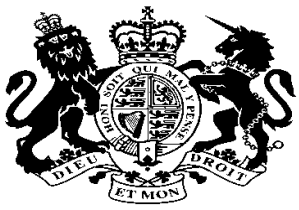

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/12700/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 April 2017	**On 3 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

S A
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani (counsel) instructed by Migrant Legal Action
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, preserving the anonymity order which has existed throughout each step of the appeal process.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Widdup promulgated on 6 February 2017, which dismissed the Appellant's appeal on all grounds.

3. The Appellant was born on 22 March 1994 and is a national of Afghanistan.

4. The appellant entered the UK on 14 May 2009. He claimed asylum the next day. On 6 November 2009 the respondent refused the appellant's application for asylum but granted discretionary leave to remain until 22nd of September 2011, because of the appellant's young age. On 28 September 2011 the appellant submitted an application for further leave to remain in the UK. The respondent refused that application on 9 May 2012. The appellant appealed against that refusal. His appeal was dismissed in a decision promulgated on 17 January 2013. Permission to appeal the decision dismissing the appellant's appeal (dated 17 January 2013) was refused and the appellant's appeal rights were exhausted on 14 March 2013.

5. On 26 April 2013, 7 May 2013 and 30 October 2014 the appellant submitted further representations. On 24 September 2015, the respondent rejected those representations.

The Judge's Decision

6. The Appellant appealed the respondent's decision dated 24 September 2015 to the First-tier Tribunal. First-tier Tribunal Judge Widdup ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 6 March 2017 Judge Osborne gave permission to appeal stating inter alia

> 2. The grounds assert that the Judge failed to direct herself and to apply the law in relation to article 15(c) of the qualification directive. The Judge failed to assess or determine the critical question which is whether there is a risk of serious harm in the appellant's home area. Additionally, the Judge failed to apply the sliding scale approach which was approved in MOJ (return to Mogadishu) Somalia CG [2014] UKUT 00442. The Judge wholly failed to assess the risk facing the appellant from indiscriminate violence in his home area. The Judge failed to refer to consider relevant parts of the UNHCR eligibility guidelines [2016] which were referred to at the hearing. The Judge failed to have regard to the fact that the appellant suffers from mental health problems and failed to have regard to the fact that the witness is a foster carer and a first-hand witness to the appellant's presentation as a human with whom she lives. The Judge wholly failed to consider the careful evidence of Mr K. The Judge failed to decide whether the appellant should benefit from the respondent's policy contained at 276 ADE(vi) immigration rules but merely considered that issue outside the rules under article 8.
>
> 3. The Judge at the start of the hearing asked counsel for the appellant to confirm the issues to be decided which were stated to be asylum, current risk under article 15(c), paragraph 276 ADE and article 8 outside the rules. Having asked that question, and having been given that apply, it is at least arguable that the Judge failed to consider any issues under paragraph 276 ADE but instead proceeded to consider the article 8 issues outside the immigration rules only. It is at least arguable that the Judge erred in that approach.
>
> 4. As this arguable error of law has been identified, all the issues raised in the grounds are arguable.

The Hearing

7. For the appellant, Mr Bandegani moved the grounds of appeal. He initially took me to [89] to [93] of the decision. In those paragraphs, the Judge refers to a CIG report on Afghanistan dated August 2016. The Judge quotes from that report. Mr Bandegani said that despite making careful enquiry he cannot find that report, and that report does not feature on the respondent's website.

(b) Mr Bandegani told me that the fundamental point in the grounds of appeal is that the Judge has not properly considered article 15(c) of the qualification directive. He told me that at [81] the Judge says that she is going to consider whether the appellant can succeed under either article 3 or article 15(c), but then confined her findings and conclusions to article 3 ECHR. He told me that for article 15(c) considerations, the critical question is risk on return to their home area, and that the appellant's home area is Jalalabad; the Judge has only considered conditions in Kabul. He told me that the Judge did not carry out a qualitative and quantitative analysis with regard to both the safety and reasonableness of return. He told me that the Judge had not carried out a sliding scale analysis. He relied on QD & AH v SSHD [2008] EWCA Civ 698.

(c) Mr Bandegani told me that the consideration of risk, either in terms of article 3 ECHR or article 15(c) of the qualification directive, is inadequate. He told me that the Judge has not carried out a careful assessment of the volumes of background materials placed before her. He said that the Judge had ignored the UNHCR's eligibility guidelines 2016. He told me that those errors were compounded between [91] and [93] where the judge referred only to the policy section of the CIG for August 2016, and not the underlying evidence.

(d) Mr Bandegani placed great emphasis on the appellant's vulnerability, telling me that the appellant suffered from depression and persistent back pain. He told me that the judge had only looked at safety and completely elided the question of reasonableness. He told me that [86] to [93] offers superficial treatment of the background materials, focusing on only one document which was not amongst the background materials produced by either party. He told me that the conclusion reached at [95] is inadequate because it makes no reference to article 15(c) of the qualification directive and because it is not supported by findings of fact or an analysis of the evidence. He told me that the Judge has applied the wrong test in law.

(e) This case has some procedural history. The Judge refers to the earlier determination of the First-tier Judge Easterman a number of times. Mr Bandegani took me to [77] and [110] where the Judge adopts the findings of First-tier Judge Easterman. He told me that the findings adopted form the earlier decision do not support the conclusions that the Judge comes to.

(f) Mr Bandegani told me that neither the First-tier Judge in the decision which is the subject matter of this appeal, nor First-tier judge Easterman made positive findings

that the appellant has family members in Kabul. He told me that the appellant's solicitors are making further enquiries with experts in Kabul, and that a visit will be made to Kabul (as part of those enquiries) to try to trace the appellant's family. Those enquiries will result in further information being available in May this year.

(g) Mr Bandegani told me that the Judge's consideration of article 8 ECHR was inadequate and that the Judge had completely failed to consider paragraph 276 ADE (1)(vi) of the rules. He told me that decision was tainted by a failure to give reasons and to make findings. He urged me to set the decision aside and to remit the case of the First-tier tribunal to be determined of new after May 2017 so that up to date information about the appellant's family members in Kabul can be presented to the First-tier Tribunal.

8. Mr Tarlow, for the appellant, told me that the decision does not contain errors, material or otherwise. He told me that counsels submission from the appellant amounted to nothing more than a disagreement with findings competently made by the Judge. He told me that at [82] the Judge properly considers the situation in Kabul. He told me that was no need to consider the situation in Jalalabad because, on the facts as the Judge found them to be, the appellant's family moved to Kabul, so that Kabul is their home area. Jalalabad may be the town of origin but removal from there makes Kabul the home area. He took me to [86] and told me that the Judge correctly considered, and then followed, country guidance and found no reasons for departing from it. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

9. In AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC) the Tribunal held that whilst when assessing a claim in the context of Article 15(c) in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing "safety" and reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many Internally Displaced Persons (IDPs) living there, these considerations will not in general make return to Kabul unsafe or unreasonable.

10. In AWQ and DH v The Netherlands (Application No 25077/06) ECtHR the Appellant claimed to be at risk in Afghanistan because of the general security situation and because amongst other things he had lived abroad for a long period. It was held that the appellant was not at risk.

11. Between [1] and [15] the Judge sets out the background to this appeal. At [16] she records the confirmation she received from counsel for the appellant that the issues to be determined are

(i) asylum
(ii) article 15(c) of the qualification directive
(iii) paragraph 276 ADE of the immigration rules, and

(iv) article 8 outside the immigration rules.

Between [54] and [79] the Judge sets out her findings of fact and draws conclusion in relation to asylum.

12. Between [98] and [112] the Judge considers article 8 ECHR grounds of appeal outside the immigration rules. At [80] and [81] the Judge says that she will consider article 15(c) of the qualification directive and article 3 ECHR grounds. At [95] the Judge reaches the conclusion that the appellant cannot succeed on article 3 ECHR grounds.

13. No conclusion is reached in relation to article 15(c) of the qualification directive. There is no real analysis of article 15(c), nor of the evidence driving at article 15(c), contained within the decision. Nowhere in the decision is any consideration given to paragraph 276 ADE of the immigration rules.

14. Despite the length of the decision, only two of the four matters summarised for determination at [16] of the decision are dealt with.

15. Article 8 ECHR grounds are considered between [96] and [112] of the decision. Insofar as the Judge makes findings of fact in relation to the article 8 appeal, they are contained between [100] and [105] of the decision. At [104] the Judge says

> The appellant has now lived in the UK since May 2009. I accept that his removal to Afghanistan would have sufficient gravity to engage article 8.

At [102] and [103] the Judge finds that the family life within the meaning of the 1950 convention does not exist for the appellant in the UK. [104] is a finding that private life within article 8 ECHR meaning exists for the appellant.

16. The assessment of proportionality which follows is inadequate. At [107] the Judge takes account of section 117B of the 2002 Act. At [108] the Judge finds that the appellant will be returned to a government-controlled area of Afghanistan. At [111] the Judge finds that the appellant has garnered transferable skills during his time in the UK. No proper analysis of the appellant's home, his friendships, his integration with UK society, his contribution to society, his hobbies and activities and pastimes, and the impact removal will have on those component parts of article 8 private life, is carried out.

17. I find that the superficial consideration of article 8 ECHR grounds of appeal, the absence of consideration of paragraph 276 ADE of the immigration rules, and the absence of a reasoned consideration of article 15(c) in applying the tests set out in QD & AH v SSHD [2008] EWCA Civ 698. and MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC) are all errors of law. I find that these are material errors of law because detailed consideration of each of those separate parts of the appellant's appeal may result in a different outcome.

18. Counsel for the appellant tells me that by the end of May 2017 there is likely to be fresh expert evidence about the circumstances which might face the appellant in Kabul. At the same time there is likely to be evidence which will help to determine whether or not the appellant has surviving relatives in Kabul, (neither Judge Widdup nor Judge Easterman were able to make findings in fact on that question).

19. I find that I cannot substitute my own decision because of the extent of the fact-finding exercise required to reach a just decision in this appeal.

Remittal to First-Tier Tribunal

20. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

21. In this case I have determined that the case should be remitted because a new fact finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

22. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Widdup.

Decision

23. The decision of the First-tier Tribunal is tainted by material errors of law.

24. I set aside the Judge's decision promulgated on 6 February 2017. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 1 May 2017

Deputy Upper Tribunal Judge Doyle