



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/10829/2018  
PA/10870/2018

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 31<sup>st</sup> January 2020**

**Decision & Reasons Promulgated  
On 9<sup>th</sup> April 2020**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**HO (1)  
KO (1)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Howard, Fountains Solicitors

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The First-tier Tribunal ("FtT") made an anonymity direction and it is appropriate to continue that direction. Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellants are brothers and both nationals of Afghanistan. The first appellant arrived in the UK on 24<sup>th</sup> August 2016 and claimed asylum on 17<sup>th</sup> October 2016. The second appellant arrived in the UK on 9<sup>th</sup> August 2019 and claimed asylum on 30<sup>th</sup> August 2016. Each of their claims was refused by the respondent for the reasons set out in two separate decisions dated 28<sup>th</sup> August 2018. The appellants appealed to the FtT and their appeals were dismissed by FtT Judge Fox (“the judge”) for reasons set out in a decision promulgated on 31<sup>st</sup> May 2019.

### The decision of FtT Judge Fox

3. The claims made by the appellants are summarised at paragraphs [5] to [8] of the decision. The appellants and their brother [M] gave evidence. Their evidence is set out at paragraphs [33] to [52] of the decision. The judge noted that each of the appellants had previously claimed they left Afghanistan in December 2015. The judge considered the evidence of the first appellant that he had not claimed to have left Afghanistan in December 2015 and his claim that the date had erroneously been provided by his previous representatives. At paragraph [73], the judge considered the oral evidence of the first appellant confirming he left Afghanistan, and arrived in the UK on 24<sup>th</sup> August 2018 after a journey which lasted 8 to 9 months, to be consistent with the previous account that he had left Afghanistan in December 2015.

4. At paragraph [68] of his decision the judge noted that the core of the appellants claim post-dates their flight from Afghanistan. At paragraph [75], the judge states:

“The second appellant’s evidence is also tainted by a chronology whereby the core of the claim postdates flight from Afghanistan. It is not credible that the appellants would seek to escape from an event which was yet to occur nor was within their reasonable, contemplation at the material time. This discrepancy damages their credibility and the core of the claim.”

5. The judge turned to consider the risk upon return. At paragraph [85], the judge found the appellants have failed to demonstrate to the lower standard, that they cannot return to their home region. Nevertheless, the judge also considered whether the appellants can internally relocate. At paragraphs [86] and [87], the judge stated:

“86. ... The appellants will return as adults. They speak Pashto. By their own evidence they relocated to Kabul where they resided without incident notwithstanding the father’s alleged death. The appellant’s

mother returned to the home region where she resided with her daughter-in-law and grandchildren.

87. There are numerous other family members present in Afghanistan who may also be available to assist the appellants if required. In addition and in the alternative there is no reliable evidence to demonstrate why [M] cannot provide practical support to the appellants upon their return and he has an established family home currently occupied by his wife and children which the appellants may be able to benefit from."

6. At paragraph [88], the judge concluded:

"For the reasons stated the appellants have failed to demonstrate that they are of any interest to the Taliban or the Afghan authorities. AS cannot assist the appellant in the circumstances. In addition reliance upon Article 15(c) alone is insufficient; AK applied."

7. The judge recorded at paragraph [89], that he had been invited to depart from the country guidance. At paragraphs [89] and [90], the judge stated:

"89. Ms Sepulveda has invited the tribunal to depart from all the country guidance cases relevant to the instant appeal. She relies upon generic country reports in this endeavour. There is no reliable evidence which engages with the issues or addresses the appellants' alleged subjective claim.

90. Without the benefit of expert evidence to address the specific issues at appeal in the context of the appellants' subjective evidence, I am not persuaded to depart from all the country guidance provided by the Upper Tribunal as invited."

### The appeal before me

8. The appellants sought permission to appeal on five grounds. First the judge has provided inadequate reasons for finding the appellants account of events not to be credible. Second, the judge failed to adequately consider the background material in the assessment of the risk upon return. Third, the judge failed to make findings on material matters. Fourth, the judge failed to consider relevant evidence and finally, the judge failed to apply the Joint Presidential Guidance Note No 2 in the assessment of the evidence of the second appellant who was a child at the date of the hearing. Permission to appeal was granted by First-tier Tribunal Judge Bird on 3<sup>rd</sup> July 2019.

9. At the outset of the hearing before me, Mr Howard confirmed that the appellants rely upon the second, third and fourth grounds of appeal only. Mr Howard submits the second appellant was a child at the time of the hearing before the FtT. He accepts the judge was aware of the claim that

the appellant's mother had passed away shortly before the hearing of the appeal and the judge had regard to the Presidential Guidance regarding vulnerable witnesses. There is no criticism of the judge's conduct of the appeal. Mr Howard submits that in the skeleton arguments that were relied upon by the appellants, there was extensive reference to the background material regarding the situation in the appellant's home area. He submits the judge did not refer to the background material concerning children in Afghanistan and the evidence that demonstrates that children are specifically targeted by anti-government groups for recruitment, child labour and forced labour. He submits the background material demonstrates that being a child in Afghanistan is a factor that places the child at risk of persecution. Mr Howard submits that if the judge had had that background material in mind, he would have reached a different conclusion as to risk of indiscriminate violence that the appellants would be exposed to, upon return.

10. Mr Howard submits the judge failed to make findings on material matters. At paragraphs [83] and [84], the judge refers to the claim regarding the risk from pro government forces. He submits the judge erred in his view that the matters form no part of the appellant's claim. He drew my attention to paragraph [21] of the second appellant's witness statement dated 7<sup>th</sup> November 2018 in which the second appellant states "*.. I also fear that I will be arrested and imprisoned by the government authorities, because they had threatened to imprison me and the men in my family, because we did not give them information on the Taliban when they had pressured us to give them this information*". A similar claim is made at paragraphs [26] and [27] of the first appellant's witness statement dated 2<sup>nd</sup> November 2018. Mr Howard submits it was therefore incumbent upon the judge to address that claim, and the risk upon return that arises.
11. Finally, Mr Howard submits that in reaching his decision that the core of the appellants claim post-dates their flight from Afghanistan, the judge failed to have any regard to the evidence set out in the witness statement of the first appellant in particular, that addresses the issues concerning the dates.
12. In reply, Mr Bates submits that judge was plainly concerned about the chronology given by the appellants. The judge refers, at paragraphs [31] and [32] to the extensive evidence before him, and at paragraphs [39] to [44] refers to the evidence of the first appellant. Mr Bates submits the

judge properly took the chronology into account. The appellants had tried to distance themselves from what they have said previously, as set out in paragraphs [5] to [8] of the decision. The judge did not accept the appellants had been truthful and rejected the first appellants claim that his representatives were responsible for drafting an inaccurate statement. In reaching his decision Mr Bates submits, the judge was entitled to note that no steps had been taken by the appellants against their previous representatives and it was open to the judge to conclude that the chronology tainted the core of their claim. Mr Bates submits the judge essentially found that the appellants had left Afghanistan before any difficulties arose and on their own account of events, the Taliban kept attending the family home but did not forcibly recruit the appellants. Mr Bates accepts the appellants' witness statements do refer to a fear from government forces that was connected to the core of their claim. He submits the judge carefully considered the evidence of the appellants taken together with the evidence of their brother, [M] and there was an overall assessment of the risk that the family is exposed to. The government has no interest in the family and although Daesh was mentioned by the appellants, there was no claim that the appellant's have been targeted by Daesh. At paragraph [83], the judge acknowledges the submissions regarding the risk from pro-government forces and Daesh.

13. Mr Bates accepts that a number of generic reports were relied upon by the appellants and the judge was invited to depart from the relevant country guidance. He submits the background material probably needed to be considered, but it would have to be strong background material that establishes a risk upon return for these appellants, to depart from the Country Guidance.
14. In my judgement, the decision of the FtT is tainted by a material error of law. The judge rejected the appellants account of events. At paragraph [68] of his decision, the judge states "*Upon the available evidence the core of the appellant's claim post-dates their flight from Afghanistan...*". The judge appears to have reached that conclusion based upon the chronology of events that is set out in the summary of the appellants claim set out at paragraphs [5] to [7] of the decision.

"5. The appellants claim that their brother [D] was imprisoned in late 2013 or approximately February 2014 by the authorities due to involvement with the Taliban. [D] was released from prison in approximately February 2016 on condition that he provide the

authorities with information about the Taliban. The authorities visited the appellants' home in March 2016 for this purpose.

6. According to the first appellant the Taliban visited the appellants' home in late 2015 to ask why the government were visiting their home. The Taliban attempted to forcibly recruit the appellants at that time. On the last visit [D] assured the Taliban that the appellants would join them and to return the following day for that purpose. The appellant relocated to Kabul the following day.

7. According to the second appellant the Taliban visited the appellants home in March 2016 asking [D] and the appellants to join the Taliban. The Taliban visited the appellants home on a regular basis until the appellants relocated to Kabul. The appellants father was murdered in Kabul by the Taliban 20 days after they arrived in Kabul."

15. It is not entirely clear where that summary comes from. The reference, at paragraph [5] to the appellants brother [D] having been released from prison in approximately February 2016 on condition that he provide the authorities with information about the Taliban, appears to have been extracted by the judge from paragraph [17] of the decision letter in respect of the second appellant's claim. The decision letter summarises the claim made by the second appellant and states:

"17. [D] was released by Afghan government in approximately February 2016 on the condition that he provided information about the Taliban. The government forces were visiting your home in approximately March 2016 over a period of a month asking your brother for information about the Taliban. (WS Para 5) (AIR Q71)."

16. The respondent appears to claim that that is what was said by the second appellant in a witness statement, and in response to question 71 of the interview completed on 8<sup>th</sup> February 2017. I have considered both of those documents. The second appellant's witness statement appears at 'C1' of the respondent's bundle and at paragraph 5 he does not claim that his brother [D] was released in approximately February 2016. In that statement, the second appellant claims "*[D] was working for the Taliban and the government arrested him following which he was imprisoned for around two years. The government released on the condition that he becomes an informer for them providing them with information about the Taliban...*". At question 71 of the asylum interview record, the second appellant was asked how long after the initial threat, he stayed in Laghman. He claimed the family was under pressure from the government and the Taliban and they stayed in Laghman for a month after his brother was released, and they then moved to Kabul.

17. For his part, in his witness statement dated 18<sup>th</sup> June 2018 that was to be found at 'C1' to 'C3' the respondent's bundle, the first appellant stated at paragraph 5 that his brother [D] was released in October 2015. In his witness statement dated 2<sup>nd</sup> November 2018, prepared specifically for the hearing of the appeal the first appellant states at paragraph [11]:

"11. In reference to paragraph 14 (RFRL), I would like to clarify that I had not stated in WS1 that the government forces started visiting my home in March 2016. This is not recorded in WS1 or my Asylum Interview Record, dated 21.06.2018 (AIR)."

18. The judge rejected the core of the appellant's account on the understanding that the core of the claim post-dated their flight from Afghanistan. At paragraph [75], the judge states it is not credible that the appellants would seek to escape from an event which was yet to occur nor was within their reasonable contemplation at the material time. In reaching his decision, it appears the judge simply adopted the matters set out in the respondent's decision letters, without considering the claim made by the appellants that there were errors in the decision. Having carefully considered the material that was before the judge, I accept the submission made by Mr Howard that in reaching his decision that the core of the appellants claim post-dates their flight from Afghanistan, the judge failed to have any regard to the evidence set out in the witness statement of the first appellant in particular, that addresses the issues concerning the chronology. In my judgement, the judge failed to engage with the evidence of the appellants, and I have no confidence that the judge would have rejected the core of the appellant's account and reached the same conclusions as to the relevant chronology, if the judge had engaged with that evidence.
19. That is in itself sufficient for me to conclude that the appropriate course is for the decision of the FtT judge to be set aside, without consideration of the other grounds relied upon. In any event, Mr Bates acknowledges the Tribunal had been asked to depart from the country guidance and the background material relied upon by the appellants probably needed to be considered. The assessment of the risk upon return, must inevitably be undertaken by reference to the factual matrix as found by the Tribunal.
20. In my judgment, the judge rejected the core of the account without properly addressing whether the events relied upon by the appellants do in fact post-date their departure from Afghanistan and failed to adequately address the appellants evidence in this respect. As to disposal, the

assessment of a claim for asylum such as this is always a highly fact sensitive task, and the appellants are entitled to have their claim properly considered by the FtT. In all the circumstances, I have decided that it is appropriate to remit this appeal back to the FtT for hearing afresh, having considered paragraph 7.2 of the Senior President's Practice Statement of 25<sup>th</sup> September 2012. The nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.



**Notice of Decision**

21. The appeal is allowed. The decision of FtT Judge Fox promulgated on 31<sup>st</sup> May 2019 is set aside, and I remit the matter for re-hearing de novo in the First-tier Tribunal, with no findings preserved.

Signed

Date

23<sup>rd</sup> March 2020

**Upper Tribunal Judge Mandalia**