



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02441/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5 July 2017

Decision & Reasons Promulgated
On 12 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

A R
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton of Counsel instructed by Duncan Lewis & Co.

For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge N M Paul dismissing the Appellant's asylum appeal in a decision promulgated on 25 April 2017.
2. The Appellant is a citizen of Afghanistan whose personal details are a matter of record on file. He claims to have arrived in the United Kingdom clandestinely on 10

June 2016. On 14 June 2016 he underwent an Islamic marriage ceremony with Z, a refugee in the UK to whom he had been engaged whilst living in Afghanistan.

3. The basis of Z's grant of refugee status is founded in the same circumstances upon which the Appellant advances his own claim for protection. This is summarised starting at paragraph 2 of the Decision of the First-tier Tribunal Judge herein. It is said that the Appellant and Z, who was a cousin of his, had become engaged at a relatively young age but that in February 2015 Z's parents were approached by one S. S was a senior military commander and a political figure of some considerable influence acquainted with Afghani war lords. He was also the commander of the police within Mazar-e-Sharif. S approached the parents of Z indicating that he wished to marry her. The parents refused this request and in consequence Z's father was beaten. Arrangements were thereafter made for Z to move to Kabul, and later on indeed she left Afghanistan and made her way to the United Kingdom. After Z's departure the Appellant returned to his family home where he was later attacked by S resulting in him being hospitalised for two weeks. He then in effect went into hiding and in due course also left Afghanistan. It should perhaps be briefly observed at this stage that the Appellant's history also includes a period of time pre-dating these events where he was present in Europe travelling between Turkey, Greece and Italy but then returning to Afghanistan.
4. Z departed Afghanistan in 2015. Details of her case are set out in the decision of First-tier Tribunal Judge Callender Smith, (Ref.No. AA/12055/2015), promulgated on 1 February 2016. It may be seen from that decision at paragraph 4 that Z's case was based on her fear that she would be forced to marry S who would then abuse her. The background to Z's case is set out at paragraph 10 of the decision of Judge Callender Smith and includes references to the Appellant herein. In particular it is noted that at the time of the approach by S she was already engaged to the Appellant. It is also indicated that following the assault on her father the Appellant was instrumental in escorting her to Kabul. In the context of Z's case the Secretary of State acknowledged that women in Afghanistan could form a particular social group. The decision of Judge Callender Smith notes that a country expert report was prepared by Dr Antonio Giustozzi dated 1 January 2016: the report provided particular information about S, his background position and influence. The same report was included in the Appellant's bundle before the First-tier Tribunal in the instant case.
5. The Judge in Z's case made the following findings at paragraphs 27 to 30:
 - “27. On the documentary and oral evidence that I have heard and considered in this appeal I find the Appellant's account (as has the Respondent) cogent and credible.
 28. The issue is not whether threats were issued to her and her family by [S] but whether she is someone who can return to Afghanistan and live safely if she relocated to somewhere like Herat.

29. *I note that her father was hospitalised having been beaten up by [S] with the butt of his gun and that her fiancé [the Appellant herein] was directly threatened by [S] and in effect warned off continuing any relationship with the Appellant or assisting her in any way.*
 30. *Central to this appeal is the issue of the power and the reach of [S] as a Police Commander with powerful political friends."*
6. The Judge then sets out something of the evidence that was before him with particular reference to the country expert's report and then states the following conclusions at paragraphs 38 to 40:
38. *It is of note that at paragraph 10 of the expert report it is stated that [S] is married with two wives but "has a reputation for harassing young girls and for forcing them into forced marriages. His position in the police and the protection he enjoys from Atta prevent families and individuals from bringing him to justice."*
 39. *[S] is clearly a thoroughly unpleasant and dangerous individual and there is every reason why this Appellant fled from his attentions to seek safety and asylum in this country.*
 40. *The final paragraph of the expert report confirms my view. It is stated that [S] is one of the closest associates of Atta Mohammed Noor, one of the main powerbrokers in Afghanistan and the dominant personality in the North. Despite having been involved in criminal activities and in abuses against women, he has never been prosecuted thanks to the political protection he enjoys."*

On that basis the Judge concluded that Z was a refugee as defined by Article 1A(2) of the 1951 Refugee Convention.

7. The Judge additionally observed as follows at paragraphs 43 to 48:
43. *I have found that [S] is someone of considerable influence. He 'casts a long shadow' and - given his attacks on both the Appellant's father and fiancé - is unlikely to change his attitudes or approaches in the future.*
 44. *This leave the Appellant at significant risk if she returns to Afghanistan and makes the prospect of any kind of relocation unsafe for her because of the long reach [S] would have to find out where she might be.*
 45. *He is someone who could use all the intelligence sources of the state to find out about her whereabouts and to cause her further distress and potentially direct harm.*
 46. *There is insufficient protection available to this particular Appellant on return to Afghanistan. The very person she fears on return is part of the state that she*

would need to turn to for protection and, from the evidence I have seen, he is the person who would prevail rather than anyone else in this situation.

47. *I note from the Respondent's 2015 OGN on Afghanistan (at 3.2.9/3.2.10) that women with a male support network may be able to relocate internally but that women cannot rely on protection from the Afghan authorities and it would be unreasonable to expect lone women and female heads of household to relocate internally.*
48. *In the unusual circumstances of this appeal, the Appellant is a lone woman. Her father has been unable to give her any protection - and has landed up in hospital as a result resisting [S] - and her fiancé is unlikely to wish to take on the baleful power and influence of [S]."*

8. I pause to make a brief observation in respect of paragraph 48. Although it is clear that the Judge in Z's case ultimately found the Convention reason to be membership of a particular social group being 'lone women', it is to be noted that with regard to the assaults that had taken place on Z's father and fiancé, such assaults were indicative of the fact that even if in the company of male relatives she - and they - were not safe from the attentions of S.
9. The Appellant herein advances his claim against the background set out in Z's case - although he gave some detail as to the circumstances and events that befell him after Z had been taken to Kabul and he had returned to his family home. This may be seen in his witness statement dated 25 January 2017: see in particular at paragraphs 12, 17 and 18. At paragraph 12 he refers to his return to his home and being beaten by S with his men and warned that if they found that it was him that had helped Z to escape from Mazar-e-Sharif or Afghanistan they would kill him. He describes thereafter going into places of hiding and then at paragraph 17 states that during that period S's men went to his home looking for him and similarly, at paragraph 18, that there was a raid on his house and documents were sought with a view to implicating him in some criminal behaviour.
10. The Respondent refused the Appellant's application for protection for reasons set out in the 'reasons for refusal' letter ('RFRL') dated 9 February 2017. At paragraphs 19 and 20 of the RFRL the Respondent asserted that the Appellant's claim did not engage the Refugee Convention because there was an absence of Convention reason for his feared persecution or feared harm. This is repeated at paragraphs 46 and 47 of the RFRL.
11. So far as the facts were concerned the Respondent observes the following at paragraph 24:

"It is accepted, to the lower threshold and with the assistance of the appeal determination of Immigration Judge Callender Smith dated 01-02-2016 that [S] wanted to marry [Z]."

Thereafter the Respondent makes reference to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and associated case law, before observing that the Appellant had not claimed asylum en route to the UK and indeed had not claimed asylum immediately upon arrival.

12. At paragraph 28 of the RFRL the Respondent restates that the facts as set out at paragraph 24 (quoted above) were accepted. Nothing further of substance is said about the facts underlying the Appellant's claim save that in respect of his subjective fear it is said at paragraph 30 that "*in light of the above conclusions it is not accepted that you have a genuine subjective fear on return to Afghanistan*".
13. The "*above conclusions*" in context can only mean the adverse 'section 8' consideration. It is difficult to see in circumstances where the Respondent accepted the essential truth of Z's case, accepted the relationship between Z and the Appellant, and where the Appellant had indicated that in addition to fleeing Afghanistan he was motivated by a wish to be with his fiancée, that the failure to claim asylum *en route* to the UK, or indeed to claim asylum until after he was married, could have weighed so significantly heavy in the overall balance that it destroyed any other aspects of the credibility of his claim.
14. Be that as it may, the remainder of the RFRL essentially goes on to reject the Appellant's claim to have a well-founded fear of persecution by reference to sufficiency of protection or alternatively internal relocation.
15. Nothing in the passages set out by the Respondent under the headings of 'sufficiency of protection' or 'internal relocation' expressly engages with the findings and reasonings of Judge Callender Smith in respect of the hopelessness for Z of approaching the authorities for protection, or the difficulties that she might experience in seeking to relocate. Whilst necessarily Judge Callender Smith's findings were in the context of Z's case, it is difficult to see how, provided with such findings, and in the light of the acceptance of some such findings at paragraph 24 of the RFRL, the decision-maker did not consider it necessary or appropriate to descend to some sort of consideration and analysis so that the Appellant might have better understood why those favourable findings in Z's appeal were not considered to be of great assistance to him in his own claim.
16. Nonetheless, the Respondent accepted the fact of the Appellant's relationship with Z, noted that Z was due to give birth to their child in March 2017, (Z and the Appellant are indeed now the parents of a child), and at paragraph 54 indicated that in such circumstances the Appellant would be granted discretionary leave to remain by reference to Article 8. The covering page of the RFRL identifies that the Appellant was granted 30 months' leave to remain to expire on 9 August 2019. I pause to note that this was not leave directly 'in line' with the leave granted to his partner.
17. Notwithstanding the grant of discretionary leave to remain the Appellant appealed against the refusal of protection to the IAC.

18. The appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Paul promulgated on 25 April 2017.
19. I do not propose to recite at length the Decision of Judge Paul (see further below) but do make the following observation in respect of paragraph 6. It is apparent that the Appellant was asked by the Respondent's representative to consider the apparent absence of any harm to family members. The Judge records the following:

"He then confirmed to [the Presenting Officer] that no other harm had come to her family since her departure, and that as far as he was aware no further threats had been made to either their respective families since he had been in the United Kingdom. However, he added that it would be a matter of 'honour' if they were to come after them if they returned to Afghanistan."

20. Much of the Judge's determination is a recitation of the background facts and the respective submissions: it is not until paragraphs 16 and 17 that anything appears by way of specific reasoning on the facts of the particular case. Indeed there is nothing beyond paragraphs 16 and 17 that might be characterised as constituting reasoning with regard to the outcome of the appeal. In those circumstances it is appropriate to quote those paragraphs in full:

"16. This case is concerned with whether the appellant can establish that he is a victim of persecution. In my view, he cannot. He has not established that he is a member of any particular social group and is not able to rely on the fact that, simply because he is married to his spouse, that he becomes (by osmosis) entitled to protection on the basis that she had been granted protections which, in any event, was only extended to her on the basis that she was a lone woman. The appellant's own history is an interesting one because, on his own account, he had previously left Afghanistan and had spent time in Europe before deciding to return to Afghanistan. He had a background working for an oil company and, in his witness statement, alludes to the fact that there had been previous problems based on allegations of corruption which had caused him to flee. In my view, the appellant is a resourceful and experienced man and does not (in my view) fall to be treated as being linked to his wife in the same way that perhaps might be the case if he was a woman in traditional culture dependent upon the safety and sanctity provided by a husband.

17. *This is not in any way to undermine the findings made by the previous decision in respect of his wife. But it does involve considering the fact that there has been no continuing of threats in relation to his or his wife's family, and that whatever the position might have been in 2015, it is highly unlikely that there would be any long-term consequences at this stage. In any event, those findings were not germane to the critical question as to whether or not he is able to establish on the facts that he has relied on that he qualifies for refugee protection."*

21. The Judge then concludes the decision by stating that the appeal is dismissed “*on refugee grounds and humanitarian grounds*”.
22. It may be seen from paragraphs 16 and 17 whilst there is direct consideration of Refugee Convention reasons, there is no finer consideration of issues of ECHR Articles 2 and 3 or otherwise the principles of humanitarian protection.
23. The Appellant applied for permission to appeal to the Upper Tribunal which was granted on 24 May 2017 by First-tier Tribunal Judge Cruthers. Judge Cruthers considered that it was arguable that the Judge had taken in isolation a single paragraph from the decision in Z’s appeal in respect of protection as a lone woman and had accordingly not given full weight and consideration to the import of that decision. It was also considered arguable that the Judge had not made sufficient findings on the core asylum account of the Appellant.
24. As I have indicated above, it is paragraphs 16 and 17 that contain the entirety of the material reasoning in the decision of the First-tier Tribunal. Nothing else in the decision is present by way of case specific reasons. With all due respect to the First-tier Tribunal Judge, even the well-informed reader has to work very hard to take much by way of understanding from these paragraphs. In my judgment they lack clarity. There is no very obvious finding present in respect of the Appellant’s history. There is no very clear engagement with the Convention reason issue as recorded at paragraph 12 of the decision as having been argued on behalf of the Appellant by his representative with regard in particular to the case of **K & Fornah [2006] UKHL 46**. I have already noted that there is no particular alternative engagement with issues in relation to the ECHR and humanitarian protection. The second half of paragraph 16 is not obviously relevant to the issues that were germane to the appeal – notwithstanding that they were, in the Judge’s inconclusive observation, “*interesting*”.
25. What sense might then be made of these passages?
26. In the first instance it seems to me that the first half of paragraph 16 and the final sentence in paragraph 17 appear to be addressing the issue of Convention reason. I have already noted that it was the Respondent’s case in the RFRL that the Appellant’s appeal did not engage the Refugee Convention. In contrast the Appellant’s representative argued that it did by reference to the case of **K & Fornah**. In my judgment the opening half of paragraph 16 does not engage adequately with those submissions and arguments in respect of each of the parties to the appeal. However if the appeal rested on this point alone I would likely not be minded to interfere with the decision in the appeal. In my judgment, albeit that there is an absence of clear reasoning, the Judge has reached the appropriate conclusion in respect of Refugee Convention reason. I invited submissions today in this regard and there is nothing pursuant to those submissions that persuades me that this is a case that engages the Refugee Convention.

27. It seems to me that the real difficulty for the Appellant in this regard is that he was not targeted whilst in Afghanistan as a family member *per se*, but was targeted either or both because he was a love rival of S, and S suspected him of assisting Z to escape him. This indeed is underscored by the fact that the risk that had eventuated to the Appellant and resulted in his ill-treatment whilst in Afghanistan had occurred at a time when he was not married to Z and therefore was not a family member and could not be said to be a member of a common particular social group with Z. The current fear it seems to me is essentially the same fear that the Appellant had prior to his departure - and necessarily prior to his marriage to Z - which therefore can be seen not to be contingent upon the fact of marriage but instead to be a result of personal animosity on the part of S for the Appellant's role in frustrating his sexual ambitions towards Z. This is essentially a personal dispute.
28. In my judgment the way in which the Appellant responds to question 55 in the asylum interview is instructive. He is asked, "*So if [S] wanted to marry your wife and she is no longer in AFG why would he still be after you?*", to which the Appellant replied, "*I was involved with her escape. Those commanders are those types of people and cannot accept to be shamed in society or cannot accept humiliation*". It seems to me that that is echoed by the Appellant's answer to the Presenting Officer at the appeal hearing when he was asked why there would still be a problem if his and Z's families were no longer being threatened, and he responded that it would be a matter of 'honour'.
29. In my judgment the real reason for the Appellant being targeted is the personal animosity that has arisen between him and S by reason of those past events which, as I say, do not relate directly to his now marriage to Z. In my judgment the risk to the Appellant does not arise for the same reason as the risk to Z in Convention terms, and does not arise for any other Convention reason.
30. Accordingly, in those circumstances, as I say, I would not be minded to find the brief and poorly-reasoned treatment in respect of the Convention reason issue to be a material error of law. That leaves then the question of risk, the possibility of engagement of Article 2 or 3 of the ECHR, and the establishment of an entitlement to humanitarian protection.
31. I have already indicated - and indeed as is manifest from any reading of paragraphs 16 and 17 (quoted above) - that the Judge makes no clear findings as to the narrative of the Appellant's account or indeed as to his credibility. At best it might be said that the Judge proceeded on the basis of an acceptance of the Appellant's narrative and credibility although this is not overt. It might be said that in stating that his conclusions at paragraph 16 did not "*in any way undermine the findings of the previous decision in respect of [Z]*" the Judge was in substance accepting that all of the findings made by Judge Callender Smith stood, and that there was no reason shown to depart from such findings.
32. If that be the case - and as I say it does seem to lack any clarity of reasoning - but if, generously, that be the case the decision of the First-tier Tribunal Judge essentially

comes down to the following two matters: that there had been no continuing threats in relation to the Appellant's or Z's family; and that the passage of time since 2015 made it "*highly unlikely that there would be any long term consequences at this stage*".

33. Mr Eaton urges on me the proposition that the Appellant had indicated continuing threats in relation to him whilst he was in hiding in Afghanistan. That may be so, but I suspect what the Judge had in mind was the Appellant's answer already quoted above at paragraph 6 of the Judge's decision that there had been no threats to either of the families since the Appellant's own departure from Afghanistan. However what that fails to do is to engage with the matter that the Appellant asserted both at question 55 in interview and again in his evidence before the Judge: that his reappearance in Afghanistan would mean that as a matter of honour - which might encompass notions of vengeance and/or to preserve status or standing - S would seek to visit harm on him again. The Judge fails to engage with that aspect of the case or otherwise offer any reason as to why there would not be a risk in this regard. This is particularly pertinent in circumstances where Judge Callender Smith had found at paragraph 43 of his decision that S was unlikely to change his attitudes or approaches in the future. To a very large extent the failure to engage in this aspect of the Appellant's case also undermines the Judge's stated finding that the passage of time rendered it highly unlikely that there would be any long term consequences. Mr Armstrong acknowledged during the course of submissions that the Judge does not appear to have offered any reasons in support of such a finding. Indeed in my judgment it is pure supposition, and moreover is supposition without any attempt to engage in the assertion of the Appellant or the findings of Judge Callender Smith. As I have observed, it has nowhere been suggested that the findings in Z's appeal should be deviated from in any material respect; indeed the Judge himself seems to acknowledge that those findings were "*not in any way to [be] undermine[d]*". If that is the case it is difficult to reconcile Judge Paul's ultimate conclusions with such findings: certainly Judge Paul offers no such reasoned reconciliation.
34. For those reasons I do find a material error of law in the approach of the First-tier Tribunal. The decision lacks clear findings and clear reasons. The error is such that the decision of the First-tier Tribunal Judge must be set aside.
35. I turn then to the issue of remaking the decision in the appeal. After discussion with the representatives I am content that it is appropriate to remake the decision in the appeal without further evidence. The Respondent's case is clear with reference to the RFRL and the observations made by Mr Armstrong during the course of the hearing today. Essentially, without necessarily going behind the primary facts of the Appellant's narrative account, the Respondent observes that the Appellant at no point sought to avail himself of the protection of the authorities in Afghanistan; the Respondent also prays in aid in this regard - as per the First-tier Tribunal Judge - the passage of time, and otherwise points generally to the availability of state protection. As regards the Appellant, Mr Eaton essentially relies in respect of risk on the acceptance - or an invitation to accept - the narrative account of the Appellant, the findings of Judge Callender Smith based on substantially the same evidence that was

before the Tribunal herein, the absence of any evidence to suggest any material change in country situation since the expert report was filed in Z's case, and moreover also directs my attention to the case of **RQ [2008] UKAIT 00013** which is a country guidance case which in effect suggests that where a person has been individually targeted there is not inevitably effective state protection upon relocation even in Kabul.

36. I prefer the submissions on behalf of the Appellant. It seems to me that the findings of Judge Callender Smith may be adopted for the purposes of this appeal, albeit that such findings require to be viewed through the prism of the fact that I am looking at a different Appellant. The findings so far as Z's history are concerned have been expressly accepted by the Respondent; as regards country situation and the status and standing of S, nothing has been advanced to suggest any material change of circumstance. Accordingly, in substance the findings of Judge Callender Smith provide very good reasons why, just as it would not have been helpful for Z to approach the authorities for protection, it would not have been to the Appellant's benefit to approach the authorities in Afghanistan for protection, and would not presently be of benefit – "*[S] is the person who would prevail rather than anyone else*". Equally the findings in respect of the 'long shadow' of S and the lack of likelihood of him changing his 'attitudes or approach' apply equally to the Appellant's case. In my judgement such a person who maintains a position or status through a combination of force and threat, it may be reasonably inferred, will reasonably likely 'follow through' on any such threats lest he be considered to display weakness otherwise. In those circumstances I find that there is a risk to the Appellant upon his return to Afghanistan of serious harm such as to engage either or both Articles 2 and 3 of the ECHR with no prospect of availing himself of state protection or avoiding such harm by internal relocation.
37. For the reasons already indicated I do not accept that the Appellant's case engages the Refugee Convention.
38. In consequences I remake the decision by allowing the appeal with reference to Articles 2 and 3 of the ECHR and thereby pursuant to the principles of humanitarian protection.

Notice of Decision

39. The decision of the First-tier Tribunal was flawed for material error of law and is set aside.
40. I remake the decision in the appeal. The appeal is allowed on humanitarian protection grounds
41. An anonymity direction is made, not least to provide consistency with the anonymity direction still in force in respect of the Appellant's wife's appeal, and to maintain her anonymity.

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.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **11 July 2017**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

A fee award would be appropriate but there is no fee paid so no award is to be made.

Signed:

Date: **11 July 2017**

Deputy Upper Tribunal Judge I A Lewis
(in capacity of a Judge of the First-tier Tribunal)