



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03455/2013

THE IMMIGRATION ACTS

Heard at Field House
On 15 June 2016

Decision & Reasons Promulgated
On 4 July 2016

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

BKZ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

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 AND REASONS

1. The Appellant is a citizen of Afghanistan and his date of birth is [] 1975. He came to the UK on 18 February 2003. He made a claim for asylum which was refused on 2 February 2003. The Appellant absconded. He made contact with the Home Office on 14 August 2009 and was on 6 March 2013, following further submissions, granted leave for a period of 30 months which expired on 5 September 2015. In the same decision his asylum claim was refused.
2. He was granted discretionary leave because it was accepted that he had ongoing family life in the UK as a result of his relationship with a Polish national and their daughter. It was accepted that he would not be able to continue family life in Poland.
3. The Appellant appealed against the decision to refuse to grant him asylum and his appeal was allowed by First-tier Tribunal Judge Devittie in the following terms, "to the extent that the matter is remitted to the Respondent for her to consider whether the Appellant should be granted leave under the legacy policy". The appeal was dismissed on asylum grounds. Judge Devittie accepted the Appellant's evidence and found him credible. He concluded that the Appellant would be at risk on return to his home area, but that relocation was a safe option.
4. The Appellant applied for permission to appeal against the decision of Judge Devittie to dismiss his claim on asylum grounds. Permission was granted by First-tier Tribunal Judge J M Holmes on 13 June 2013. The matter came before Deputy Upper Tribunal Judge Hanbury on 27 August 2013. Judge Hanbury found there was no material error of law in the decision of Judge Devittie to dismiss the Appellant's appeal on asylum grounds and the decision was maintained. Judge Hanbury's decision was set aside by Lord Justice Christopher Clarke who made an order which was issued on 25 February 2014. The decision of Lord Justice Christopher Clarke is contained at [4] of my error of law decision and there is no need for me to repeat it here.
5. The thrust of the decision was that given that Judge Devittie found the Appellant to be at risk of return to his home area and that his persecutors from whom the risk emanated were in power in Kabul, the conclusion that he would not be at risk in Kabul appeared to be illogical unless there was no serious risk of prospective employers or landlords having cause to view him with suspicion and to make enquiries about his background. Following from this decision there was an order by the Court of Appeal on 19 May 2015 that the matter should be remitted to the Upper Tribunal. The matter came before me on 26 October 2016. I concluded that Judge Devittie made a material error of law, having failed to properly consider the risk of detection in the light of the Appellant's claim, given that he was at risk on return to his home area and that his evidence had been accepted by Judge Devittie. I went on to set aside the decision (to dismiss the Appellant's appeal on asylum grounds) aside and the matter was adjourned for a substantive hearing.

6. The matter came before me again on 2 December 2015. It came to light at the hearing that the Appellant had returned to Afghanistan and the Secretary of State submitted a skeleton argument, prepared by Mr Walker, on which the Respondent sought to rely. In addition the Appellant had made a further witness statement relating his return. The matter was further adjourned and came before me again on 15 June 2016.
7. At the start of the hearings on 2 December 2015 and 15 June 2016 the representatives discussed the remit of the rehearing, in the light of Mr Walker's skeleton argument and the Appellant's return. I heard submissions from the parties and concluded that in the light of the clear directions that I had made in my decision of 26 October 2015, the lack of response thereto by the Secretary of State and that there had been no proper counter challenge to the decision of Judge Devittie (that the Appellant was at risk on return to his home area), I concluded that the hearing before me was limited to the issue of relocation; notwithstanding, the evidence that the Appellant had returned to Afghanistan and that there was evidence that he had made another trip to Peshawar in Pakistan.
8. At the start of the hearing on 15 June 2016 Mr Avery made an application to adduce further evidence, namely case notes indicating an entry made by an Immigration Officer on 15 May 2014, following from the Appellant having been encountered by Immigration Officers returning from Afghanistan and having been asked questions about his visit. There are a series of questions and answers. It is recorded that when the Appellant was asked who he had visited in Afghanistan, the answer he gave was "my mother. I stayed with my father and grandfather". Mr Avery indicated to me that the note had only been discovered by him the day before the hearing and that is why it had not previously been submitted.
9. Mr Bazini objected to the admission of the evidence and referred me to a document at page 11 of the Appellant's bundle which is a UKBA landing card which is undated but which shows a handwritten note of a series of questions and answers. The questions and answers are almost identical to the ones in the typed case notes produced by Mr Avery with one significant difference, which is that there is no reference in the handwritten notes (signed by the Appellant) to him having said that he had stayed with his father and grandfather.
10. To his credit Mr Avery accepted his application was problematic. I refused to admit the evidence which was served very late in the day. There was no reasonable explanation for the delay and there was no evidence relating to the context of the notes in the light of the handwritten document at page 11 of the Appellant's bundle. Mr Avery submitted that the note that he relied on and the handwritten document related to two separate interviews, but there was no evidence in support of this. I concluded that it was not in the interests of justice to admit the document. Mr Avery conceded that if it were admitted, it would in the circumstances be of limited evidential value, in any event. Mr Avery did not make an application to adjourn the proceedings to obtain further clarification about the notes.

11. Mr Bazini indicated that the Appellant would not be giving oral evidence. In his view, he was not well enough to give evidence and reference was made to his mental health problems. He confirmed that there was no medical evidence relied upon to support this. It was confirmed by Mr Bazini that the Appellant travelled to UAE on 15 April 2014. On 17 April 2014 he flew to Kabul and he returned to UAE on 11 May 2014. He returned to the UK on 14 May 2014. The Appellant travelled again to UAE on 23 March 2015 and he left UAE on 28 March 2015 arriving Peshawar Pakistan on 28 March 2015. He left Peshawar and returned to UAE on 13 April 2015 returning to the UK on 15 April 2015.

The Appellant's Evidence

12. The evidence before me was that contained in the Respondent's bundle which included the reasons for refusal decision. The Appellant relied on a bundle with a covering note from his solicitors of 25 November 2015. The bundle contained 845 pages and includes the bundle that was before the First-tier Tribunal including the expert report from Dr Antonio Giustozzi of 8 May 2013 (pages 641-667) and the second report from Dr Antonio Giustozzi of 17 November 2015 (pages 43-67). There is a significant amount of background evidence relied upon by the Appellant. There is a supplementary bundle which contains a third report from Dr Antonio Giustozzi of 14 June 2016 and a letter from the Appellant's GP, Dr A S Gor of 15 May 2016. There is a copy of the Appellant's Afghan passport which he produced at the hearing and other documents in support of his case. At the hearing, after I had heard submissions, the Appellant produced identity cards relating to individuals that he claimed to be his brother and sister who reside in Pakistan.
13. The Appellant's evidence, accepted by Judge Devittie, can be summarised. He is from Paktia Province. His brother was an active member of Hezb-e-Islami for approximately ten years. In 2002 local warlords abducted him and the Appellant's father. Four days later their bodies were discovered in the mountains. The Appellant's father was innocent, but he was killed because of the Appellant's brother's role in Hezb-e-Islami. The Appellant's brother handed weapons over to the Taliban. The Appellant was detained for about a week prior to the murder of his brother and father and he was questioned about his brother's whereabouts. The village elders managed to secure his release. The Appellant fled Afghanistan and fears return from the warlords who are commanders of the Afghan Mujahedeen and who now hold powerful positions in the Afghanistan government. The commanders are Dawood of Paktia Province, Chaman and Qalin who are from an area bordering the Paktia Province. The commanders were effectively running President Karzai's government in Afghanistan. The Appellant's evidence about which there has to date been no lawful findings relate to relocation. His case is that relocation was not a viable option because he would be arrested in Kabul.
14. The reason the Appellant returned is because he missed his mother and there was no-one else left in his a family. He had not seen his mother for eleven years and she

was unwell and was almost 75. The Appellant's evidence is that he saved money from his benefits and borrowed £600 from his friend in order to pay for a flight from London to Heathrow to Dubai. He stayed at his sister's house in Dubai and his brother-in-law Omir Gul helped him to buy a ticket to travel from Dubai to Afghanistan. Omir Gul arranged for a person in Afghanistan to meet the Appellant at Kabul and to take him to his home area because the Appellant does not know anybody in Afghanistan. At Kabul Airport he was met by Javid Khan who drove him to his village by car. The journey was four hours. There were no checkpoints at any time. The Appellant stayed at his maternal grandfather's house. He hid and did not go out. He did not tell anyone other than his brother-in-law that he was going to Afghanistan. When he was there he looked after his mother and gave her medication. She was depressed and stressed. There was no hospital that he could take her to in the area. After two weeks, she passed away. She was buried the next day in the village. Approximately 150 people attended the funeral. There were no newspaper reports of her death.

15. Three days after the funeral his brother-in-law arranged for Javid Khan to collect him from the village and to take him to the airport in Kabul. They went through a checkpoint, but nobody spoke to the Appellant. He flew from Kabul Airport to Dubai where he spent sometime with his brother-in-law before travelling to London. He was asked questions at Heathrow Airport when he returned on 14 May 2015 and he told the Immigration Officer that he had returned from visiting his sick mother and that he had taken a risk. He spent about three weeks in Afghanistan. He would never have returned there had his mother not been critically ill. He was not harmed during his stay there because he was in hiding.
16. Even though Hezb-e-Islami have not been in power since 2001 a lot of their members were part of the Karzai government including the former governor of Paktia Province Juma Khan Hamdard Khar. He was the former governor of Paktia Province until 2015. The authorities will take a dim view of the Appellant and he would not be accepted into Afghan society.
17. The Appellant does not have anywhere to live in Kabul and he does not know anybody who could support him there. He has no friends or family there. He has no family member left in Afghanistan. If he wanted to rent accommodation the landlord would ask him straightaway where he came from and he would have to show the landlord his passport and ID and it would become apparent that he had fled the country twelve years ago and reveal his identity which would lead to his arrest. He would not be able to find employment in Kabul. He suffers from mental and physical health problems including stress and depression. He is on medication; he is prescribed; fluoxetine; propranolol and amitriptyline (60mg, 40mg and 40mg daily respectively). If he does not take this medication he cannot control himself and is at risk of seriously harming himself. He visits a psychiatrist at St Ann's Hospital in London twice a year. He receives employment support allowance because he is unable to work.

The Background Evidence

18. Dr Giustozzi has produced three reports. In the first report of 8 May 2013 Dr Giustozzi concluded (see [29]) that the Appellant would be tracked down around Afghanistan relatively easily unless he was able to hide without seeking employment. It is worth quoting paragraph 29 in full;

“29. [The Appellant] could be tracked down around Afghanistan relatively easily, unless he was able to hide, without seeking employment. [The Appellant] would have to urgently look for a source of livelihood and accommodation, which will prevent him from hiding in order to avoid detection. Prospective landlords and employers will be asking information about his places of origins and his family background. Failure to provide them would hamper his chances of finding either; lying would not work in the medium and short term as employers and landlords are able to check information through networks of acquaintances and regularly do so. It might take weeks for receiving a feedback, but eventually the background of individuals will be checked. His whereabouts will therefore be known.”

Dr Giustozzi goes on to conclude that if relocated the Appellant without family support or state assistance and being unable to find a secure well-paid job would risk becoming homeless. Dr Giustozzi concludes;

“32. It is not clear from [the Appellant’s] account whether his case can be described as a blood feud. The execution of his father and brother were extra judiciary ones, as the death penalty was not being applied in Afghanistan at that time. However, the blood feud would only apply where it was possible to identify the particular individuals who ordered the murder, or executed it. This is not clear from the account. It would appear that the local authorities were fully mobilised against [the Appellant’s] family.

33. In sum, the threat to [the Appellant] from the authorities would be greater today than in 2002, because Hizb-i Islami is so much more active today. The authorities cannot be sure of what [the Appellant] has been doing all these years, where he was and whether he maintained contact with Hizb-i Islami or not. His presence in Paktia would be immediately detected, but it would only be a matter of time before it was detected in Kabul too for the reasons explained.”

19. In his report of 17 November 2015 Dr Giustozzi concluded that the police are less able than ever to protect individuals like the Appellant (see [10]) even if they wanted to and that they are badly stretched because of the insurgency. Dr Giustozzi concluded at [15] that the Appellant would not receive a level of mental healthcare even remotely comparable to what he could receive in the UK. At [23] he states that

several antidepressants are available in Afghanistan as authorised drugs however the real issue is that in practice having access to treatment will be extremely difficult and that Kabul is the only place offering a relatively wide range of treatment opportunities. However, he would have to compete with a large portion of the 5 million residents of the city of which 40% suffer mental health issues and that there are only a handful of mental health staff but that it is far from certain that the appellant would be able to live in Kabul considering the high cost and his inability to obtain employment. Dr Giustozzi concluded the following;

“26. What stated in my previous report about traceability of [the Appellant] remains valid. [The Appellant] could avoid being traced if he only sought basic accommodation in a dormitory and menial employment as a day labourer. Given his mental health condition, however this would be living conditions hardly conducive to improved conditions, quite the contrary.

27. In sum, [the Appellant] would still be at risk from the rivals of his father and from the authorities because of his background. The general climate of violence and insecurity facilitates these political feuds. In addition, [the Appellant] will be particularly vulnerable because of his mental health condition, which will force him to seek accommodation in an area where accessing mental care would be relatively easy.”

20. At [12] of the second report Dr Giustozzi states that from the beginning of 2015 the Afghan government has been putting pressure on Western governments not to return failed asylum seekers because of the unsafe situation. He concludes at [13] that finding accommodation in Kabul in the central neighbourhoods would be difficult and forbiddingly expensive and prohibitively so in the safe central areas. He concludes that it is very rare for Afghans to live alone and it is common to have large families and that one-bedroom flats are almost non-existent. As in his earlier report he concludes that earning a living on his own would be a major challenge for the Appellant.
21. Dr Giustozzi’s third report addresses the situation for those leaving Kabul Airport or arriving at it and he concludes on the basis of an interview with a police officer named Omar Gul, who is deployed at Kabul Airport, that an individual, who is deported back to Afghanistan but is in possession of a regular passport and properly stamped, is not guilty of any violation of Afghan law. Dr Giustozzi described the situation for failed asylum seekers who return and who are identified by possession of documents which have been issued to them by the country which deported them. Dr Giustozzi concludes that the fact that [the Appellant] was able to travel to Afghanistan through Kabul Airport and back suggests that he is not on the national list of wanted individuals; he might be still on the list of local suspects, without having an arrest warrant on his name.

Submissions

22. Mr Avery's submissions can be summarised. It is his view that the Appellant is not at risk on return to Kabul. The Appellant's claim rests on his brother's involvement with Hezb-e-Islami. There is no direct evidence of the individuals named by the Appellant as responsible for the death of his brother and father having been involved in their murders. In any event General Dawood has since been assassinated. There is nothing of any interest in the Appellant to the authorities, his father was a shopkeeper and had no involvement with Hezb-e-Islami. The Appellant's evidence is that he was detained and subsequently released having been asked about his brother's whereabouts. At this time he was relatively young, still a teenager. The Appellant has not had any involvement in terrorist activities and it is very difficult to see how he would come to the attention of the commanders. He has been in the UK in excess of ten years. Mr Avery submitted that the findings of Dr Giustozzi at [4] of the second report, where reference is made to a blood feud is speculative. The same report at [27] talks of rivals of the Appellant's father which shows a misunderstanding of the Appellant's case. Mr Avery referred me to the second report at [29] where Dr Giustozzi indicates that the Appellant would be tracked down very easily. He submitted that there is no reason to track the Appellant down because he has no profile and indeed his brother did not have a significant profile. There is no realistic prospect of anyone having any interest in him whether or not it is possible to track him down.
23. Mr Avery addressed me in relation to family support indicating that the Appellant has returned to Kabul and received help from his brother-in-law who arranged for him to travel to his village in Afghanistan. He would be assisted by his family should he return to Kabul and the fact he has returned suggests there is no real fear of the authorities. There is no evidence relating to the Appellant's mental health.
24. In submissions Mr Bazini relied on the Asylum Policy Instruction relating to the revocation of refugee status issued by the Home Office (version 4.0) published on 19 January 2016 and he addressed me in submissions on this document. There is also a copy of AJ (Risk to homosexuals) Afghanistan CG [2009] UKAIT 00001 which is relied on by the Appellant.
25. Mr Bazini addressed relied on the skeleton argument and submitted that there was no evidence of family connection or support from the Appellant's family. He referred me to the decision of the Court of Appeal which was strongly worded and made reference to the illogicality of the decision of Judge Devittie that the Appellant would be at risk in his home area but not in Kabul. He also drew my attention to the fact that the Appellant has been found by Judge Devittie to be credible having given oral evidence. The Appellant had been open and frank to the immigration authorities when he returned to the UK from Afghanistan. He that I should be cautious about making adverse credibility findings. It is accepted that one of the commanders has now passed away and that there is no up-to-date evidence relating to the other named warlords. However, they were involved in terrible behaviour and

subsequently found positions in government and they have their own individual power base. The Appellant's family was prominent enough to be murdered. It is illogical for the Home Office to put forward that there would be no interest in him should he return to Kabul. The Tribunal should start on the basis that the Appellant is at risk in his home area. The passage of time is not material. Judge Devittie's decision that the Appellant is at risk on return significantly post-dates events.

26. Mr Bazini referred me to the case of AJ. He submitted that had the Appellant not returned to Afghanistan his claim would have to be allowed in the light of the findings in relation to risk on return to his home area. He referred me to the asylum policy and cited various paragraphs there from relating to the cessation of refugee status which establishes that a refugee can return to the country of origin without cessation of status and that there is a legitimate distinction between travelling back to one's country of origin, say for a visit, and travelling back and re-establishing oneself. It has never been the case for the Appellant that he is on a list of wanted individuals. He returned to Afghanistan in order to see his mother who died during his stay there and he attended her funeral.
27. Mr Bazini referred me to [11] and [13] of Dr Giustozzi's first report in which it is stated that the Hekmatyar faction of Hezb-e-Islami is still a target of the state security forces. Hezb-e-Islami was once a powerful party which has been eclipsed by the Taliban as the main illegal armed group of opposition in Afghanistan. Pockets of Hezb-e-Islami activity clearly existed in Paktia Province and in 2011 Hezb-e-Islami was becoming more significant in the insurgency and again reference is made to Paktia Province. The significance of the paragraphs cited is that should anything happen in Kabul, for example an explosion, the Appellant would immediately be a suspect. Dr Giustozzi's reference to a blood feud was made on the basis that this would put him at even greater risk.
28. In relation to [67] of Dr Giustozzi's first report the reference to father is clearly a typographical error. The Appellant's evidence in relation to relocation can be found in his witness statement of 6 August 2015.

Conclusions

29. According to Dr Guistozzi the risk emanates from the Appellant having to disclose information to landlords and employers which would lead to any information given being checked. Once his identity and family history became clear he would be at risk from the authorities and those who are responsible for the death of his father and brother. There is no reason for me to doubt Dr Giustozzi's conclusion that it is not difficult to track people down and that it is reasonably likely, considering Dr Giustozzi's evidence that someone returning alone to Kabul without family support would be at risk of being tracked down. This is supported by the UT judgement in AJ (Risk to homosexuals) Afghanistan CG [2009] UKAIT 00001. However there are problems with the Appellant's evidence. He returned to Afghanistan voluntarily and it is reasonably likely, in my view, that he has family or close contacts there on whom

he can rely and this puts a different complexion of the case. Whilst I accept that return of short duration is not in itself fatal to his appeal, what is known about the circumstances surrounding the Appellant's return, does not establish that he would be at risk on return to Kabul. The burden is on him to establish that he would be at risk on return.

30. The Appellant gave oral evidence before Judge Devittie and he was found credible. He decided not to give evidence at the hearing before me and it follows that he was not cross-examined about his return to Afghanistan. There is no medical evidence relied on by the Appellant to establish that he was unfit to give evidence. Whilst there is no obligation on the Appellant to give oral evidence, he has failed to provide a further statement in response to the issues raised in Mr Walker's skeleton argument and there are still material questions unanswered about his return. This was made available to the Appellant at the hearing in December.
31. It is entirely understandable that the Appellant would take a risk to visit his dying mother and there is no reason to doubt that this was the motivation for his return. However, what we do know about the visit is that his brother-in-law in Dubai has contacts which extend to Kabul. I find that are close contacts (either family or very close friends). Javid Khan was willing to take a significant risk in driving the Appellant from the airport in Kabul to his home village (where the Appellant is at risk) and back again. There is no information about Javid Khan and why he was willing to put himself at risk to help the Appellant. It is clear that any logical conclusion that may have arisen prior to the Appellant's return to Afghanistan must now be considered in the light of this further evidence. The Appellant has not established that he does not have connections in Afghanistan and specifically in Kabul, either relatives or friends on whom he can rely. It is reasonably likely that the Appellant would have some level of support and be assisted in terms of accommodation and employment. In this context the risk of being tracked down is significantly minimalised. Dr Giustozzi's conclusions relating to tracking down were based on the Appellant returning to Kabul alone and without family or other connections; however this does not apply to the Appellant.
32. Mr Bazini submitted that Mr Avery did not made submissions that the Appellant would have family support in Kabul and therefore it was not open to me to make such a findings. Mr Avery in submissions made reference to family support and in any event, it is a reasonable inference from the evidence before me, that the Appellant would have the support of family and friends should he return to Kabul.
- 33 In terms of whether or not relocation would cause undue hardship, I have taken into account that he is currently in receipt of various medications for depression and associated complaints. It is also the case that he is at present not able to work because of this. However, the evidence does not establish that with support from family or friends he would not have access to treatment in Afghanistan and that he would not be supported. It is not unreasonable for him to relocate to Kabul in the light of this. In terms of financial support the natural inference is that he could be supported by his

brother in law who resides at in Dubai should he return to Kabul. I note that the Appellant's siblings live in Pakistan and may also be able to help him. The Appellant has not established that he would not be able to access treatment for his mental health problems in Kabul with family support. There is no medical evidence before me which would indicate that he has serious mental health problems that would deteriorate should he return.

34. The grounds of appeal are under the Refugee Convention and Articles 2 and 3. I have considered relocation in the light of the fact that the Appellant has been here for a significant period of time. There is no up-to-date evidence from his partner Ms Mikula and there is no reference to either his partner or daughter in his most recent witness statement. There is insufficient evidence before me that would establish that he has an ongoing relationship with either which would be material to relocation.

Decision

35. The Appellant's asylum claim is dismissed.

Signed Joanna McWilliam

Date 30 June 2016

Upper Tribunal Judge McWilliam

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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