Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13478/2017

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 6 November 2018	**On 22 November 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

RS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Meikle, instructed by Duncan Lewis Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Afghanistan who was born on 1 January 1991. He originally came to the United Kingdom in 2007 but was removed back to Afghanistan on 8 December 2009. He claims that he then left Afghanistan in 2013 and arrived clandestinely in the UK in 2013. On 12 February 2015, he was apprehended and arrested by the UK authorities. On 26 February 2015, he claimed asylum. Following the usual interviews, his asylum claim was refused on 14 April 2015. However, following an appeal, initially unsuccessfully to the First-tier Tribunal but ultimately successful before the Upper Tribunal in April 2016, the Secretary of State reconsidered his decision.

3. On 1 December 2017, the Secretary of State again refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

The Appeal to the First-tier Tribunal

4. The appellant again appealed to the First-tier Tribunal. The appeal was heard on 9 April 2018 by Judge I D Boyes.

5. Judge Boyes made an adverse credibility finding and did not accept that the appellant's claim to be at risk from the Taliban and the Afghan authorities was established. In addition, the judge considered whether the appellant could relocate to Kabul. He rejected the appellant's claim that he would be exposed to a risk falling within Art 15(c) of the Qualification Directive (Counsel Directive 2004/83/EC). Consequently, Judge Boyes dismissed the appellant's appeal on asylum and humanitarian protection grounds and also under Arts 2 and 3 of the ECHR. Further, he dismissed the appellant's appeal under Art 8 of the ECHR concluding that there were no significant obstacles to his reintegration into Afghanistan and there was nothing exceptional to justify the grant of leave outside the Rules.

The Appeal to the Upper Tribunal

6. The appellant appealed to the Upper Tribunal on a number of grounds. First, he challenged the judge's adverse credibility finding. Secondly, he contended that the judge had failed properly to consider the background evidence relied upon and had wrongly failed to depart from the (then) relevant country guidance decision in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) which concluded that there was no Art 15(c) risk in Kabul.

7. On 15 May 2017, the First-tier Tribunal (Judge C A Parker) granted the appellant permission to appeal but only on the ground that the judge had failed properly to consider the background evidence and had wrongly failed to depart from the country guidance case of AK. Permission was refused on the ground challenging the judge's adverse credibility finding.

The appellant did not seek to renew his application for permission to the Upper Tribunal on the ground relating to the adverse credibility finding.

8. Mr Meikle, who represented the appellant, accepted that the adverse credibility finding stood. Nevertheless, he maintained the ground upon which permission was granted, namely that the judge had failed properly to consider the background evidence and expert report such that he had failed properly to consider whether he should depart from the country guidance case of AK and conclude, as was argued, that there was in fact an Art 15(c) risk in Kabul.

9. That, of course, cannot be relevant to the issue of whether the appellant can succeed in his asylum claim. The judge's adverse credibility finding, which now stands unchallengeable, is fatal to success on that basis. However, before me, it was common ground that if the judge had erred in assessing whether the appellant would be exposed to a risk of indiscriminate violence contrary to Art 15(c) in Kabul, the appellant's humanitarian protection claim would need to be reconsidered, not least because the judge had made no finding in respect of any risk falling within Art 15(c) in the appellant's home area.

The Judge's Decision

10. Before the judge, the appellant, in effect, invited the judge to depart from the country guidance decision in AK relying upon an expert report from Tim Foxley (at pages 15–67 of the appellant's bundle) and a substantial bundle of "objective evidence" from sources such as Amnesty International and Human Rights Watch and news articles (at pages 68–356). All of these documents postdated AK. In addition, the appellant relied upon a French case in which the court had held that the level of indiscriminate violence in Kabul did reach the Art 15(c) threshold.

11. The judge first referred to the country expert's report at para 16 of his determination as follows:

> "16. I turn to the report by Tim Foxley MBE, the country expert. Mr Foxley produces a very, very lengthy report which makes for interesting reading. He is obviously a man who enjoys his topic area and subject well. I do not say that pejoratively. However, in terms of relevance to the issues which fell to be decided in this case, the assistance he gives is limited."

12. The judge then, having rejected the appellant's credibility on the basis of his asylum claim, returned to the issue of Art 15(c) at paras 30–31 where he said this:

> "30. If I am not correct in relation to the return to the appellant's home town then there is no reason why the appellant cannot return to Kabul and live there. The Country Guidance, which I follow, highlights that although Kabul is not a place where nothing happens, the risk does not meet the Article 15C threshold. Foxley, the country expert, does not assert that it does and the

matters contained within the objective bundle, individually or cumulatively, do not lead me to the conclusion that Kabul meets the threshold of 15C. None of the news reports within the appellant's bundle are independently verified or peer reviewed. I place no reliance upon them accordingly.

31. I note the appellant's reliance upon a French case in which it is said that the French Court found that Kabul met the Article 15C threshold. I pace (*sic*) no reliance upon this. I cannot do so as the French court is not binding upon me and I do not know of what evidence was provided to the French Court."

The Submissions

13. Mr Meikle submitted that the judge's reasoning in para 30 of his determination was inadequate.

14. Mr Meikle submitted that the judge had failed properly to consider Mr Foxley's report, in particular at paras 59–63. Mr Meikle accepted that Mr Foxley had not expressed a conclusion as to whether the level of violence in Afghanistan met the requirements of Art 15(c) but that, in itself, was not a basis upon which his report could, in effect, simply be disregarded. Mr Meikle submitted that it was not the country expert's role to determine whether the appellant's return to Kabul would breach Art 15(c). Mr Meikle submitted that at paras 61–63 of his report, Mr Foxley had set out a number of factors which pointed to a deterioration in the security situation in Afghanistan, and in particular in Kabul.

15. Further, Mr Meikle submitted that the judge had failed, in effect, to give proper reasons for rejecting the background evidence relied upon before him. In particular, he relied upon a number of background documents which he listed at para 18 of his skeleton argument which all postdated AK (and with one exception also postdated the more recent country guidance case of AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)) which supported Mr Foxley's analysis of a deteriorating security situation. Also, Mr Meikle submitted that, whilst the news report might properly be given less weight than the reports from organisations such as Amnesty International and Human Rights Watch, the judge had been wrong to place "no reliance upon them" because they were not "independently verified or peer reviewed".

16. On behalf of the respondent, Mr Howells accepted that the judge's assessment of the Art 15(c) claim was short. However, he pointed out that there was no skeleton argument from the appellant's (then) Counsel and no guide to the essential passages in the background evidence which were relied upon. It appeared from the Record of Proceedings that Counsel had referred to Mr Foxley's report and the French case and had submitted that the Art 15(c) threshold was reached in Kabul.

17. Mr Howells submitted that the judge had sufficiently, in these circumstances, dealt with the material and was entitled not to rely upon the French Court's decision. He submitted that there had not been a

"vigorous argument" about Art 15(c) and that the judge's decision disclosed no material error of law.

Discussion

18. At the date of the hearing, AK was the relevant country guidance decision. That case decided, on the evidence before the Upper Tribunal at that time, that no Art 15(c) risk of indiscriminate violence existed in Kabul.

19. In fact, on 16 April 2018, which was three days before the judge's decision was promulgated, the Upper Tribunal published the new country guidance case of AS. That decision left "unaffected" the decision in AK in relation to Art 15(c).

20. Mr Meikle did not seek to argue that the judge should have considered the decision in AS which had become the relevant country guidance case by the time his decision was promulgated. Mr Meikle's position, no doubt, reflects the fact that AS, in effect, affirmed AK in respect of any Art 15(c) risk.

21. Consequently, before me, the parties' argument centred on whether the judge had properly considered whether to depart from AK.

22. The judge was bound to treat as "authoritative" the decision in AK unless there were "very strong grounds supported by cogent evidence" not considered by the Upper Tribunal in AK for reaching a different view (see SG (Iraq) v SSHD {2012] EWCA Civ 940 at [47]).

23. In my judgment, the judge did fail properly to consider whether the evidence justified a departure from AK.

24. First, Mr Foxley's report did provide some support for the appellant's case that the security situation had deteriorated in Afghanistan, in particular in Kabul. It was no part of his role to usurp the judicial function of determining whether the appellant had established a breach of Art 15(c).That was not a good reason for giving it no weight. His expert report, nevertheless, spoke to a deterioration in the security situation and contained material at paras 59–71 which relies upon material since AK was decided that merited consideration by the judge.

25. Secondly, there was, in the bundle, a considerable volume of background material, much of which originated from recognised international organisations and official bodies that, again, spoke to a deteriorating security situation in Afghanistan and, in particular, in Kabul. I would also add that with the exception of the US Department of State Report dated 3 March 2017 (at pages 78–112), this material also postdates AS. The judge was required to grapple with this evidence and provide adequate reasons why this evidence did not justify a departure from AK.

26. Whilst, as Mr Howells in effect submitted, one can have sympathy with the judge if he was not directed to the relevant material, nevertheless his

obligation to apply "anxious scrutiny" to the appellant's claim required him to engage with the relevant material. To assist the judge in those circumstances, it should be common practice for an appellant's representative to highlight the relevant material and passages in the material upon which reliance is placed. It is simply not acceptable to present a significant bundle of documents, which may run to several hundred pages, and legitimately expect a judge to plough through it to see whether there is any relevant material to support the appellant's claim.

27. Here, the judge says that he has considered the material in the bundle. However, his conclusion that it did not "individually or cumulatively" lead him to find that "Kabul meets the threshold of 15C" was a conclusion and not a reasoned rejection of the material's claim import. The judge's error is that neither the parties nor this Tribunal is able to understand the basis upon which the judge concluded that the background evidence did not justify a departure from AK (see Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)).

28. That, in itself, is sufficient in my judgment, to establish that the judge's adverse finding in respect of Art 15(c) was flawed and cannot stand.

29. I would add this in relation to Mr Meikle's other points. First, whilst the judge was entitled to give news reports (because of their very nature) less weight than reports produced by international organisations and the such like, the fact that they had not, in his words, been "independently verified or peer reviewed" was not a justification for giving them no weight and placing "no reliance" upon them. Secondly, in relation to the decision of the French Court, in the absence of a clear understanding as to the evidential basis upon which the French Court reached its conclusion, I see nothing wrong in the judge's approach in para 31 of his determination in respect of that decision.

30. Having set aside the judge's adverse finding in respect of Art 15(c), a fresh decision must be made in respect of the appellant's humanitarian protection claim. That claim will require findings to be made in respect of the risk of indiscriminate violence to the appellant in his home area and in Kabul. The appellant will, of course, have to contend with the conclusion of the Upper Tribunal in AS. That decision was, however, based on material available to the Upper Tribunal up to the end of 2017. The judge will have to consider whether to depart from the Upper Tribunal's conclusion that the decision in AK is unaffected on the basis of the expert evidence relied upon by the appellant and the more recent material in 2018 including that which Mr Meikle relied upon before me and which he set out in para 18 of his skeleton argument.

31. The judge's adverse credibility finding and, therefore, his decision to dismiss the appellant's claim on asylum grounds stands.

Decision

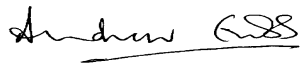
32. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal on humanitarian protection grounds and any related claim under Arts 2 and 3 of the ECHR involved the making of an error of law and cannot stand. The decision is set aside.

33. The judge's adverse credibility finding and his decision to dismiss the appellant's appeal on asylum grounds stands.

34. The judge's decision to dismiss the appellant's appeal under Art 8 was not challenged and stands.

35. The appeal is remitted to the First-tier Tribunal (to be heard by a judge other than Judge I D Boyes) in order to remake the decision in respect of the appellant's humanitarian protection claim and related claims under Arts 2 and 3 of the ECHR.

Signed



A Grubb
Judge of the Upper Tribunal

14 November 2018