Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07147/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th September and	**On 12th March 2019**
29th November 2018	

Before

UPPER TRIBUNAL JUDGE COKER

Between

AS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani instructed by Duncan Lewis & Co solicitors (Harrow)

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as AS. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. First-tier Tribunal Judge McCarthy dismissed the appellant's appeal against a decision of the respondent refusing his claim for international protection. That decision was upheld by DUTJ Doyle. The Court of Appeal, by consent, remitted the appeal to the Upper Tribunal and set out the respondent's acknowledgement that

> "…the country information and guidance documents published in February 2015 contains both guidance and policy statement (sections 1.3 and 1.4). The respondent further acknowledges that as conceded before the Upper Tribunal, she is under a duty to draw the First-tier Tribunal's attention to any policy or guidance which might have a bearing on the decision in the case but that she had in this instance failed to do so."

2. The appellant sought and was granted permission to amend the grounds of appeal relied upon. Ms Isherwood submitted that any error of law was not material because, when the documents were considered as a whole in the context of the evidence before the judge, the finding that the appellant would not be at risk on return to Kabul was sustainable.

3. The respondent did not challenge the findings of fact made by First-tier Tribunal Judge McCarthy. The judge failed to have proper regard to the documentary evidence in assessing the risk on return.

4. On 27th September 2018 I found the First-tier Tribunal Judge materially erred in law and set aside the decision dismissing the appeal, all findings of fact retained.

5. The relevant findings of fact made by the First-tier Tribunal Judge and the factual matrix relied upon by the appellant before the First-tier Tribunal which was not challenged was as follows:

   (i) The SSHD accepts that AS had a business in Afghanistan supplying goods to the US Coalition Forces in October 2011 and January 2013 and this could be perceived as supporting the coalition forces;

   (ii) He visited Bagram airfield base, had appointments with the military's contracting officers and visited the military bases often;

   (iii) AS received three letters from the Taliban and telephone calls. Each letter was addressed to the appellant in his home village in Laghman; he received telephone calls in Kabul;

   (iv) The third letter, in February 2014, threatened Shariah law would be inflicted – the death penalty;

   (v) AS reported the threats to the police;

   (vi) AS' account is generally credible;

   (vii) The Taliban's interest in AS developed over time;

   (viii) AS no longer worked after February 2014 when he moved to Kabul;

   (ix) AS left Afghanistan on 27th April 2014 and arrived in the UK on 27th May 2014 and claimed asylum shortly thereafter.

6. I adjourned the hearing on 27th September 2018; I directed the respondent file full copies of their policy documents and gave leave to both parties to file such further country material as they sought to rely upon, to file and serve skeleton arguments and that the hearing on 29th November 2018 would proceed by way of submissions only, no oral evidence.

7. The appellant, in the event, filed a further witness statement. Ms Isherwood did not, after consideration, seek permission to cross examine the appellant but, in submissions drew attention to what she stated were inconsistencies between that witness statement and the appellant's earlier evidence which undermined the findings made and retained. She also urged that little or no weight be placed upon the witness statement in assessing the appellant's current circumstances and risk. Mr Bandegani submitted that there were no inconsistencies between the recent witness statement and previous evidence and that the current witness statement was simply a more economical and shortened form of evidence he had previously given; whilst acknowledging that great weight could not be placed upon it, it was nevertheless a statement of the appellant's current circumstances and some weight should be given accordingly.

Appellant's supplementary statement.

8. In his most recent witness statement, dated 31st October 2018, AS said, *inter alia:*

> "2. To confirm, as stated in my previous statement, my family are no longer living in Laghman Province in Afghanistan. After they were refused stay in Pakistan, they returned to Afghanistan in 2014 and began living in Arzanqimat in Kabul, where they are currently living.
>
> 3. Sometime in 2016, I cannot remember the date, my father told me that a group of Taliban men wearing scarves around their faces, came to the house in Arzanqimat. He told me they searched around the house and interrogated my father about my whereabouts….
>
> 4. I have been told by my dad that this has happened a few times over the past few years with the most recent occasion being around a month ago …..I feel bad that they all have to go through this and that they had to leave Laghman because of me. My dad has told me that each time the Taliban come to the house, the same things happen…
>
> 5. I do not think my family's life is in danger because it is me who they want; but my family are still being harassed about my whereabouts. I do not know how they knew where my family relocated to but this is what I have been saying all along; the Taliban have agents all over the country – even in Kabul – and can always discover the whereabouts of someone."

9. Ms Isherwood submitted that the appellant's evidence had changed:

> (a) In paragraph 10 of his first witness statement dated 9th October 2014 (WS1) he said *"…I returned home to Laghman in March 2013 when my dad showed me a letter that my cousin…had given him the day before…*"
>
> (b) In paragraph 12 WS1, he said, "In December 2013 I received a second letter from the Taliban. My cousin…dropped this off at my house, again while I was out of the house…"

(c) In paragraph 13 WS1, he said "*On 24th February 2014 at around 4pm, I was at home eating lunch with my family when we heard a knock on the door"*.

(d) According to the substantive interview record (responses to questions 28, 29, 79, 88-104) the appellant and his family had returned to Afghanistan, Laghman about five years before the interview; the appellant's family were in Laghman and the appellant was living with his family. Yet the appellant was also saying that his family were in Pakistan and Kabul but the letters in 2013 were delivered to the family home in Laghman.

10. Ms Isherwood submitted that there were inconsistencies and contradictions in the evidence such as to undermine the findings of the First-tier Tribunal that were retained from the earlier proceedings. There had been no challenge by the respondent to the findings of the First-tier Tribunal in the earlier proceedings. I note that the appellant's bundle was not served until late although Ms Isherwood had received the appellant's witness statement by 7th November. Her skeleton argument, dated 27th November 2018, does not take issue with the retained facts although there is a reference to the bundle being filed outside the period specified by the directions which "*suggest that other matters may be argued. This will be addressed at the hearing*". Mr Bandegani did not deviate from his skeleton or the bundle of documents.

11. Although not addressed in her skeleton argument I have considered Ms Isherwood's objections to the evidence given by AS in his most recent witness statement and have given careful attention to what she has described as inconsistencies and contradictions.

12. I note that the appellant speaks fluent English. This is commented upon in the substantive interview record and the appellant says he studied in Pakistan. His brother worked as an interpreter for the Americans and is now in the USA, married to a US citizen. During the substantive interview, which took place on 18thJune 2014, AS said that when he was small he and his parents had moved to Peshawar in Pakistan as refugees; they received financial assistance from the UNHCR. He thought they had lived in Pakistan for "over 10 years". They had remained in Pakistan and about five years before his interview had returned to Afghanistan. This would have been about 2009 /2010. During the substantive interview, the appellant said that he had been living in Laghman, Kabul, Jalalabad (see questions 28, 79, 86). He said that after the third letter (February 2014) he went to Kabul and rented a house for him and his family. He said he left in April and his family remained living there for three months; they told him they would go to Pakistan after he left. He spoke to his father on 28th May 2014 and they were in Peshawar but were being bothered by the police because they didn't have documents (see questions 121 -124).

13. I do not agree with Ms Isherwood that the appellant's evidence has changed. The most recent witness statement is in short form but, when the earlier witness statement and the substantive interview record are considered fully, and not just the selective extracts commented upon by Ms Isherwood, it is plain that his account has been consistent throughout.

14. The appellant was not cross examined by Ms Isherwood. I gave her the opportunity to make an application to cross-examine him, given that my earlier directions were that there was to be no oral evidence, but she declined to make such an application. She did not seek to have the witness statement excluded from evidence and relied upon her submissions as to changed evidence (which I reject) and that there should be no, or little weight placed upon his assertion in the witness statement that the Taliban came to the home in Kabul. Where a witness has not given oral evidence, and in this case I have never heard the appellant give oral evidence, then witness statement evidence must be approached with particular caution. In this appeal, the appellant has been found credible by the First-tier Tribunal, who heard him give oral evidence. His evidence has continued to be consistent and I am satisfied that there is nothing said that can dislodge the findings of the First-tier Tribunal judge that his account is generally credible. I decline to place no weight upon the witness statement but such weight as I do place upon it is in the context of the country material that is before me. It is not determinative of his appeal.

15. I note the submissions by Mr Bandegani that even if I were to place no weight at all upon the statement, the country evidence is such that this appellant is at real risk of being persecuted because of his work as a subcontractor providing goods for the US Coalition forces, he has had three letters, received threatening telephone calls and has been sentenced.

16. In addition to the report by Dr Giustozzi prepared for this appellant, the country material relied upon by the appellant includes:

    - Home Office Country Information and Guidance Afghanistan: persons supporting or perceived to support the government and/or international forces February 2015
    - Home Office Country Information and Information Note Afghanistan: fear of anti-government elements (AGEs) version 2 December 2016
    - Home Office Country Policy and Information Note Afghanistan: unaccompanied children version 1 April 2018
    - EASO Country Guidance: Afghanistan June 2018
    - UNAMA 15 July 2018

17. My attention was also drawn specifically to *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 00118 (IAC) by both advocates. Ms Isherwood submitted that the expert report by Dr Giustozzi did not undermine the guidance provided in *AS* and did not support Mr Bandegani's submission that the evidence before me was such as to enable a departure from or enhancement of the risk categories in *AS*; this appellant was not, she submitted, at risk of being persecuted on the retained findings of fact. I note that the EASO report and the UNAMA report post-date *AS CG.*

18. Mr Bandegani referred to *Batayav* [2003] EWCA Civ 1489 in support of his submission that the assessment of risk set out by Dr Giustozzi amounts to a real risk: the evaluation of conditions that are alleged to create a real risk are not to be considered in terms of being "frequent" or "routine" unless "systematic"

or "consistently happening". "A real risk is in language and in law something distinctly less than a probability, and it cannot be elevated by lexicographic stages into something more than it is"[1].

19. Ms Isherwood forcefully submitted that Dr Giustozzi's report, dated 21st November 2018 and prepared on this appellant, did not disclose material that enabled a departure from the CG case of *AS*; that his report was not significantly different to that which had been before the Upper Tribunal in *AS CG* and that his report had been found lacking in *AS CG* because it lacked verifiable sources and gave inadequate detail. She referred to many of his sources being "old", some dating as long ago as 2006. References in her submissions included:

    (a) The references by Dr Giustozzi to the existence of a 'blacklist' of those collaborators identified by the Taliban were rejected by the Tribunal in *AS CG*[2] and the current report did not provide any further evidence to support their existence.

    (b) In §175 of *AS,* the Tribunal took the view that the evidence of such a blacklist came from only a limited number of Taliban sources, was not supported by other commentators and that some aspects of the evidence as to its size and comprehensiveness undermined a conclusion that it existed.

    (c) The appellant had not said he had been sentenced – he had only received telephone calls and warning letters so in any event would not be on a blacklist even if such a thing existed.

    (d) The possibility of him coming to the adverse attention of the Taliban as a target was so remote given the practicalities of such a process – as referred to in §180 to §185 of *AS*.

    (e) Up to date information which is not referenced by Dr Giustozzi in his report, indicates that although police protection isn't very good, it is improving.

20. Ms Isherwood took issue with what she said was Mr Bandegani' s submission that the respondent had, in his policy documents, made concessions. She referred to the use of the word "may" in the policy documents and that all the country material relied upon said that the contents were for guidance only which, she submitted, indicated that each case had to be considered on its own facts and within its own factual matrix. I did not detect any real difference between Mr Bandegani and Ms Isherwood. Mr Bandegani was not, as I understood him to submit, saying that the sections of the respondent's policy documents and guidance which were pre-fixed with the word "may' indicated a concession that individuals that fell within those specific groups *were* to be recognised as refugees; merely that they fell within a category of persons who *may*, depending on all the circumstances, be refugees. Ms Isherwood did not dispute that the respondent was bound to follow his policy.

[1] See paragraphs 37, 38 & 39 of *Batayav*
[2] Paragraphs 175 to 179 *AS*

21. At one-point Ms Isherwood appeared to be saying that the position of the appellant was more closely equated with an off-duty truck driver rather than a contractor/subcontractor, because he drove his own delivery vehicles. She did not pursue this but said that the appellant was not in the same position as an interpreter. She referred to the EASO Report that individuals undertaking general maintenance work were not "systematically targeted although attacks occur". In her skeleton and oral submissions Ms Isherwood acknowledged that the words high profile and low profile were not particularly helpful; what was required was a careful look at the individual circumstances. She submitted that in this case, the appellant was not of such a profile as to result in him being at risk; there was no indication of his visibility, he was a contractor and not on the payroll, his family have not been banished, he has not been sentenced, there is an improvement in policing and protection, there is no evidence that having been in the West for four years that increases his risk and he is a single healthy young man returning to Afghanistan with skills he can utilise.

22. Mr Bandegani disputed that AS had not been sentenced. The third letter from the Taliban refers to him being treated according to Sharia law. He drew attention to the specific elements in Dr Giustozzi' s report which addressed *AS CG* and the lack of sources and corroboration. He drew my attention to the policy and guidance document issued by the respondent and to the UNHCR and EASO reports.

23. On 6th December 2018 I made the following directions:

    1. The hearing of this appeal took place on 29th November 2018, the appeal having been remitted back to the Upper Tribunal for determination.
    2. In considering the documents and submissions made, it is not clear to me whether
        (a) The respondent accepts that the appellant is at real risk of being persecuted in his home province of Laghman and the issue is thus an issue of internal relocation and sufficiency of protection in Kabul; or
        (b) The respondent does not accept the appellant is at real risk of being persecuted in Laghman.
    3. This matter is therefore to be listed for 1 ½ hours on the first available date before Upper Tribunal Judge Coker for this to be clarified.
    4. Alternatively, if the parties are able to agree whether the appeal falls within 2(a) or 2(b) above, they are to notify the Tribunal within 14 days of the date these directions are sent to avoid a hearing. In the event that there is no agreement, the parties are to notify the Tribunal (no later than 14 days after the date these directions are sent) of their availability during January and February 2019. The Tribunal will endeavour to list the hearing at the convenience of the parties.

24. In an email sent on 20th December 2018, Ms Isherwood on behalf of the respondent said:

> "The SSHD has considered the directions dated 10 December and whether it is accepted that the appellant would be at risk if he is returned to Laghman.

> It is the SSHD position that because of the individual facts of the case which have been sustained and the background evidence indicating that the Taliban does have some presence in different areas of Laghman. It is accepted that the appellant would be at risk if returned to Laghman and Kabul is to be considered for internal relocation and sufficiency of protection."

Discussion

25. It is correct that the Afghan State has taken measures to attempt to improve its law enforcement and justice system (see for example the June 2018 EASO report) but the systems remain weak and cannot provide sufficiency of protection for individuals at real risk of being persecuted.

26. AS falls, I am satisfied, within the category of individuals perceived to have collaborated with and been associated with foreign troops present in Afghanistan. The undisputed findings of the First-tier Tribunal make it plain that this appellant is at real risk of being targeted by the Taliban in his home area and has been targeted by them and has been sentenced under Shariah law.

27. As I understand Ms Isherwood's submissions, the respondent is of the view that the appellant would be able to relocate to Kabul because he would not be at risk of being traced and thus a target there. I note the evidence in his supplementary witness statement which although the subject of a submission that little weight should be placed upon it, was not challenged in cross examination.

28. As succinctly put in the EASO report, the "reach of an insurgent group depends on its power position, including its networks or other co-operation mechanisms. For example, the Taliban are mostly present in rural areas, it is also reported that they run a network of informants and conduct intelligence gathering in the cities. Information suggests that they will persecute certain individuals even in major cities, depending on their profile and their individual circumstances."

29. *AS CG* declined to make findings or give guidance on what could be described as wider risk categories because of a lack of evidence before it. Although Mr Bandegani submitted that those in the position of the appellant should be included as being in a risk category covered by *AS CG*, it is not necessary in this decision to reach a decision on whether the specified risk categories should be expanded and if so how – the respondent accepts that this appeal is concerned with the question of internal relocation to Kabul for AS given that he is at real risk of being persecuted in his home province. The issue of whether internal relocation is a viable option for the appellant is a matter of fact, personal to this appellant. That *AS CG* refers, in the first paragraph of the guidance, to those of lower level interest, that assessment is always going to be informed the particular characteristics of an applicant for asylum. In this case the appellant is accepted to be at real risk of being persecuted in his home province because he either was or was perceived to be a collaborator with the foreign forces. That perception continued after he had ceased undertaking any work and culminated in a death threat.

30. The appellant's family live in Kabul. The appellant does not submit that they are either at risk of or are being persecuted for a Convention reason. The appellant

received threatening telephone calls when he was in Kabul, prior to coming to the UK. It is reasonable to conclude that the Taliban, or a network or group associated with the Taliban, were aware of his presence in Kabul. His family moved from Kabul after the appellant had left the city. They have now returned there. There is no reason, given the overall credibility of the appellant's account and the appellant personally, to doubt the appellant's account that his family have told him that they have been visited by elements of the Taliban demanding to know his whereabouts. I accept that evidence to be correct. That is not to say that the guidance in *AS CG* regarding blacklists is no longer operative. That is not the issue before me. The particular evidence and factual matrix for this appellant is that his family have been identified as being in Kabul, that when he was there he was identified as being there and if he returns to his family in Kabul there is every likelihood that he will again be identified as being there.

31. It is simply not going to be possible to prevent it becoming known that a son has returned to his family, unless he went straight into hiding which is unreasonable.

32. This appellant is a single young man of reasonable health and he has contacts and support mechanism available to him in Kabul – his family. Yet the Taliban have reached his family and identified that the appellant is not there. They have not desisted in their harassment of the appellant's family. There is every reason to suppose that if the appellant returns to Kabul, his return to the family home would be remarked upon and knowledge of his presence would, with little difficulty, end up in the hands of insurgents.

33. When he was last in Kabul he received threatening telephone calls, albeit that was some five years or more ago; although the interest in the appellant had increased over time.

34. The Country Policy and Information note December 2016 refers to a Canadian IRB report which considers the ability of the Taliban to uncover individuals' whereabouts not only in rural areas but also in Kabul. *AS CG* had this document before them, but as I have said earlier, for this appellant there is no doubt that if he is identified as having returned to Kabul, then he will be at risk.

35. The question then arises whether he could live elsewhere in Kabul. If it were not for the fact that he has been previously targeted, and his family receive visits and are harassed, that might well be a viable possibility, in accordance with the guidance of *AS CG*. But the nature of Afghani society, the questions that are asked of individuals who arrive in a neighbourhood as documented in the various reports relied upon, and that in this case the appellant speaks fluent English would all lead to a more intense enquiry from those he met. I am satisfied that in his case because of his personal background and circumstances, that he would be found.

36. This risk is a risk that amounts to it being unduly harsh for him to relocate, if not meeting the threshold of persecution. Although, as submitted by Ms Isherwood the level of policing is improving, there was simply inadequate evidence to show that although the will might be there, an individual in this appellant's position could even begin to access protection.

37. For the reasons I have set out above, I am satisfied that the appellant is at serious risk of being persecuted for a Convention reason if removed to Afghanistan, that internal relocation would be unduly harsh and there is a lack of sufficiency of protection.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision, findings of fact preserved.

I allow the appeal against the respondent's decision to refuse the appellant's protection claim.

Date 8th March 2019

Upper Tribunal Judge Coker