



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: AA/07147/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20 October 2015**

**Decision & Reasons Promulgated
On 28 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**AS
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani (counsel), instructed by Duncan Lewis & Co, solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

2. This is an appeal by the Appellant against the decision of Designate Judge of the First-tier Tribunal McCarthy promulgated on 1st June 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 19 January 1992 and is a national of Afghanistan.

4. On 4 September 2014 the Secretary of State refused the Appellant's application for asylum.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. Designated Judge of the First-tier McCarthy ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 10 September 2015 Upper Tribunal Judge Canavan gave permission to appeal stating inter alia

"The first-tier tribunal judge wrote a careful and detailed decision. However, having relied on that evidence to come to his conclusion that the appellant was not at risk because he was not sufficiently high profile it is at least arguable that he failed to take into account a material fact that may be relevant to future risk. The first-tier tribunal judge had regard to paragraph 3.10.9 [47] of the OGN, which stated that "if a low-profile person has had a conflict with the Taliban in his place of origin, the Taliban would most probably not make it a priority to track him down in Kabul as the Taliban's activities will mainly focus on targeting high-profile persons". Given that this was likely to be the source of the First-tier Tribunal judge's distinction between those who are high or low profile targets of the Taliban it is at least arguable that, in the light of the fact that he accepted the appellant had been tracked down and threatened in Kabul [80], the First-tier Tribunal Judge may have erred in his assessment of future risk."

The hearing

7. Mr Bandegani, for the appellant, urged me to allow the grounds of appeal to be amended. Permission to appeal was granted by Upper Tribunal Judge Canavan on 10 September 2015. Upper Tribunal Judge Canavan specifically refused permission to argue grounds three, which relates to an alleged failure to have regard to evidence about the respondent's "*published concession*". In essence, Mr Bandegani argued that the respondent's OGN published in February 2015 contains a concession from which the appellant could benefit. He relied on the case of Mandalia v SSHD [2015] UKSC 59, and told me that the respondent has a duty to draw the First-tier Tribunal's attention to policies and concessions. He argued that the refusal to allow permission to argue grounds three has been made in error.

8. Ms Everett, for the respondent, conceded that the respondent is under a duty to draw the First-tier Tribunal's attention to policies and concessions, but argued that the operational guidance note published in February 2015 is not a concession. It is a summary of background evidence. She opposed the application to vary the grounds of appeal.

9. The respondent's operational guidance note is prefaced with an introduction which includes the sentence "*caseworkers must not base decisions on the country information in this guidance; it is included to provide context only and does not purport to be comprehensive.*" In his written submissions Mr Bandegani quotes from the respondent's operational guidance note published February 2015. The case file reveals that the operational guidance note placed before the First-tier Tribunal judge was dated September 2014. Mr Bandegani handed me a copy of the operational guidance note that he told me he was relying on at the close of the hearing. The OGN handed to me by Mr Bandegani was issued in June 2013.

10. I refused the application to vary the grounds of appeal. In reality this is an application to argue a ground for which permission has been refused on two occasions, rather than an application to vary the grounds of appeal. There is force in what is said by Ms Everett. The appellant seeks to place reliance on one source of background materials. The OGN published in February 2015 is a summary of background materials prepared by and relied on by the respondent. It does not amount to a concession or a statement of policy.

11. Mr Bandegani relied heavily on paragraph 1.3.13 of the respondent's operational guidance note published 15 February 2015 and argued that there is no sufficiency of protection available to the appellant in Kabul. He explained that the Judge found the first appellant to be a credible witness, & was satisfied that the documentary evidence produced was reliable. He argued that at [85], [86] and [87] the Judge made errors of fact and law which are material because the Judge failed to assess the appellant as a person who was at high risk from the Taleban. He argued that because it has been established that the appellant has received three written threats from the Taleban, one of which declared that orders had been issued Taleban fighters to find and punish the appellant; because the appellant's house has been the subject of a terrorist attack; and because the appellant has received a telephone threat from the Taleban whilst in Kabul, the judge should have found that the appellant was at high risk. He argued that the judge erred in his assessment of future risk to the appellant.

12. Ms Everett for the respondent argued that the Judge's decision does not contain any material errors of law but is a carefully reasoned decision leading the Judge to a conclusion which was open to the Judge & which is supported by the facts as the Judge found them to be, supported by the case-law and supported by the background materials. Ms Everett asked me to dismiss the appeal and uphold the Judge's decision.

Analysis

13. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. In AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC) the Tribunal held that whilst when assessing a claim in the context of Article 15(c) in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing “safety” and reasonableness”) not only the level of violence in that city but also the difficulties experienced by that city’s poor and also the many Internally Displaced Persons (IDPs) living there, these considerations will not in general make return to Kabul unsafe or unreasonable.

15. The thrust of the appeal in this case amounts to no more than a disagreement with the judge’s finding in fact. In a carefully worded determination the Judge finds that the appellant is at risk from the Taliban, but that risk is at a low level. The fact that the Judge finds the appellant to be a credible witness and that the Judge accepts the history given by the appellant does not mean that the appellant automatically merits international protection.

16. It is argued by the appellant that the Judge should have assessed him as being at high risk rather than low risk. Between [18] and [21] of the decision the Judge correctly directed himself in law (it is not suggested that the Judge did not correctly directed himself in law). Between [20] to [41] the Judge analysed the documentary evidence, and then between [42] and [50] the Judge considers, in detail, the background materials available to him before reaching conclusions about the Taleban letters at [51] to [54]. Between [55] and [66] the Judge considers the police reports produced by the appellant. At [67], having carried out a detailed analysis of the documentary evidence, the Judge finds that the Taleban letters and the police reports alone do not discharge the low burden of proof to establish that the appellant has been targeted by the Taleban.

17. After considering the appellant’s own evidence between [68] and [76], the Judge finds the appellant to be a credible witness at [77]. Between [79] and [86], the Judge considers whether or not the appellant’s fear amounts to a well-founded fear of persecution. He draws the conclusion that it does not at [87] and [88]. Between [89] and [83] the Judge considers sufficiency of protection, and at [94], finds that there is sufficient protection available to the appellant in Kabul.

18. The decision does not contain a material error of law. It is a carefully reasoned and detailed decision in which the Judge correctly directs himself in law and examines each strand of evidence before reaching conclusions which are open to the Judge to make on the basis of the facts as he found them to be. In finding that if there is a risk to the appellant it is a low-risk the Judge makes a finding of fact which was open to the Judge to make. Is not a finding of fact which has its basis in a misdirection in law.

19. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for a Judge to fail to deal with every factual issue under argument. Disagreement with a Judge’s factual conclusions, his appraisal of the evidence

or assessment of credibility, or his evaluation of risk does not give rise to an error of law.

20. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

21. I therefore find that no errors of law have been established and that the Judge's determination should stand.

DECISION

22. The appeal is dismissed.

Signed

Date 27 October 2015
Deputy Upper Tribunal Judge Doyle