



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/07351/2017

**THE IMMIGRATION ACTS**

Heard at Newport  
On 22 August 2018

Decision & Reasons Promulgated  
On 6 September 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

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(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr Bates, Senior Home Office Presenting Officer

For the Respondent: Ms Casely, instructed by Avon & Bristol Community Law Centre

**DECISION AND REASONS**

1. The Secretary of State appeals against a decision of First-tier Tribunal Judge Povey in which he allowed the appellant's appeal against a decision of the respondent made on 17 July 2017 to refuse his application for asylum and to refuse his protection claim.
2. The respondent arrived in the United Kingdom on 7 April 2015, a few weeks before his 16<sup>th</sup> birthday. He is from a village in Paktika province of Afghanistan. His case is that he is at risk on return, having lost all contact with family there. The case was pursued, as is noted in Judge Povey's decision at [10] to [12], that in essence, the

respondent was at risk on return on account of his westernisation compounded by his poor mental health and lack of family support.

3. It is of note that it was agreed that the parties would not question the respondent about his experiences in Afghanistan, and also that Ms Lewis for the Secretary of State confirmed that he took no issue with the respondent's mental health or his westernisation [11], the case being that any risks from either of these facts would be alleviated by the benefit of family support on return or the availability of financial support.
4. The judge found that:-
  - (i) the respondent was a credible witness [21];
  - (ii) the respondent had lost all contact with his family in Afghanistan and although he claimed to be the nephew of an Afghan politician, enquiries made revealed that that person denied any knowledge of a relationship with the respondent and in any event even if he was not his uncle, was not prepared to offer support or assistance on return to Afghanistan [22.2];
  - (iii) the respondent although no longer a child still had significant vulnerabilities and support needs, having PTSD and depression, being supported in school by mental health nurse [22.4], his difficulties in coping without support, the risk of him being exploited and his vulnerability would not be alleviated by the provision of financial support alone;
  - (iv) if returned to Afghanistan the respondent would be considered westernised;
  - (v) there is a significant Taliban presence in the respondent's home area and given that he is westernised, he would be at risk of being targeted by the Taliban, as set out in the Secretary of State's CPIN at 8.9;
  - (vi) the lack of support on return to his home area would put him at further risk of persecution and serious harm [24], Paktika being one of the least secure provinces in Afghanistan [25];
  - (vii) it would be unreasonable and unduly harsh to expect him to relocate to Kabul or any other area of Afghanistan where he would face the same difficulties in order to minimise the risks he would face from the Taliban in Paktika [28].
5. The judge concluded that the respondent would be at risk of persecution by reason of his westernisation, the risk from non-state actors not being reasonably addressed by sufficiency of protection or by internal relocation [30]. The judge concluded that the fear of persecution was on the basis of membership of a particular social group and that in the circumstances it was unnecessary for him to consider the grounds of appeal advanced.
6. The Secretary of State sought permission to appeal on the grounds that Afghans being perceived as westernised do not form a particular social group in that they do not share an immutable or innate characteristic which cannot be changed, are not perceived as

different and do not have a distinct identity in Afghan society, albeit that some Afghans who return from western states may face discrimination and social stigma.

7. The grounds were confined to asylum grounds only and it was submitted that the respondent cannot be granted refugee protection, the decision needs to be set aside for a new hearing where all matters could be considered.
8. On 5 February 2018 First-tier Tribunal Judge Pedro granted permission.
9. It is unclear from the grounds whether the Secretary of State is asserting simply that there is no nexus with the Refugee Convention; or, that there is insufficient evidence to allow a finding that the appellant is at risk of ill-treatment.
10. Mr Bates relied on the grounds submitting that there was in this case no particular social group, being westernised not amounting to an immutable characteristic. He relied also on AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) at paragraph 187. He accepted that there was no challenge made to the findings of fact but he did accept that the point was a narrow one. He expressly conceded that the respondent would be entitled to a grant of humanitarian protection were it not shown that there was a nexus with the Refugee Convention.
11. Ms Caseley relied on her Rule 24 notice submitting that it could not be argued that a failure to rely on a country guidance decision which was not available at the time of promulgation amounted to an error of law where that decision did not make a finding on an error of law in another decision. She submitted that, on the evidence, being westernised was an immutable characteristic which forms part of the respondent's identity since he had been in the United Kingdom and on the facts of this case the evidence was in his home area the risk was significantly greater.
12. Ms Caseley submitted that those returning face different treatment, particularly in difficult areas and it was difficult to predict how they would be treated. She submitted that there was sufficient evidence to show that he would be at risk of ill-treatment on return to Afghanistan.
13. The grounds of challenge appear to conflate two issues. Whether a group of individuals constitutes a particular social group is a question separate from whether an individual faces persecution on account of membership of a particular social group. Those who meet the second criteria will inevitably form a subset of the particular social group. There is no requirement that all members of a group face persecution for it to be a social group.
14. It is sensible first to consider the provisions of the Qualification Directive which underpin the Immigration Rules, and in this context, to have regard to SSHD v K [2006] UKHL 46 which at paragraphs [11] to [16] considered the issue of social group. At [16], Lord Bingham held

“16. EU Council Directive 2004/83/EC of 29 April 2004, effective as of 10 October 2006, is directed to the setting of minimum standards among member states for the qualification and status of third country nationals or stateless persons as refugees,

or as persons who otherwise need international protection, and setting minimum standards for the content of the protection granted. The recitals recognise the need for minimum standards and common criteria in the recognition of refugees, and for a common concept of "membership of a particular social group as a persecution ground". The Directive expressly permits member states to apply standards more favourable to the applicant than the minimum laid down. Article 10 provides (with Roman numerals added to the text):

*"Reasons for persecution*

I Member States shall take the following elements into account when assessing the reasons for persecution ...

(d) a group shall be considered to form a particular social group where in particular:

[(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

[(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

[(iii)] depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article."

Read literally, this provision is in no way inconsistent with the trend of international authority. When assessing a claim based on membership of a particular social group national authorities should certainly take the matters listed into account. I do not doubt that a group should be considered to form a particular social group where, in particular, the criteria in sub-paragraphs (i) and (ii) are both satisfied. Sub-paragraph (iii) is not wholly clear to me, but appears in part to address a different aspect. If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published *Comments* on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met. With regard to (iii), the UNHCR comments:

"With respect to the provision that '[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of the article,' UNHCR notes that courts and administrative bodies in a number of jurisdictions have found that women, for example, can constitute a particular social group within the meaning of Article 1A(2). Gender is a clear example of a social subset of persons who are defined by

innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. This does not mean that all women in the society qualify for refugee status. A claimant must demonstrate a well-founded fear of being persecuted based on her membership in the particular social group.

Even though less has been said in relation to the age dimension in the interpretation and application of international refugee law, the range of potential claims where age is a relevant factor is broad, including forcible or under-age recruitment into military service, (forced) child marriage, female genital mutilation, child trafficking, or child pornography or abuse. Some claims that are age-related may also include a gender element and compound the vulnerability of the claimant."

15. It is also to be borne in mind the observations on the nexus with the Convention at paragraph [17] of the same decision: -

"17. The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple "but for" test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case.

18. I do not understand these propositions to be contentious."

16. Further, the "distinct identity" may be demonstrated by discrimination – see Islam v SSHD [1999] UKHL 20.
17. The above is not contentious and there was no need for the judge to set it out in his decision. It was also set out in the respondent's skeleton argument, as was the submission that [20] having become westernised was not a fact that the respondent could change. There was sufficient material before the judge, including in the expert reports including the assessment of his mental health problems, that this was so. Given that the respondent had become accustomed to the culture of the United Kingdom where he has spent an important part of his adolescence that is unsurprising.
18. There is evidence, as the judge noted at paragraphs [23] and at page 102 of the second bundle which was taken into account, that those who become westernised are seen as different. Again, that is supported by the UNHCR Guidelines and the EASO report.

19. As Ms Casely submitted, it is of note that it was not put either in the refusal letter or at the hearing before the First-tier Tribunal that westernised Afghans could not amount to a particular social group.
20. The finding in AS (Afghanistan) identified above is nothing more than an observation that those who are seen as westernised may face discrimination. It is not a finding that they do not amount to a social group, or that they are not treated differently
21. Further, as noted in SSHD v K at [17], it is sufficient for membership of a social group to be one of the reasons behind ill-treatment; it is not necessary to show that it is the sole or primary reason for that. There is only a need for there to be a causal link. The judge found that there was a causal link. The second limb of the Secretary of State's grounds proceed on the assumption that it must be the sole or main cause. That is not a proper proposition of law.
22. The Secretary of State's case is in effect a reasons challenge. While the decision could have been more detailed in its analysis both of social group and the nexus to the convention, there is no indication that the judge misdirected himself in law or reached findings not open to him. I bear in mind that the parties had access to all the material and the skeleton argument, and in the context of these proceedings, the Secretary of State was sufficiently informed as to why the judge allowed the appeal on asylum grounds. It cannot be said that there was a material inadequacy of reasoning behind the conclusion that the respondent is a member of a particular social group, that is westernised Afghan men, or that he is at risk of ill-treatment on account (in part) of his membership of that group, albeit that his other vulnerabilities contribute to that risk.
23. For these reasons, I consider that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

**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 his 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.

Signed

Date: 28 August 2018



Upper Tribunal Judge Rintoul