IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01471/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 April 2016	**On 9 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR SHIR KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Easty of Counsel
For the Respondent: Mr D Clarke, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan who was born on 1 January 1998.

2. The appellant appeals to the Upper Tribunal against the decision of Judge of the First-tier Tribunal Khan (the Immigration Judge) to dismiss his appeal against the respondent's decision to refuse him international

protection on asylum, humanitarian protection and on human rights grounds. Judge Khan's decision was promulgated on 15 February 2016.

3. On 29 February 2016 the appellant appealed the decision of the FTT to dismiss his appeal on the grounds that the Immigration Judge had been wrong not to adjourn the case to permit him to see a neurologist and because it was alleged that the Immigration Judge had not adequately considered, or considered at all, the objective evidence in support of the appeal.

4. On 10 March 2016 Judge of the First-tier Tribunal Grant-Hutchison gave the appellant permission to appeal because she found that the two grounds identified in the previous paragraph were at least arguable.

5. On 21 March 2016 the respondent in her Rule 24 response asked the Upper Tribunal to uphold the decision of the FTT.

Background

6. The appellant is a Pashtu speaker who claims to be from Nanjarhar. He is said to have arrived in the UK on 31 July 2012 and claimed asylum on 28 August 2012. The appellant has resided with a cousin (Mirwais Jabarkhyl) under the supervision of Social Services.

7. The appellant's application for asylum for human rights and humanitarian protection in the UK was refused on 8 March 2013. A subsequent appeal to the FTT was dismissed on 2 May 2013 but the appellant was given leave to remain until he reached 17 years and 6 months of age under the UASC policy. This expired on 1 July 2015.

8. The appellant submitted an application for further leave to remain on 26 June 2015. This was considered by the respondent on 18 September 2015. The respondent decided the appellant did not qualify for discretionary leave to remain in the UK. She considered that the appellant did not qualify for the grant of humanitarian protection in line with paragraph 339C of the Immigration Rules and her asylum claim was recorded as having been refused under paragraph 336 of HC 395 (as amended). The respondent also considered whether the appellant's family and private life rights under Article 8 of the ECHR would be infringed but decided that the appellant was not entitled to leave to remain in the UK on the basis of a private or family life here either.

9. It was the decision on 18 September 2015 to refuse further leave to remain that formed the subject matter of the appeal to Judge Khan which came for hearing on 1 February 2016. In his decision Judge Khan did not accept the appellant's account had concluded that the appellant could safely return to Afghanistan having regard to recent authorities.

The Upper Tribunal Appeal Proceedings

10. Detailed grounds of appeal were submitted on 29 February 2016. They criticised the Immigration Judge on a number of grounds. In particular, they contended that the Immigration Judge failed to grant an adjournment to allow the appellant to obtain expert evidence on the extent to which he was suffering from headaches. Secondly, it is said that the Immigration Judge had failed to have any regard to the objective evidence.

11. Judge Grant-Hutchison considered these grounds to be at least arguable and gave permission to the Upper Tribunal.

The Hearing

12. At the hearing I heard submissions by both representatives. Ms Easty submitted that her client's headaches had been referred to well before the hearing took place in front of the Immigration Judge. In particular, the Social Services had referred to them in the past and reference was made to them in the Immigration Judge's decision at paragraph 55 where he set-out the appellant's evidence that he had suffered from these since he was a child, having fallen from a roof. It was clear that the appellant had suffered from headaches for a long time. When the case came for hearing on 1 February 2016 there had been an application for an adjournment already which had been rejected. I noted from the Tribunal file that the application for an adjournment was made on 27 January 2016 but had been refused because there had been a recent pre-hearing review at which the appellant had not identified any need to obtain medical evidence. Ms Easty said her instructing solicitors had been notified of the appointment (with a neurologist) on 5 January 2016. She said that the headaches went to the issue of the appellant's vulnerability as a young adult in a violent country. I noted that a pre-trial hearing had taken place on 18 January 2016 but that no reference had been made to the need to obtain such evidence at that hearing. Ms Easty said that her client had been to see the neurologist and a report had been obtained but, she understood, it had not been served. The headaches in question were described by her as "debilitating migraines" which were sufficient to make her client a vulnerable individual.

13. Ms Easty went on to criticise the Immigration Judge's decision on the separate ground that it did not refer at all to the background material. She referred me to paragraph 48, which contained a summary of the findings, and paragraph 63. The case was put forward by Ms Easty on the basis that the principal international obligation engaged was Article 15 (c) of Directive 2004/83/EC ("the Qualification Directive"). That article defines "serious harm" as:

> "(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

14. The suggestion that her client was in no different position than others of his age was not accepted. Extensive background evidence had been referred to and expert evidence had been obtained from a Mr Foxley. That report (dated 9 July 2015) was difficult to find in the several hundred pages of documents relied on by the appellant. I was informed that it was produced before the FTT on the day of the hearing, as it had only been posted to the FTT on 28 January 2016. This was in breach of directions that had been made for the bundle to be filed by, I understand, no later than 5 days before the hearing. The bundle in my possession is date-stamped as having been received by Hatton Cross on 1st February 2016. I was particularly referred to paragraphs 16 et seq of Mr Foxley's report. It was said to deal with the deteriorating security situation in Afghanistan since 2012. My attention was particularly drawn to the security situation in Nanjarhar and Kabul. Ms Easty understood that the respondent proposed to remove the appellant to the latter. These places were no longer safe. She accepted that the Immigration Judge and the respondent had not had adequate time to consider the documents, although her predecessor (Miss Capel) had submitted a detailed skeleton argument. I was provided with a copy of that skeleton argument, which was unsigned and undated. Ms Easty could not assist me as to when it had been filed with the Tribunal. Nevertheless, by the end of the hearing before the FTT all the documents which were in the bundle (which had not all been received by the Tribunal in time for the start of the hearing) were copied to the Immigration Judge. Footnote 1 of the grounds of appeal explains this in detail. Ms Easty said that the background evidence supported her client's claim and demonstrated that on return to Afghanistan and in particular on return to Nanjarhar or Kabul he would be made subject to indiscriminate violence. Her client's claim exceeded the threshold set by Article 15(c) of the Qualification Directive. Given his vulnerable situation he would not be safe in Afghanistan. There would be a substantial risk on return therefore. No finding had been made by the Immigration Judge on internal flight.

15. I then heard from Mr Clarke. He submitted that the evidence did not exceed the threshold required to demonstrate that the appellant was at serious and individual risk of indiscriminate violence from an international or internal security situation. However, he acknowledged that the Immigration Judge had not dealt fully with all the evidence, especially the background evidence.

16. Mr Clarke then dealt with the two principal complaints about the decision of the FTT. He said that there had been a failure on the part of the appellant's representatives to prepare properly for the hearing, despite the fact that there had been a pre-trial review two weeks before the substantive appeal. The matter had been ongoing for four years and the appellant had been interviewed, had provided witness statements and previously appealed to Immigration Judge Lloyd. The Immigration Judge found Judge Lloyd's findings to be "sound" (see paragraph 51 of the decision) and decided they were the starting point for the assessment to be made by the FTT. As far as the late bundle was concerned, this had

been entirely the fault of the appellant's representatives but the documents were, in fact, before the FTT. As far as the medical evidence was concerned, no medical report had been produced before either the FTT or the Upper Tribunal. Mr Clarke noted that no application had been made to adduce fresh evidence before the Upper Tribunal. The Immigration Judge had dealt fully with the failure to obtain up-to-date medical evidence and the inconsistencies in the various explanations for the headaches. No evidence was put before the Immigration Judge that the appellant actually suffered from migraines as opposed to headaches. In any event the Immigration Judge had dealt with the headaches at paragraph 29-30 of his decision. It seemed to the Immigration Judge that the headaches became worse after asylum was refused. The case had been ongoing since 2012 and the appellant had every opportunity to obtain expert evidence prior to the hearing. He clearly had not done so. I was then referred by Mr Clarke to the case of **R (On the Application of Naziri) v Secretary of State for the Home Department [2015] UKUT 437 (IAC)** and in particular paragraph 85 which defines that "vulnerable groups" and "vulnerable people" as "... children, families, women without male relative(s) and individuals whose permanent residential areas are insecure ..." The appellant did not fall within any of these categories and had been amply able to deal with the proceedings. It was a leap of faith to say that he was within any vulnerable group.

17. Secondly, although Mr Clarke accepted the Immigration Judge should have dealt more fully with the objective evidence, it was clear from the country guidance case of **AK [2012] UKUT 00163 (IAC)** that the appellant did not fall within an "at risk" category for the purposes of Article 15(c) of the Qualification Directive. The evidence here showed that the appellant was not at risk. No justification for departing from the guidance in the case of **CG** had been shown. The Immigration Judge had dealt fully with the test in paragraph 16 of his decision. He had considered whether there was a real risk of indiscriminate violence in practise in his decision but concluded that there was not. It was submitted that the indiscriminate violence complained of must seriously endanger non-combatants. The evidence did not come close to that here. I was then referred to a document called EASO. EASO stands for "European Asylum Support Office." It was submitted that there was quite a small population in Nanjarhar Province (by reference to page 107 paragraph 2.5.2 of that document). In particular, the total population was 1.5 million or so of which about 2,000 were subject to incidents of violence. It was submitted that there had been no breakdown of law and order so as to cross the threshold to require international protection. None of the areas relevant to the appellant were areas of such high risk. Therefore, Mr Clarke submitted, the error was not material to the outcome.

18. Ms Easty then replied fully to the submissions made by Mr Clarke. She said that the idea that a proper analysis of Article 15(c) of the Qualification Directive could be dealt with by "breezing through it", as she accused Mr Clarke of doing, was insufficient. After lengthy argument a judge may

conclude that 15(c) is addressed adequately but only after lengthy argument. The refusal letter did not set out all the relevant evidence but was selective. It is necessary to reach a balanced decision having reviewed all the evidence. There had been an extreme deterioration in the security situation in the parts of Afghanistan to which the appellant might go in the last month or so. Certainly, the situation had been deteriorating over the previous years. The appellant was a vulnerable person. I was invited to allow his appeal because there had been an obvious error in that the Immigration Judge had made in not considered the objective evidence properly or at all. The ISIS had recently taken over Nanjarhar Province and the situation was very grave. A fresh hearing at which fresh evidence could be given if necessary supported by skeleton arguments and a proper consideration of the expert and objective evidence was called for. Ms Easty did not accept she had been given an adequate opportunity to address the issue of materiality at the hearing and considered it was necessary to hold a further hearing at which this could be done. She said that her submissions, just on that issue, would take up to two hours. I noted that the appellant's appeal had been listed with four other matters, many of which had been effective.

19. At the end of the hearing I reserved my decision as to whether there was a material error of law and if there were what steps should be taken to rectify matters. The hearing before me had lasted from 11.45am to 13.12 approximately.

Discussion

20. The appellant is an adult, having been born on 1 January 1998. The Immigration Judge dealt with his claim on that basis. He appeared through experienced Counsel instructed by a well-known firm of solicitors specialising in immigration work. The case was subject to a pre-hearing review on 18 January 2016, some fortnight prior to the substantive hearing. The appellant's solicitors were required to complete a reply notice indicating that they were ready in all respects for the substantive hearing which had already been allocated the date 1 February 2016. Shortly before the substantive hearing, but after the PHR, the appellant's representatives sought an adjournment of the case in order for the appellant to undergo medical examination by a neurologist. It seems that the appointment was not for medico-legal purposes but had been made by the appellant's GP on 5 January 2016, according to Ms Easty.

21. Against this background the appellant seeks to appeal the decision of the FTT to dismiss his appeal against a refusal of his application of leave to remain on asylum, human rights and humanitarian protection grounds, because it is said:

    (1) The Immigration Judge ought to have adjourned the case until additional medical evidence was obtained;

(2) The Immigration Judge had not taken adequate cognisance of the objective evidence relating to Nanjarhar Province;

(3) It is said that the Immigration Judge failed to give adequate reasons for his conclusion that the level of violence in Nanjarhar did not reach the threshold required for Article 15(c) of the Directive;

(4) That the Immigration Judge had not demonstrated that he considered the appellant's credibility "in the round" as he was required to do having regard to the country background evidence.

22. The grounds of appeal are not included on the relevant form dated 29 February 2016 but there is accompanying that form a document headed "appellant's application for an adjournment" which I assume is in fact intended to be the grounds of appeal to the Upper Tribunal.

23. Judge of the First-tier Tribunal Grant-Hutchison considered that Ground 1 (the Immigration Judge's finding that the appellant's headaches were, "more to do with the asylum hearing than an actual complaint") and Ground 2 (that the Immigration Judge had not "engaged" with the up-to-date background evidence in relation to Nanjarhar Province) were at least arguable. There was no application to expand those grounds of appeal by amendment at the hearing. Judge Grant-Hutchison did not expressly limit the scope for argument by imposing conditions on those grounds which could or could not be argued. However, in reality, Grounds 3 and 4 do not add materially to grounds 1 and 2.

Conclusions

24. I turn to consider the merits of the arguments presented by Ms Easty.

25. In relation to the submission that the appellant ought to have been given an adjournment to complete an appointment with a consultant neurologist, I have regard to the obligation on the FTT to decide cases fairly and justly having regard to the need to keep a lid on costs and avoid unnecessary delay under Rule 2 of the Tribunal Procedure Rules 2014. That overriding objective also required the parties and their representatives to cooperate with the Tribunal. I observe in passing that the Upper Tribunal Rules contain a similar obligation on the parties and their representatives to cooperate with the Upper Tribunal.

26. Unfortunately, the appellant's representatives fell well below the standards expected of them by serving a substantial bundle of documents the Thursday before a hearing which was due to start the following Monday (on 1 February 2016). This was outside the directions that had been given for a paginated and indexed bundle of all documents and a schedule of essential passages no later than five days before that hearing. This is all the more surprising given that there had been a pre-trial hearing only two weeks previously. I would also observe in passing that the

bundle itself is extremely unwieldy. It contains, in some places, three lots of numbering and no clear index of all documents. It is confusing and difficult to follow. Nevertheless, the Immigration Judge did his best to assimilate the documents in the time available and it is not contended that all the material documents were not in fact before him.

27. The appellant had an appointment with a treating consultant not for the purposes of a medico-legal report. The Immigration Judge was entitled to take the view that it was not contended that the appellant's headaches were likely to be life-changing or to have a significant bearing on his long-term health, given that they had continued for some time prior to the hearing. The Immigration Judge dealt with this longstanding complaint in his decision, at paragraph 29, referring to the fact that the appellant had nightmares and had been scared on occasions. It was his understanding that they had come on since the appellant had left Afghanistan (see paragraph 29). The Immigration Judge clearly took account of the fact that the appellant had been referred to a neurologist and that he may have ongoing headaches (see paragraph 46 and paragraph 55). He also took account of the appellant's claim to having suffered from headaches since he was a child, well before he came to the UK.

28. Exercising his case management powers as he was, the Immigration Judge was entitled to refuse a very late adjournment in circumstances where the appellant's representatives had not acted with an adequate degree of expedition. Additionally, it is not clear to me why evidence that the appellant has headaches is likely to have a significant bearing on the outcome of his appeal in any event. For these reasons the Immigration Judge was entitled to refuse the adjournment application. His unfortunate remark about the seriousness of the headaches being "more to do with the asylum hearing than the actual complaint" does not add anything to the submission that the Immigration Judge should have granted an adjournment, which I have rejected.

29. The second, and much significant, contention is that the Immigration Judge failed to consider properly the objective evidence. Mr Clarke realistically recognised that the decision had not demonstrated sufficiently that the Immigration Judge had weighed up the objective evidence before reaching his decision. However, it was submitted by Mr Clarke that he had in fact taken into account that evidence, as he said at various points in his decision, and that his failure to refer to specific passages was not a material error of law given the Immigration Judge's overall conclusions were ones he was entitled to come to having had regard to that background evidence.

30. I note that the Immigration Judge correctly referred to the burden and standard of proof in relation to asylum, human rights and humanitarian protection and stated in paragraph 17 that he had considered <u>all</u> the evidence in the case. In paragraph 21 of his decision he correctly identified that the risk to the appellant allegedly came from the Taliban.

He found that the respondent and a previous Immigration Judge (Judge Lloyd) had thoroughly considered the appellant's claims. The Immigration Judge took into account the findings by Judge Lloyd who had fully considered the reasons given by the respondent and by who, in 2013, had found the appellant's account "inconsistent" with the objective evidence. The Immigration Judge said he took full account of all the submissions made, including those contained in the skeleton argument by Ms Capel. This document also appears to have been handed in at the hearing and does not contain any date. Nevertheless, it contains extensive reference to objective evidence. The Immigration Judge made specific reference to it in paragraph 17 of his decision.

31. There is no suggestion anywhere that the Immigration Judge did not consider all the documents. Indeed, despite being burdened with a very substantial bundle at short notice he expressly said that he had considered all the documents in paragraph 25 of his decision. He took full account of the fact that the appellant claimed to have an imputed political opinion but found the appellant's account incredible. He noted that the appellant had an aunt and other family members in Jalalabad. The Immigration Judge completely rejected the evidence given by the appellant and his cousin who he found incredible and inconsistent. He said that both appeared vague and evasive. Immigration Judge Lloyd's findings also informed his conclusion that the appellant's family were in fact contactable. The appellant's evidence that he lacked family in Afghanistan was described by the Immigration Judge as "made up" and he clearly concluded that the appellant had a family support network in place in paragraph 52 of his decision. He considered the risk on return to the appellant at paragraph 58 but concluded there was no risk or no material risk in "the Province" by which he meant Nanjarhar. The Immigration Judge concluded that the appellant was in no worse a position than a number of young people of his age and he did not accept that his headaches or previous young age made him a vulnerable individual in a way that should be reflected in the outcome of the appeal.

32. As I have already identified, the Immigration Judge failed to show that he looked at the objective evidence in full. Nevertheless, the question before the Tribunal is whether the objective evidence at the date of the hearing was such as to justify the conclusion that the Immigration Judge's conclusions were unsustainable. The respondent had referred to the EASO report in an earlier edition in her refusal (see paragraph 13 of the refusal letter). I note that the latest edition of the EASO report was yet another document handed in at the hearing (see footnote 2 of the grounds of appeal). I have already commented on the difficulty faced by the Immigration Judge in assimilated and collating such a large volume of material which was so poorly presented. Nevertheless, I have concluded that the Immigration Judge did take into account the objective evidence and reached clear conclusions that he was entitled to come to. He fully considered both the submissions made including the submissions made by Ms Capel which involved looking at the objective evidence in detail. As Mr

Clarke has submitted, in any event the evidence does not establish that the levels of violence in Nanjarhar are such as to show that the appellant would be at risk on return as at the date of the hearing. The levels of violence, proportionate to the size of population, do not appear to cross the threshold where it may be said that the appellant would be at risk of indiscriminate violence.

33. Ms Easty submitted that in addition to the one and a half hours for oral submissions before the Upper Tribunal she required an additional two hours to refer to extensive passages in the objective evidence which went to the issue of "materiality." She made this submission after she had concluded her main submissions which were said to establish that the Immigration Judge had erred in law. Having regard to the fact that the grounds of appeal before the Upper Tribunal make extensive reference to the objective evidence as does the skeleton argument submitted by her colleague Ms Capel and having regard to the need to manage cases efficiently and fairly I did not consider it to be in the interests of justice to allow Ms Easty a free rein over the objective material. Hers was one of four effective appeals in my list that day and there had been no prior indication that her case required a time estimate of three and a half hours. Therefore, exercising my case management powers I limited the argument to a brief reply to the submissions made by Mr Clarke, Ms Easty already having had a full opportunity to address the Tribunal. I noted that Ms Easty addressed the Tribunal for longer than the respondent.

34. I note that the appellant's cousin with whom he has lived since he has been in the UK referred to the possibility of the appellant living in Kabul in his witness statement (at paragraph 15) drawing attention to the fact that the appellant had not lived on his own, would have nowhere to live and so forth. However, the security situation in Kabul is not the thrust of the attack on the FTT before me (see paragraph 7 of the Grounds). The FTT is said to have erred by not considering the objective evidence relating to Nanjarhar. I am satisfied having done so there was no material error of law in the decision of the FTT despite the inadequacies of the decision alluded to above. The decision was underpinned by a number of adverse credibility findings (see paragraph 55) and by the fact that the Immigration Judge took as his starting position the findings of the earlier tribunal.

Notice of Decision

I find there was no material error of law in the decision of the FTTT and this appeal is therefore dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury