



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/05129/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4 June 2019**

**Decision & Reasons Promulgated  
On 12 July 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**M F N  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Bandegani, Counsel, instructed by Duncan Lewis & Co Solicitors (Harrow Office)

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DECISION AND REASONS**

The Appellant is a national of Afghanistan born on 9 March 1992. His appeal came before the Upper Tribunal to determine whether or not there was an error of law in the decision of First-tier Tribunal Judge Aujla. In a Decision and Reasons promulgated on 11 April 2019, I found a material error of law in the decision of the First-tier Tribunal as to the judge's assessment of the safety of internal relocation to Kabul. In light of the fact that the judgment of the Court of Appeal in *AS (Safety of Kabul) Afghanistan* was pending, I adjourned the appeal for a resumed hearing on the first available date after promulgation of that judgment. A copy of that Decision and Reasons is appended.

At the hearing before me on 4 June 2019, Mr Bandegani on behalf of the Appellant produced a skeleton argument. I proceeded on the basis of submissions only, there being no real dispute as to the facts or findings, which were that the Appellant would be at risk of persecution in his home and local area of Herat [32] and that it was accepted that the Appellant worked for the civil service and then for the intelligence service in Afghanistan [34].

Mr Jarvis submitted that, following the judgment of the Court of Appeal in AS [2019] EWCA Civ 873 that the appeal had been remitted back to the Upper Tribunal on the following basis:

*“Lord Justice Underhill:*

*It seems to me that remittal to the Upper Tribunal can and should be on the basis that it need consider its conclusions only on the question of the extent of the risk to returned asylum seekers from security incidents of the kind considered in paragraphs 190 to 199 of its reasons. Although of course the relevance of that risk is to the overall issue of whether it is reasonable for asylum seekers to be expected to relocate to Kabul it is in practice a self-contained element within that assessment, and since I would hold that there was no error of law in the Tribunal’s approach to the other elements I see no reason why those elements require to be reconsidered”*,

and at [82]:

*“Those limits on the scope of the remittal are subject to one important qualification. We were told that last year, after the decision of the Upper Tribunal, UNHCR produced further guidelines on returns to Afghanistan, which, unlike the 2016 version, unequivocally recommend that ‘given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city’. It will be for the Tribunal, no doubt after hearing submissions, to consider whether that assessment requires a reconsideration of its country guidance on a more extensive basis than is required by the remittal of this appeal. If it decides that it does, it is likely to make sense either for the scope of hearing to be increased or (which may be procedurally more correct) for the remittal in this case to be heard along with whatever appeal is the vehicle for that wider consideration.”*

Mr Jarvis submitted that the Appellant’s profile is that he worked in the civil service and was perceived to be a spy. In respect of the expert report from Mr Foxley, Mr Jarvis submitted that he had not quite applied the approach advocated in *MOJ (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC)* as to country guidance and experts, in particular, his dependence on the report of Professor Giustozzi, whose evidence of a blacklist held by the Taliban was expressly rejected by the Upper Tribunal in AS at [175]. The Upper Tribunal also went on in any event at [181] to find that the evidence did not show that

the Taliban had any real sophistication in its networks or were able to identify those of adverse interest. He submitted that there had been vast population movements over the last few years and that there was no real system in place nor was it possible for someone to be identified by name. The Upper Tribunal in AS found that there was no blacklist and that it was fanciful to think that somebody could be identified. *MOJ* (op cit) and *AAW* (expert evidence - weight) Somalia [2015] UKUT 00673 (IAC) make plain that an expert needs to state why he is departing from a country guidance decision, and this aspect of the appeal had not been impacted by the judgment in the Court of Appeal.

At [182] of *AS* the Upper Tribunal indicated that the evidence was not particularly forthcoming and one must put the evidence in the context of the fact that the population in Kabul is between 3,500,000 and 7,000,000. At [183] the Upper Tribunal placed significant weight on the EASO report, which indicated in respect of their expert evidence that there are only a few dozen people and the Taliban would have to devote significant time and planning to identify and track down targets. Mr Foxley acknowledged at [37] that different Taliban groups act in different ways. It is also the case that the Taliban will be most concentrated in Kabul because this is where the prime military and security targets are to be found. However, as Mr Foxley acknowledged at [46] and [47], the Taliban do not have direct influence and control in Kabul and cannot just move around freely.

Mr Jarvis submitted this reduced the likelihood that the Taliban would know if the Appellant has even returned to Afghanistan. He submitted that in terms of findings of fact, the likelihood of the Appellant coming into contact with the Taliban in Kabul or the likelihood of them knowing he was wanted in Herat is fanciful and that the Appellant was distinguishable from someone who would be a key military or security target. He submitted that the report of Mr Foxley should not cause the Upper Tribunal to take a different approach from that set out in the country guidance. He submitted that the reasoning of the Upper Tribunal in respect of the general conditions in Kabul, e.g. accommodation, were authoritative and in light of the Secretary of State's submissions as to the absence of the ability to target, then it would be fanciful to find the Appellant would be targeted on account of his past skills and experience.

In his submissions, Mr Bandegani asserted that his case is not that the Appellant is a low-level person, such as those analysed in the country guidance, but that the Appellant would be perceived to be a spy because of the work he undertook for the security and intelligence services in Herat. If the Appellant is not perceived to be a spy, then on the individual facts of his case he falls within his own unique risk category not dealt with by *AS*. Mr Bandegani submitted that it was unreasonable in light of the UNHCR guidelines to expect the Appellant to internally relocate.

Mr Bandegani submitted that the criticisms of Mr Foxley were not justified. He is a well-respected and qualified expert and any minor departure from the country guidance findings was certainly not sufficient reason to reject the entirety of his report. Mr Bandegani submitted that the Appellant falls squarely within the risk categories set out in *AS* because he is perceived to be a spy. At

[48] the expert found that primarily much depends on information known about the Appellant prior to arrival. He acknowledged that the Taliban do not generally target people but sets out simply what Professor Giustozzi said and what the evidence is from both sides. Mr Bandegani submitted he cannot rationally be criticised for that.

In relation to [181] of the country guidance, Mr Bandegani submitted that his case is that the Appellant falls within a risk category identified in AS and that he will be perceived to be a spy. Although it was not known how many civilians living in Kabul are of interest, clearly, if one was a spy or at risk of being perceived as such, one would be at risk of persecution in Kabul. He submitted that the Appellant would thus be at risk on return to Kabul. In relation to the Appellant's previous work, the First-tier decision supported the Appellant's claim to be at risk on return to Kabul. The Appellant was travelling to Kabul as part of his work for the Afghan government rather than simply as a civilian who was unprotected. The Taliban knew he was travelling to Kabul and his family would tell them, the Taliban, he was travelling there. Mr Bandegani submitted that the blacklist does not apply. The consistent and well-reasoned evidence from Mr Foxley is that the Appellant would be perceived to be a spy.

Mr Bandegani sought to rely on the CPIN report. He submitted it was important to note that, where it is making reference to risks concerning individuals moving from their home areas, Kabul is the main relocation site in Afghanistan. He submitted that whilst not determinative, the UNHCR guidelines must be considered and that the Court of Appeal has made this clear. Mr Bandegani submitted that the appeal should be allowed, that there was clearly more than a fanciful prospect of persecution and that if the country guidance were to be applied properly, then the appeal should be allowed.

I reserved my decision, which I now give with my reasons.

### *Findings and reasons*

I have concluded in light of all the evidence, particularly the CPIN December 2016, the EASO report of June 2018, the expert report of Mr Tim Foxley dated 10 December 2018 and the updated UNHCR guidelines dated 30 August 2018, all of which post dated the decision of the Upper Tribunal in AS and bearing in mind the terms of the remittal to the Upper Tribunal by the Court of Appeal in AS [2019] EWCA Civ 873, that it would be unreasonable and unduly harsh to expect this Appellant, on his particular facts, to internally relocate to Kabul. My reasons for so finding are as follows:

12.1. I find that there is a real risk that the Appellant would be perceived as a spy. This is because his evidence, which was accepted by the First tier Tribunal Judge, was that in 2013, whilst working for the Ministry of Affairs as a civil servant, he was recruited by the Afghan intelligence services as an informer, specifically to report individuals believed to be working for the Taliban and he provided information that led to the capture of a senior Taliban commander. He subsequently received threatening telephone calls and letters from the Taliban telling him to work for them and accusing him

of working with the infidels. His family home was targeted in a grenade attack at the end of 2015, an incident for which the Taliban took responsibility; he was the victim of an attempted assassination and his uncle was kidnapped and murdered. This factual background was the basis of the Judge's finding that the Appellant would be at risk of persecution in his home area.

12.2. I find, consequently, that the Appellant falls within the risk categories set out in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC) as someone in respect of whom there is a real risk that he would be perceived as a spy. However, the issue is not simply whether the Appellant would be at risk of persecution if returned to his home area of Herat, but whether it would be reasonable to expect him to internally relocate to Kabul. The Upper Tribunal in AS set out the test in the following terms:

*"173. We consider first the risk of persecution by the Taliban in Kabul to a person who is accepted to be at risk on return from them in their home area. The two main ways in which it is said that this may arise is first, through specific targeting of an individual in Kabul, and secondly, through a chance encounter with a person, for example at a temporary checkpoint in or around the city. We deal with each in turn.*

*174. The risk of a specific individual being successfully targeted depends upon their identification as a target (for example, due to past or present actions/circumstances) and the ability of the Taliban to locate and then carry out an attack on that person, as well as their will or priorities in doing so. The evidence was broadly in agreement as to the order of importance of targets for the Taliban in Afghanistan being (i) senior serving government officials and the security services, (ii) spies, and at the lower level, (iii) other collaborators (including the wider security forces, government authorities, foreign embassies, the UN, NGOs and anyone passing information to the government about the Taliban) and deserters.*

Whilst the Upper Tribunal then went on to reject the evidence of Professor Giustozzi that there is a blacklist, due to the absence of supporting evidence of this and a lack of detail, they then went on to find as follows *inter alia* at [183]-[185]:

*"183. ... Overall, this adds an additional level of remoteness such that in totality, there is insufficient evidence to support a real risk of a low-profile person being identified, located and targeted even if there is a blacklist on which their name appeared. In the absence of a blacklist at all, that risk is fanciful at most.*

*184. As to the prospect of a chance encounter placing a person at risk on return to Kabul from the Taliban, we find little evidence to support any real risk arising from such a situation. There is evidence (which is uncontroversial and has not been specifically*

*challenged) of the Taliban setting up temporary checkpoints in and around Kabul city based on specific intelligence, although no quantification or estimate of the number or range of locations (other than including main routes in and out of the city) used was submitted by either party. That specific intelligence is said to include the expected movement of a targeted person (or persons – such as employees of the state, other countries or NGOs), including the day and time of travel, means of travel (up to and including identification of a specific vehicle) and destination, or at least expected route. We find that such specific intelligence indicates targeting of the most high-profile people, given that significant or at least very well-placed resources would be required to identify such specific information. The specific intelligence identified also suggests higher-profile targets as opposed to lower-level individuals are far, as a matter of practicality, far less likely to be travelling in specific vehicles or have such predictable movements.*

*185. There is of course the possibility that a checkpoint set up to target a specific person or group may also involve others being stopped either randomly or because of a suspicion based on a particular feature. The features suggested in evidence could be that a person is wearing a shirt and tie (which may indicate that they are a state employee of some sort) or has English contacts on a mobile phone. There is however no specific evidence of such incidents regularly occurring or at all. The only example that appears in the evidence is of an Australian man taken off a bus by the Taliban, but the evidence is inconsistent as to whether he was specifically targeted by name or coincidentally by his appearance or other feature. Although we accept that a person is likely to need to travel in and around Kabul for work and other daily necessities, the chances of encountering such a checkpoint, being stopped at it, being questioned by the Taliban, being identified as a target and suffering harm as a result are, cumulatively, too remote to give rise to a real risk of harm. For the reasons set out above, there is no real risk that even if a blacklist exists and a person's name is on it, that that information could or would be obtained at a temporary checkpoint because of the lack of availability of access to a complete or searchable list; or that the person's name would, coincidentally, happen to be one of a very small number given to a local Taliban member.”*

I find that it is unclear from the Upper Tribunal's findings, which focus on the risk to a low profile person, whether or not someone such as the Appellant, who was considered by the Taliban to be a spy and so falling within (ii) would face a real risk of being targeted. Despite the clear and helpful submissions made by Mr Jarvis, I have concluded that a real risk to the Appellant as someone who falls within this higher profile category is not simply fanciful but cannot be excluded, given that the Appellant was

specifically targeted by the Taliban in Herat and previously travelled to Kabul on a weekly basis in connection with his work and thus may already be known to the one or other of the various Taliban groups operating in Kabul [20].

12.3. In any event, the evidence that post dates the decision of the Upper Tribunal and will be considered upon remittal to the Upper Tribunal by the Court of Appeal, in particular the UNHCR guidelines of August 2018 would indicate that internal relocation to Kabul is not viable, in light of the negative trend in the security situation for civilians in Kabul. This is, however, general guidance and the individual's circumstances are clearly relevant. The First tier Tribunal Judge found at [34] that the Appellant should be able to sustain himself in Kabul without much problem given the fact that he was an educated man who came from a well-off family in his home area and he could even get a government job. This aspect of the Judge's decision was, however, set aside as the Judge failed to factor into his assessment the fact that the Appellant fled Herat because of the kidnap, torture and murder of the Appellant's uncle, as a consequence of the Appellant's refusal to assist them and his inconsistent finding as to the risk category under which he fell for consideration. I find that the Appellant could not reasonably be expected to obtain a government job because that would place him directly at risk of targeting from the Taliban, both on that account and because of his past history, which was expressly found to be credible.

12.4. Consequently, for the reasons set out above, I find that the Appellant's education and potential access to financial support from his family do not render internal relocation to Kabul reasonable as there remain a real risk, on the lower standard of proof, that he would be targeted by the Taliban because of his past history, in circumstances where it is accepted that at the current time there is no sufficiency of protection by or on behalf of the State.

### **Notice of Decision**

The appeal is allowed on asylum grounds.

### **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 Rebecca Chapman

Date 4 July 2019

Deputy Upper Tribunal Judge Chapman