



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02154/2020

THE IMMIGRATION ACTS

Heard on 28th June 2021
At Manchester Civil Justice Centre (remote hearing)

Decision & Reasons Promulgated
On 11th August 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SA
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Hussain, Counsel instructed by BA Chambers
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born in 1991. He appeals with permission against the decision of the First-tier Tribunal (Judge Atkinson) to dismiss his protection appeal.
2. The basis of the Appellant's claim was that as a member of the Afghan National Army he had come to the adverse attention of the Taliban. He had left the army after only 6 months due to their threats. He thereafter opened a grocery store near a bridge along the Kabul-Logar highway. Unfortunately this only increased the Taliban's interest in him, as due to the location of his store they

accused him of being a spy for the Americans. His shop was shot at and broken into. The Appellant continues to fear persecution for reasons of his imputed political opinion.

3. The Respondent refused to grant protection. It was accepted that the Appellant had joined the Afghan National Army in 2010 but not that he had been threatened by the Taliban. The Respondent argued, in the alternative, that the Appellant could avoid any persecution from the Taliban by relocating within Afghanistan, for instance to Kabul.
4. In evaluating the claim on appeal the First-tier Tribunal therefore had to make findings on three matters:
 - i) Was the Appellant's account of threats credible, applying the lower standard of proof;
 - ii) Is the Appellant's fear of the Taliban currently well-founded;
 - iii) Could the Appellant reasonably be expected to avoid persecution by relocation to Kabul.
5. By its decision dated the 20th November 2020 the First-tier Tribunal resolved all of these issues in the Respondent's favour and the appeal was dismissed.
6. The Appellant was granted permission to appeal by the Upper Tribunal on the 18th January 2021. The first ground of appeal is that the Tribunal erred in "adopting plausibility as a criterion". The second ground is that the Tribunal failed to take material matters into account, in particular the expert evidence of Dr Antonio Giustozzi, who had commented upon the risk faced by the Appellant as a former soldier, and upon how Covid-19 had impacted upon the informal job market in Kabul.
7. Before me Mr Hussain concentrated his submissions on the second of these grounds. He did so in acknowledgment of the fact that in order to succeed the Appellant needed to discharge the burden of proof in respect of matters (ii) and (iii) at paragraph 4 above. The outcome of the credibility assessment - matter (i) - was not determinative of either. The Appellant might be entirely honest about his past experiences but still fail to establish a current entitlement to refugee status; equally he may be lying but still be at risk.
8. For the Respondent Mr Diwnycz submitted that in respect of matter (iii) above the Tribunal was obliged to apply the very recent country guidance, and that being so, its findings on (i) and (ii) were largely irrelevant for the purpose of this appeal. He further relied on a written 'rule 24' response prepared by his colleague SPO Mrs R. Pettersen, which defended the Tribunal's approach the Appellant's overall credibility.

Discussion and Findings

9. The written grounds make extensive reference to the Tribunal's alleged reliance upon plausibility as a criterion for rejecting the Appellant's evidence. This ground was wisely ignored by Mr Hussain. The Tribunal does not in fact reject evidence on the grounds of plausibility. It rejects certain parts of the Appellant's evidence on the basis that it is vague, and because the Appellant was unable to provide the Tribunal with a coherent chronology of the events he described. The Tribunal accepted that dates can be difficult to recall, but reasoned that the order in which things happened are more likely to be fixed in the mind if the account narrated is true. That is not reasoning that I can legitimately interfere with.
10. The grounds next take issue with the approach taken to the evidence of Dr Antonio Giustozzi. No issue was taken, either here or below, with the value of Dr Giustozzi's expertise. He has been acknowledged as an expert in successive 'country guidance' cases. His report for this appeal is dated the 21st September 2020. It was his considered opinion that letters such as those purportedly sent to the Appellant by the Taliban, warning him about his conduct and threatening him, are a genuine feature of life in those parts of Afghanistan where the Taliban continue to hold sway. As such it was plausible, in his view, that someone who had voluntarily joined the Afghan army, or be suspected as a collaborator, might receive such threats. The Tribunal declined to place any significant weight on this commentary, however, since Dr Giustozzi had not considered the evidence that such letters are also routinely provided to would-be refugees by the agents who organise their passage to Europe. The grounds mischaracterise this as the Tribunal "dismissing" Dr Giustozzi's evidence. That is not what the Tribunal did. The Tribunal simply noted that the commentary that the account was plausible had to be balanced against the apparently unchallenged evidence that such letters can also be forged. In other words, the evidence was neutral and did not advance the case one way or the other.
11. Now the grounds turn to the meat of the claim, at least as it was advanced by Mr Hussain before me. It is submitted that the First-tier Tribunal erred in apparently regarding its findings on the threats made to the Appellant - or lack of them - as determinative. It had already been accepted that he had been a soldier for the ANA, and there was significant evidence before the Tribunal to demonstrate that he could be at risk for that reason alone. The grounds cite paragraph 5.3 of the CPIN, the material substance of which is that persons associated with the Afghan authorities, whether past or present, are "systematically" targeted by Anti-Government Elements (AGEs). That the Appellant could face a risk of harm as a former soldier was also emphasised by Dr Giustozzi. He points out that it is the Taliban's *modus operandi* to threaten those that they consider to be collaborators. He writes that the Taliban continue to enforce death sentences passed by them even if these related to historic 'crimes': he gives the example of a *shura* judgement relating to the 2000 hijacking of a plane. They maintain a 'blacklist' of those whom they perceive to

be government collaborators. They do not prioritise them in order of importance, but they do concentrate on high ranking officials and those whose deaths will cause the greatest level of shock. Information provided to Dr Giustozzi indicates that as of August 2019 there were approximately 1500 Taliban fighters still stationed in Logar, as well as an estimated 300 members of 'Islamic' State. As to the position in Kabul, Dr Giustozzi writes that there is a significant infiltration of Taliban in the city, and that they continue to carry out terrorist operations such as bombings and assassinations. Anybody who appears on their blacklist could be at risk, although their priority are those currently associated with foreign interests.

12. Mr Hussain relied heavily on this evidence to submit that the Tribunal conducted only half a risk assessment. At its §44 the Tribunal rejects all aspects of the account that had been placed in issue by the Respondent. It rejects the core of the account of being threatened and having fled as a result. Then at its §45 the Tribunal says this:

“I therefore find that if the appellant were to return to Afghanistan, he would not be targeted by the Taliban as a collaborator or a spy”

13. I accept Mr Hussain has a point. The case did not, for reasons I summarise above, begin and end with the Appellant's claim that he had been threatened by the Taliban. It was evident from the submissions made on his behalf, and from the views expressed by Dr Giustozzi, that the Appellant's former position in the ANA was also relevant to the risk assessment moving forward. Nothing in the extant country guidance decision of AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC) contradicted Dr Giustozzi's assessment on that matter, at least insofar as the potential risk to the Appellant in his home province of Logar was concerned. Whilst it might be argued that the Tribunal's finding on credibility were dispositive of the question of risk – it being some years since the Appellant left the army, this was not the position adopted by Mr Diwnycz, who recognised that any assessment of the current risk had to be based on the current position in Logar. It might be, for instance, that no specific action was launched against the Appellant in the years between his discharge and his departure from Afghanistan because the Taliban did not have sufficient numbers, resources or political strength in his home area during that period: it was however incumbent upon the Tribunal to consider whether a risk was made out at the date of the appeal, arising from the Appellant's historical association with Afghan forces.

14. Is that omission material? As the parties agreed, in the final analysis it is question (iii) above that is determinative in this appeal. If the Tribunal's conclusions on internal flight to Kabul are free of error of law, then its decision must stand and the Appellant's appeal be dismissed, regardless of any errors that might be identified in respect of the initial risk assessment.

15. Here Mr Hussain relied on the specific evidence produced from Dr Giustozzi about how living conditions in Kabul have deteriorated as a result of the pandemic. AS (Kabul) was heard in January 2020, and for reasons relating to the history of that appeal, much of the evidence before the Tribunal dated from 2018 and earlier. The decision itself was promulgated in May 2020. By the time that the appeal in the instant matter came before the First-tier Tribunal in November of last year, the impact of Covid-19 on the Afghan economy, says Dr Giustozzi, was tangible:

“Since the AS ruling the situation in Kabul and in Afghanistan has changed greatly, due to the onset of Covid 19. While in the ruling it was assumed that an individual could always hope to be able to find employment as a day labourer, even obtaining employment as a day labourer is difficult in the current economic predicament in Afghanistan.....

Before the onset of the Covid-19 crisis, a day labourer could hope to be hired two days out of three, although this is an average and the actual rate of employment would fluctuate. That implies an average monthly earning (excluding periods of illness) of Afs 8,800 (\$113).

At present, because of this crisis, a day labourer cannot hope to get hired more often than one/two days out of four (at reduced rates). That implies a monthly earning of Afs 3,150 (\$40).

It is impossible to survive in Kabul with \$40 per month, so day labourers commonly take loans from relatives, sell whatever valuables they might have, and cut their consumption to the lowest possible level, such as feeding on tea and bread”

16. The Tribunal addresses this evidence at its §52-53 and concludes:

“Whilst I accept that it is likely that the pandemic is likely to have a detrimental impact on opportunities for employment, I do not find Dr Giustozzi’s opinion to amount to sufficiently cogent evidence such that I should decline to follow AS. That is because the evidence shows that whilst there might have been some deterioration in the economy, it does not go so far as to show that such deterioration is so great that the guidance in AS should not be followed...

I interpolate to say that I accept that this reasoning is arguably circular. It can be read to say that the Tribunal did not find Dr Giustozzi’s evidence persuasive because his evidence is not persuasive. Any doubts about the sufficiency of the reasoning are however swept away by the final sentence in paragraph 53:

... Further and in any event, to the extent that there has been a degree of deterioration in the economic situation in Kabul, the consequences for this appelland would be mitigated by the fact that he is able to call on the support of his family”.

17. This conclusion was based on the Tribunal’s finding that the Appellant remained in contact with his natal family and that they had the wherewithal to raise the funds required to send him to Europe. I find it difficult to detect any error in the Tribunal’s reasoning here. Logar is immediately adjacent to Kabul.

Travel is relatively straightforward and it would not, at least at the date that the appeal was heard in the First-tier, be difficult for the Appellant's family to send him food or supplies if he chose to settle in the capital. It follows that Dr Giustozzi's helpful, and no doubt accurate, evidence about the impact of Covid-19 on the job market in Kabul was not of particular assistance to this Appellant. That being the case, the First-tier Tribunal's findings on internal flight are uninfected by error of law and must stand. The appeal is therefore dismissed.

18. There has been some delay between the appeal being heard before me, and this decision being made and promulgated. That is nobody's fault but mine, and I take this opportunity to apologise to the parties for it. It is however appropriate to note that in that hiatus of some five weeks the situation in Afghanistan is reported, by the BBC and others, to have dramatically deteriorated. The withdrawal of US and allied forces has resulted in an immediate resurgence of the Taliban in virtually every area of the country excepting Kabul. Although it does not yet appear that the Taliban pose a military threat to the capital, there is likely to be a knock-on effect on conditions in the city as civilians flee fighting elsewhere. The Respondent will, in light of our international obligations, no doubt therefore give careful consideration to events on the ground in Afghanistan before effecting any removal of the Appellant.

Anonymity Order

19. The Appellant continues to seek international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions

20. The appeal is dismissed.
21. There is no order for anonymity.

Upper Tribunal Judge Bruce
4th August 2021