**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/04927/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 20th November 2018** | **On 18th December 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**USMAN [O]**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr D Sellwood of Counsel, Duncan Lewis & Co Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Afghanistan born on 1st January 1999. The Appellant left Afghanistan around March/April 2015 making his way via Turkey and European countries before arriving in Calais. He arrived in the UK on 28th June 2015 in the back of a lorry and claimed asylum on arrival. The Appellant's claim for asylum was based on a well-founded fear of persecution in Afghanistan on the basis of interest shown by the Taliban. That application was refused by Notice of Refusal dated 11th May 2017.

2. The Appellant's appeal came before First-tier Tribunal Judge Burns sitting at Taylor House on 19th February 2018. In a decision and reasons promulgated on 26th February 2018 the Appellant's appeal was dismissed on all grounds.

3. The Appellant lodged grounds of appeal to the Upper Tribunal. Those grounds initially came before First-tier Tribunal Judge Landes who on 27th March 2018 refused permission to appeal. Renewed Grounds of Appeal were lodged to the Upper Tribunal on 15th May 2018 and on 8th October 2018 Deputy Upper Tribunal Judge Chapman granted permission to appeal. Judge Chapman noted that the Grounds of Appeal asserted that the judge erred materially in law in:

   (i) in making irrational findings in respect of the risk of harm to the Appellant in his own village;

   (ii) in failing to consider the evidence of the Appellant's mother recorded by Claire Murphy;

   (iii) in making findings without evidence at paragraph 43 of the determination in respect of the Appellant's family members;

   (iv) in failing to consider relevant country evidence as to the risk in Baghlan from the Taliban;

   (v) at paragraph 32 of the decision in failing to consider relevant case law/guidance, namely the authority of *AA (Afghanistan) CG [2012] UKUT 00016 (IAC)*;

   (vi) in taking an unlawful approach to relocation at paragraph 41; and

   (vii) in taking an unlawful approach to the Article 8 claim.

4. Judge Chapman noted that the First-tier Tribunal Judge had accepted the basis of the Appellant's claim that his father had been murdered by the brother of a Taliban commander who had then been arrested and imprisoned as a result of which threats were made to the Appellant and his family as recited at paragraph 28. Judge Chapman considered that it was arguable that the judge had erred materially in law in his assessment of risk on return, internal relocation and Article 8 in light of the fact that the Appellant's brother's asylum claims have not yet been determined.

5. There is no Rule 24 response. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel Mr Sellwood. The Appellant does not appear in person. Mr Sellwood believes that the Appellant is detained at home where he has responsibilities for looking after his two younger brothers. The Secretary of State appears by his Home Office Presenting Officer Mr Clarke.

**Submission/Discussions**

6. There are, I note, seven grounds upon which the Appellant relies and in considerable detail Mr Sellwood takes me through these cross-referencing and referring to the paragraphs in the decision. Mr Clarke in similar vein goes into considerable detail and very thoroughly presents a contrargument. It is fair to say that both submissions involve an assessment of what is set out in the decision particularly at paragraphs 27 through to 42. They have addressed the paragraphs as set out in order in the Grounds of Appeal albeit they acknowledge that some paragraphs are of greater significance than others.

7. Mr Sellwood's starting point is that the judge's findings at paragraph 32 that there would not be an ongoing risk of harm in the Appellant's home village and that the Appellant wished to stay in the United Kingdom for economic reasons as set out at paragraph 45 was not sustainable on the basis of it being irrational. The judge has concluded that the Appellant would not be at risk in his home area and Mr Sellwood submits that that is an unreasonable and unsustainable finding. He points out that it has been accepted that the Taliban had made inroads into the state and that the Appellant's family had been punished. The judge accepts at paragraph 28 that the Taliban had killed the Appellant's father and submits that the Appellant was also at immediate risk as a result. However, he points out that the judge has relied on a perceived misconception, set out at paragraph 21, that the Appellant's siblings remain in Afghanistan. He acknowledges that that is actually what is said in the Appellant's witness statement but reminds me firstly that the Appellant was a minor when making that statement and secondly, and importantly, that was made in 2015 when such facts were correct. He reminds me that the Appellant's brothers fled Afghanistan in 2016. He submits that it is irrational that having accepted past threats and past persecution that the judge finds that there would not be an ongoing risk particularly given the prevalence and methods used by the Taliban. Further he submits that the suggestion that is made by the judge at paragraph 29 that the dispute is a local dispute does not sit well with the background evidence, the factual matrix and the evidence provided to the Tribunal by Ms Claire Murphy. In concluding that the Appellant's brothers had lived in the village after the attack he fails to take into account their subsequent fleeing and Ms Murphy's evidence and submits that his findings at paragraphs 31 to 33 do not take into account Ms Murphy's evidence, which he submits fundamentally undermines what he ultimately concludes.

8. He turns to the evidence of Claire Murphy. He emphasises the importance of her evidence. He points out that she was a representative of the Refugee's Council who had spoken to the Appellant's mother and he makes reference to her evidence at paragraph 27 of the First-tier Tribunal Judge's decision. In particular the telephone conversation that she had with the Appellant's mother in Afghanistan. He points out that the Appellant's mother confirmed that her daughters and mother-in-law and her own brother reside in the vicinity of her village and that the situation therein is not good. He submits that these factors and the evidence of Ms Murphy are highly relevant to the continuing risk and whether the

suggestion that the family could relocate is unduly harsh or practical. He submits that on her own evidence it would have been very hard for the Appellant's mother to go anywhere else and that had the judge given full and proper consideration to the evidence as produced by Ms Murphy he would have come to a different conclusion.

9. Thirdly, he looks at the evidential findings and submits that there is nothing in the determination which creates a summary of the evidence at the hearing and that there is no suggestion in the witness statements produced as to the position of the three brothers. However, he points out that if their claim was based on the same factual basis as the Appellant, if his claim fails theirs would too.

10. He notes that the judge has failed to consider the risk of harm to the Appellant and his position under Article 15(c) and that he has not considered, nor applied the authority of *AA* and indeed has only made passing reference at paragraph 44 to the fact that the Appellant would be relocating as an unattached and unaccompanied minor (now a young adult). He points that it would be necessary for the Appellant to return through Kabul and that there are problems in reaching his home village and that it is highly material to note that the Appellant had never been to Kabul so the question of whether he would be an unattended minor is relevant and therefore the Appellant is entitled to seek protection under the country guidance authority of *AA*.

11. He takes me to paragraphs 33 and 34 of the decision which relate to the Country Policy Information Note on Afghanistan. What however he submits the judge has not done is to apply an unreasonably harsh or reasonableness test and to analyse the evidence. He remines me that the Appellant has never lived in Kabul, that he is a minor, has no education, has hearing disabilities, has had no work experience and that his mother is uneducated. He submits that if the UNHCR Guidelines had been considered it would be appropriate for the Appellant if he is to relocate to be in a safe, accessible and practical area where there are support mechanisms. He submits that this is exactly what Ms Murphy indicated but the judge has failed to consider this. As such he considers that there are material errors of law.

12. Finally, he addresses the situation with regard to Article 8 and whilst accepting that the Appellant has been in the UK for a relatively short period of time he submits if a proper balancing exercise had been carried out that the judge would have come to a different decision. He asked me to find that there are several errors of law in the decision and to set it aside and to remit it back to the First-tier Tribunal for rehearing.

13. Mr Clarke adopts a similar attitude in that he approaches this matter by looking at the various submissions made in the Grounds of Appeal. He submits that at paragraph 42 of the decision the judge has indicated that if his findings are not accepted at paragraph 32 that the Appellant's relocation as part of his family would be appropriate. He submits

consequently there is not a great deal of merit in the submission made by Mr Sellwood challenging the Appellant's ability to get to his home area. He also challenges the finding on irrationality referring to paragraphs 29 to 32 and submits that there has been a very specific risk looked at to this particular Appellant and that there was no evidence before the Tribunal of harm coming to his brothers and they did, he reminds me, stay with his mother for some period after the Appellant left. He submits that the decision was one that was open to the judge and is not perverse.

14. Mr Clarke submits that paragraphs 33 to 46 of the decision are ones in which the judge has looked at relocation and has failed to make a finding of fact regarding that. He points out that the judge finds the family are of relatively low profile and considers their relocation to Kabul. He accepts that the judge does not look at the evidence for Kabul being somewhere where the whole family can reside but if it is accepted he submits that there is risk in the home area then such a failure to address this issue would fall away. In reality he submits that if they do relocate to Kabul there would be, as is shown in the country guidance authority of *AS* (albeit that this relates to single adult males) employment, housing and money available to secure short-term accommodation and he submits that there was no evidence before the Tribunal to say that the family was destitute. He submits that it would not be irrational for the judge to have made the findings that he did and that the findings were open to the judge on the evidence.

15. So far as Article 8 is concerned he submits that a proportionality assessment has been carried out. He points out that paragraph 49 submits that the submission is an artificial one and he endorses that and that there has been a proportionality assessment. He submits that it has been shown that the Appellant cannot succeed under the Rules and the question is are there any matters outside the Rules which would enable the Appellant to succeed. He submits that there are not and that there has been a full and detailed analysis carried out by the judge. He asked me to dismiss the appeal.

16. In brief response Mr Sellwood submits that it is fundamental if any error of law is identified for it to be shown and to say that any submissions made are immaterial would in this instant case not be correct. As a matter of generality, he submits that no findings of fact overall have been made looking at the evidence. He further submits that it is not appropriate to analyse the authority in *AS* retrospectively and that all the evidence must be considered in the round.

## The Law

17. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

18. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

**Findings on Error of Law**

19. What I have listened to here is to two extremely competent advocates arguing about the manner in which the First-tier Tribunal Judge has set out his decision and they have gone into some considerable detail in looking at each and every paragraph. There is however a paucity of reference to the evidence provided by Ms Murphy. Ms Murphy had the opportunity of recording a conversation with the Appellant's mother and it has been accepted that that was broadly consistent with the account given by the Appellant. I agree however with the submission made by Mr Sellwood that in failing to consider the evidence of the Appellant's mother or at least in failing to set it out that has demonstrated ongoing threats to the family and that evidence has been documented by Ms Murphy and fails to demonstrate that the family have been able to live without risk since the Appellant's departure from Afghanistan. I consider that the failure to give appropriate weight to Ms Murphy's statement is an error of law and that overall the judge has failed, so far as the question of materiality is concerned, to make findings of fact looking at all the evidence.

20. I do not consider paragraph 33 where the Appellant states he fears the Taliban in our area but did not say he would be at risk anywhere in Afghanistan to be adequate and it is not appropriate to analyse the authority of *AS* retrospectively. All evidence must be considered in the round. Further, at paragraph 42 to make the conclusion that the Appellant relocating with his family would be appropriate is not sufficient in that the full facts of this case has not been analysed and generalities are not appropriate. I am consequently persuaded that there are errors of law in the manner in which this judge has reached his conclusions and that as a result the decision should be set aside and reheard.

21. So far as Article 8 is concerned, I accept that there has been no consideration of any compelling circumstances and further there has not

been any analysis of what may be or may not be in the best interests of the Appellant. In reaching all these conclusions this is not to say that on a rehearing of this matter that another judge would not come to exactly the same conclusions as the First-tier Tribunal Judge.

**Decision and Directions**

22. I consequently find that there are material errors of law and set aside the decision of the First-tier Tribunal Judge. I make the following directions:

    (1) That the appeal be remitted to the First-tier Tribunal sitting at Taylor House on the first available date 28 days hence with an ELH of three hours.

    (2) That none of the findings of fact are to stand.

    (3) That the appeal is to be before any Judge of the First-tier Tribunal other than Immigration Judge Burns.

    (4) That there be leave to either party to submit such further objective and/or subjective evidence upon which they seek to rely at least seven days prior to the restored hearing.

    (5) That the Appellant do attend the restored hearing for the purpose of cross-examination.

    (6) That a Pushtu interpreter be in attendance.

23. No anonymity direction is made.

Signed Date 18 December 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT**
**FEE AWARD**

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris