Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01869/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On the 5th May 2016

Decision & Reasons Promulgated
On 17th May 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

[A S]

~~(Anonymity Direction not made)~~

Claimant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:
For the Claimant: Mr Sills (Counsel)
For the Secretary of State: Mr Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Shamash promulgated on the 11th March 2016, in which he allowed the Claimant's asylum appeal.

2. The Claimant is a citizen of Afghanistan who was born on the [ ] 1989. Within the decision First-tier Tribunal Judge Shamash accepted the Claimant's account that he had been handed over to the Taliban when he had been returned to Kabul following the refusal of his previous asylum claim in 2005 and found that the medical evidence had substantiated the Claimant's account that he had

been tortured over a long period. The Judge accepted that the Claimant had been interrogated as to why he ran away from the Taliban and further accepted the Claimant's account that he was considered a traitor by the Taliban. The Judge went on to consider future risk and found that the Claimant having suffered past persecution and that although considerable time has passed he did not find that this meant the Claimant was no longer at risk and that insurgent groups remained active and the Claimant was still at risk upon return. The Judge accepted the Claimant's account as to how he was tortured because of his connection to his father and that having spent a considerable period of time in the UK the Judge found specifically that "there is a realistic likelihood that he would be at risk in the future, from both sides."

3. The Judge went on to consider the question of internal relocation both in terms of whether it was available and as an option and reasonable in all the circumstances and the Judge relied upon paragraphs 130 – 132 of the decision of the Upper Tribunal in the case of AA (Afghanistan). He then considered the case of Januzi and found that the Claimant does suffer from mental health difficulties and that he had been easily identified in 2005 and the Judge found that there was no evidence before him to show that the situation had improved in Afghanistan since 2005 and the Taliban were still active and there was no reason to suspect they would no longer wish to harm the Claimant and that in many ways the situation had deteriorated by the withdrawal of troops. The Judge found that his escape and decision to return to the UK would both place him at an even more vulnerable position and that the Claimant had suffered both past persecution and faced future risk of persecution having fled Afghanistan and refused to join the Taliban. The Judge therefore allowed the appeal under the Refugee Convention on asylum grounds.

4. The Secretary of State has sought to appeal against that decision and within the Grounds of Appeal argues that the Judge has failed to resolve a conflict amounting to a material error of law and that the Judge has now answered the question as to whether or not the Claimant could internally relocate within Afghanistan both in terms of the ability to relocate and whether it would be unduly harsh to expect him to do so and that no reasons are given as to why it would be unduly harsh for him to internally relocate if that was an option.

5. It was further argued that the Judge in referring to the case of AA (Afghanistan) has not taken account of the fact that that case was superseded by the case of AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 and that whilst in assessing the claim under the context of Article 15(c) in which the Secretary of State asserts that Kabul City would be a viable internal relocation alternative, it is necessary to take 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 living there, these considerations will not in general make returning to Kabul unsafe or unreasonable.

6. Permission to appeal was granted by First-tier Tribunal Judge Fisher on the 29th March 2016 on the grounds that it was both arguable that the Judge had failed to explain why it was unreasonable to expect the Claimant to internally relocate and that her reliance upon the decision in AA was arguably in error in view of the subsequent decision in AK.

7. It was on that basis that the case came before me in the Upper Tribunal.

8. In reaching my decision I have fully taken account of all of the submissions made by the legal representatives, which are fully recorded within the record of proceedings.

9. Mr Kotas on behalf of the Secretary of State argued that the Judge's decision in respect of internal relocation had not specifically found whether or not the Claimant could not relocate to Kabul because he would be at risk there, or whether or not it was being argued that it would be unduly harsh for him to internally relocate to Kabul. He conceded that it was the Secretary of State's case that the only area where it was being suggested that the Claimant could relocate within the original refusal notice was to Kabul itself, not to any other area within Afghanistan. He argued that it was incumbent upon the Judge to refer to the case of AK, but conceded that this Claimant's appeal had not been decided on Article 15(c) grounds. He argued that the Judge had misquoted the case of AA and referred me to paragraph 130 of that decision. He argued that

the Tribunal had not stated that it was relatively simple for the Taliban to track down individuals in Kabul and that the Judge had not made proper findings in respect of whether or not it would be unduly harsh and internal relocation. He took me to paragraphs 51, 81 and 82 and 217 of the decision in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163, and sought to argue that in light of those paragraphs the Claimant would not be at risk in Kabul. He sought to argue that the Taliban would not be interested in going after him and will not have the means to do so.

10. In his submissions Mr Sills on behalf of the Claimant sought to argue that the Judge's decision was sound and well-reasoned and that the case of AK dealt with the generalised violence under Article 15(c) and the risk of indiscriminate violence in a case where the Appellant was from Ghazni and had an uncle in Kabul. However he relied upon the fact that Judge Shamash had found that the Claimant was at risk from both the Taliban and the authorities. He argued that the paragraphs from AK quoted by Mr Kotas did not assist as they related to the average civilian and the situation in Ghazni, rather than the circumstances faced by this Claimant who had already been persecuted by the Taliban. He argued that any error in the Judge's reasoning or findings were immaterial given that the Judge found that the Claimant was at risk from both sides, but he argued that the Judge had given clear reasons as to why the Claimant would be at risk.

11. Mr Kotas conceded that the Secretary of State had not been granted permission to argue that the finding of the Judge at [62] that the Claimant would be at risk from both sides was unsustainable and that that had not formed part of either the original Grounds of Appeal or the grant of permission, and he did not specifically seek permission to amend the Grounds of Appeal to argue that point. I therefore did not allow that argument to be run.

My findings on error of law and materiality

12. Although the decision in the case of AA (unattended children) Afghanistan CG [2012] UKUT 16 was dealing with the situation of unattended children being returned to Afghanistan, and therefore was not directly relevant to the situation of the Claimant who was born on the [ ] 1989 and was therefore clearly an adult

as at the date of the appeal hearing, Judge Shamash only relied upon that case to the extent that he referred to paragraphs 130 through to paragraph 132 of the decision, which paragraphs deal with Dr Giustozzi's evidence regarding in that case whether there was a chance encounter with the Taliban which the Appellant in that case feared, which Dr Giustozzi regarded as a real risk.

13. In those paragraphs it was also stated that Dr Giustozzi's evidence that tracking someone down from the provinces in Kabul is not difficult; and although the Taliban would not be proactively seeking that Claimant, it would not be easy for him to not settle away from the southern and south eastern parts of the city which are Pashtuns dominated. It was stated that the north was dominated by Tajiks, the west by Hazaras (heavily hostile to Pashtuns) and the central area was found to be very expensive so that the Claimant in that case was highly unlikely to be able to afford to live there. The Judge when quoting these paragraphs, was simply referring as is clear from [63] that he was simply referring to the fact that it would be relatively simply for the Taliban to track down an individual in Kabul.

14. Although I do accept the submission from Mr Kotas that the Judge has somewhat misquoted the paragraphs in that regard, in that in that case at paragraph 130 it had been accepted by the Appellant that the Taliban would not be actively seeking to track him down within Kabul City but rather it was a chance encounter with the Taliban that that Appellant feared and which Dr Giustozzi regarded as a real risk and that at paragraph 131 it was stated that "We take into account his evidence that tracking down someone from the provinces in Kabul is not difficult". This was not an indication that everyone could be tracked down within Kabul. However, given that there was reference within paragraph 130 of that decision to there being a real risk of a chance encounter with the Taliban, in circumstances where Judge Shamash had found that the Claimant had previously suffered persecution at the hands of the Taliban for having run away and that he would be considered a traitor, if there was even a chance encounter with the Taliban upon return, rather than it being easy for them to be "tracked down", that in itself would be sufficient to place the Claimant at risk in Kabul, such that any error of the Judge in misquoting AA, I consider not to be material.

15. In respect of the argument the Judge should have taken account of the subsequent decision in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC), that case was dealing specifically with the question the legal principles governing Article 15(c) and was Country Guidance on the applicable Article 15(c) risk of indiscriminate violence to the ongoing armed conflict in Afghanistan. It was stated specifically the Country Guidance given in AA

(unattended children) Afghanistan CG [2012] UKUT 00016, in so far as it related to unattended children, remains unaffected by the decision. However, I do bear in mind that that decision in AK was relating specifically to the risk to the general population and the paragraphs to which Mr Kotas sought to refer me, in particular paragraph 51 related to the targeting of civilians, paragraph 52 related to how the insurgents have targeted two main types of civilians, those associated with coalition forces and other international bodies and those associated with the government at central and provincial levels. Paragraphs 81 and 82 refer to the situation in Ghazni and paragraph 217 referred to by Mr Kotas again refers to the general risk under Article 15(c) as a result of indiscriminate violence to civilians.

16. However, that is not the situation faced by the Claimant in this case in light of the unchallenged findings of Judge Shamash. Judge Shamash found that the Claimant had already escaped from the Taliban and had suffered persecution at their hands and was at real risk of persecution from them in the future. In such circumstances, I do not consider that the Judge erred in not referring to the subsequent Country Guidance of AK, given that the Judge was not considering the general risk to the civilian population, but was considering the risk to someone who had run away from the Taliban and refused to be recruited by them, and had been previously tortured by them on his unchallenged findings.

17. Further, the Judge specifically found at [65] that the Claimant does suffer from mental health difficulties and that he was easily identified in 2005 and that there was no evidence before him to show that the situation had improved in Afghanistan since 2005. He concluded that the Taliban are still active and there is no reason to suspect they would no longer wish to harm the Claimant and that in many ways the situation had deteriorated by the withdrawal of the troops and that his escape and his decision to return to the United Kingdom would both place him in an even more vulnerable position. The Judge further referred to the UNHCR guidelines at [63] and that “It is particularly important to note the operational capacity of the Taliban, the Haqqani network, Hisbe-e-Islami, Hekmatyar and other armed groups that carry out attacks in all parts of the country, including areas that are not under the effective control of AGEs as evidenced by example by reports on high profile complex attacks in urban areas under the effective control of pro-government forces.”.

18. Although the Judge may not have specifically stated that the Claimant could not safely internally relocate to Kabul, it is clear given his analysis of the risk faced by the Claimant from the Taliban and the fact that they were active throughout the country and how in his view they could relatively simply track him down in Kabul, which although I agree is a misstatement of AA, for the reasons set out above, given that in AA it was stated that there would be a risk of a chance encounter, which in itself will be enough to put the appellant at risk, I do not accept that any error on the part of the Judge in this regard was material, given that even though the Judge has not turned his mind to specifically stating whether or not there was an ability of the Claimant to internally relocate to Kabul, it is clear given his analysis and findings, that the Judge would have specifically found that the Claimant was not able to internally relocate to Kabul.

19. In any event, given the unchallenged findings at paragraph 62 that the Claimant given his period in the UK that there was now a realistic likelihood that he would be at risk in the future from both sides, and thereby would be at risk from both the Taliban and the State, it is perfectly clear that internal relocation would not be a viable option for him. Any error in the way that the Judge then considered the question of internal relocation would not be material, as the Claimant clearly would not be able to internally relocate anywhere within the country. This finding was not challenged within the Grounds of Appeal and the Secretary of State had not been given permission to argue that that finding was untenable.

20. The decision of First-tier Tribunal Judge Shamash therefore does not reveal a material error of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Shamash does not reveal a material error of law and is maintained.

The First-tier Tribunal did not grant an anonymity order, and no application for such an order was made before me. No anonymity order was therefore made.

Signed

R McGinty

Deputy Judge of the Upper Tribunal McGinty Dated 5th May 2016