



IAC-BH-PMP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11667/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9th July 2015**

**Decision & Reasons Promulgated
On 11th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

**OBIADULLAH NIAZI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gilbert, Lawrence Lupin Solicitors, Wembley
For the Respondent: Miss Fijiwala

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan born on 1st January 1999. He appealed against the decision of the Respondent dated 11th December 2014 refusing to grant him asylum or other protection. His appeal was heard by Judge of the First-tier Tribunal Naphthine on 31st March 2015. The appeal was dismissed in a determination promulgated on 13th April 2015.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Martin on 8th May 2015. The grounds of application assert that the First-tier Tribunal erred in rejecting

the expert evidence, gave inadequate reasons for rejecting the evidence of the Appellant and witnesses and failed to consider the contents of a letter from the Afghan Embassy in London.

3. There is a Rule 24 response from the Respondent. This states that the First-tier Tribunal Judge directed himself appropriately and made reasonable sustainable findings that were properly open to him on the evidence. The response states that at paragraphs 32 and 33 of the determination the First-tier Judge correctly applied the principles in **Devaseelan** about the proper starting point, which is the earlier determination which assessed and made findings of fact and such findings, should not generally be departed from without evidence. The response states that the judge gave good reasons for rejecting the expert evidence before him, given that there was a previous determination which the expert witness was not made aware of. At paragraph 43 of the determination the judge states that he considered all the evidence in the round and gives numerous reasons for finding that the Appellant has failed to discharge the burden of proof to the requisite lower standard. The response states that it was properly open to the First-tier Judge to conclude that the Appellant is not at risk of persecution or Article 2 or 3 ill-treatment and is not eligible for humanitarian protection on the facts and evidence before him.

The Hearing

4. The Presenting Officer handed to me a Wikipedia article and a judgment by Upper Tribunal Judge McCloskey and Upper Tribunal Judge Allen of a judicial review decision which, I was told could not be considered by the Appellant. I rejected both of these pieces of evidence as no application had been made to lodge them.
5. The Appellant's representative submitted that the First-tier Judge rejected the expert evidence but gave inadequate reasons for doing so. He referred to paragraph 29 of the determination - "Such general claims would no doubt apply to many if not most Afghans who all will have tribal links to various insurgent/counter-insurgent groups". He submitted that this is a flawed statement when the expert report is analysed. This refers to the Appellant's father's name being a contributing element in the Appellant's claim, giving the Appellant a risk profile on return and also the Appellant's tribe, the Niazi tribe being very much identified with the insurgents. He submitted that the conclusions at paragraph 29 when this information is considered, is inadequate.
6. At paragraph 33 of the determination it was submitted that the judge was wrong when he states that Dr Giustozzi, the expert, places reliance on Ismail Khan, who gave evidence at the Appellant's father's appeal and was found not to be credible. The representative submitted that the expert had the Appellant's father's determination when he made up his report so he had all the facts before him and what the expert did was take the Appellant's account and assess plausibility against the background

material. The representative submitted that the expert report fits with the background evidence. What the expert states is that the Appellant's account is plausible and the expert was not under a misapprehension as is implied by the judge in the determination.

7. The representative submitted that even if I do not accept that argument the material in the report is directly relevant to the issue before the judge. The judge took the Appellant's father's determination promulgated in 2013 as his starting point which under **Devaseelan** he was entitled to do.
8. Paragraph 27 of the expert report is referred to in the grounds of application. The representative submitted that the report deals with the specific issues in Parwan province and this is something the judge should have taken into account. I was referred to the determination by First-tier Tribunal Judge Devittie, on the Appellant's father's appeal, promulgated on 20th May 2013 and he submitted that what has to be considered is whether it is credible that the Appellant's father could have returned to his village and been discovered by Jamiat Islami in military uniforms and could then leave the area and whether it is credible that having left and returned to Kabul he would be pursued and discovered five months later. The representative submitted that the current evidence before the First-tier Judge was not before the judge in 2013 and this goes to the heart of this claim. He submitted that had this evidence been before the judge in 2013 the judge's findings might well have been different. He submitted that if it is credible that the Appellant's father did get taken by Jamiat Islami in the village and was then let go, would he be at risk from them. He submitted that it is the family members of Jamiat Islami who tracked him down to Kabul. He submitted that it is not Jamiat Islami itself, which is interested in the Appellant's father but the family members of the Jamiat Islami fighters his uncle killed and the issue is a blood feud. He submitted that this is the catalyst and it is perfectly credible that the family members could have tracked him down to Kabul.
9. At paragraph 14 of the expert report it is stated that the Appellant could well be at risk from specific families linked to Jamiat as revenge killings are a common occurrence. The expert states that avenging a death is a matter of opportunity and it has been known for families to wait tens of years before making an attempt to take revenge. I was referred to paragraph 35 of the expert report and the representative submitted that it is clear that the expert finds that Jamiat Islami is not the danger, it is the blood feud that is the danger for the Appellant if he returns to Afghanistan. He submitted that based on the expert report it is likely that the Appellant will be tracked down if he is returned to Afghanistan and this is consistent with the evidence in the country guidance cases on Afghanistan.
10. The representative made reference to the Appellant's uncle who was involved in killing 40 Jamiat Islami fighters. He submitted that this was not before the judge in 2013. He submitted that the expert report is relevant, even if he did not see the 2013 determination, as there is new evidence. He submitted that it was improper for the judge to sideline the report.

What the expert was doing in the report was giving evidence of the country situation. The Respondent submitted that the expert has been praised in other determinations on Afghanistan and should not have been disregarded by the judge. He has demonstrated his independence and his reports have been considered reliable.

11. I was referred to paragraph 39 of the determination in which the judge states that this Appellant's claim amounts to a reiteration of his father's claim and the representative submitted that that is not the case. The Appellant gave his own experiences including evidence about his contact with Jamiat Islami. He also gave the evidence about his uncle and the problems he is going to face from the Taliban if he returns to Afghanistan today. He submitted that the Appellant's evidence is that his uncle will make him join the Taliban and he will be radicalised. This is not what his father's evidence was.
12. At paragraph 42 of the determination the judge states that the impression created is that no one is interested in giving a clear and honest account of the Appellant's background in Pakistan and Afghanistan. He submitted that there was no reason for the judge to state this. It is not clear what evidence the judge is taking issue with.
13. I was referred to the case of **AK (Turkey) [2004] UKIAT 00230** which states that it is for the judge to consider the medical and psychiatric evidence in a case. He should do this and then decide what weight he is prepared to attach to it. It is also incumbent upon the judge to give proper intelligible and adequate reasons for arriving at his conclusions on that evidence. The representative submitted that the judge did not do that in this case. He submitted that the judge's approach to the expert evidence is flawed. He submitted that what seems to have happened is that the judge used the **Devaseelan** argument and because his father's claim was found not be credible he rejected this Appellant's claim in spite of the differences and additional evidence produced.
14. The representative submitted that the judge has made no factual criticisms of the witnesses and he has misread the 2013 determination. He submitted that the judge gave no weight to the fact that the Appellant is a minor. He submitted that the judge should have given him the benefit of the doubt because of this.
15. The representative also submitted that there is now an additional witness who was not at the 2013 hearing and there is a letter on file dated 6th March 2015 from the embassy of the Islamic Republic of Afghanistan in London requesting countries to suspend the deportation of Afghan migrants indefinitely, as the ministry cannot provide the necessary service to returning Afghans at present. He submitted that this is also mentioned in the expert report at paragraph 33.
16. I was asked to find that there is a material error of law in the judge's determination based mainly on the fact that the judge did not properly

consider the expert report and did not consider the additional evidence submitted since the 2013 decision was made.

17. The Presenting Officer made her submissions first of all dealing with the expert report. She submitted that at paragraph 26 of the determination the judge states that he has paid close attention to this report. I was asked to find that that is correct. She submitted that the Appellant's representative has complained about paragraph 29 of the determination because the Niazi tribe is identified with the insurgents but, I was asked to read all of paragraph 12 of the expert report as this refers to the Niazi being a tribe of the Ghilzai Confederation and being seen as key supporters to the insurgency of both the Taliban and Hizb-e-Islami. This paragraph refers to the Niazi having smaller groups in the Parwan province and she submitted that the Appellant's representative has not considered paragraph 12 of the expert report properly and that there is no error in paragraph 29 of the determination.
18. With regard to the witness statement of Ismail Khan the Presenting Officer submitted that the Appellant's representative has stated that the expert relied on this statement but that is not the case. The evidence is that the expert read the statement and that is all.
19. At paragraph 11 of the expert report there is no mention of the father's application being rejected although the expert does state that the Appellant's father might have faced serious problems in Parwan Province and that the situation there has worsened over the years.
20. The Presenting Officer referred me to paragraphs 12 to 16 of the Appellant's statement. This refers to the Appellant's father's claim and at paragraph 21 reference is made to the father making a fresh claim to the Home Office in February 2014 which claim pointed to the fact that his son, this Appellant, is now in the UK and his father has been here for over seven years. The Presenting Officer submitted that as there is no mention of the Appellant's father's claim in the report the judge was entitled to find that it had not been given to the expert. He was therefore entitled to conclude at paragraph 33, that the expert was under a strong misapprehension relating to the findings in the Appellant's claim. Because of this it was submitted that the judge was entitled to conclude that the expert did not deal with the claim properly. He was entitled to find that the Appellant's claim was not plausible.
21. I was referred to the case of **PM and Others (Afghanistan) [2007] UKAIT 00089**. In this case the expert was criticised. The expert is Dr Giustozzi as in this claim. She submitted that similarly in the case of **AK (Afghanistan) [2012] UKUT 163 (IAC)** Dr Giustozzi's assessment was criticised. She submitted that the Respondent is criticising paragraph 12 of the expert report in this appeal. This is the paragraph which states that the Niazi tribe is very much identified with the insurgents.

22. With regard to the **Devaseelan** point the Presenting Officer submitted that the Appellant's father's claim was based on fear of Jamiat Islami. The appellant's uncle was responsible for 40 Jamiat Islami people being killed. The Presenting Officer submitted that in the Appellant's father's determination the judge found that the Appellant's father's account of the adverse interest in him from Jamiat Islami when he was in his home area and in Kabul is not credible and the judge does not accept his evidence in that regard. At paragraph 9 of the Appellant's statement the Appellant refers to his family having problems in Afghanistan because he has gone against the word of his paternal uncle who is a senior Taliban commander by refusing to attend a training camp to prepare himself for Jihad. The Appellant refers to his uncle moving between Pakistan and Afghanistan and he states he would not be safe from him in either country. The Presenting Officer submitted that at paragraph 10 of his statement it is clear that the Appellant is relying on historic events and he has no political profile of his own. The Presenting Officer submitted that that makes this Appellant's claim very similar to his father's claim and his father's claim was rejected so the judge was right to deal with the matter on the **Devaseelan** principle. The judge refers to this at paragraph 39 of the determination and it was submitted that he has a correct understanding of the claim. The judge does not accept the incident in the Appellant's account about his uncle and so the judge was entitled to follow the decision in the Appellant's father's claim.
23. At paragraph 40 of the determination the judge states that the witnesses who gave evidence in support of the Appellant were largely those who had supported his father and had been found to be unreliable, as was his father. The Presenting Officer submitted that there is only one different witness. Three of the witnesses are the same. At paragraph 40 of the determination the judge finds that these witnesses are unreliable and the Presenting Officer submitted that he was entitled to do so. Because of this it was submitted that at paragraph 42 he was entitled to find that no one was interested in giving a clear and honest account of the Appellant's background in Pakistan and Afghanistan. She submitted that the judge did not need to set out all his reasons for rejecting the claim. At paragraph 47 of the determination the judge finds that the Appellant has produced no credible evidence to undermine the findings of Judge Devittie in 2013 concerning the lack of political profile of either the Appellant's father or his uncle. She submitted that the judge has clearly looked at all the evidence presented to him and found the Appellant's account not to be credible.
24. With regard to the Appellant being a minor she submitted that at paragraph 17 it is clear that the judge has taken this into account.
25. With regard to the Appellant's removal to Kabul the Presenting Officer submitted that based on the background evidence the judge was entitled to find that this would be a possibility for the Appellant based on the Human Rights Watch Report 2015 which is in the Respondent's bundle.
26. I was asked to dismiss the appeal.

27. The Appellant's representative referred me to paragraph 17 of the determination and submitted that this paragraph does not make it clear that the judge dealt with the Appellant as a child. He simply refers to the conduct of the hearing, and there is nothing to show that he dealt appropriately with this important matter.
28. With regard to Judge Devittie's determination in 2013 the representative submitted that at paragraph 8 the judge in that case rejected credibility but there is now new evidence which the judge in 2015 had to take into account. He submitted that the expert did not rely on Ismail Khan's statement and that his report is balanced.
29. The representative submitted that many of the facts in this claim are personal to the Appellant. The judge has not addressed the blood feud and the requirements in the said case of **AK** have not been addressed. He submitted that the judge should have looked at these matters. He submitted that it is not fatal or even relevant whether the expert considered the Appellant's father's determination or not. I was referred to the instructions to the expert which make it clear that the Appellant's father's appeal was dismissed.

Decision and Reasons

30. I have to decide if there is an error of law in the First-tier Judge's determination. The judge has based his determination on the **Devaseelan** principle, taking into consideration Judge Devittie's determination in 2013 relating to the Appellant's father's appeal and using this as his starting point. Judge Devittie made a good case and gave adequate reasons for finding that the father's appeal lacked credibility. The appellant's father stated that his difficulties were caused by his brother's profile in Afghanistan. That is also the Appellant's claim. Judge Devittie did not believe the Appellant's father's account about being traced to Kabul by Jamiat Islami. It is clear that Judge Devittie assessed the Appellant's appeal comparing it to the background evidence. The judge does not believe any of his account about this group being interested in him because of his brother's profile. He found that Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2006 applied as the Appellant's father absconded after claiming asylum and he does not accept the Appellant's father's account of the adverse interest in him from Jamiat Islami in his home area or in Kabul. He finds that the Appellant's father had no political profile and was never involved in any political activity in Afghanistan. He rejects the father's account regarding his brother's profile. The judge also rejects his Article 8 claim.
31. When the facts of the Appellant's father's case are compared to the facts in the Appellant's case, they are very similar. The Appellant's claim is that he fears his uncle, as did his father. The Appellant has no political profile and it has been found that his father had no political profile. Judge Devittie also rejected the information relating to the Appellant's uncle. He

rejected the evidence of the witnesses and these witnesses are the same (apart from one), as the Appellant's witnesses.

32. At paragraph 26 of the determination the First-tier Judge states that he paid close attention to the report of Dr Giustozzi in his assessment of the Appellant's claim and the assessment of the overall situation in Afghanistan. There is nothing in the determination which makes me believe that that is not the case. Dr Giustozzi refers to a blood feud and the judge notes this at paragraph 27 of the determination. I find there to be no error in paragraph 29 of the determination and I find that Dr Giustozzi, even if he did not see the determination in the Appellant's father's appeal, was aware that his father's application for asylum had been rejected. There was no error in the judge dealing with the case on a **Devaseelan** basis. This is the correct starting point. At paragraph 32 he states that no new credible evidence has been placed before him to in any way undermine the findings of Judge Devittie.
33. The judge may not be correct in finding that Dr Giustozzi has laboured under a strong misapprehension which has nullified his findings concerning the Appellant's claim but, I believe that the judge did give weight to Dr Giustozzi's expert report when making his decision and considered everything before him in the round. He refers to Dr Giustozzi's general observations and he takes into account the COI Report, the Operational Guidance Note for 2013, (reissued in February 2015), the documentary evidence submitted by the Appellant and the case law from both sides. There is additional evidence since the Appellant's father's claim but the judge clearly found that this evidence made no discernable difference to the claim. At paragraph 45 he refers to the Appellant's age finding that the Appellant is a minor acting under instruction and finding that that instruction was given by his father, whose account was found to lack credibility. This is important when the issue of the Appellant being a minor is pursued.
34. The judge refers to the case of **AA (Afghanistan) [2012 UKUT 00016 (IAC)]**. This relates to minors from Afghanistan. The Appellant's mother is in contact with the Appellant and the Appellant's father. The judge notes that the Appellant is not an unaccompanied minor. He has considered everything before him and made a decision, giving adequate reasons for his decision.

Decision

35. There is no material error of law in the judge's determination and his decision, promulgated on 13th April 2015, must stand.
36. This Appellant's asylum appeal is dismissed and his human rights appeal is dismissed.
37. Anonymity has not been directed.

Signed

Date

Deputy Upper Tribunal Judge Murray