IAC-HX-DML-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/11194/2013
AA/11195/2013
AA/11196/2013
AA/11197/2013
AA/11198/2013
AA/11206/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 August 2015	**On 13 January 2016**

Before

UPPER TRIBUNAL JUDGE CONWAY
UPPER TRIBUNAL JUDGE KNOWLES QC

Between

MR SNE (FIRST APPELLANT)
MRS SE (SECOND APPELLANT)
MR SYE (THIRD APPELLANT)
MISS RE (FOURTH APPELLANT)
MISS HE (FIFTH APPELLANT)
MISS HE (SIXTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Bazini
For the Respondent: Mr Duffy

DECISION AND REASONS

INTRODUCTION

1. The Appellants are citizens of Afghanistan. The First Appellant (born 1950) is the husband of the Second Appellant (born 1967). They are the parents of the rest of the Appellants who were born, respectively, in 1984, 1992, 1999 and 1993.

2. The immigration history is that the Third Appellant travelled to the UK on his own passport in October 2011 with leave to enter as a student.

3. The Second, Fourth, Fifth and Sixth Appellants travelled to the UK in November 2011 also on their own passports. The purpose of their journey was to visit the Third Appellant.

4. The First Appellant entered the UK in December 2011 travelling on an Afghani Diplomatic passport. This had been endorsed with a UK visit visa granted to him by the British Consulate General in Istanbul in June 2011. He claimed asylum in December 2011.

5. The First Appellant's claim (hereafter simply "the Appellant") is summarised as follows: he was appointed as Minister of Internal Affairs in 1980 for one year; from 1989 he was the Deputy Leader of Communications for two years. In that role he was part of the Mujahadin's Transitional Government outside Afghanistan; during the anti-Soviet war waged in Afghanistan from 1980 to 1992 he was primary based in Afghanistan on behalf of the Jamiat; when the Jamiat came to power in 1992 he held the position of Minister of Agriculture until 1996. From 1991 onwards he was a member of the Council of the Mujahadin in government.

6. He also held the position of Director of the Jamiat Islami Council in Iran and was charged with resolution of the party's problems with Iran. In 1999 he was appointed to the Political Office of the Leadership Council of the Islamic State of Afghanistan. The Chair of this Council was Burhanuddin Rabbani and Ahmad Shah Massoud.

7. In 1999 President Rabbani described the Appellant as "my representative" in letters to Hussainpoor Hefzullah and Mehdi Karodi. In the same year, Rabbani wrote to the President of Iran introducing the Appellant as the head of a "Combination Council" of a number of parties and areas within Afghanistan. Rabbani elected him to the role of "Chairman of the western part of Aghanistan in charge of security". He was also involved in work relating to Afghan refugees during this period.

8. In a letter addressed to Brigadier Saraj of the Pakistani "Inter-Services Intelligence" ("ISI"), he was described as a "member of the Political Office of the High Council of the Islamic State of Afghanistan". He was Rabbani's "special envoy" tasked with helping to resolve issues between Afghanistan and Pakistan.

9. He returned to Afghanistan from Iran in 2001.

10. He believes he was targeted by the Taliban in 2010. His brother (who acted as his driver and guard) was shot dead by unknown assassins when he was driving the Appellant. He reported the murder to the police but no investigation took place. After this incident he did not travel much in Afghanistan and only to provinces that were secure.

11. He never received any threats by phone or letter or email from either the Taliban or the ISI. However, he claimed that due to incidents which happened daily in Afghanistan it was difficult to predict what would happen particularly as the ISI are active in Afghanistan. He believed that the ISI and the Taliban have published a list of people who they wish to kill. President Rabbani and General Dawood were on the list and have since been killed in suicide attacks. He believes he is on the list although he has never seen it.

12. He left Afghanistan in early December 2011 to visit his student son in the UK. A few days later he received calls from different people who were in different locations, including his office. He was told that "they are after you". Additionally, the Interior Minister contacted his office and sent him an oblique message which he interpreted as advice from the Minister of the Interior that he should not return to Afghanistan. Fearing that his life was at risk he claimed asylum.

13. He believes that were he to return to Afghanistan he would be at risk from the government of Afghanistan, the Taliban, the ISI and from others within his party.

THE RESPONDENT'S CASE

14. The detailed reasons for the Respondent's decision to refuse the Appellant's application are set out in a Home Office letter dated 6th December 2013 ("the Reasons for Refusal Letter"). In essence, the Respondent argued that:-

    (i) there were serious reasons for considering that, during the period in which the Appellant held ministerial posts in the Afghan government and during which he was also the deputy leader of the Jamiat, the forces under the command of the Afghan government (in particular units of the Jamiat and/or Shura-e-Nazar (fighters), were responsible for the commission of war crimes and crimes against humanity. In particular, there were serious reasons for considering that the Afghan government's artillery and rocket units either deliberately fired on civilian occupied areas of Kabul or indiscriminately used weapons in such a manner as to result in civilian casualties that would have otherwise been avoidable had the weapons been effectively targeted on opposition military positions;

    (ii) the evidence showed that significant war crimes and crimes against humanity had been committed by all factions in the Afghan

Civil War during the period between 1992–1996. Although it was noted that the primary blame for these crimes was usually apportioned to Hizb-i-Islami, under the leadership of Gulbuddin Hekmatyar, which was accused of causing a larger proportion of the destruction of Kabul (and as such the large proportion of civilian casualties), notwithstanding that the First Appellant was a member of the country's legitimate government which had come under significant attack from Hizb-i-Islami and other factions, international law does not allow the commission of war crimes/crimes against humanity in any circumstances;

(iii) research had shown that the Appellant was a high-ranking and significant figure within the Mujahadin, having been appointed to an important ministerial position as the Interior Minister in the shadow government established in 1988 and as the Minister of Agriculture following the collapse of the PDPA regime in 1992. He was also a member of the Council for the Mujahadin Government and, whilst holding ministerial office, he had continued to serve as the deputy party leader to President Rabbani. Moreover, research showed that the First Appellant had taken part in high-level negotiations during 1992/1993 during the civil war between the rival Mujahadin factions. He had attended those negotiations as the Representative of President Rabbani and Jamiat;

(iv) there was evidence to show that the attacks on civilians were carried out in various locations within Kabul at different times which indicated that the attacks were not isolated events and thus gave serious reasons for considering that they were carried out on a widespread basis. This identified those actions as crimes against humanity perpetrated against civilians by Jamiat and/or Shura-e-Nazar military units;

(v) whilst it was not argued on behalf of the Respondent that the Appellant had been an active participant in the war crimes and crimes against humanity perpetrated by the Afghan army and/or Jamiat/Shura-e-Nazar military units, there were serious reasons for considering that he had made a significant contribution to the commission of these crimes;

(vi) the Respondent relied on the case of **KJ (Sri Lanka) [2009] EWCA Civ 292**, a case in which the Court of Appeal held that, "*the higher up in the organisation a person is, the more likely will be the inference that he agrees with and promotes all of its activities*";

(vii) the Appellant met the criteria set out in the case of **JS (Sri Lanka) [2010]** in which the Supreme Court set out the factors to be considered when assessing what more than mere membership of an organisation that committed international crimes was required to exclude a person from the protection of the Refugee Convention under Article 1F(a). The Appellant met the criteria for exclusion for a

number of reasons which are set out in paragraph 76 of the Reasons for Refusal Letter. These included the conclusion that the First Appellant must have been aware of the nature of the conflict in and around Kabul and the actions of the Jamiat party and/or Shura-e-Nazar. Nevertheless, he had failed to disassociate himself from that party and the actions of its military wing nor had those actions been challenged by President Rabbani's government;

(viii) given the Appellant's proximity to President Rabbani and the extent to which he shared President Rabbani's responsibilities and took part in high-level discussions regarding military actions, such as (allegedly) the planning of the Afshar offensive during which the military forces of the Jamiat and Shura-e-Nazar committed international crimes, the Respondent was of the view that the Appellant had made a significant and substantial contribution to the government's ability to commit these crimes. Accordingly, the Respondent concluded that the provisions of the Refugee Convention did not apply to the Appellant pursuant to Article 1F(a) of the Geneva Convention. This was because, for the reasons summarised above, there were serious reasons for considering that he had committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes.

15. Since the Respondent had found that the provisions of the Refugee Convention did not apply to the Appellant, because Article 1F(a) was applicable to him, the Respondent issued a certificate pursuant to Section 55 of the Immigration, Asylum and Nationality Act 2006 stating that the Appellant was not entitled to the protection of Article 33(1) of the Geneva Convention and his asylum claim was refused accordingly.

16. As regards the Appellant's eligibility for Humanitarian Protection, this was considered under the criteria set out in paragraph 339C of the Immigration Rules and for similar reasons as those upon which the Respondent relied for finding that Article 1F(a) applied to the Appellant, it was concluded on behalf of the Respondent that the Appellant did not qualify for Humanitarian Protection.

17. Notwithstanding the Respondent's conclusion that the Appellant's claim did not qualify for consideration for asylum or Humanitarian Protection and a Certificate had been issued against him to this effect, according to paragraph 89 of the Reasons for Refusal Letter, consideration had in fact been given to the question of whether or not the Appellant qualified for asylum or Humanitarian Protection.

18. The Appellant's claim for asylum and Humanitarian Protection was considered in conjunction with Article 3 of the ECHR in paragraph 93 onwards of the Reasons for Refusal Letter. Although much of the factual

basis of his account was accepted by the Respondent, his claim to be at real risk of persecution or other serious harm from the Karzai government, the Taliban, the ISI and those others he claimed to fear was challenged because of the inconsistency and lack of cohesion in his evidence, which was not substantiated by any objective means. In view of these factors, the Respondent concluded that the Appellant had never been, nor would he in the future be of adverse interest to the authorities or those others he claimed to fear in Afghanistan. Removal of the Appellants, in accordance with the removal directions, would not be in breach of the UK's obligations under the Refugee Convention, the Qualification Directive or the ECHR.

19. The Appellant stated that he did not leave Afghanistan in December 2011 due to any fear of persecution or of serious harm, and he claims that he was in such fear after he had received information since he came to the UK that his life would be in danger were he to return to Afghanistan. Accordingly, the Respondent assessed his case as a person who had claimed to be a refugee '*sur place*'.

20. Since the Second and Fourth Appellants' applications were assessed as dependants of the First Appellant, their applications were considered with his claim and as such, they were not issued with separate Reasons for Refusal Letters. As regards the Third, Fifth and Sixth Appellants, their applications were based on the assertion that their father was a prominent politician and that he had been a former deputy leader of the Jamiat party and also an Interior Minister in the former regime. The Third Appellant confirmed that he was happy for his Asylum Interview Record to be read and considered with his father's interview record and the Fifth and Sixth Appellants also confirmed that they were content for their Asylum Interview Records to be considered with that of their father and their other family members. Accordingly, their applications were refused in line with the reasons given for the refusal of the First Appellant's application. However, it was not alleged by the Respondent that their applications were excluded from the protection of the Refugee Convention or from Humanitarian Protection on account of their commission and/or participation in the international crimes of which, it was alleged, the Appellant was guilty.

21. The detailed reasons for the Respondent's Decision to refuse the Third, Fifth and Sixth Appellants' applications are set out in Home Office letters dated 18th December 2013, 19th December 2013 and 16th December 2013 (respectively).

22. They appealed.

THE DECISION OF THE FIRST TIER TRIBUNAL

23. Following a hearing at Richmond on 16 July 2014 Judge of the First-tier (FtT) Morris did not uphold the Respondent's certificate made under

Section 55. She also dismissed the appeals on asylum and human rights grounds.

24. On the former the judge's analysis is at paragraphs 30- 40 of her determination. In summary she found that the Jamiat could not be said as a party to be "*predominantly terrorist in character*" or an "*extremist international terrorist group*" and that the Appellant's voluntary membership of the Jamiat did not amount to "*personal and knowing participation or at least acquiescence amounting to complicity in the crimes in question*". [30]

25. She found that the military wing of the Jamiat under the leadership of Ahmad Shah Massoud was autonomous. Also that although the Appellant was a "*high-ranking member of the Jamiat … his role was allied to that of President Rabbani (in respect of whom the documentary evidence amply testifies to his peace-making aim) and not to Massoud*". [35]

26. She found that the Appellant was not involved in the atrocities detailed in the refusal letter. It was the military forces of Jamiat that were responsible for the commission of war crimes and crimes against humanity in the Kabul area between 1992 and 1996 [36]. Rather the Appellant was "*associated" with seeking a peaceful solution by negotiation rather than military force*. …" [37]

27. She concluded (at [39]) that "*notwithstanding his position and rank in the Jamiat the Appellant's influence in this organisation, especially insofar as it is related to Ahmad Shah Massour was very limited"* with the result that there were "*no serious reasons for considering that (he) contributed voluntarily in a significant way to the Jamiat's ability to pursue its purpose of committing war crimes, aware that his assistance would in fact further that purpose."*

28. On the asylum claim the judge considered this at paragraph [42 ff].

29. Dealing first with his claim to have been involved in politics giving interviews critical of the Karzai government and the Taliban since his arrival in the UK, the judge did not consider that he would be at greater risk than before he left Afghanistan. Similar interviews he had given there shortly after the assassination of Rabbani "*did not result in any harm or threat of harm*" to him. Also there was no evidence that the alleged suicide bombers carried out their threat. Indeed, he remained in Afghanistan for another three months. [42]

30. Further, Karzai had been in power since 2004 and it had not been shown that the Appellant had had any problems as a result. Moreover, members of the Jamiat also work for the current Afghan (Karzai) government. There was no evidence that the Appellant's position would be any different from theirs particularly as he does not claim to have had a military profile. In

addition, he could rely on the bodyguards or others who had protected him and his family before he left. [45]

31. Moreover, the fact that he was contacted by his secretary after the Minister of the Interior phoned his office and asked them to inform the Appellant that he should not return to Afghanistan suggested that he has "*influential contacts*" who would be able to aid his security. [46]

32. As for his claim to be at risk from the Taliban/the ISI his evidence was "*vague and unsubstantiated*" including the claim that his brother had been killed by the Taliban. [47]

33. The judge also found it significant that the Appellant had never received any letters or threats from the Taliban/ISI. It was usual for "*collaborationists*" to be threatened initially [48]. They had had ample time to "*either threaten and/or assassinate him, but they never did so*". [49]

34. As for threats from the Jamiat the judge appeared to accept the Respondent's position which noted that he was no longer deputy leader of the party. Also "*numerous other persons associated with the Jamiat still live and operate safely in Afghanistan"*. Further, the judge considered, any perceived threat "*must to some extent be lessened by his health difficulties*". [50]

35. The judge found no merit in the claim that the Third Appellant might face risk not only because of his association with the First Appellant but because he too was a politician in his own right.

36. As regards the fears expressed by the Fourth, Fifth and Sixth Appellants because of the status as women in Afghanistan the judge found that as the Appellants would be returned as a family unit the female Appellants would not be lone women in Afghanistan. [53]

37. The judge also found that there would be a sufficiency of protection [54]. Further, having wealth the Appellant would not have to seek work and would thus be able to keep a low profile. They would be able to live safety in Kabul where they had lived for many years. [56]

APPEAL TO THE UPPER TRIBUNAL

38. The Appellants sought permission to appeal which was granted by Judge of the First-tier White on 4 November 2014.

39. Following an error of law hearing on 8 January 2015 Deputy Upper Tribunal Judge Chana concluded at [32] "*The judge fell into material error as she failed to consider all the evidence in the appeal and come to sustainable conclusions. I therefore set aside the determination of the First-tier Tribunal in its entirely and preserve none of the findings of the First-tier*

Judge in the determination. All issues in the appeal will be reargued including the Respondent's certification".

40. Following further procedure the matter came before Upper Tribunal Judge Kebede. In a Notice dated 19 May 2015 she stated "… *it is my provisional view that the Deputy Upper Tribunal Judge in setting aside the entire decision of the First-tier Tribunal including, the (unchallenged) decision on the Article 1F(a) certificate, overlooked the provisions in Section 11(3) of the Tribunals, Courts and Enforcement Act 2007 as well as the reported decision of the Upper Tribunal in* ***EG & NG*** ***(UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 143*** *in relation to the scope of the challenges to the First-tier Tribunal decision which were before her".*

41. UTJ Kebede proposed in the absence of objection to set aside the decision of DUTJ Chana.

42. There was no objection with the result that UTJ Kebede on 5 June 2015 issued a decision to set aside under Rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008 with the further result that "*the appeal will now be set down for an oral hearing in the Upper Tribunal for determination of the error of law, pursuant to the grant of permission on 4 November 2014".*

43. Thus, the matter came before us. Parties agreed that our first task was to decide whether the FtT Judge's determination was materially flawed. It was also accepted in that regard that all the Appellants stood or fell on the decision in respect of the First Appellant. It was further agreed that if an error of law was found the issue was risk on return.

44. Mr Bazini sought to rely on the grounds seeking permission. The credibility of the Appellant's historical account was not challenged by the Respondent. He was a serious player politically in Afghanistan. The judge had not dealt adequately with the expert's report and the evidence concerning the targeting of other prominent Jamiats. It did not follow that because nothing had happened to the Appellant such led to the conclusion that he might not be at risk on return. The judge's approach overall showed inadequate analysis.

45. The judge also failed to deal with the expert's conclusion that the Appellant as a high profile and thus priority target would not be safe in Kabul and that there was likely to be an insufficiency of protection.

46. In reply Mr Duffy submitted that the reasons given by the FtT Judge had been adequate. She had referred to the expert's report. Whilst there would be no guarantee of protection she was entitled to find that there is a sufficiency of protection.

OUR DECISION ON ERROR OF LAW

47. It is important to note that there is no appeal by the Respondent against the FtT findings or decision with respect to certification under Article 1F(a) of the Geneva Convention and thus we uphold that part of the FtT's decision for the reasons it gave.

48. However in relation to the analysis of the asylum claim we found that there had been material error. We concluded as follows:

> "In paragraph 44 the FTT stated that the Respondent's reasons for refusal letter set out a cogent and detailed explanation for her decision that the Appellants were not at risk of persecution. However there was no separate evaluation of the Respondent's reasons in the FTT's decision as the FTT merely stated that it had come to the same conclusions for the same reasons. Though the FTT said it had reached its decision independently and gave some supplemental reasons, its approach to these important factual matters represented something of an abdication of responsibility by failing to scrutinise with care the Respondent's reasoning. Unfortunately that approach led the FTT into material errors of law.
>
> First, the report of Dr Giustozzi was unequivocal in its conclusion that there was an insufficiency of protection available to the Appellant from the police. This expert evidence was essentially unchallenged in circumstances where the Respondent had failed to provide any evidence to make good her assertion that, because of his political prominence, the First Appellant would receive a level of protection unavailable to others. The FTT simply failed to address this material adequately. The suggestion made by the FTT in paragraph 54 that the existence of a police force coupled with evidence of some police activity in response to the violent death of the First Appellant's brother was enough to demonstrate sufficiency of protection flew in the face of the conclusions reached by Dr Giustozzi. If the FTT was unpersuaded by Dr Giustozzi's report, it should have explained why this was the case. It did not and thereby materially erred in law.
>
> Second Dr Giustozzi's report provided a careful analysis of the risks of assassination faced by even lower profile members of the Jamiat. His report also concluded that, due to the First Appellant's continued attacks in the media on the current Afghan Government, it would be more difficult for him to obtain state protection. In circumstances where apparently the Minister of the Interior considered that he could not protect the First Appellant, the FTT failed to explain what it made of this material in reaching its decision. It thereby once more fell into material error of law.
>
> For these reasons, we conclude that the FTT materially erred in law and we set aside its decision."

49. Mr Bazini wished to lead oral evidence. He was able to do so immediately. We heard briefly from the Appellant's son, the Third Appellant, Mr SYE. He sought to rely on his statement and several photographs. These, he said, showed his involvement in the Global Afghan Forum. This is an organisation which he founded in Turkey when he was a student there and now active in London and Afghanistan. It is a non-profit organisation which works to deal with extremism particularly amongst the young who in

Afghanistan are often unemployed and make up most of the suicide bombers.

50. He was asked if he and the family would have bodyguards were they to return to Afghanistan. He said that in the past they had paid for bodyguards privately but now they would have no money to pay for such.

51. In cross-examination the witness agreed that as well as having a house in Kabul they have an ancestral property in Herat.

OUR ANALYSIS AND CONCLUSIONS

52. In light of the voluminous amount of material in this case parties agreed that the most appropriate way to proceed was by way of written submissions by both parties. There was some delay on the part of the Respondent but both sets were received by early October 2015. We did not begin our consideration of this matter until we had received them.

53. We refer to the submissions in the course of our analysis below.

54. As well as the submissions we had before us statements and various documents and background material. Also an expert's report by Dr Giustozzi.

55. There is no dispute that the Appellant was a senior politician in Afghanistan for a number of decades and indeed served as a senior minister in government. It is clear from the background material he was one of the leading members of Jamiat Islami together with Rabbani, to whom he was allied and a deputy.

56. It suffices to note of Jamiat, a 2012 report referred to by the Respondent which refers to the National Front of Afghanistan and National Coalition of Afghanistan – both of which comprised Jamiat leaders. "*Jamiat is a former Mujahedin party that always had been characterised by an extremely diversified – some might say; fragmented – organisational structure. Many of their leading personalities have been closely allied with each other over long years. Politically, both alliances support Afghanistan's shift to a parliamentary system, the decentralization of power and electoral reforms as well as talks with the Taliban*."

57. The issue before us has narrowed to risk on return from the Taliban.

58. It is noteworthy that the Respondent appears to have accepted that the Appellant was and is at risk but considers that the risk is not sufficient. Thus, in his oral submissions resisting the error of law challenge Mr Duffy conceded that "*I accept that he was always at risk".* Further, "*The Taliban would kill him if they could*". In his written submissions he writes "*In relation to the Appellant's professed fear of the Taliban, as a senior and*

founding member of Jamiat-i-Islami, it is probable that the Taliban would have an adverse interest in him …".

59. Mr Duffy noted the report by Dr Giustozzi dated 28 April 2014 which identifies several other high profile figures from Jamiat who have been assassinated or have had attempts on their lives. However, Mr Duffy suggests these have "*significantly different profiles*" to the Appellant in essence that they are "*more active and more likely to come into direct conflict with the Taliban due to their roles outside of Jamiat-i-Islami".*

60. We do not find this persuasive. In the context of the Respondent's acceptance that the Taliban would have an adverse interest in him simply on the basis that he was a senior and founding member of Jamiat consideration needs to be given to the specific matters that the Appellant claims amount to a real future risk of persecution.

61. The Appellant points out in his witness statement [26-28] that he was an outspoken critic of Karzai's government's talk of bringing the Taliban into government. He opposed negotiations and compromise. He articulated his disregard for the Taliban leader Mullah Omar on BBC radio pointing out his distrust of the Taliban's ideologies and activities. He continued to express his ideas and views in the media and at conferences.

62. We note that the Respondent does not challenge the Appellant's evidence in respect of these activities and we see no reason to do so.

63. We agree with Mr Bazini that this open criticism increased and increases the risk over and above his position and membership of Jamiat.

64. The Appellant claims that during this period his vehicle was attacked in Nimroz and his brother who was the driver as well as his bodyguard was killed. The Appellant believes he was the intended target as his brother was not political and the manner of the attack strongly suggested that the Taliban was likely to be responsible. Therefore he took precautions, avoiding travelling at night, going to the provinces and attending conferences only when absolutely necessary.

65. In the refusal letter the Respondent states that the attack was a random one or did not take place "in the manner" suggested. It is not clear to us what the alternative means.

66. In our judgement bearing in mind the context we find it reasonably likely that it was an attempted attack on the Appellant. We note Dr Giustozzi's comment that it was "*plausible*" that the Appellant might have been targeted for assassination. "*The Taliban had at the time of the attack a significant presence in south-western Afghanistan … so the capability to carry out such attacks was certainly there. The fact that (he) appeared in the media to oppose negotiations and compromise with the Taliban would*

certainly have contributed to make a target of him – all the political leaders targeted were known for their uncompromising position towards the Taliban …" [11]

67. In Mr Duffy's written submissions it is asserted for the first time that the failure to provide media reports about the attack casts doubt that the event took place. We see nothing to support the contention that the media would necessarily have reported this. Further, the point was not put in the refusal letter or indeed to the Appellant's son who gave evidence.

68. The Respondent makes the observation that even though there had been such an attack the Appellant did not seek to flee Afghanistan.

69. We agree with Mr Bazini that this misses the point. First, as the Respondent acknowledged, the Appellant was of adverse interest to the Taliban and was always at risk. Second, as the Appellant stated it was part and parcel of his life, as for many others in the country, that they knew they were potential targets but nonetheless simply accepted this and got on with the job they had to do. It follows that they did not simply flee at the first opportunity. The fact that an individual does not flee does not mean that they are not at risk.

70. The Respondent continues by suggesting that apart from the killing of the brother in 2010, which was not accepted as having occurred as claimed, nothing adverse happened to the Appellant. Such must mean that either the Appellant was not at risk of real harm or enjoyed a sufficiency of protection.

71. We disagree. The fact that a person goes unharmed for a period does not necessarily mean that there is not a real risk or that there is a sufficiency of protection. People can be at risk for years without coming to harm as is plainly the case with many persons currently occupying positions hostile to the Taliban. There may be many reasons why an individual who is at risk is not attacked, including opportunity, luck, location, priorities, resources.

72. The assassination of Rabbani took place in September 2011. The Appellant was deputy leader. As such it is reasonable to conclude that he was the next most prominent member/leader of the party.

73. Mr Duffy argues that the fact that Rabbani was the leader of Jamiat was irrelevant to the attack on him and so by implication this attack had no bearing on the risk to the Appellant.

74. We do not agree. The Respondent has already accepted that the Taliban would have an adverse interest in the Appellant. It seems to us that it must follow that they must have had an adverse interest in Rabbani. It may well be that Rabbani's involvement in the High Peace Council brought

about additional risk, but it cannot be said that Rabbani was not in any event at risk from the Taliban.

75. Further, we note that Rabbani was killed by the Taliban at a time when he was trying to make peace with them as opposed to the Appellant who had taken a harder stance against the Taliban publicly announcing that peace should not be made with what he regarded as a treacherous group.

76. We note that following the assassination of Rabbani the Appellant was interviewed by 1TV. In his statement he makes it plain that he expressed his position not to talk to the Taliban as they did not want peace. He also refers during the televised interview to his meeting with the Vice President's Office in respect of the information received concerning the security threat from suicide bombers to him (he also refers to this at [37] of his statement). This clearly gives support to his claim that the highest office in the land considered in light of their own information that the Appellant and others were at risk following the Rabbani assassination and saw fit to specifically warn the Appellant about it.

77. Mr Duffy does not comment on this evidence but it is clear that in light of particularly the contemporaneous TV interview given by the Appellant the government of Afghanistan had information that it believed placed the Appellant at risk.

78. The Appellant claims that in December 2011 while visiting his son in London he received a call from his secretary in Kabul who related to him a call he had received from the Interior Minister, Bismillah Khan, who had advised him that his life was at risk. The background material indicates that Khan is also a Tajik and a former high-ranking member of Jamiat who later became Minister of Defence.

79. Mr Duffy submits that little weight should be attached to the email of the Appellant's secretary as it is not on headed paper and he is not impartial as he is in the employ of the Appellant.

80. We note that the Appellant's narrative as set out in his interview and statement together with the statements of his family have remained consistent on this point which we find to be a factor in his favour.

81. Mr Duffy further suggests that it was convenient that the Appellant received the warning call shortly after arrival in the UK and only then became a higher profile target. However, we find that that assertion ignores the evidence of the killing of Rabbani, the interview he gave on TV concerning the information received as to the risk to him and others in Jamiat given to him by the President's Office that took place only a matter of a couple of months before that. It also ignores the Respondent's own acceptance of risk and adverse interest to the Appellant.

82. Mr Duffy suggests that there may be other reasons for the asylum claim namely the Appellant's ill health or his being surpassed by a new generation. We note that his ill health arose after his stroke in January 2013. The asylum claim was made in December 2011 and so ill health had nothing to do with his asylum claim. We also take into account that much of his life was occupied with activities which he perceived to be for the good of his country and we do not find that he would readily give up the private life which accrued during this period.

83. Looking at the evidence in the round and applying the lower standard for the reasons given we accept the Appellant's historical account on all material matters.

84. The next issue in light of our findings is the degree of risk on return and sufficiency of protection.

85. In respect of Kabul, Mr Duffy relies on **PM and Others (Kabul – Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089** and the OGN (February 2015). It is clear from the OGN that every case will be fact sensitive and the individual facts will need to be considered. Mr Duffy appears to acknowledge this and therefore asserts that because of the Appellant's status he will receive a level of protection not available to others.

86. The Respondent's comments ignore those of Dr Giustozzi that many senior figures have been targeted and many killed. He states clearly that the Appellant "*would not be safe in Kabul"*. Moreover, the Respondent has failed to refer to any background material to support the assertion that because of his previous positions the Appellant would receive a level of protection unavailable to others. Indeed, Dr Giustozzi in his unchallenged evidence states at [23] that the Appellant "*clearly has the profile of a typical Taliban target and his isolation from the current leadership of Jamiat makes him more exposed to risk than it would otherwise have been the case."*

87. Mr Duffy asks us not to accept the evidence of the Appellant's son about the employ of bodyguards but gives no reason why this evidence should not be accepted. The opportunity to challenge the son about the ability to employ bodyguards was not taken at the hearing. We see no reason not to accept the explanation given by the son.

88. We find that there would not be a sufficiency of protection.

89. As for internal relocation Mr Duffy submits that there is no reason why the Appellant could not relocate to Herat where the Taliban have "*limited influence*". He notes Dr Giustozzi's description of Herat as one of the "*safest cities*".

90. In fact what Dr Giustozzi actually states is:

> "… aside from assassinations the Taliban target government officials, workers of NGOs and international organisations and Afghans working for foreign countries in an intimidation campaign, again in areas of Kabul where the Taliban are active.
>
> The same applies to the rest of the country; even the safest cities of Mazar-i-Sharif and Herat do suffer occasional attacks and given his high profile (the Appellant) would rank among their priority target. Even the modest human resources the Taliban have in these cities could be assigned to this type of target, while they would be considered wasted for low profile collaborationists". [13]

91. We conclude that the (unchallenged) expert evidence is clear that internal relocation for the Appellant and his family even in Herat is not an option.

92. Mr Duffy raised the issue of the Third Appellant (Mr SYE), stating that he does not have a "*significant profile independently of his father, and if his father is not at risk, then neither is he".*

93. We would simply note the oral evidence given at the hearing (supported by photographic and documentary evidence) and that he too is a target of the Taliban on account of his activities and speeches which have been broadcast in Afghanistan was not challenged at the hearing or subsequently. We find that the Taliban are very likely to be aware of who his father is and this combined with his pro-western approach has led him to become a target. Such is also the opinion of Dr Giustozzi (at [10]). We note, further, in that regard the letter from the General Department of Anti-Terrorism Affairs dated 1 July 2015.

94. In conclusion, for the reasons given and applying the lower standard, we find that the Appellant and his son have established a well-founded fear of persecution for a Convention reason if returned to Afghanistan. The Respondent accepts that in such case his wife and daughters also succeed.

95. Their appeals succeed.

Notice of Decision

The decision of the First-tier Tribunal contained errors of law and is set aside. It is remade as follows:

> The appeals are allowed under the Refugee Convention.

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 their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Conway
Upper Tribunal Judge Knowles QC