



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/12781/2015

THE IMMIGRATION ACTS

Heard at Field House
On 2 January 2018

Decision and Reasons Promulgated
On 19th January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

QK
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani (for Duncan Lewis Solicitors)
For the Respondent: Mr L Tarlow (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of QK, a citizen of Afghanistan born [] 1984, against the decision of the First-tier Tribunal of dismissing his appeal against the refusal of his asylum claim of 30 September 2015. Although I do not believe an anonymity order has so

far been made on his appeal, it is plainly appropriate to do so, given that his claim involves an allegation that his activities online have come to the attention of his antagonists in Afghanistan and as he has family remaining in the country, for which reason I have anonymised all the names of persons involved in the proceedings, save for the well-known figure of Masood.

2. The Appellant entered the UK on 5 October 2011 as a Tier 4 student with entry clearance conferring leave until 28 January 2013. He applied for further leave to remain before that leave expired, and that application was refused on 21 February 2013; the ensuing appeal was dismissed. He was encountered by the immigration service during enforcement activity on 26 August 2013 and served notice as an overstayer, and detained. He made further efforts to appeal to the First-tier Tribunal, and that application was refused on 16 September 2013. An application to the Upper Tribunal failed and he was recorded as appeal rights exhausted in October 2013. He was served with removal directions for 25 November 2013, and detained once again, eventually being removed on 17 February 2014. The flight was unable to land in Kabul, however, and he was returned to the UK, claiming asylum on 25 February 2014.
3. He came from the village in Shakardara District, Kabul province. His asylum claim was summarised in the refusal letter thus. A Tajik leader called Masood had given his father, a Pashtun, weapons to store in his house. He understood that his father had subsequently sold the weapons, so that when the Taliban, who came to know of their existence, subsequently searched the village for the cache, they discovered they were missing, and demanded that the arms, or their monetary value, be provided to them. His father and the family fled to Pakistan. His father returned to Afghanistan for his brother's funeral, and was captured by Masood's men, who killed him. The Appellant's brother estimated that this took place in 1999.
4. In 2003, the Appellant and his family returned to Afghanistan, as they could no longer afford to live in Pakistan. They returned to live in Kabul. They were arrested at his uncle's home by the security forces. The Appellant was detained and tortured, for two or three weeks. His mother bribed someone to secure their release. He was subsequently arrested and detained for around two months a few years later, and was again tortured, and once again his mother procured his release by bribery. The harassment from Masood's men continued, notwithstanding that he relocated to Baghlan province. In April 2009 Masood's men located him once again and demanded that he return to his home village. His brother was attacked in Kabul in 2015. He made arrangements to depart the country, and feared a severe punishment if he returned there.
5. The Secretary of State rejected his asylum claim, on the basis that the account was vague and speculative. In any event, the authorities could be expected to provide sufficient protection and alternatively he could find safety in Kabul where conditions would not be unreasonable.

6. An expert report from Dr Ough for the Helen Bamber Foundation set out his opinion that the Appellant's knee problems were consistent with his account of being forced to carry heavy logs during the period of his first kidnap (though a minor back strain caused for other reasons might also have been responsible); and that his psychological presentation merited recognition as Post Traumatic Stress Disorder applying the international measure ICD10 given his state of hyper-arousal, the onset and persistence of his symptoms, the history he gave as to exposure to relevant stressors, his avoidance of reminder stimuli, and his degree of emotional numbing. The doctor considered that the memory loss he would have experienced given these factors accounted for any discrepancies in his account. He needed to be in an environment he perceived as safe in order to have reasonable recovery prospects. He would experience increased fear and worsening PTSD, anxiety and depression were he to be returned to Afghanistan. He had considered whether the Appellant might have been exaggerating his symptoms but considered that unlikely given the way he gave his account.
7. An expert country report from Ms Emily Winterbotham, a Research fellow at the Royal United Services Institute, who had lived and worked in Afghanistan from 2009 to 2015 for the Office of the European Union Special Representative and the Afghanistan Research and Evaluation Unit, set out that she had a range of contacts in the Appellant's home District. The torture and abuse he described was wholly in keeping with the behaviour of Masood's commanders. It was possible that the Appellant would now be caught in a blood feud given his father's disposal of the weapons even though he had been young at the time of the original incident and notwithstanding that Masood's men were Tajik rather than Pashtun. He would be at risk of being identified if he sought protection from the authorities for legal advice, or if he sought employment, given the system of checking a person's history via a chain of enquiries going back to their home area. He might be in danger in Kabul given the possibility of being informed upon there via the network of operatives loyal to former Northern Alliance commanders such as Masood; his brother had been identified in Kabul, on his account.
8. In a short addendum report Ms Winterbotham commented on three further elements of the Appellant's claim. The newspaper article regarding the attack on his brother came from a publication, OQAB, she was familiar with, and she believed it reliable; it stated that RD, son of SM, had been seriously injured in the head and face but managed to escape alive, consistent with the Appellant's account. Turning to the video and the threatening messages attached to the posting, she stated that extremist groups in Afghanistan closely monitored social media and other sources. Two of the messages appeared to be written by persons familiar with the Appellant and his history.
9. The First-tier Tribunal heard evidence from the Appellant at his appeal hearing which it recorded in detail alongside a summary of the Appellant's witness statements. It also noted evidence that he had posted a video on his Facebook page

of a demonstration outside the Pakistan Embassy, and a transcript of the interview he had given in which he complained about the Taliban being the worst enemy of Afghanistan and that Daesh were the "Military of Pakistan".

10. The Appellant's brother HU gave evidence and described the family's farm, and the background to his father's storage of weapons which included armaments powerful enough to shoot down aircraft. After his father had returned to Afghanistan, their brother WU had been detained and beaten by Masood's men. The people they had feared were now part of the government themselves. The Appellant's uncle SA gave evidence, saying he had heard about his brother-in-law being killed, from his own sister, who had herself died some years earlier.
11. Other witness statements were provided from non-attending witnesses: the Appellant's brother WU, who said he was present when Masood's men first came to the family home. RD stated he was attacked in Kote Char, Kabul, near a police station, and he required several stitches. He was now living in a refugee camp in Germany.
12. AJT, a military intelligence operative with British citizenship who had worked in Afghanistan as an advisor and interpreter for a UK company training and monitoring Afghan intelligence officers, said he had heard of the Appellant's problems including the death of his father over the weapons' disappearance and he believed that the Taliban had made the comments on the Appellant's Facebook page: the Pakistan ISI, to his mind, were also effectively Taliban. He believed the Taliban could find someone and strike against them anywhere in Afghanistan, having been threatened himself as a political activist and requiring a bodyguard whenever he returned to the country.
13. Determining the appeal, the First-tier Tribunal noted the Appellant's very late asylum claim, and the inconsistent reasons that he had given for it. He said that he had originally remained in the UK as a student, which was a safer and more predictable way of staying in the UK legally than pursuing asylum, and then when his extension application was refused, his solicitors had told him that providing further evidence by way of a missing bank statement would fix the problem; however he believed they had sent the wrong evidence, and he shortly faced removal from this country. He had been advised that he would not be removed from the UK, and it was only when he was actually boarding the flight to Afghanistan that he tried to tell a security guard about his wish to claim asylum. The First-tier Tribunal found that his delay in claiming asylum counted heavily against his credibility, bearing in mind the statutory enjoiner to look at this issue with care.
14. The First-tier Tribunal noted discrepancies and vagueness in his accounts of the background to his father's storage of any particular kind of weaponry, which were of concern notwithstanding the Appellant's age. None of the witnesses were able to explain who had killed the Appellant's father or why.

15. The various abductions suffered by the Appellant were not shown to have been linked to his father's disposal of the weaponry. He accepted the Appellant's father had died, but not the account of how it happened. It was possible that the abductions had taken place given the medical evidence of the Appellant's ill treatment, but he found that the Appellant had not been truthful as to the identity of the abductors. On the lower standard of proof it was more likely that the apparent wealth of the family and its ability to raise money were the true motivation for the abductions and extortion that procured the Appellant's release.
16. There was no documentary evidence of the grant of asylum to HU or WU, or of the reasons on which they might have been granted asylum. He accepted the attack on RD had taken place, but it was by unidentified people; no motive was clear, and it was of interest that it was reported in a newspaper run by Tajik Extremists, which seemed odd if Masood's group were known to be responsible.
17. The Judge gave significant weight to the Winterbotham report, given her direct experience of the Appellant's home area, though he noted that she had taken the Appellant's account at face value when making her report. The First-tier Tribunal did not consider that the events at the Pakistan Embassy could put the Appellant at risk: the only risk of harm he claimed to face arose from Masood's supporters and for them to have come across this article, they would have searched for the Appellant by name, and besides, given it recorded a protest against Pakistan, it was not obvious that they would ever come across it; anyway, Masood was opposed to the Taliban.
18. Overall, these considerations, taken with the claim's extreme lateness, undermined his account. Risks could diminish over time and it was possible that this was why he had waited so long after the last abduction before making an asylum claim. There was nothing before the Tribunal to indicate the Facebook threats were linked to Masood. The Appellant would not be at risk of serious harm in Afghanistan, and he had given only a vague account of harassment during his final years there; he would be safe in Kabul or elsewhere.
19. Grounds of appeal argued that
 - (1) The Winterbotham report had in fact clearly predicated her opinion on the *possibility* that the First-tier Tribunal would find the Appellant credible, and she had referenced aspects of his story that were consistent with the background country evidence: this was not a situation where the expert evidence had misunderstood that the Judge, rather than the report's author, was the final arbiter of credibility;
 - (2) Ms Winterbotham's opinion that Masood's faction was linked to the Jamiat party which was very powerful in the Appellant's home area resonated throughout her report and indeed aspects of it were cited in the First-tier

Tribunal decision, but when the Judge made his actual findings, he simply referred to her view of the plausibility of the possibility of revenge lasting for a long time and across generations, which he rejected without reasons;

- (3) In finding that the Appellant's abductions and ill treatment were due to causes other than those to which he attributed them, perhaps due to unknown actors for economic gain, the First-tier Tribunal overlooked material evidence that Masood's commanders were known to pursue their own economic interests as well as factional aims;
 - (4) The Judge's characterisation of the evidence of the three live witnesses to be inconsistent when they described the arms cache from which the family's problems arose was factually erroneous: their references to "guns and rockets", "tanks and big artillery" and "weapons" were in fact not materially discrepant;
 - (5) The First-tier Tribunal had failed to consider or apply the Practice Direction on vulnerable witnesses, notwithstanding the Appellant's diagnosed Post Traumatic Stress Disorder.
20. The First-tier Tribunal granted permission to appeal on 10 November 2017, giving particular mention to the first two grounds, though not restricting the permission grant.

Findings and reasons

21. At the start of the hearing the parties informed me that they were in agreement that the first two grounds of appeal did indeed evince material errors of law which fatally flawed the decision of the First-tier Tribunal. That agreement does not of course bind the Upper Tribunal, but where two such experienced advocates combine to state a common position, it is a weighty factor. Given this feature of the case, I shall state my reasons on the appeal briefly.
22. The First-tier Tribunal made a fully reasoned decision with which it plainly took care. Nevertheless that does not necessarily immunise it from the presence of legal error: asylum appeals must be approached applying the appropriate anxious scrutiny, and as Carnwath LJ explained in *YH* [2010] EWCA Civ 116 that term "has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account." Nevertheless, as noted by Beatson LJ in *Haleemudeen* [2014] EWCA Civ 558 §35, 37:

"What is required is that the reasons must give sufficient detail to show the parties and the appellate tribunal or reviewing court the principles upon which the lower tribunal has acted, and the reasons that led it to its decision,

so that they are able to understand why it reached its decision. The reasons need not be elaborate, and need not deal with every argument presented ... judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined and it should not be assumed too readily that the tribunal misdirected itself because not every step in its reasoning is set out in it”.

23. It seems to me that this is one of those relatively rare cases where one cannot understand the reasons why the First-tier Tribunal reached its ultimate conclusions, given the approach that it itself thought appropriate to the expert evidence. Findings of plausibility are necessarily closely linked to the country evidence in an asylum claim, see for example Neuberger LJ in *HK* [2006] EWCA Civ 1037 §28: “in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any.”
24. In this particular appeal, very significant aspects of the expert evidence were left out of account in the final assessment of the Appellant’s case, notwithstanding that the Judge had expressly emphasised that the report merited significant weight given the expert’s familiarity with the Appellant’s home area. As set out in the grounds of appeal, there are some nine aspects of the expert report (ranging from the behaviour of Masood loyalists to the influence that his faction has over the Appellant's home area) that raise features of the evidence of the Appellant's account that are consistent with, expressly or by inference, the background country evidence.
25. I accordingly find that the First-tier Tribunal decision is flawed by material error of law.
26. I was invited by Mr Bandegani to preserve certain findings within the decision below. Mr Tarlow, on the other hand, argued that it would be undesirable to tie the hands of a future judge, and that a hearing afresh would be more appropriate.
27. Overall I consider that the findings cannot be clearly distinguished from one another, and that it would be unrealistic to fetter the judgment of a future fact-finder by tying them to particular paragraphs of the decision of Judge Pullig. However, I would emphasise that there is no rule of law that prevents a future judge from reading the decision of an earlier one, and given the general care that the First-tier Tribunal took in setting out the overall evidence, and analysing it, they would be well advised to do so in this particular case. In so doing they should bear in mind the important country evidence context in which the expert evidence sets the overall account, to avoid repeating the error that caused the First-tier Tribunal to go astray in its adjudication of the appeal last time round.

Decision

28. The decision of the First-tier Tribunal was flawed by material error of law and I accordingly remit the appeal for hearing afresh.

Signed

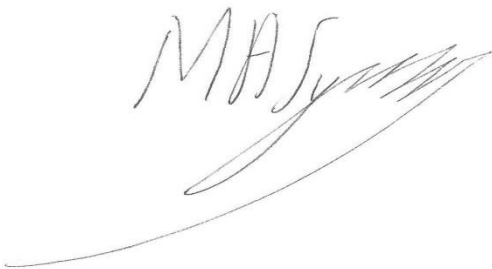
Date 2 January 2018

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Deputy Upper Tribunal Judge Symes

ANONYMITY ORDER

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long, sweeping underline that extends to the left.

Signed:

Date: 2 January 2018