Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12408/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons Promulgated**
On 19 July 2017	**On 08 August 2017**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FN
(ANONYMITY DIRECTION MADE)

Respondent

And between

FN

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms A Davis, Counsel, instructed by Sutovic & Hartigan

DECISION AND REASONS

1. These are cross-appeals and I shall refer to FN as 'the appellant' as he was before the First-tier Tribunal. He is a national of Afghanistan and it is accepted that he was born on 12 March 2000. He is now 17 years old but he was 16 when he arrived in the United Kingdom. He was also 16 at the date of decision, which was a decision made on 7 June 2016. He was 16 at the date of the hearing which took place at Hatton Cross on 12 December 2016.

2. The cross-appeals arise in this way. There was an issue before the First-tier Tribunal as to whether the conditions in Kabul, or perhaps in other parts of Afghanistan, were such as to engage Article 15(c),that is, the risk of serious harm. It is of course defined in subparagraph (c) *'as serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*.'

3. In the concluding paragraph of the determination the judge says:

> I confirm that I have also had regard to the objective evidence regarding the increase in the level of indiscriminate violence since 2015 and in particular during the first half of 2016.

However, that falls well short of deciding whether there was a violation of Article 15(c) and it was on that basis that the appellant made a pre-emptive strike, if I can call it that, to allege that the First-tier Tribunal Judge was wrong in failing to grapple with that Article 15(c) issue. The approach adopted by the appellant arises from the case of *EG & NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia* [2013] UKUT 00143. It was there held that the use of Rule 24 is not to be used where there is a materially different outcome sought from that which was obtained before the First-tier Tribunal. The determination reads:

> A party that seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties needs permission to appeal. The Upper Tribunal cannot entertain an application purporting to be made under Rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for permission to appeal.

Adopting this reasoning, the appellant properly, in my judgment, advanced the case in this pre-emptive notice of appeal.

4. It is made clear, however, in the notice that if no error of law is found, this ground will not be advanced. Indeed, of course it would be entirely unnecessary to advance it, if the Upper Tribunal finds that no error has been made. In such circumstances it is properly accepted by the appellant that this ground of appeal would be withdrawn.

5. Consequently the nub of the appeal before me is the respondent's appeal, which is, amongst other things, that the First-tier Tribunal Judge failed

properly to deal with the issue of internal relocation. That was a matter which was raised in the Secretary of State's decision.

6. Before dealing with that, however, it is necessary to consider the position that was adopted by the Secretary of State in the course of the hearing. It was accepted by the Secretary of State that the appellant had a genuine subjective fear of return to his home area. The home area was Qalaye Zaman Khan village in Kabul. In the determination the precise nature of his home area was described in a report submitted by Dr van Engerland. It is referred to in paragraph 16 of the determination and describes Qalaye Zaman as a self-contained area of Kabul that used to be a village but that has kept that village tradition of living together as a community. The judge also noted that the appellant has his parents in Afghanistan, two maternal uncles and siblings.

7. It was the respondent's submissions that he could return to Afghanistan looking to them for support. It is as well to point out what was said in the decision letter about conditions in Kabul. Paragraphs 30 and 31 said:

> 30. It is noted that Kabul is the capital and largest city by population within Afghanistan. Kabul has a population of 6,350,000 and therefore it is considered that you would be able to internally relocate within Kabul and continue to live safely.
>
> 31. Background information confirms that Kabul is vastly controlled by the government. It is also noted that you failed to demonstrate that your profile within the Taliban is significant enough that they would be willing or even able to trace you following your relocation…

and then references were made as to the internal circumstances within Kabul.

8. The determination, as a result of the way the case was put, spends much time on the circumstances of the appellant's position in his home area. However, all of that, in my judgment, seems to be of little or no impact because of the concession made by the Secretary of State that the appellant was at risk in the home area but could safely relocate. I do not regard the reference to his having a genuine *subjective* fear of return to the home area as being limited to a subjective fear without a corresponding objective fear. So much is apparent from paragraph 27 of the determination to the effect that the appellant could reasonably relocate where he would not face a real risk of harm. It is clear that he was found to have a genuine fear of return, both objectively and subjectively, in his home area and the sole issue was whether there was an option available to him of locating himself in another part of Kabul. Such a solution was a potentially reasonable one: it would not be unduly harsh in the sense that it would deprive the appellant of the basic amenities of living as a civilised human being.

9. There were in favour of the appellant a number of clear factors. There was a finding that he had been subjected to pressure from the Taliban in his home area. There was a finding that he was a minor. Those two factors

would be conclusive evidence of it being unduly harsh for him to return if there was no evidence of any support networks available to him. If he had no support networks as a vulnerable minor it would be difficult if not impossible to find livelihood opportunities in Kabul.

10. However, the circumstances were not as clear-cut as that and the reason for this was that the judge herself records in paragraph 7(3) that the appellant has his parents, two maternal uncles and siblings to whom the respondent said he could return in Afghanistan. In addition, it was said in the respondent's submissions that the appellant's parents have not moved and they are not in danger. That appears to be something which is uncontroversial. Further, it was said that the appellant's maternal uncle lives only fifteen to twenty minutes away although the precise location where he lives is not identified.

11. Consequently in considering the issue whether he, as a minor, could return to Kabul, there was inevitably a requirement to deal with the network of support which was available to him in the form of his family. In most circumstances a child returning to his family or a family support network would not establish that it is unduly harsh for him to do so or that it is unreasonable. The question in this case was whether the family support network was available which might provide the inevitably necessary safety net for his return. Clearly, if a member of the family is at risk, it is not necessarily unreasonable for the entire family to move if, by doing so, the risk can be avoided.

12. The judge, having dealt with the matters which I have indicated were largely irrelevant although engendered by the position that was adopted by the Presenting Officer, dealt with internal relocation principally from paragraph 21 onwards. She properly reminded herself that the test was whether it would be unduly harsh to return to wider Kabul and appropriately considered the UNHCR eligibility guidelines for assessing internal relocation, which she set out in subparagraphs (i) to (v) in paragraph 21.

13. However, she then said in paragraph 22:

> In considering the internal relocation the appellant who would be returning from the West, would not have his family support network in any other locations in Kabul or other areas in Afghanistan with no prospect of access to essential services, shelter or means of earning a livelihood. I find that in the circumstances of this case the appellant's internal relocation to the wider Kabul would be unduly harsh.

14. Unfortunately there is no consideration of the role that it was possible for his family to play in providing a family support network. It is not suggested that the appellant himself could return to Qalaye Zaman. However, Qalaye Zaman, as he have noted, is a self-contained area of Kabul and that does not mean that it does not provide a springboard from which there might be internal support provided to the appellant on return.

15. I do not for one moment speculate upon what the result of that enquiry would be. It may be that they cannot afford or offer any support but that was simply something that was not dealt with by the judge in paragraph 22 of the determination. All we have is a conclusion that it would be unduly harsh to return to Kabul without dealing with the potential for the family providing him with support that would be both material support as well as emotional and domestic support. As this issue was not developed in the determination and it needed to be and was an obvious point that had to be pursued, the judge's approach amounts to an error of law.

16. No support for the judge's failure to consider this issue is to be found in the paragraphs of the determination that follow. First of all, in paragraph 22 the First-tier Tribunal Judge makes reference to a report of Dr Liz Schuster dated 12 August 2016 in which she states the obvious point that:

> Unless they have access to support networks they would find it difficult if not impossible to find livelihood opportunities.

I entirely agree with that statement. It is clear that the appellant as a vulnerable young person needs to have family support but the question was whether family support was available to be provided in one form or another.

17. In addition the judge appears to rely upon a further risk of those forcibly returned because of evidence that criminals had been targeting returnees from Europe assuming that they must have money and refusing to believe that they have been deported without any resources. That does not mean, in my judgment, that all returnees are equally at risk or that there can be no returns at all. It may well be that there are patches of difficulties for people in certain areas in Afghanistan but the judge had to confine herself to the narrow issue of whether there was another part of Kabul where the appellant might reasonably and safely return subject to the provision of support networks. The issue remained the availability of support networks.

18. Similarly the judge's reference to the Amnesty International Reports for 2015 and 2016 was so general in character that it did not assist in resolving the circumstances of the current case. She recorded evidence that there was growing insecurity with insurgency and criminal activity worsening across the country and that the first three months were the most violent period on record. Those were all material considerations if one was looking at Afghanistan as a *whole* but what the judge should have been looking at was the situation in Kabul and in particular an area other than the appellant's home area. Finally, the judge, as I have already mentioned, noted a level of indiscriminate violence in 2015 and on the increase in recent months but did not then go on to deal with whether that amounted to a level sufficient to engage Article 15(c).

19. The narrow and sole issue in this case was whether, if the appellant were to be returned to Kabul, his family members were able to offer a support network. The judge's failure to do so amounted to an error of law. I set aside the First-tier Tribunal Judge's determination and direct the decision

be re-made. That will entitle the appellant to put forward evidence in relation to Article 15(c) point and require consideration of the existing country guidance on Article 15(c) in Afghanistan. Fresh evidence may require the country guidance to be expanded or modified.

DECISION

I set aside the decision of the First-tier Tribunal.

I allow both the appeal of the Secretary of State and the cross-appeal of FN.

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 his 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.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL Date: 07/08/2017