Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: LP/00287/2020
[PA/50199/2019]

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 28 October 2021	**On 17 November 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

IO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Khashy, Hoole & Co Solicitors
For the Respondent: Mr C Bates, 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. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and 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 1994.

3. The appellant arrived in the United Kingdom clandestinely on 24 November 2018. On 3 December 2018 he claimed asylum. The basis of his claim is that, as a result of an accident in which he blew out candles at the local mosque where he was praying during Ramadan, the mosque burnt down. He was accused by the local mullah and villagers of deliberately doing so. He claimed that the local villagers, led by the mullah, attacked his mother and set fire to their home when a sister was injured, although he initially thought she had been killed. He claimed that he had been called an "enemy of Islam" and un-Islamic. He feared that he would be seriously harmed or killed and so he left Afghanistan. He claimed that after he left Afghanistan, his family (mother, sister, brother and his uncle's family) left their village and moved to Kabul. The appellant claimed that he was wanted by the Afghan authorities as a complaint had been made to the local police and a summons issued against him. He claimed to fear that on return he was at risk from the Taliban and other religious extremists and was wanted by the Afghan authorities.

4. On 21 November 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a determination dated 17 February 2021, Judge Rhys-Davies dismissed the appellant's appeal on all grounds.

6. First, the judge accepted the appellant's account concerning the burning down of the mosque in his village and that he had been accused by the mullah and village chiefs of having deliberately done so. The judge also accepted that the summons, relied upon by the appellant, was genuine as a result of an expert report by Dr Giustozzi. The judge accepted that the appellant was at real risk of persecution for his perceived anti-Islamic conduct if he returned to his home village.

7. Secondly, however, the judge found that the appellant could safely and reasonably relocate to Kabul. The judge accepted that the appellant's family had moved to Kabul as a result of the events. However, the judge did not accept that the appellant had lost contact with his family (as he claimed) or that the mullahs (and other villagers) had pursued the appellant's family to Kabul causing them (as he claimed) to relocate within the city two or three times. Further, the judge did not accept that the authorities had, or would, pursue the appellant in Kabul because, when Dr Giustozzi's researcher visited the local police station, no record of the summons had been found in the police files although the summons had been confirmed to be genuine. As a consequence, the judge found that the appellant would not be at real risk of persecution or serious harm in Kabul.

8. Thirdly, applying the relevant country guidance decision in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC), the judge concluded that it would be

reasonable for the appellant to relocate to Kabul given his circumstances, including that he had some mental health issues, but he would have a family network there to support him.

9. As a consequence, the judge dismissed the appellant's appeal on asylum grounds.

The Appeal to the Upper Tribunal

10. The appellant sought permission to appeal to the Upper Tribunal on three grounds. First, the judge had applied too high a burden of proof in determining whether the appellant would be at real risk on return in Kabul given the existence of the police summons. Secondly, the judge had failed properly to take into account the accepted past persecution in determining whether there was a future risk to the appellant in Kabul. Thirdly, the judge applied too high a burden of proof in relation to internal relocation and in determining whether it would be reasonable to expect the appellant to relocate to Kabul.

11. On 5 March 2021, the First-tier Tribunal (Judge Adio) granted the appellant permission to appeal.

12. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 28 October 2021. The appellant was represented by Mr Khashy and the respondent by Mr Bates.

The Issues

13. At the hearing, Mr Khashy relied upon the grounds and also adopted a skeleton argument drafted by Counsel (Mr Paul Draycott) filed with the UT on the day of the hearing. Mr Khashy developed the grounds and submissions made in the skeleton argument in his oral submissions.

14. Mr Bates also made oral submissions in response seeking to uphold the judge's decision.

15. Although the situation in Afghanistan, with the take-over of the country by the Taliban, has changed since the judge's decision, those post-hearing/decision country changes are not relevant to whether the judge erred in law in assessing the appellant's claim at the date of the hearing. They will only become relevant if an error of law is found and the decision is being re-made on the basis of the (then) current circumstances in Afghanistan or if a fresh claim is made to the Secretary of State by the appellant.

16. The following points were identified in the submissions:

    (1) The judge's finding that the appellant is at real risk of persecution in his home area is accepted.

    (2) The issue is whether the judge erred in law in finding that the appellant could safely and reasonably internally relocate to Kabul.

(3) In that regard, no challenge is made to the judge's reasons and findings at paras 84–88 that the appellant has not lost contact with his family in Kabul and that the authorities and local villagers have not, in fact, pursued his family to Kabul causing them to relocate two or three times.

(4) In finding that the appellant could safely relocate to Kabul the judge, it is argued by the appellant, fell into error for two reasons:

(a) the judge failed properly to apply Art 4(4) of the Qualification Directive (Council Directive 2004/83/EC) (the "QD") by failing to find that there was a real risk of serious harm or persecution in the future as a result of the acceptance by the judge that the appellant had been subject to past persecution in his home area ("Article 4(4) QD");

(b) in concluding that the evidence did not establish that the appellant would become known to those he feared in Kabul, the judge failed to take into account evidence from Dr Giustozzi set out in the earlier country guidance decision of NM (Christian converts) Afghanistan CG [2009] UKAIT 0045 that in order for the appellant to obtain work or accommodation it was likely that checks would be made upon his background which would lead to the risk that he could be pursued to Kabul ("NM/Dr Giustozzi's evidence");

(c) relying upon HJ (Iran) v SSHD [2010] UKSC 31, the appellant would be at real risk of persecution or serious harm in Kabul because he could not be expected to lie as to his background and, as a result, he would be at risk in Kabul when that was revealed ("HJ(Iran)").

(5) Finally, the judge failed properly to have full regard to the appellant's circumstances in applying AS and concluding that he could reasonably relocate to Kabul, in particular failing to have regard to evidence concerning the appellant's mental health (the "IR and Reasonableness").

Discussion

17. I will take each of points 4(a)-(c) and 5 set out above in turn.

Article 4(4) QD

18. Art 4(4) of the Qualification Directive provides as follows:

> "The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated".

19. That provision has been transposed into UK law in para 339K of the Immigration Rules (HC 395 as amended) which it is not necessary to set out and is in identical terms.

20. Adopting Counsel's skeleton argument, Mr Khashy submitted that the judge had erred in law as the burden of proof was upon the respondent to demonstrate that

there were not "good reasons" to consider that the accepted past persecution would not be repeated in the future. Mr Khashy submitted that the judge had made no reference to Art 4(4) or para 339K. Drawing upon para 4 of Counsel's skeleton argument, Mr Khashy relied upon passages in a number of decisions in the CJEU, Court of Appeal, the High Court and the UT as follows:

> "4/. The FTT and UT are required to apply the above provisions [i.e. Art 4(4) and para 339K] as a matter of law, as per [94] of Abdulla and others -v- Bundesrepublik Deutschland [2011] QB 46 CJEU (GC) ('*the evidential value attached by article 4(4) of the (QD) to such earlier acts or threats will be taken into account by the competent authorities*'), [38] of KB & AH (credibility-structured approach) Pakistan [2017] UKUT 00491 (IAC) ('*If a finding of past persecution has been made, Article 4(4)(Paragraph 339K) requires a particular approach to assessing the risk of repetition*') and [10] and [16]-[17] of PS(Sri Lanka) -v- Secretary of State for the Home Department [2008] EWCA Civ 1213 in which the Court of Appeal emphasised : '*the centrality given (by Rule 339K …) to past experiences as a guide to future risk*' before then holding that the relevant Appellant's past rapes were determinative as to her future risk as no other conclusion was possible. Further, as per the Divisional Court's conclusions at [58], [61] and [67]-[69] in the extradition case of Konuksever -v- The Government of Turkey [2012] EWHC 2166 DC a finding of past serious harm must give rise to considerable caution and demands a detailed and careful consideration as to future risk and the material evidence concerning the same, despite an Appellant's lack of credibility in respect of other issues."

21. In addition, to relying upon those cases as establishing the importance of Art 4(4), drawing upon para 5 of Counsel's skeleton argument, Mr Khashy relied upon a number of cases which identified the importance of taking into account the threat of persecution or serious harm in respect of a family member and, he submitted, establishing that the burden of proof lay upon the respondent:

> "5/. In accordance with the domestic proposition accepted at [23] of Katrinak -v- Secretary of State for the Home Department [2001] INLR 499 CA, the ambit of Article 4(4) QD has also been widely construed by the CJEU at [51] of Ahmedbekova and another -v- Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite (2019) 1 WLR 2779 as applying not just to threats of persecution and/or serious harm made against an Appellant, but members of their family as well : *'account must be taken of the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to such a threat*'. Further, if an Appellant has shown that they have previously been subjected to either 'persecution' or 'serious harm' in their country of origin, Article 4(4) has been held to require the authorities of the member state to formally bear the burden of proof of establishing 'good reasons' that this would not occur again, as per the stance taken by the Applicant, the Federal Republic of Germany, the Italian Republic and the European Commission as noted at [65]-[67] of Advocate General Mazak's opinion in Abdulla and others, before '*the relaxation of the rules of assessment contained in article 4(4) of Directive 2004/83*' being accepted in terms by the Advocate General at [74]-[75] (also see [21]-[22] of the judgment of Germany's Federal Administrative Court in In the Name of the People (2010) 22(3) IJRL 440 BVerwG and [27(1)] of Z.G. -v- The Federal Republic of Germany (2011) 23(1) IJRL 113 to the same effect)."

22. The case law plainly recognises the evidential importance that past persecution can play in determining whether a future risk of persecution is established. In Abdulla and Others v Bundesrepublik Deutschland (Joined cases C-175/08, C-176/08, C-178/08 and C-179/08) [2011] 1 QB 46, at [93]–[94] the CJEU said this:

> "92. By Question 3(b) the referring court asks, in essence, whether, in so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of the Directive applies when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of the Directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee.
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> 93. In that regard, it must be stated that Article 4(4) of the Directive applies when the competent authorities have to assess whether the circumstances which they are examining justify a well-founded fear of persecution on the part of the applicant.
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> 94. That is the situation, first and foremost, at the stage of the examination of an initial application for the granting of refugee status, when the applicant relies on earlier acts or threats of persecution as indications of the validity of his fear that the persecution in question will recur if he returns to his country of origin. The evidential value attached by Article 4(4) of the Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are connected with the reason for persecution relied on by the person applying for protection.
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> 95. In the situation envisaged by the question referred, the assessment to be carried out by the competent authorities as to the existence of circumstances other than those on the basis of which refugee status was granted is, as has been pointed out in paragraph 83 of the present judgment, analogous to that carried out during the examination of an initial application.
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> 96. Consequently, in that situation, Article 4(4) of the Directive may be applicable where there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage."

Here, the CJEU refers to the "evidential value" of past persecution as recognised in Art 4(4) but there is no suggestion that the burden of proof formally passes to the respondent even, as in that case itself, when revocation was the issue rather than an initial asylum claim.

23. I accept that the case law recognises the importance of the approach in Art 4(4) in assessing future risk when past persecution is established. So, in KB & AH (credibility – structured approach) Pakistan [2017] UKUT 00491 (IAC), at [38] the UT acknowledged that Art 4(4) and para 339K "requires a particular approach to assessing the risk of repetition". Further, in PS (Sri Lanka) v SSHD [2008] EWCA Civ 1213 at [16], Sedley LJ referred to the "centrality" given by para 339K to "past experience as a guide to future risk". Likewise, in Konuksever v The Government of Turkey [2012] EWHC 2166 (Admin), in the context of extradition, the Divisional Court acknowledged the importance of a finding of past persecution (or torture) and applying para 339K in determining whether an individual was at future risk of persecution (or torture) (see [58] per Irwin J; and [67]–[68] per Davis LJ).

24. None of these cases impose upon the Secretary of State a legal burden of establishing there are "good reasons" why there is no real risk of persecution in the future if the past persecution is established.

25. I do not accept what is said in para 5 of Counsel's skeleton (adopted by Mr Khashy) that the Advocate General's opinion in Abdulla and Others recognises that the

burden of proof formally lies upon the state of establishing "good reasons". Reliance is placed upon [65]–[67] of Advocate General Mazak's opinion. However, those paragraphs appear under the heading "Main Argument of the Parties" and so to the extent that it is being asserted that the burden of proof lies upon the state, that was no more than the argument put forward by some of the parties in Abdulla and Others. Reading Advocate General Mazak's assessment and conclusions at [68]–[76] and [77] respectively, there is nothing to suggest that the Advocate General accepted the argument put forward on that issue.

26. That case was, of course, did not involve an initial claim for asylum but rather was one where the state sought to revoke asylum based upon a permanent change of circumstances. In invoking the cessation provisions in the QD (or, indeed, the Refugee Convention) a burden of proof may well lie upon the state itself. That has no application in a case where an individual is seeking to establish that they are a refugee for the purposes of the QD or the Refugee Convention. Further, there is nothing in the decision of the CJEC in Abdulla and Others which suggests that a formal burden of proof lies upon the state where Art 4(4) of the QD is invoked. Indeed, Counsel's skeleton does not rely upon the CJEU's decision apart from [94], which I have set out above, which simply refers to "the evidential value" of that provision.

27. Finally, in the context of internal relocation, the formal burden of proof in establishing the first limb of whether internal relocation is an option, namely whether the individual will be at real risk of persecution or serious harm in the proposed place of internal relocation, lies upon the appellant. As regards the second limb, namely the reasonableness of internal relocation, it is recognised that reliance upon a formal burden of proof is unhelpful and a more holistic assessment of the circumstances is required. The approach is summarised by the Upper Tribunal in KAM (Nuba – return) Sudan CG [2020] UKUT 269 (IAC) at [58]–[60] as follows:

> "58. The burden of proof is upon the appellant to establish the real risk of serious harm in the proposed place of relocation (see SMO and others (Article 15(c); identity documents) CG Iraq [2019] UKUT 400 (IAC) at [206]).
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> 59. As regards reasonableness or undue harshness, an evaluative and holistic assessment of all the relevant circumstances is required. In MB (Internal relocation - burden of proof) Albania [2019] UKUT 392 (IAC), the UT stated:
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> > "The burden of proof remains on the appellant, where the respondent has identified the location to which it is asserted they could relocate, to prove why that location would be unduly harsh, in line with *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia* CG [2011] UKUT 445 (IAC), but within that burden, the evaluation exercise should be holistic. An holistic approach to such an assessment is consistent with the balance-sheet approach endorsed later in *SSHD v SC (Jamaica)* [2017] EWCA Civ 2112, at paragraphs [40] and [41]. *MM v Minister for Justice, Equality and Law Reform, Ireland (Common European Asylum System - Directive 2004/83/EC)* Case C-277/11 does not impose a burden on the respondent or result in a formal sharing of the burden of proof, but merely confirms a duty of cooperation at the stage of assessment, for example the production of the country information reports."

> 60. The UT in MB pointed out (at [25]) that "[a]n over-emphasis on the overall burden of proof can be a distraction from that holistic assessment"."

That approach was repeated by the Upper Tribunal in AS at [47]–[49].

28. As regards the first limb, that approach is inconsistent with the appellant's submission in this case that Art 4(4) imposes a legal burden upon the state to establish "good reasons" rather than reflecting, as a matter of common sense, that absent "good reasons" being raised (forensically that is likely to be by the state) past persecution is, in fact, a serious indicator of future risk of persecution.

29. For these reasons, I reject Mr Khashy's submission that Art 4(4) imposed a legal burden of proof upon the Secretary of State to establish that there were "good reasons".

30. I also do not accept that the judge failed to have regard, in substance, to Art 4(4) as properly understood. Although the judge did not make specific reference to Art 4(4), he clearly had the correct legal approach in mind when at para 83 he reached his finding that the past persecution (which he accepted) in the appellant's home area was relevant in determining (and in reaching a positive finding) that the appellant would be at real risk in his home area in future. So, at para 83 the judge said this:

> "The appellant has therefore proved that he is reasonably likely to be at risk of persecution if he returns to his home village or its immediate locality. The incidents that occurred prior to his departure are sufficiently serious to amount to persecution. Past persecution is good evidence of future persecution, absent any material change in circumstances. The appellant has not been away so long it is not reasonably likely that he would not be targeted again by the other villagers and the mullah, were he to present himself to them by returning home".

31. In substance, the judge applied the "evidential value" in Art 4(4) of the past persecution in the appellant's home area and went on to find that unless there was a material change in circumstances that was "good evidence of future persecution". He concluded that there was no change in circumstances as the passage of time since the villagers and mullah had previously targeted the appellant was not sufficiently long to indicate that they would have no future interest in the appellant.

32. Whilst that was concerned with the risk to the appellant in his home area, it would be wrong to conclude that the judge had failed to have regard to the same approach when considering whether the appellant would be at risk in Kabul, namely the proposed place of internal relocation. In truth, the judge considered whether there was any "good reason" why the risk to the appellant in his home area would, so to speak, follow him to Kabul.

33. First, the judge rejected the appellant's oral evidence that the authorities and local villagers had pursued his family to Kabul causing them to relocate within the city two or three times (see paras 86–88). At para 90 the judge concluded:

> "Furthermore, there is no evidence before me that it is reasonably likely that the mullah, the village chiefs, or the occupants of the appellants' village would have the resources to pursue the family to Kabul".

34. Secondly, the judge considered the argument that the appellant would be at risk from the Afghan authorities because a complaint had been made to the local police and a summons had been issued against him. The judge rejected the contention that, as a result, the appellant would be at risk in Kabul at [91]–[93] as follows:

> "91. It is also not reasonably likely that the Afghan authorities in Kabul would pose any risk to the appellant either. If the appellant's local police station has no record of the summons issued against him (per Dr Giustozzi's report), then it is not reasonably likely that they would even take any action to find him locally (unless a fresh complaint were made there), let alone that they would have circulated his 'wanted' status more widely, or travelled to Kabul to look for him/his family.
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> 92. Mr Coyte argued that in all likelihood an arrest warrant would have been issued for the appellant by now, given his failure to respond to the summons, albeit that no such warrant is mentioned in Dr Giustozzi's report because it was not searched for during the visit of Dr Giustozzi's assistant. I disagree. The absence of 'any matching records' at the police station is a material indication to the contrary: that they held no records relating to the appellant at all.
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> 93. I therefore conclude that while the appellant has proved that he would be at risk of persecution in his home village, it is not reasonably likely that he would be at risk of persecution were he to return to Kabul".

35. None of those factual findings or the judge's reasons are challenged in the grounds. The judge has, in effect, found that there are "good reasons" why the past persecution in the appellant's home village does not "evidentially" establish that there is a real risk to the appellant in Kabul. The fact that there is not a real risk that the appellant would be pursued either by the mullah, villagers or by the authorities in Kabul is "good reason" within Art 4(4).

36. The final point raised concerned the application of Art 4(4) not only to past persecution to an appellant, but also of past persecution to family members, being indicative of future risk of persecution to an appellant. There are undoubtedly situations in which a risk to one family member may give rise to a risk to other family members. In Katrinak v SSHD [2001 INLR 499, Schiemann LJ recognised this at [23]:

> "23. Miss Laing submitted that the tribunal was under no obligation to take into account what had happened to [the appellant's wife] and might happen to her again in the future. She submitted that that would only be relevant if it could be shown that the notional future attacker intended by that attack to harm the husband. I would reject that submission. If I return with my wife to a country where there is a reasonable degree of likelihood that she will be subjected to further grave physical abuse for racial reasons, that puts me in a situation where there is a reasonable degree of risk that I will be persecuted. It is possible to persecute a husband or a member of a family by what you do to other members of his immediate family. The essential task for the decision taker in these sort of circumstances is to consider what is reasonably likely to happen to the wife and whether that is reasonably likely to affect the husband in such a way as to amount to persecution of him."

37. Of course, whether an individual is at risk of persecution because of past persecution of a family member must be a fact-specific assessment. The risk may arise but not necessarily so. The past and future target of persecution may only be, on a proper

analysis of the evidence, the family member. The same must apply when applying Art 4(4).

38. The CJEU decision in Ahmedbekova and another v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite (Case C-652/16)[2019] 1 WLR 2779 mirrors the approach in Katrinak. At [50]-[51] the CJEU said this:

> "50. Although it follows from the foregoing that an application for international protection cannot be granted as such on the ground that one of the applicant's family members has a well-founded fear of being persecuted or faces a real risk of suffering serious harm, by contrast, as the Advocate General stated in point 32 of his Opinion, account must be taken of such threats in respect of one of the applicant's family members for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to the threat of persecution or serious harm. In that regard, as stated in recital 36 of Directive 2011/95, family members of a person at risk will also normally be in a vulnerable situation themselves.
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> 51. Therefore, the answer to the fourth question referred is that Article 4 of Directive 2011/95 must be interpreted as meaning that, in carrying out the assessment of an application for international protection on an individual basis, account must be taken of the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to such a threat."

39. Although that was said in respect of Art 4 in general, and not Art 4(4) specifically, I have no doubt it applies to the latter provision.

40. However, in this case the judge found that the past persecution of the appellant's family did not create a risk to them (or the appellant) in Kabul. The unchallenged finding was that the appellant's family had not been pursued to Kabul by local villagers and that they had not experienced any difficulties there which required them to move within Kabul (see paras 16(3) and 33 above). Taken together with the judge's other findings that the appellant would not be pursued to Kabul (see para 34 above), the judge was not unreasonable in finding, in effect for "good reasons", that any past persecution was not indicative of future risk to his family and/or the appellant himself in Kabul.

41. For those reasons, therefore, I reject Mr Khashy's submissions based upon Art 4(4) of the Qualification Directive.

NM and Dr Giustozzi's Evidence

42. In response to those factual findings, raised for the first time in Counsel's skeleton argument is the contention that the judge erred in law in concluding that the appellant's past persecution would not put him at risk in the future on the basis of evidence given by Dr Giustozzi in earlier cases and referred to in NM. The argument turns upon evidence cited at [30] of NM and [70] which is set out at paras 6 and 7 of Counsel's skeleton argument.

43. At [30], the AIT referred to Dr Giustozzi's evidence concerning enquiries or checks that might be made where an individual sought work or accommodation in Kabul. The AIT said this:

> "30. Dr Giustozzi confirmed that he also continued to rely on what is recorded at paragraph 134 of the Tribunal's decision in PM and Others ([2007] UKAIT 00089) as to the nature of Afghanistan society. It is helpful if we set it out as follows:
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> > "134. The risk, according to Dr Giustozzi, would arise after a period following their return. He argues that it is in the nature of Afghanistan society that relationships are based on trust and that for the appellants to obtain work or accommodation they would need to reveal something about themselves to their prospective employer or landlord. He said that would give rise to checks being made into their background. He said that is easier now, with the advent of mobile phones and other communications, and that their pasts would become apparent. It would not thereafter take long for the people and therefore the authorities to hear about them. Not only would the authorities hear about them, through their sources, but it could be assumed that after a relatively short number of weeks or months they would have re-established themselves and become part of informal networks of family and friends. Dr Giustozzi said that the security forces may well then think that they are worth interrogating, because of knowledge they may pick up from those family or friends."

In relation to that, the AIT concluded at [70] in NM as follows:

> "70. We consider that a real risk remains wherever the appellant goes in Afghanistan. Initially the respondent would return him to Kabul. We do not accept that in a city with a population of approximately five million, there is a real risk that the appellant would come into contact again with the two men who threatened him in the UK. However he would need to engage in the social networks that operate within Kabul in order to find employment and accommodation simply to be able to live. This would necessitate, as the Tribunal has found previously in PM, investigations into his background and we think there must be a real risk that that would lead to enquiries in his home town and so back to his son and possibly to others who know him. We think via that route alone, sooner or later, there is a real possibility the appellant's conversion would become known with the same consequent risk in Kabul as in his home town.."

44. There are a number of difficulties with Mr Khashy's submission that the judge erred in law by failing to take into account this evidence.

45. First, it does not appear that the judge was referred to this evidence. Mr Khashy was unable to confirm it had been put before the judge. There is certainly no reference to it in the judge's determination or in the grounds of appeal. The point appears to have been first raised in Counsel's skeleton argument for the error of law hearing in the Upper Tribunal. The file contains a detailed skeleton argument put before the First-tier Tribunal dated 1 October 2020. It was not suggested before me that the evidence was referred to, and relied upon, in that skeleton argument. There is, so far as I can see, no reference to it. The judge cannot be said to have erred in law by failing to take into account evidence that was not placed before him or relied upon by the appellant at the hearing in the First-tier Tribunal.

46. The fact that this evidence was given in an earlier CG decision does not gainsay that proposition.

47. In post-decision submissions made a week after the hearing and received whilst I was preparing this decision, Mr Khashy relied upon two Court of Appeal decisions for the proposition that it is an error of law not to take into account a relevant CG decision even if the judge has not been referred to it. Given the lateness of these submissions which were not presaged by any request at the hearing, I am reluctant to consider them. Parties to an appeal before the IAC Chambers should not be encouraged to make, in general, uninvited post-hearing submissions as if a hearing is an on-going enterprise until the determination is promulgated. It is not. This is particularly pertinent in the UT when the issue concerns an error of law and the parties have had ample opportunity to make submissions on the issues – here including counsel's written submissions. That said, albeit with some hesitation given the timing, I will consider the late submissions.

48. In Bozhurt v SSHD [2006] EWCA Civ 289 at [9]-[10] Laws LJ (with whom Tuckey and Moore-Bick LJJ agreed) said this:

> "9. ….the IAT took the appellant's case at its highest in order to answer the hypothetical question whether, if his account was true, there was objective evidence that the fear he claimed was well founded.
>
> 10. The answer to this question would tell the IAT whether the adjudicator's error in her approach to credibility was material or not. The country guidance case of IK, replicating the risk factors in A, though apparently the appellant's solicitor was unaware of it and the Home Office Presenting Officer failed to remind the IAT of it, was in my judgment clearly relevant to that question. It constituted country guidance which might assist the appellant, to use the IAT"s words at paragraph 6, "in establishing his fear as being well-founded." But in that case, as it seems to me, the adjudicator's error of law cannot be said to have been immaterial. A different credibility finding might have produced a different result."

49. The Court of Appeal concluded, therefore, that it was an error of law for the judge to fail to take into account the CG decision even if he was not referred to it.

50. That approach was applied by the Court of Appeal in NA(Libya) v SSHD [2017] EWCA Civ 142. Flaux LJ (with whom McFarlane and McCombe LJJ agreed), citing Bozhurt, said this at [30}:

> "30. Nor should the fact that the failure to have regard to a Country Guidance case will amount to an error of law depend upon whether the representatives of one or other of the parties has drawn the attention of the Tribunal to the Country Guidance case, as was suggested on behalf of the appellant. That there is still an error of law even though neither party has drawn the attention of the Tribunal to the relevant Country Guidance case is clear from the decision of the Court of Appeal in *Bokhurt v SSHD* [2006] EWCA Civ 289."

51. In NA(Libya), the Court of Appeal applied this approach to a CG decision that was promulgated after the FtT hearing (indeed after the decision was signed by the judge) but before the determination was sent out (see [28]-[34]).

52. Accepting that as the law, Mr Khasky's argument overlooks the context of the CG system and what precisely is the "authoritative" effect of a CG decision that must be followed by the FtT (and indeed the UT) in other cases "unless very strong grounds

supported by cogent evidence, [is] adduced justifying their not doing so" (see SG(Iraq) v SSHD [2012] EWCA Civ 940 at [47] per Stanley Burnton LJ). What is treated as "authoritative" is the *country guidance* as is made plain by s.12 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal of the Senior President of Tribunals (dated 10 February 2010) concerns the status of Country Guidance decisions. So far as is relevant, it provides:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding *on the country guidance issue identified in the determination* based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law." (my emphasis)

53. The CG system requires CG decisions to be treated as "authoritative" on country conditions in order to promote efficiency and consistency in decision-making (see SG(Iraq) at [43]-[46] per Stanley Burnton LJ). I do not see how "evidence", expert or otherwise, could be taken as "authoritative" in a subsequent case. That is certainly not what is contemplated in the CG system. Consequently, what must be followed is the "country guidance" identified by the Upper Tribunal in the CG decision (see para 12.2). There is no obligation to treat as "authoritative", or even take into account, expert or other evidence considered by the UT in the CG case such that a failure to do so "is likely" to be an error of law (para 12.4). Mr Khashy does not rely upon the country guidance in NM (or PM) only the evidence of Dr Giustozzi. I reject Mr Khashy's submissions and his reliance on Bozhurt and NA(Libya).

54. There is a second difficult with Mr Khashy's submissions. The fact that Dr Giustozzi gave this evidence in an earlier case, in fact in 2007, which is cited in NM, does not establish that that was, in fact, Dr Giustozzi's expert opinion at the time of the FtT hearing or now. There is, in my judgment, a serious problem in relying upon expert evidence given in an earlier case which has not been confirmed by the expert involved as remaining their opinion at the present time. Even if this evidence had been cited to the judge, it would have been necessary to satisfy the judge that Dr Giustozzi's opinion expressed in 2007 remained his opinion in 2020. No such affirmation was, of course, provided. How could the judge properly have taken that evidence into account in those circumstances? In fact, of course, in this appeal Dr Giustozzi did provide an expert report but on a single issue, namely whether a

summons was held by the local police station in Afghanistan. No doubt, if his earlier evidence was considered to be relevant and relied upon, he could have been asked to confirm whether that remained his opinion. It does not appear to have been and so, in fact, the judge had no contemporary evidence upon which he could have made a factual finding that checks or enquiries might have led to the appellant being at risk in Kabul.

55. I reject this ground. The judge did not err in law by failing to take Dr Giustozzi's evidence in the earlier CG cases into account.

HJ (Iran)

56. Mr Khashy adopted the submission in para 14 of Counsel's skeleton argument that the judge erred in law by failing to consider whether the appellant would be at risk on return to Kabul because if he were asked why he and his family had fled his home area he could not be expected to lie and would, therefore, disclose what had happened in relation to the burning down of the mosque and that he had been accused of anti-Islamic beliefs. He would be at risk of persecution if he disclosed it or, he would be discrete, in order to avoid persecution. That, of course, is an argument firmly founded in HJ (Iran) and RT (Zimbabwe) v SSHD [2012] UKSC 38.

57. This was an argument made to the judge but rejected by him at paras 94–96 as follows:

> "94. Mr Coyte argued in the alternative the appellant would additionally face new risks of persecution because he might be forced to reveal his history to other people in Kabul, or to the authorities there, if he were asked about his background, because he could not be expected to lie. It was further argued that the appellant was likely to have difficult encounters with the authorities because he no longer had a Tazkera, which would lead to him being harassed and questioned.
>
> 95. I reject those arguments. To take the Tazkera first, while Mr Coyte argued that it would be reasonably likely to have been lost when the appellant's home was burnt, that is not the appellant's evidence. On the contrary, at Q36 of the appellant's second asylum interview he states he believes it is still with his mother, and this was not corrected or amended in the post-interview submissions from his solicitors, or in any later evidence. In those circumstances, I find it unduly speculative to say that the appellant is reasonably likely to be questioned about his background by the authorities and at risk of arrest or ill-treatment as a result.
>
> 96. I further find it is not reasonably likely that the appellant's past would cause him problems with other members of the public in Kabul. It is similarly speculative to argue that a real risk of persecution would follow were the appellant to be asked about his history and for him to say *'I had to leave my village because the mosque burnt down and I was wrongly accused'*".

58. Whilst RT recognises that an individual cannot be required to lie in order to avoid persecution about his political opinion or, indeed, his religious beliefs or sexual orientation, that is because those are protected characteristics under the Refugee Convention.

59. In HJ (Iran) the Supreme Court accepted that a person would have a well-founded fear of persecution if, in order to avoid persecution, they behaved so as to avoid the risk created by their race, religion, nationality, political opinion or membership of a particular social group. To behave discreetly (including not telling the truth) in relation to one of those matters which would otherwise expose a person to persecution, is as much a basis for a well-founded fear of persecution and to be a refugee as to be directly at risk because of one of those characteristics.

60. At [53], Lord Rodger said this about the underlying rationale of the Convention:

> "The underlying rationale of the Convention is therefore that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them. "

61. At [67], Lord Rodger again recognised that the Convention protected: "the right to live openly without fear of persecution.

62. The right to live openly meant, the Supreme Court determined, that a person could not be required to "live discreetly" in order to avoid suffering any actual harm if he or she were to live openly and would then suffer persecution for a Convention reason. At [69], Lord Rodger said this:

> "... if a person has a well-founded fear that he would suffer persecution on being returned to his country of nationality if he were to live openly as a gay man, then he is to be regarded as a refugee for purposes of the Convention, even though, because of the fear of persecution, he would live discreetly and so avoid suffering any actual harm ...".

63. At [25] in RT, Lord Dyson added this:

> "Thus the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual. The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental rights."

64. However, the protected rights are spelt out in the Convention's five "reasons". As Sir John Dyson JSC said in HJ(Iran) at [110]:

> "110. The Convention must be construed in the light of its object and purpose, which is to protect a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country."

65. That, however, is not the appellant's case in this appeal. The case law does not recognise that a person has a claim simply because they could avoid persecution by not telling the truth. Here, the appellant would not be required to lie in such a way that he would not be able freely to conduct himself according to his political opinion or religious beliefs. The fact is that the appellant has falsely, on his case, been accused of anti-Islamic activities. The appellant is a Muslim and, as the evidence demonstrates, a Muslim who attends mosque. In order not to disclose the attacks upon him, the appellant would not be required to lie about his fundamental religious beliefs which are the protected characteristic under the Refugee Convention. He would not be denying his religious beliefs nor would he be unable to practise his faith if he did not disclose why he and his family had left his home village. This is not, therefore, a case which falls within the principle recognised in HJ (Iran).

66. For these reasons, therefore, I reject Mr Khashy's submissions that the judge erred by failing to properly consider whether the appellant would be at risk when in Kabul because he would be required to lie about his history.

IR and Reasonableness

67. The final ground relied upon by Mr Khashy, in essence the original ground 3, is that the judge failed properly to consider the reasonableness of the appellant's relocation to Kabul in the light of AS. In particular, Mr Khashy relied upon evidence at pages 42 and 43 of the bundle concerning the appellant's mental health. At para 42, a letter from his general practitioner dated 15 February 2015 says that the appellant: "is suffering from symptoms of Depression and Post Traumatic Stress Disorder for which he is having therapy ...". The letter also goes on to state that he suffers from "significant physical health problems" which cause headaches and widespread pain contributed to by nutritional deficiencies and he is awaiting investigation and to start treatment for hepatitis B. At para 43 are photocopied scripts dated 1 May 2019 and 27 June 2017 relating respectively to "Ferrous Sulfate" tablets and "Mirtazapine" tablets.

68. It would appear that before the judge the appellant wished to rely upon more extensive medical records which were contained within a further bundle filed after the hearing was initially convened on 6 January 2021 but before the resumed hearing (the appeal having been adjourned part-heard) on 1 February 2021. The judge dealt with this at paras 9–10 and refused, in all the circumstances, to admit the further bundle of documents. That decision has not been challenged. The material, therefore, before the judge which was relied upon by Mr Khashy was somewhat limited.

69. The judge was clearly aware of the contention that the appellant had mental health issues which he referred to it at para 89 and then, in relation to AS and internal relocation he dealt with it at para 99 as follows:

> "Finally, applying the country guidance at **[253]** of ***AS***, I find that relocation to Kabul is reasonable in the appellant's case on his circumstances as I have found them to be. He was an adult when he left Afghanistan. Although he has not lived in Kabul before, he has not proved that he is not in contact with his family, who were already there and who

had been there for some years without incident. He has not claimed, let alone proved, that he will not have access to his Tazkera on return. He has had some health issues but these do not establish that he is unable to function on a day-to-day basis, particularly when he has a family network to turn to for support. I conclude that the appellant can reasonable relocate to Kabul. It follows that the appellant's protection appeals must be dismissed".

70. In AS, the UT set out the country guidance for internal relocation to Kabul at [253] as follows:

> "**Reasonableness of internal relocation to Kabul**
>
> (iii) Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout many other parts of Afghanistan) it will not, in general, be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul and even if he does not have a Tazkera.
>
> (iv) However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within the general position set out above. Given the limited options for employment, capability to undertake manual work may be relevant.
>
> (v) A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return. A person without a network may be able to develop one following return. A person's familiarity with the cultural and societal norms of Afghanistan (which may be affected by the age at which he left the country and his length of absence) will be relevant to whether, and if so how quickly and successfully, he will be able to build a network."

71. I am not persuaded that the judge has failed to consider all the relevant factors in relation to the reasonableness of internally relocating to Kabul. Of course, the judge rejected some of the appellant's claims, namely that he had no contact with his family and had no Tazkera. The judge found that the appellant was in contact with his family in Kabul and that he could obtain a Tazkera there. In those circumstances, it was reasonably and rationally open to the judge to find that the appellant would obtain financial and other support from his family on return to Kabul. He would have access to a Tazkera and that would assist him in integrating and living in Kabul.

72. The evidence concerning the appellant's mental health was limited. The GP letter goes no further than recognising that the appellant suffers from depression and has some symptoms of PTSD. It does not contain a diagnosis of PTSD. I accept that there is some evidence concerning investigations for hepatitis B (see, for example, page 37 of the bundle). That evidence is dated 25 March 2020. There is also evidence that the appellant has been assessed as suitable for psychotherapy (see page 41 of the bundle). The prescribed medication dates to May 2019 and June 2019. The latter would appear to relate to treatment for depression or anxiety. However, there is no

other indication of what has been prescribed to the appellant or whether that is a continuing prescription beyond mid-2019.

73. Having regard to the totality of the judge's findings, and having considered the evidence relied upon before him, I am satisfied that the judge's finding in para 99 properly takes into account the guidance in AS at [253] and that he reached a reasonable and rational conclusion that the appellant could reasonably be expected to relocate to Kabul and that, therefore, internal relocation was open to him.

Conclusion

74. For all these reasons, I reject each of the grounds (together with the supplementary written and oral submissions) made on behalf of the appellant. The judge did not materially err in law in dismissing the appellant's appeal.

Decision

75. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

76. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
6 November 2021

TO THE RESPONDENT
FEE AWARD

Judge Rhys-Davies made no fee award as the appeal was dismissed. In the light of my decision, that fee award decision also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
6 November 2021