Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/12057/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 June 2017	**On 20 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR FS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Neale instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This case concerns both an appeal by the appellant and a cross appeal by the respondent as follows: the appellant in this case is a citizen of Afghanistan born on 15 March 1985. In a decision dated 27 August 2015 the respondent refused the appellant's claim. A supplementary refusal letter was issued on 3 November 2016 following the provision of an expert report. This refusal maintained that the appellant was excluded under Article 1F(c) grounds and under paragraph 339D(iii) as there were serious

grounds for believing that the appellant had been guilty of acts contrary to the purposes and principles of the United Nations.

2. In a Decision and Reasons promulgated on 20 January 2017 following a hearing on 13 January 2017, Judge of the First-tier Tribunal A J M Baldwin dismissed the appellant's appeal under the Refugee Convention and his appeal under humanitarian protection grounds as the judge found that the appellant was excluded. However, the judge allowed the appellant's appeal on human rights grounds under Articles 2 and 3 on the grounds that there was good reason for believing that the authorities would be interested in interrogating the appellant as a commander within the Taliban and that the appellant could not be expected to lie; even if he did it was very possible that further enquiries made at the time or later would suggest he should be detained and interrogated. The judge went on to find at [30] that it was more than possible that the Afghan authorities would need a lot of persuading that the regular commander of that unit was not on duty that particular day having been persuaded to take that day off. The judge went on to find that even if the appellant was not of sufficient adverse interest to the Taliban the appellant would be at real risk of serious ill-treatment by the authorities.

3. The appellant appealed on the grounds that the respondent raised credibility for the first time at the hearing as a result of which the appellant's representative commissioned an addendum report from Dr Giustozzi which was submitted three days prior to promulgation. It was stated that it was not clear if the judge received this report but that it should have been submitted in line with **SD (Treatment of post-decision evidence) Russia [2008] UKAIT 0037**. It was argued that there was procedural unfairness.

4. The respondent cross-appealed, with permission, on the grounds that:

(1) it was arguable that the First-tier Tribunal failed to give legally adequate (if any) reason for its conclusion that the Afghan authorities would have knowledge of the appellant's involvement in the Taliban and would thus be 'very interested' in interrogating him'.

5. Following an adjourned error of law hearing on Wednesday 5 April 2017 amended grounds were submitted by the appellant's solicitors addressing the handwritten note copied to the parties by the Upper Tribunal on 5 April 2017. This was handwritten by Judge of the First-tier Tribunal Baldwin on 20 January 2017 and addressed information received from the appellant's solicitors dated 17 January 2017 including post-hearing submissions, the addendum report of Dr Giustozzi and a new report in relation to Taliban Making Military Gains in Afghanistan. Judge Baldwin indicated as follows:

> "These docs were received after I had determined all issues. Before issuing the determination I have read the post-hearing docs and have concluded that it is not necessary to have the appeal listed for further argument as the conclusions I reached would have been the same in relation to all of the significant issues had I been given this

information at the hearing. It should be noted in particular that plausibility is not the same as credibility, the latter being a matter for the judge".

6. It was argued on behalf of the appellant that it was not satisfactory for a First-tier Tribunal Judge to supplement the reasons given by a handwritten note which was placed in the court file but not circulated to the parties which did not satisfy the duty to give reasons, **MK (Duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)**. It was further submitted that Judge Baldwin was obliged to consider whether to admit further evidence pursuant to the principles set out in **SD (Treatment of post hearing evidence)** and if he admitted it to consider its relevance in the round and to recognise that an expert can offer factual context in which it may be necessary for a fact-finder to survey the allegations placed before him (**Mibanga [2005] EWCA Civ 367**) applied. Mr Neale submitted that the respondent was incorrect in her Rule 24 in relation to post hearing evidence and that it was significant that this evidence was received prior to promulgation. Paragraph 27 of **E v Secretary of State for the Home Department [2004] EWCA Civ 49** alluded to the fact that the Tribunal would be at liberty to admit further evidence prior to promulgation and reminded that the Tribunal remains seized of the matter until the decision has formally been communicated to the parties. With respect to the post-decision evidence, Mr Neale submitted that the Ladd v Marshall principles were satisfied namely:

   (1) whether the evidence could have been obtained with reasonable diligence for use at the hearing;

   (2) whether it would probably have had an important influence on the result;

   (3) whether it is apparently credible as set out in SD **(Treatment of post-hearing evidence) Russia [2008] UKAIT 0037**.

7. Mr Neale also relied on **MM (Unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** which he relied on as authority for the fact that even if there had been an error on his part, which he did not accept, in not bringing this information to the Tribunal's attention earlier this did not mean that unfairness did not arise.

8. Mr Neale accepted that it was un-contentious that credibility was a matter for the judge but that the judge had reached plausibility findings based on his own view of events including at [27] of the Decision and Reasons in relation to whether it was credible that the appellant would have been swiftly appointed to the position he was which suggested he had showed himself to be a key member of the Taliban whereas Dr Giustozzi in his updated report stated that:

   "There are often issues among the Taliban over civilian casualties. It is not uncommon for commanders and fighters to resign and quit the Taliban over this issue. In fact Taliban regulations ban indiscriminate killing, so Mr S's superior officer knew that Mr S could reject carrying

> out the attack without actually breaking any Taliban rule. So it is plausible that the senior commanding officer might have wanted to get him temporarily out of the way".

9. Mr Neale submitted that the judge had accepted that Dr Giustozzi was a genuine expert but even if he did not accept what he said then he needed to say why and that there was no substitute for such reasoning.

10. At [28] of the Decision and Reasons the judge rejected the appellant's assertion that he thought France had invaded Afghanistan and were alone and doing so whereas Dr Giustozzi's additional evidence was as follows:

> "It is absolutely clear that Taliban propaganda portrayed troops in Afghanistan as an occupying force. The Taliban still describe the 2001 invasion as illegitimate. The average member of the Taliban, like the average villager, does not have a sophistication to even understand what a UN mandate is. It is not uncommon to find villagers and even urban dwellers who have not realised Afghanistan is a republic now (the monarchy was abolished in 1973) the level of understanding of international politics is even lower".

Mr Neale submitted that in this context the judge had not explained why a low level, largely uneducated unit commander in a rural area would be expected to have an understanding of the reasons for the presence of the UN mandated troops.

11. In addition Judge Baldwin did not find it credible, at [26] that the letter would have been delivered to the appellant in the manner in which he claimed. Mr Neale relied on the additional news article which indicated that although Tagab district is mainly Taliban controlled the relevant district centre was controlled by the government.

12. Dr Giustozzi stated that:

> "The villagers have their own arrangements for the mail to be taken from the district centre to them, whether in areas controlled by the government or by the insurgents. Drivers come traders and other travelling to the district centre will pick up mail and take it to the villagers".

13. Mr Neale also submitted that at [26] the judge was making Western-centric assumptions. It was the appellant's contention that S is a tribal name and submitted that there was no adequate reasoning as to why the judge found it odd that a leaflet would mention his Taliban name rather than his official name.

14. It was submitted that the judge had not taken into account background information submitted with the appellant's skeleton argument before the First-tier Tribunal to the effect that many Afghans do not have a surname at all.

Error of Law Discussion

Cross-Appeal

15. I am not satisfied that the Secretary of State has established any material error. The judge set out adequate reasons at [30] of the Decision and Reasons which must be read in the context of all the evidence, and specifically paragraph 22 of Dr Giustozzi's original report, which indicated that there was at real risk to someone in the appellant's circumstances. Mr Neale submitted there was ample evidence before Judge Baldwin to conclude that the appellant would be identified on return as a former Taliban commander, notwithstanding the issue in relation to his alias.

16. I am satisfied that this must be the case; Dr Giustozzi stated in his report at paragraph 22:

> "On returning to Afghanistan, Mr S will be questioned about his personal background. If Mr S lied to the police, he might be able to get through unhindered. However, Mr S's background might emerge later as explained below. There is a real risk that this information would be sought and provided, even arising from a routine police check. On the basis of an interview with the police officer O, deployed at Kabul Airport, the following facts have been ascertained:
>
> (a) a returnee who is not in possession of his passport, having either deliberately destroyed it or having left the country illegally, will be arrested and tried and can be sentenced to up to six years of detention;
>
> (b) an individual who is deported back to Afghanistan, but is in possession of regular passport and properly stamped, is not guilty of any violation of Afghan laws;
>
> (c) failed asylum seekers are identified by their possession of documents, issued to them by the country which deported them. These individuals are interrogated on arrival, in order to assess where they come from and why they tried to obtain asylum, what passport was used, how they paid for travel, whether smugglers were used;
>
> (d) the failed asylum seekers are also asked details about their deportation, whether they committed crimes abroad, how long they were there, why the application for asylum was rejected;
>
> (e) sometimes the documentation accompanying the failed asylum seeker includes information about crimes committed abroad; in such cases checks are made about whether the failed asylum seeker was jailed for his crime and spent his whole sentence; if yes he would be released and allow to go home, if not he would be detained and sent to court;
>
> (f) checks are made whether the failed asylum seeker is wanted in Afghanistan for crimes committed there;

(g) most failed asylum seekers arrested on arrival in Kabul are jailed because of having destroyed their own passport or in any case having left the country illegally;

(h) if the failed asylum seeker found to be clean, he will be issued a new Tazkira and allowed to go free;

(i) Checks are made to verify the identity of the returning failed asylum seeker. Sometimes cross checks are made with the embassy of the deporting country;

(j) individuals trying to enter the country without documentation are all imprisoned and sent to court."

17. Dr Giustozzi went on to set out at paragraph 23 of his original report that arrests are often carried out on the basis of the slimmest evidence including where the suspect was apprehended because of the ringtone on his mobile.

18. The judge set out in some detail the evidence before him, including summarising Dr Giustozzi's report at [20]. It must be the case, reading the decision as a whole, that Judge Baldwin had that background information and Dr Giustozzi's report in mind (including that checks are made to verify identity and that arrest are carried out on the slimmest of evidence) when he made the specific findings he did, at [30], that there was good reason for believing the authorities would be interested in interrogating the appellant and crucially that the appellant could not be expected to lie which is a non-contested principle. I therefore find no material error of law disclosed in the judge's findings on Articles 2 and 3.

The Appellant's Appeal

19. I am further not satisfied that any error of law is disclosed in the judge's decision dismissing the appellant's protection claim, such that it should be set aside.

20. In relation to the additional evidence submitted on behalf of the appellant after the hearing and prior to promulgation of the decision I am far from satisfied that the new material passes the Ladd v Marshall test. Even if I were to accept that it could not have previously obtained with due diligence I am not satisfied, as Judge Baldwin was not, that it would have had an important influence on the result.

21. Although it might have been preferable had Judge Baldwin, for example, invited further submissions or set out his addendum note in the actual decision, any error in not doing so cannot be material, I am satisfied that there was not even a minimal possibility that the outcome could have been different due to the totality of the judge's finding.

22. It was accepted that the appellant served with the Taliban in Afghanistan. However, the judge properly directed himself that even though this was accepted there were a number of issues that needed to be examined.

23. The judge went on at [25] to find that:

> "He has claimed the Taliban knew he would never partake in any attack on civilians but I find it implausible that the Taliban command would have appointed him to command a unit so quickly if they had any doubts about his willingness to obey their commands. In his statement he claims that the only fighting in which he was ever involved was when they were attacked but this assertion I find at best to be disingenuous because he made it clear that he commanded attacks of troops by setting up ambushes of them – (question 61). The appellant also claims that he believed that Afghanistan had been invaded by France and it was therefore 'exactly the same' as when they had been invaded by Russia. I find that his assertion in this respect not credible, not least because in his asylum interview he made it clear that whilst the foreign forces were mainly French, 'there would be other nationalities too'. His claim at the same time that he only ever fired in the direction of those they were ambushing and he does not know whether his shots ever killed anyone, I also find incredible. Were he claiming he had only ever been involved in a single short skirmish, that might well be credible, but the idea that he would have been engaged in combat duties for around five years and had no idea whether he had ever killed anyone is simply not credible."

24. A reading of the judge's findings in their entirety demonstrates that his finding, that the exclusion clause under 1F applied, was made specifically in relation to the appellant's actions as an active fighter for around five years. Much was made by Mr Neale in relation to Dr Giustozzi's plausibility indications, including that there were often issues among the Taliban over civilian issues and it was not uncommon for commanders and fighters to quit, and that it was Dr Giustozzi's opinion that it was plausible that the senior commander might have wanted to get him temporarily out of the way. However this was not material given the judge's findings at [28] that:

> "whether or not he commanded them on the day his unit launched an attack at the market in 2009, the fact is that his claimed disapproval was not such as to cause him to make arrangements to leave the Taliban at or shortly after that attack. Indeed, it was from that year that he had assumed and maintained control of a greater number of soldiers. It was another 2.5 years before he claimed he left. The appellant may not have been a high level commander within the Taliban but he was no foot soldier and he served for several years as a commander of a small unit which carried out ambushes on troops acting on a UN remit. The suggestion that he did not know of this remit is, I find, wholly lacking in credibility, as is his assertion that he believed it was purely a French invasion of his country".

25. Therefore it is immaterial whether it was plausible or otherwise that the appellant could have effectively been picking and choosing what commands he would have undertaken and that the Taliban would

therefore have chosen not to ask him to do things which might offend his sensibilities (which the judge found did not sit well with his swift appointment to the command some of the men). In any event Dr Giustozzi's opinion does not address the judge's findings, which were open to him, that someone who was swiftly appointed to command did not sit well with someone who would then pick and choose what they might do. Indeed I note that Dr Giustozzi's opinion was that it was not uncommon for commanders and fighters to "resign and quit the Taliban over this issue". However, as noted above at [28] of the Decision and Reasons the judge went on to specifically find that the appellant did not leave the Taliban and indeed assumed and maintained control of a greater number of soldiers and remained for another two and a half years. In these circumstances there can be no material error in the judge's findings.

26. In addition, the judge's findings in relation to the implausibility of the Taliban appointing him to a command unit so quickly if they had any doubts about his willingness to obey their commands is also a somewhat separate issue from that addressed by Dr Giustozzi in relation to Taliban fighters resigning and quitting the Taliban over this issue which the appellant clearly did not.

27. In relation to the issue of the appellant believing that he was fighting the French again, Dr Giustozzi stated that Taliban propaganda portrayed foreign trips in Afghanistan as an occupying force and that the average member of the Taliban and the average villager did not have sophistication to understand what a UN mandate was. However the judge set out, and explored fully, the evidence and was fully aware of the appellant's background and his circumstances.

28. The judge considered, at [25], the appellant's claim that the only fighting in which he was ever involved was when they were attacked, but the judge found this to be disingenuous at best as the appellant had made clear that he commanded attacks of troops by setting up ambushes and this finding was not substantively challenged. The judge also gave adequate reasons for finding at [25] that the appellant's claim that he believed Afghanistan had been invaded by France and that it was therefore"exactly the same" as when they had been invaded by Russia was not credible not least because in his asylum interview he made it clear that whilst the foreign forces were mainly French "there were other nationalities too".

29. The judge therefore made negative credibility findings against the appellant for the detailed and careful reasoning he gave. The fact that Dr Giustozzi indicates that the average member of the Taliban did not have the sophistication to understand the UN mandate does not come close to addressing the appellant's inconsistency and lack of credibility including in relation to the foreign forces including "other nationalities too", which the judge records (at [18]) the appellant subsequently denied in oral evidence stating that "no troops from any other countries were involved in our area or elsewhere to our knowledge".

30. In addition there was no substantive challenge made to the judge's finding that it was not credible that the appellant stated he only ever fired in the direction of those they were ambushing and does not know whether shots killed anyone.

31. In not being satisfied that there is an error of law, I have also taken into account the issue raised in relation to the judge's finding at [26], that the way in which the letter which required him to report is said to have been delivered was "very odd as it would seem highly unlikely the authorities would simply go up to someone in the market and ask them to deliver a letter to someone known or believed to a member of the Taliban." Again Dr Giustozzi's addendum report was relied upon, where he stated that there were difficulties with the post in Afghanistan and that most families do not use the mail and that villagers have their own arrangements for the mail to be taken from the district centre to them, whether in areas controlled by the government or by insurgents and that drivers, traders and others travelling to the district centre will pick up mail and take it to the villages; however, this does not address the judge's central finding that there were difficulties in accepting that someone would be asked to deliver a letter, such as this requiring the appellant to report, to a member of the Taliban. Dr Giustozzi's comments in relation to post in general do not address this issue and could not make any material difference.

32. It was also submitted that the judge failed to take adequate account of the evidence attached to the skeleton background evidence that many Afghans do not have a surname at all and that the appellant had stated in his witness statement that his tribal name was S and that was why he had taken this name in the UK whereas he is known in his village by the Taliban name of Mukhlis. The judge found it very odd that a leaflet dropped on the general public would mention the appellant's Taliban name rather than his official name. At paragraph [26] of the decision however what was not challenged by the appellant was that this was also inconsistent with the appellant's assertion at his screening interview [1.3] that he had never used an alias and that given that he claimed the Taliban generally provided a different family name to make it more difficult for them to be identified by non-Taliban it was odd that a leaflet would mention his Taliban name rather than his official name.

33. The judge correctly directed himself in relation to **Al-Sirri (FC)** and **DD (Afghanistan) (FC) v SSHD [2012] UKSC 54** where the Supreme Court held that Article 1F must be interpreted restrictively and applied with caution and there should be a high threshold and serious reasons for considering that the person or individual responsibility for acts of the character required. An attack on ISAF is in principle capable of being an act contrary to the purposes and principles of the UN.

34. The judge made more than sufficient and adequate findings in relation to Article 1F and I am not satisfied there is any unfairness in him failing to explicitly explain in his decision why Dr Giustozzi's addendum report would not have had an important influence on the result and that his conclusions would have been the same in relation to all the significant

issues. It was not necessary to reach findings on every item and the judge made no material error in not specifically addressing in writing what was a minimal issue and would not have made any material difference.

35. In a well-reasoned decision Judge Baldwin took great care in making his findings and in reaching the decision he did and it is not arguable that the additional evidence could have had an important influence or made a material different to those comprehensive findings including significant negative credibility findings.

Summary

36. The decision of the First-tier Tribunal does not disclose a material error of law and shall stand. The appeal by the appellant and the cross-appeal by the respondent are both dismissed.

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: 16 June 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee application was sought or is made or indeed was paid or payable.

Signed Date: 16 June 2017

Deputy Upper Tribunal Judge Hutchinson