonetheless she states that much of the evidence is widely available and he could have effectively heard about or read about the evidence and incorporated this into his own account. I find that in error she rejected his account in relation to Sarpoza Prison because of her mistaken understanding of the objective evidence. She states that "there are some aspects of the appellant's account which are not supported by the objective evidence. In particular those relating to Sarpoza Prison (31)."

44. She accepts that he has his father were involved with the Taliban but goes on to state "his claims of torture at the prison are not supported by the objective evidence and importantly there is no evidence that his father was killed as a result of being shot by the authorities during the jailbreak from Sarpoza". The judge further adds "those that were injured or were killed are accounted for and it seems that the Canadians who had oversight of the prison have come in for criticism for not doing enough to stop the breakout or preventing inmates from escaping". There was a mistake by the judge in respect of the objective evidence of torture at Sarpoza Prison and a mistake by the judge in respect of the Canadians having oversight of the prison at the relevant time of claimed torture. The background material such as Sabawoon Online and the Edmonton Journal articles and the Canwest News Service referred to torture in Sarpoza prison and the issue that it had raised in Canada. Indeed there was reference to the jail breakout in 2008 in response to torture at Sarpoza. A further article entitled 'Canada complicit in Torture of innocent Afghans' referred to allegations of Canadian involvement in torture. There were references in the paperwork to United Nations Assistance Mission in Afghanistan dated 21st January 2013 documenting sufficiently reliable and credible cases of torture with reference to Sarpoza.

45. The fact is that there were country background reports of torture relating to Sarpoza Prison and his claims of torture were in fact further supported by the medical evidence of Dr Bennett.

46. There does not appear to have been sufficient weight attached either to the report of Dr Giustozzi bearing in mind he did have all the relevant documents and the report of Dr Bennett bearing in mind he also had all the relevant documents.

47. As noted at paragraph 30 of the judge's determination Dr Bennett did not merely accept that the injuries to his feet could be "attributable to torture,

hitting the soles of the feet with hard implements sometimes referred to as falaka". In particular he states that they were 'typical' and the judge herself records that "in his opinion are more likely to have been caused in that way and that the flashbacks and general mood of the appellant is attributable to PSTD".

48. The fact that the report was prepared as long ago as 2009 does not undermine the fact that the appellant did indeed have injuries to the soles of his feet and the judge did not give sufficient weight to those injuries.

49. The judge appeared to accept that the report of Dr Bennett was balanced and measured. She appeared to accept that the appellant was involved with the Taliban (36) and she appears to accept that "at some point he was arrested and imprisoned" (paragraph 36).

50. It would appear that the judge became confused because at paragraph 32 she stated "therefore although I accept that the account is plausible I am not satisfied on the lower standard that the appellant was tortured or that his father was killed whilst attempting to escape from the prison". In conclusion the judge stated at 37 that the appellant "may be wanted by the authorities in relation to his escape from the prison but that would not place him in need of international protection".

51. I find that the above is an incorrect assessment of the objective evidence before her, particularly when considering the reports I have cited, and therefore I find an error of law and remake the determination.

52. What was accepted by the respondent was that he had an involvement with the Taliban and Judge Obhi too found the appellant's account to be plausible. She accepted he had been associated with the Taliban. On the basis of the above findings by the judge, which were not challenged by the respondent, the appellant was a former combatant in the Taliban, who had then left, and on the basis of the findings he may be wanted by the authorities in relation to his escape from the prison. The finding by Judge Obhi was that the appellant would be at risk on return of detention from the authorities. Bearing in mind the findings of the judge which remain unchallenged and preserved in relation to the appellant's account he may well be rearrested on return. The evidence of Dr Giustozzi, who is a respected expert in this field, supports the assertion that the appellant may well be re-arrested on his return. Clearly he would be at risk from the authorities and sufficiency of protection and relocation would not be options.

53. A further question is whether he would still be at risk from the Taliban on his return? The report of Dr Guistozzi recorded at paragraph 11 of his report that the Taliban have an increasingly sophisticated operation growing in Kabul which is where the appellant would be returned to. However, as Dr Giustozzi indicated the police are often known to collaborate with the Taliban and thus it is a risk that if the authorities want the appellant that the Taliban might also be informed of his return.

54. Even if that were not the case I find that the appellant would be, on the basis of the judge's findings, to be at risk from the government on the basis of his perceived connection with the Taliban albeit that his account that he had left and was a bodyguard was accepted.

55. Paragraph 3.16.5 of the Operational Guidance Report on Afghanistan confirmed that 'there were widespread reports that government officials security forces, detention centre authorities and police committed abuses' 'security forces continued to use excessive force' and evidence cited of 'torture at nine NDS facilities and several ANP facilities such as beating with sticks, electric cables, pipes and rubber hoses'. The report continued 'overall prison conditions in Afghanistan are severe and taking into account the levels of overcrowding poor sanitation s prevalence of disease and absence of medical facilities, lack of food and the high incidence of torture are likely to reach the Article 3 threshold'.

56. I apply **AK (Article 15(c)) Afghanistan CG [2012] UKUT 163** such that return to Kabul is, in general, a safe option but in this instance he would be at risk from the authorities of detention for his perceived connection with the Taliban and perceived imputed political connection, should he return to Afghanistan and he would be at real risk of inhuman and degrading treatment, in view of the critical conditions in the Afghan prisons as recorded in the Country of Origin Information Report. Therefore he should be afforded asylum and Article 3 protection.

57. As I found an error of law in respect of the appellant's risk on return and I set aside the determination of Judge Obhi in that respect, remake the decision and allow the appeal.

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.

DECISION

I allow the appeal on Asylum grounds
I dismiss the appeal on humanitarian protection grounds
I allow the appeal on human rights grounds.

Signed Date 3rd October 2014

Deputy Upper Tribunal Judge Rimington