



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13846/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5 June 2018

Decision & Reasons Promulgated
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

MM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

For the Appellant: Mr D Bazini (counsel instructed by Lawrence and Co)
For the Respondent: Ms A Everett (Home Office Senior Presenting Officer)

1. This is the appeal of MM, a citizen of Afghanistan with an attributed birth date of 1 January 1975, against the First-tier Tribunal's dismissal of his appeal on 5 March 2018, itself brought against the decision of the Secretary of State of 5 December 2017 to refuse his application on international protection grounds.
2. The Appellant arrived in the UK in June 2002, claiming asylum on 22 July 2002, the application being refused and appeal rights becoming exhausted following the dismissal of the his appeal on 8 January 2003. Further submissions were refused on 18 May 2011. The Appellant applied for the Assisted Voluntary Return program and returned to Afghanistan on 31 October 2012; by so doing, a further set of further

submissions made in October 2011 were treated as abandoned. He returned to the UK on 4 February 2016 and submitted further representations on 26 October 2016, the refusal of which gave rise to the instant appeal.

3. The Appellant's asylum claim was based on his family's history of conflict with the Taliban. He and his brothers were from an influential family in Wardak Province which increasingly fell foul of the local insurgents as the latter's power increased. The family had helped the American intelligence services by providing them with valuable information, in particular because a cousin who had obtained US citizenship had returned to Wardak Province and encouraged the local people to support the Americans. This had led to them coming to the attention of the Taliban who had first begun to harass their farmers and subsequently killed his mother's younger brother in 2007. As the situation deteriorated they lost control over their lands altogether.
4. Two cousins had obtained residence and citizenship in the USA on the basis of this assistance, having been embedded with the Americans working as interpreters and actively collaborating with them; they were comparatively safe at the time they did this work as they lived on the American bases. Two brothers (accepted as such in the light of DNA evidence, as referenced in the refusal letter) have already been granted refugee status in the UK, TSW following judicial acceptance of the history he provided regarding his family's problems, and HW having been recognised as a refugee directly by the Secretary of State having regard to the earlier appellate findings on TSW's appeal. One notable feature of the case is that a Detective with the FBI joint terrorism task force had travelled to the UK to give live evidence of the active assistance that various family members had given to the cause of the Americans and their allies in HW's appeal, and of the risks they were believed to face thereafter.
5. In June 2009, a significant period after his first and unsuccessful asylum claim in the UK, the Appellant ran into his brother, TSW, and learned that he had claimed asylum and been granted refugee status. He also learned much more of the difficulties that his family had faced since he himself had departed Afghanistan.
6. The Appellant returned to Afghanistan in November 2012. This followed a period in which he despaired of his circumstances in the UK given his inability to obtain lawful residence and his brothers' difficulties in caring for him here. For a while he lived at his family's large home in Kabul. In March 2013 he married. He was concerned that news of this marriage would reach the Taliban, but it was unrealistic to wholly bar his father-in-law's relatives from the wedding. Shortly afterwards news must have reached the Taliban of his return to Kabul, he presumed because a guest must have reported back to the local community in Wardak. From then onwards the Taliban began to contact him, visiting his house in Kabul.
7. The Appellant reported their interest to the Chief of Intelligence in Wardak Province, who was aware of his family's situation, but was told that they lacked the

capacity or ability to protect him with bodyguards. He then went to their Member of Parliament and to the Chief of the Defence Ministry in Kabul, who both told him that there was nothing the authorities could do. The latter advised him that he should leave the country if he could not make his own arrangements to secure his protection. The Appellant took flight to Pakistan where he lived from 29 March 2013 until September 2015, when the authorities there deported him back to Afghanistan for lacking immigration status.

8. An Asylum Grant Minute of 13 September 2016 relating to the Appellant's brother HW set out that one of the siblings had returned to Afghanistan in 2006 and met with Taliban members and commanders and encouraged them to support the Americans to improve the country's security. His mother's younger brother, a government supporter, had been murdered by the Taliban in 2007; that individual's son was also killed whilst training to be a police officer. As time went on an increasing amount of the family's income from their land was taken by the Taliban.
9. Two of HW's brothers had fled the country on 1 October 2008, because of their fears as being seen as American informants. He himself had learned from his mother, whilst he was out of the family home, that the Taliban had raided the family home seeking his brothers. She warned him not to return home. He went to Pakistan with his brother. They were deported back to Afghanistan on 21 December 2015 after being stopped by police officers who asked for their documents. They contacted a cousin in Afghanistan, moving to an area in Kabul where they rented accommodation. In February 2016, the Taliban tracked them down at the compound where they were staying. Fearing being shot they managed to escape, and called their cousin, who collected them and made arrangements for them to join their brother TSW in the UK.
10. The Minute went on to note the findings on the Appellant's brother TSW's appeal, where a judge had found his account credible, including that he came from a strongly-placed family in Wardak which lost access to their land as local extremists became more powerful. An American investigator with the security forces, Detective X, had attended that appeal to give evidence confirming the assistance provided to the Americans. The Minute observed that the Judge who heard TSW's appeal found that the backdrop to the family's problems was credible, given that it was plausible that an expatriate might return to Afghanistan to try to justify American operations in Afghanistan and encourage support for the Western presence there. At the time that stand was first taken, the risks the family would face were not that great given the control they then held over their lands. However, the ever increasing power of the local extremists changed things, allowing them to target the family with impunity. With hindsight their stance might be thought to have been unwise, but many individuals engaged in political conflict might feel compelled to express their views whatever dangers might follow. It was credible that, having a distinct identity as being a former provincial council member and part of a prominent and wealthy land-owning family in Wardak, that TSW would have a profile that would endanger him even in Kabul.

11. The Minute concluded that those judicial findings were properly transferrable to the asylum claim of HW, such that his recognition as a refugee was appropriate.

Salient evidence before the First-tier Tribunal

12. In his witness statement for this appeal the Appellant stated that the final incident that caused him to flee Afghanistan for Pakistan happened at the end of December 2015, when a bang at the front of the house foreshadowed the forced entry of individuals who transpired to be the Taliban. The Appellant managed to escape by leaping from a window and taking refuge at the Cashman Hotel, on the basis of (as it transpires, misplaced) confidence that the Taliban would not search a house where they believed only women to be present.
13. The next morning he rang his wife and found out that two members of the Taliban had indeed searched the house, but had not taken any further action save to leave a warning letter once they discovered the Appellant was absent. They told her that the Appellant was thought responsible for many deaths in Wardak because of the information he had provided to the Americans which had led to bombing operations.
14. A letter from the Walesi Group at the National Parliament Group at the National Assembly of Afghanistan of 21 March 2013 stated that the Wardak province had referred the Appellant to them because of his security problems; however they had been unable to help him.
15. A letter, ostensibly emanating from the Taliban and intended to intimidate the Appellant, of 16 January 2016 stated that following the Taliban's visit to his home on 16 January 2016 he had escaped; it reported that earlier attempts to contact him had also failed, and threatened that he would be killed if he failed to come and talk to them. His brothers were also specified as targets for having helped American non-believers. A letter of 5 August 2016 from one Kamaluddin, describing himself as a neighbour of the Appellant, stated that he had witnessed the government opposition attacking the Appellant's home.
16. The representations of 20 April 2017 that followed his asylum interview sought to put the Appellant's return to Afghanistan in context: he did so whilst suffering from mental health problems and living in a state of heightened anxiety, having been encouraged by the International Organisation for Migration (IOM) to return; he had understood that the IOM would help him thereafter but quickly realised, having tried to contact them, that that was a false hope.

Findings of the First-tier Tribunal

17. The First-tier Tribunal did not accept all of the facts advanced by the Appellant. It *did* accept that he had assisted the US forces in Afghanistan by informing on the

Taliban. However, his voluntary return to Afghanistan weighed heavily with it, and it did not accept that his mental health problems were sufficient to accept that he had acted irrationally rather than on the basis of a measured assessment of the risks he faced. It was surprising that the Taliban would not have looked for the Appellant at the home of his father-in-law had they truly been concerned to seek him out, and that the Appellant would court the risk of detection by getting married publicly. It did not accept that he had been deported from Pakistan to Afghanistan, absent independent evidence of the same, and thus assumed that he had lived in his country of origin without incident from October 2012 until February 2016 without attracting adverse interest. It appeared that the Appellant had provided information to the US forces in Afghanistan “with the intention of creating an asylum claim in the USA”.

18. The First-tier Tribunal concluded that the Appellant's provision of intelligence to the Taliban would not be known to the Taliban and that his return to spend a period of time in Afghanistan voluntarily without suffering harm suggested that family members such as himself were no longer at risk. The Appellant had provided information to the Americans “with the intention of creating an asylum claim in the USA, which did not materialise”. Detective X had not explained why he thought the Appellant's life might be in danger. The Appellant could live safely in Wardak if returned to Afghanistan, without necessarily being associated with his brothers, and in any event could reasonably be expected to seek safety via internal relocation to Kabul. Asylum aside, his Article 8 rights would not be disproportionately infringed by return to Afghanistan.

The appeal to the Upper Tribunal

19. Grounds of appeal of 5 March 2018 contended that
 - (a) Relevant evidence (*viz* the material listed above under the heading *Salient evidence*) had been overlooked;
 - (b) The Appellant's return to Afghanistan could not rationally be thought to show that he faced no risks there given the findings as to risks of persecution by the Secretary of State regarding HW's claim and the judge allowing TSW's appeal;
 - (c) The reasonableness of internal relocation should not have been assessed without regard to the Appellant's mental health problems including paranoid ideation: the available medical evidence recorded the Appellant suffered from depression with psychiatric symptoms prior to his departure to Afghanistan, which was additionally documented by a contemporaneous email from TSW and had a significant history of suffering from paranoid ideation, most recently confirmed by a GP letter.
20. Permission to appeal was granted on 4 April 2018 on all those grounds.

21. Before me Mr Bazini succinctly developed those grounds of appeal, founding heavily on the relevance of the documentary and witness statement evidence said to have been overlooked. Ms Everett pragmatically accepted that whilst not instructed to concede the existence of an error of law, it was very difficult to see how it was that the First-tier Tribunal could have concluded that the Appellant would not face similar risks to his brothers recognised as refugees without giving rather fuller reasons than it managed.

Findings and reasons

22. The First-tier Tribunal decision is rather difficult to follow because the Judge has not set out their understanding of the Appellant's asylum claim. Instead the decision jumps straight from a general legal direction as to the relevant authorities for assessing international protection claims to a recital of aspects of the evidence. Doubtless such a decision could survive legal challenge, there being no absolutely set form for the structure of a Tribunal decision, but it is a very unhelpful way to proceed, not least because it leaves the reader unclear of the basis of the asylum claim as the First-tier Tribunal perceived it.
23. 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."
24. In this appeal, the material labelled above as *Salient evidence* was wholly overlooked, as the advocates before me agreed. It was patently of central importance to the assessment of the Appellant's credibility. The material from the Afghan authorities such as the National Parliament Group letter potentially corroborated his account of the non-availability of protection in Afghanistan, which is relevant both to the credibility of his alleged sojourn in Pakistan and to the reality of any risk he might face in Kabul or elsewhere. The letters said to emanate from the Taliban indicate his antagonist's ability to track him down; so too does the letter from a neighbour.
25. Of course, none of this material is necessarily established to be genuine. The governing authority is of course *Tanveer Ahmed* [2002] UKIAT 00439, which essentially holds that material of this nature stands and falls with the assessment of the evidence as a whole. However, given the backdrop to the Appellant's claim includes the successful refugee claims of his siblings, one cannot say that the starting point when assessing documentary evidence is necessarily one of scepticism. These pieces of evidence are not obviously inconsistent with the findings by both the Secretary of State and the independent judiciary on the asylum claims of his brothers.

26. Furthermore, the rejection of the Appellant's claim that he was in poor mental health when he returned to Afghanistan and arranged for a wedding reception does not engage with the medical and witness statement evidence from various sources to contrary effect.
27. Finally, aspects of the assessment of risk to the Appellant are out of line with international protection law generally: for example the statement that the Appellant had deliberately manufactured an asylum claim for American consumption by giving information to the Taliban sits rather ill with the notion of persecution for reasons of attributed political opinion. There is no exclusion clause predicated on an asylum seeker's state of mind when they engage in activities within their country of origin that might lead to imputations of a particular political view. In any event, the First-tier Tribunal should have considered whether the Appellant faces a real risk of guilt by association, given that the UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* (April 2016) state:

“k) Family Members of Individuals Associated with, or Perceived as Supportive of, the Government and the International Community

AGEs [anti-government elements] have been reported to target family members of individuals with the above profiles, both as acts of retaliation and on a "guilty by association" basis. ... In particular, relatives, including women and children, of government officials and members of the [security forces] have been subjected to harassment, kidnappings, violence, and killings.”

28. The First-tier Tribunal determined the appeal in the alternative on the basis that the Appellant had a viable internal relocation alternative in Kabul. However, whether he had a reasonable safe haven there is thrown into doubt by the material above which was overlooked, such as his account of having been tracked down at the family home. As the grounds correctly note, questions of mental health are of central importance in assessing the reasonableness of such an option.
29. I accordingly find that the decision of the First-tier Tribunal is unsafe and must be set aside.

Observations for the re-hearing of the appeal before the First-tier Tribunal

30. Given that material relevant to the assessment of the Appellant's credibility was overlooked, it is necessary to remit the appeal for re-hearing. There are some findings which should be preserved on the re-hearing given it is not in the public interest to re-litigate factual findings that have not been shown to be legally flawed.
31. Carnwath LJ stated in *HF (Algeria)* [2007] EWCA Civ 445 at [26] stated that “the appellant should not be subjected without good reason to the stress and uncertainty of a new hearing on an issue on which he has succeeded. Both aspects are relevant to the present case. ... From a human point of view, appearing in front of a tribunal

in support of an asylum claim must be a gruelling experience at the best of times. To require it to be repeated on issues which have already been decided is not only wasteful of the tribunal's time and resources, but oppressive and potentially unfair for the applicant.”

32. Accordingly the fact of the Appellant’s having passed information to the US forces accepted at §17 of the First-tier Tribunal decision should be preserved.
33. It is necessary to make a passing observation on the future determination of this appeal. It has not been necessary to engage with every factual aspect of the appeal in the course of establishing material errors of law demanding a remittal of the appeal for re-hearing. That duty lies ahead for the First-tier Tribunal re-determining the matter. Nevertheless, Immigration Rule 339K states:

“The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.”

34. Thus Rule 339K requires attention to be given to whether there has been a material change of circumstances that might prevent the recurrence of persecution or the threat of it suffered in the past. On the evidence, it is readily apparent that the Appellant's close family members have been established as facing a real risk of serious harm or persecution from the Taliban. It would be difficult to conclude that there has been any significant fall in the influence of anti-government elements in recent years.
35. Of course, the burden of proof in establishing an entitlement to international protection lies upon an asylum seeker. However, given Rule 339K and the context of this case where the Secretary of State has already recognised the Appellant's brothers as refugees in circumstances where an official of the US law enforcement agencies has taken the family’s situation sufficiently seriously to travel to the UK to give evidence in the support of one brother’s appeal, the First-tier Tribunal should give careful attention to whether there is cogent evidence that is sufficient to undermine the “serious indication” of well-foundedness to which those facts would ostensibly point.

Decision:


The decision of the First-tier Tribunal contains material errors of law. The appeal is allowed and remitted to the First-tier Tribunal for hearing afresh (save for the preserved finding identified above §32).

Anonymity Order

I make an anonymity order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of any information or matter likely to lead members of the public to be able to identify the Appellant.

Signed:

Date: 8 June 2018

A handwritten signature in black ink, appearing to read 'M.A.S. Symes'. The signature is written in a cursive style with a long, sweeping underline that extends to the left.

Deputy Upper Tribunal Judge Symes