Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/09291/2011
AA/02526/2010

THE IMMIGRATION ACTS

Heard at Birmingham City Centre Tower	**Decision & Reasons Promulgated**
On 16 March 2016	**On 31 March 2016**

Before

UPPER TRIBUNAL JUDGE PITT

Between

RB
NRB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Mair, instructed by Paragon Law
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

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

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs

otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This is the remaking of the Appellants' appeals on protection and Article 8 ECHR grounds. The matter comes back before the Upper Tribunal following remittal by the Court of Appeal in an order dated 16 October 2014. The specific direction in the order states that the remaking should deal with the "following discreet issues";

> "A. The safety and reasonableness of internal relocation: and
>
> B. The impact of the respondent's accepted failure to trace the appellants' families when they were minors, and the consequent benefit the appellants should receive under the corrective injustice principle. This will necessarily include an up-to-date consideration of the Article 8 right of the appellants."

3. The order from the Court of Appeal was accompanied by a Statement of Reasons. This reads as follows:

> "1. In summary the Appellants, Afghan nationals and paternal cousins, arrived in the UK as minors. They claimed asylum which was refused, although they were granted discretionary leave to remain as minors, and they appealed against the refusal of their asylum claims by the Respondent. They averred that they would face a real risk of serious harm in Afghanistan from the Taliban due to their imputed political opinion (i.e. their fathers administered and taught in a school in Baghlan province, and taught girls, and their families had been threatened and persecuted on that basis including the kidnap of the Appellants' brother/cousin). Furthermore, they averred that there is no sufficiency of protection or safe part of the country (and which would not be unduly harsh) to which they could internally relocate.
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> 2. The Appellants' appeals were each dismissed by a panel of the First-tier Tribunal (Immigration and Asylum Chamber) in determinations dated 24 February 2012 and 3 June 2010, respectively. The Appellants applied for and were granted permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) and ultimately the Upper Tribunal found an error of law such that their cases were linked and reheard in the Upper Tribunal. Positive findings from the First-tier Tribunal's assessment with regard to risk in their home area were preserved) (§16 of the Upper Tribunal determination).
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> 3. In a determination promulgated on 13 March 2013 Upper Tribunal Judge Hanson found that the Appellants would be at real risk of serious harm at the hands of the Taliban if they returned to their home area (§48) and 'that there was no sufficiency of protection from the authorities (§48).' These findings must be preserved for any future hearing.

4. However, Judge Hanson then went on to consider whether they could safely and reasonably be expected to relocate to Kabul, found that they could and dismissed their appeals on that basis.

5. On the issue of internal relocation, the UT did not expressly refer to the leading authorities (*Januzi and AH Sudan*) and at various points did not distinguish between the appropriate test for relocation, and the separate issue of whether the Appellants would face a risk of treatment in Kabul contrary to Article 3 ECHR. The Respondent acknowledges (a) that there are two significant passages in which the UT makes key findings where the issues are not properly distinguished (§59, §63), and (b) that it can be properly said that by virtue of not considering the proper test throughout the UT failed to give attention to the individual characteristics and background of each Appellant (see Lord Bingham in *AH Sudan* at §5).

6. The approach of the UT was to consider that the Appellants' position was no different from any other young man going to live in Kabul (§57, 59, 61), without considering sufficiently the individual position of the Appellants and in particular the fact that the Appellants' family had been subject of persecution, their brother/cousin kidnapped and that they had no contact with any family members. The Respondent agrees that had the UT considered their particular circumstances and the expert reports, it might have reached a different conclusion on the issue of undue harshness and reasonableness.

7. The Respondent agrees that the UT's approach to the question of affordable housing is also open to criticism (§54) on the basis that the UT concluded that housing would be available merely because there had been a fall in rental costs from their previously very high level, without addressing whether the fall in rental costs was sufficient to enable these Appellants to find somewhere to live.

8. The Respondent also accepts that the UT did not give any/any adequate reasons why it did not accept the expert evidence called on behalf of the Appellants as to the risk that their presence might come to the attention of the Taliban, especially considering the preserved findings in this case. It is accepted that the expert Mr Marsden in his report found that it is 'highly likely' that 'information on [the Appellants'] family history would reach the network of Taliban informants in Kabul, particularly in the southern neighbourhoods of the capital where they have a strong presence. It would not be difficult, in such a situation, for the Taliban to kill or abduct them, or forcibly recruit them. At the very least, I would expect them to be at high risk of being abducted and taken in for questioning by the Taliban. Once held by the Taliban, they would be particularly at risk.' He further finds: 'I would therefore expect [the Appellants] to face a greater level of risk of targeted action by the Taliban, if they were living in one of the Pushtun neighbourhoods of southern Kabul, than an individual who is not perceived as collaborating, either directly or through his or her family, with international military presence and within the Government of President Karzai.' Furthermore, the Respondent accepts that the UT does not give any/any adequate reasons for not accepting the expert evidence that there would be no sufficiency of protection against the Taliban in Kabul from either the Afghan National Police or the International Security Force (ISAF).

9. Furthermore the UT's treatment of the issue of tracing is incomplete in the UT's determination (§71 appears to be missing the whole or part of a sentence) and no clear finding was made on whether the Appellants were in contact with their family, which was denied (§38) and which appears to have been implicitly accepted at (§70). The Respondent also accepts as per *AA (Uganda) v Secretary of State for the Home Department, [2008] EWCA Civ 579* that the absence of evidence cannot be used to justify a positive finding (i.e. that there is no evidence to show that the mine-clearing uncle could not provide assistance and as such there are family in Afghanistan - (§71). However, the UT did accept that if the Respondent had undertaken to trace the Appellant's family when they were minors this may have made a material difference to the outcome of their asylum claims (§71). For these reasons the Respondent also accepts that the UT erred in law in a material way in considering whether the Appellants could benefit from the corrective injustice principle and this aspect of the determination will have to be remade.

10. The Respondent accepts that the matter should be remitted to the UT to reconsider the issue of internal relocation and the tracing point, which will necessarily include a consideration of Article 8 up to the date of the new hearing. The findings of risk on return to the home area and insufficiency of protection there are preserved (§48)."

4. The Statement of Reasons sets out the details of the Appellants' protection claims and the history of their appeals such that more is not necessary here. The finding from [48] of the decision of Upper Tribunal Judge Hanson promulgated on 26 February 2013 is as follows:

> "Based on the country expert's report and the profile of this family, who appear to be relatively well off but to have come to the adverse attention of the Taliban as a result of which the appellants were sent to the United Kingdom, I find it proved to the lower standard applicable to this appeal that if returned to their home area there is a real risk that whilst making enquiries to locate family members their presence will become known to the Taliban who would perceive them as targets. The country material makes it clear that should this happen they (sic) is no sufficiency of protection from the authorities in Kabul. It is therefore necessary to consider whether, if neither Appellant can return to their home area, there is an internal flight alternative to any other part of Afghanistan."

5. The submission for the Appellants before me was relatively straightforward given the preserved findings and the country evidence. The material on Afghanistan and threats from the Taliban in Kabul in particular showed that the situation for an individual with the profile of the Appellant's had become more difficult even than that identified in the reports of Dr Marsden. He has retired but provided a brief comment dated 3 March 2016 ([92] of the Appellants' bundle (AB)) to the effect that he considered that the high risk of identification and mistreatment by the Taliban in Kabul remained the same. The country evidence at [403] onwards showed that the situation in Kabul for these Appellants deteriorated in 2015 and 2016 after the withdrawal of international forces and upsurge in Taliban activity. The materials included numerous reports from 2015 and 2016 showing an increase in violent attacks by the Taliban in Kabul. The reports from Amnesty International [405 AB],

Human Rights Watch [424 AB], UNHCR [414 AB] and other sources [416, 422, 428, 431, 435 and 439 AB] confirmed that the last year has seen a notable escalation of civilian casualties and that the Taliban were a major source of those attacks, potentially as much as 60% or higher.

6. The evidence before me was therefore that the Appellants face a real risk of serious harm in their home area and in Kabul from the Taliban and that there is no sufficient protection for them. The risk of harm arises from their imputed political or religious opinions as members of a family perceived to be liberal or against the political or religious tenets of the Taliban. The Appellants have therefore shown that they are refugees and also entitled to protection under Article 3 ECHR.

Notice of Decision

7. The appeal is remade as allowed on asylum and Article 3 ECHR grounds.

Signed  Date: 18 March 2016

Upper Tribunal Judge Pitt