Upper Tribunal
(Immigration and Asylum Chamber)

Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 January, 2013	

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE ESHUN

Between

ABDUL MARTIN SHIZAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms K Cronin, instructed by the Brighton Housing Trust

For the Respondent: Ms E O'Bryan, Senior Home Office Presenting Officer

(1) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.

(2) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

DETERMINATION AND REASONS

Introduction

1.
The appellant is a citizen of Afghanistan born on 1 March 1993. He arrived in the United Kingdom in 2009. An application for asylum was refused by the respondent on the 16 April, 2012 and the appellant appealed to the First-tier Tribunal. On the 23 July, 2012 Judge Adio allowed his appeal. The

respondent in turn appealed against Judge Adio's decision and leave to appeal having been granted on 3 January, 2013 Upper Tribunal Judge Eshun issued a determination finding an error of law directing that the decision be set aside and be re-made.

2.
We not that the judge of the First-tier Tribunal made no anonymity order. No application has been made to us for anonymity and we make no such order of our own motion.

The decision of the First-tier Tribunal

3. The appellant comes from the Sherzad District of Nangahar. This is a province of Afghanistan on the eastern side of the country bordering Pakistan. The provincial capital is Kandahar and the background country evidence indicates that it is an area of high insurgent activity. His case is that his father was killed by relatives as a result of a land dispute and his mother arranged for him to flee Afghanistan at the age of fifteen when he was coming of age and expected to revenge his father's death with dangerous consequences for him. He also explained that he had been subject to pressure from Taliban forces to join them in the insurgency and finally that he was at risk of ill-treatment from the Government Forces because of the perception that he was a Taliban supporter.

4.
There was a dispute as to whether he appellant was fifteen or sixteen when he arrived in the United Kingdom in June 2009. The judge decided in the appellant's favour that he was fifteen. As a result of the age dispute, the appellant has given an account of his circumstances to Social Services in an Age Assessment Interview, the UKBA in the asylum interview with an appropriate adult accompanying him, and in three witness statements the earliest of which was dated September, 2009. The appellant supported his claim to asylum by a report compiled by a well known expert on Afghanistan affairs, Dr Guistozzi, as well as a quantity of documentary background evidence.

5.
Having given careful consideration to the Home Office reasons for doubting the claimant's credibility the judge was satisfied that he was a credible and reliable informant for reasons that he dealt with at some length between paragraphs 23 and 30 of his determination.

6.
By way of conclusions, although the judge accepted that the appellant faced the three sources of threats described above, he decided that relocation to Kabul (which was where the Secretary of State intended to return him) offered a satisfactory option of internal relocation away from his home village that precluded international protection so far as the threat from his relatives or the Taliban was concerned. In this respect, the judge applied the conclusions of the UT in the Country Guidance case of AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC). In that determination the Upper Tribunal did not accept Dr Guistozzi's observations about the safety of the person in the appellant's situation in Kabul.

7.
However questions of internal relocation would be inapplicable if the appellant had a well-founded fear of persecution on the basis of perceived political opinion because the governmental authorities suspected that he was a supporter of the Taliban insurgency. The judge accepted this aspect of the claim having examined the evidence as a whole.

The Secretary of State's Appeal

8. The Secretary of State submitted a notice of appeal addressing his finding in the following term:

“It is submitted that the judge has not given any adequate reasons for this finding. The only reason why the judge appears to have given for his conclusion is that there is a serious possibility that his brother in law may have given the appellant’s name to the authorities when he was detained… The judge concluded at paragraph 23 that the appellant was fifteen when he arrived in the United Kingdom. The appellant’s evidence was that he had never been personally involved with the Taliban. It is submitted that the judge had not given any reasons as to why the appellant’s brother in law had given a young boy’s name (and in which context) who has not been involved with the Taliban to the Authorities. Furthermore the judge had not adequately assessed how a mere disclosure of a young boys name several years ago would now place him at risk.”

Judge Eshun found merit in this ground and concluded in her determination:-

“I find the judge did make an error of law. He failed to give adequate reasons for his conclusion that the respondent’s brother in law would have given his name to the authorities as being involved with the Taliban, that he would be seen to be a insurgent the result of which he was at risk from the authorities throughout Afghanistan. The judge’s decision in respect of the respondent’s imputed political opinion cannot stand. His decision is set aside and is to be re-made.”

9. None of the Secretary of State’s grounds of appeal suggests that the judge erred in law when making his primary findings of fact and his conclusion on the credibility of the appellant’s claim. In those circumstances, the re-making will take place on the basis of those primary findings of fact supplemented by any fresh material that the parties seek to place before us.

10. We would emphasise that although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, such reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. Although a decision may contain an error of law where the requirements to give adequate reasons are not met, this Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance is taken into account, unless the conclusions that the judge draws from the primary data before him were not reasonably open to him.

11 We have, therefore, concluded that our task is to carefully review the evidence before the judge relating to this basis of the appellant’s claim, to determine whether it is capable of supporting the conclusions to which he came. We have also received some recent updating material to examine whether there has been any significant change of circumstances since the decision of the First-tier Tribunal.

12 The issue is whether he has a well -founded fear of persecution from the Afghan authorities by reason of his imputed support for the Taliban, and this assessment is conducted on the basis of a reasonable likelihood or real risk of adverse treatment.

<u>The primary evidence</u>

13. In his first witness statement of September 2009 the appellant gave details of his family as follows:

“My sister is called Sharifa. …she is nineteen years old. She is married to Aziz Rahman. ..I used to visit my sister and her husband. I used to go with him to the Madrassa. He was an elder of the village,

a representative. He disappeared about 2 months before I left Afghanistan, and for 2 months we did not know where he was. Then we received a letter from the Government Forces saying he was in prison for having worked for the Taliban. I did not know that he was working for the Taliban before he went missing. After he was taken however, the Taliban started to come to me and ask me to join them… On two occasions they came to the Madrassa to talk to me but usually it would be in the evenings at home I would tell them that I did not want to join them. This happened about 6 times. The last time they came they took me away into the woods tied up my hands and beat me. They said they would release me, but they will be coming back in 2 or 3 nights to make me join them. It was then that I decided that I needed to leave Afghanistan, before they came for me. During this time the Government Forces also requested that I talk to them when they captured my brother in law he had given my name and others who had worked for the Taliban and that is why they wanted me. They told us this in a letter that we received about 2 days after we received the letter that said that Aziz was in prison. I did not know why Aziz would have said that because I had not been working for the Taliban and they may have forced him to say that."

14. In his asylum interview the appellant said this:-

"My brother in law was working with the Taliban I was not aware of that. When he was arrested by the authorities after 2 months I received a letter from the authorities. After that time my brother in law went missing I faced many problems with the Taliban I was beaten up they were trying to force me to join them. They approached me on 6 different occasions and was beaten up during these occasions. (My brother in law was arrested in) 2008 I can't remember the exact date. The letter (I received from the authorities) was stating we kept your brother in law afterwards we received another letter it was stating we found info through your brother in law that you were also working for the Taliban you have to come to the district. If I would have gone there I shall be killed."

The appellant stated that this letter was received some 2 months after his brother in law went missing. The appellant also mentioned these problems in his Age Assessment Interview in August 2009 where it is recorded:-

"Abdul was asked why he left the country and he replied that he left because of the dangers in Afghanistan and the enemies who killed his father. Abdul carried on to explain that his father was killed because of a land dispute when Abdul was approximately 7 years old. Abdul further explained he used to live with his sister and her husband who was a member of the Taliban. Abdul stated that someone told the Government that Abdul was part of the Taliban which Abdul denies."

15. The appellant expanded upon this account in a further witness statement submitted for the appeal on the 4 July, 2012. Here he explained at paragraph 21 that the first letter that his family had received was from the Red Cross that indicated that the brother in law had been detained at Bagram. This was how the family came to discover this. This statement added that Aziz Rahman had a brother called Malik Jaipour who carried weapons and who attended the Madrassa and gave speeches about Jihad. He had heard subsequently that Malik Jaipour had been killed by coalition forces.

16. Ms Cronin attended on behalf of the appellant at the hearing before the First-tier Tribunal on 4 July 2012. At that stage, in the light of the further details provided she was able to do some impromptu research about Bagram detainees. She was able to access some press reports on the internet apparently dated the 18 June 2012 containing photographs of a number of former Afghan detainees who were released from US military custody in Jahalabad east of Kabul on the 8 May 2010. Names were also given that included the name Aziz –u- Rahman and the appellant identified three photographs of Aziz Rahman as his brother in law. It seems this was material that became publicly

available in response to a freedom of information request to the Pentagon. Further supporting data reveals that on February 25, 2010 a Detainee Review Board recommended that Aziz Rahman should be transferred to the Afghan National Detention Facility (ANDF) at Pol-i-charki Prison Kabul for participation in the rehabilitation programme.

17. Judge Adio noted that the appellant's account given as early as 2009 that his brother in law had been detained received substantial support from this supporting data that had only emerged into the public domain in 2010 even though there was no independent evidence that the Aziz Rahman identified in the press reports was the Aziz Rahman who was the appellant's brother in law.

18. Before the First-tier Tribunal there was also a report of Dr Guistozzi dated the 19 May 2012 that we infer was before the judge, giving further details confirming Aziz Rahman's detention in Bagram had come to light. He said at paragraph 15 of his report which is in the following terms:-

"Because of his family connections to the Taliban, there is a high chance that Mr Shizad could be seen as a suspect insurgent by the authorities. The worsening security situation from 2006 has created the conditions for the authorities to detain large numbers of people on the ground of modest or lacking evidence. Given the unsophisticated techniques still used by Afghan security services, one of the most common ways of obtaining information is to imprison people who are suspected of holding useful information and subject them to sociological and physical pressure, including torture. For this reason they tend to arrest large numbers of people in order to interrogate them. The Afghan security organisation continue rounding up suspected insurgents in the thousands; the Afghan Ministry of the Interior alone claimed to have arrested 5,596 in January to December, 2012, compared to 2956 in March 2009 - March 2010… According to the ICRC, the number of detainees is rising very fast. By 20 September 2007 it stood at 12,000, up from 5000 a year earlier, reached 16,000 in November 2009. Such a vertical rise must clearly be associated with the insurgency. There is therefore a serious chance of mistreatment and physical harm for Mr Shizad".

We note that this assessment of risk is based on family connections rather than any supposition as to what a family member may have told the security forces. In suppor t of this opinion t he next paragraph of Dr Guistozzi's report quotes extensively from an American journalist's report of a passenger in a vehicle apparently detained and sent to prison, principally because his uncle was known to be a supporter of the Taliban. The report continues and quotes the practice of arresting relatives, in order to force fugitives to hand themselves over or prisoners to confess, is also reportedly widespread. It is typically male relatives above puberty who get arrested; never women or children before puberty. Torture and beatings are also commonly used as the Police believe that this is the only way to extract confession. Although the law prohibits arbitrary arrests and detention, all sources reckon that this remains a serious problem. There was country material supporting Dr Guistozzi's observations that torture and ill-treatment at the hands of the Afghan Security Services is and was widespread.

19. At the hearing before us, Ms Cronin relied on a recent report dated 21 January 2013 of the United Nations Assistance Mission in Afghanistan (UNAMA) entitled "Treatment of Conflict Related Detainees in Afghan Custody". In a number of places that report confirmed torture and ill-treatment of detainees by Afghan Forces. Page 19 of that report entitled Transfer of Detainees to NDS, ANP and ANA by International Military Forces and ISAF Detention Monitoring Programme, particularly noted the ill treatment of those who had been transferred by International Forces to various sections of the Afghan Security Services. The report noted:

“ISAF’s resumption of transfers to NDS provincial headquarters in Kandahar where UNAMA found systematic torture remains pending. ISAF has also not resumed transfers to AMP provincial headquarters in Kandahar where the Afghan Independent Human Rights Commission an Open Society Foundations also identified torture. “

At page 42 of the report evidence of disappearances particularly in Kandahar was noted. There is also substantial evidence related to allegations of ill-treatment of detainee’s at the Bagram Airbase by the US Forces.

20 Ms Cronin also relied on a consortium news report published on a website on 20 September 2012, confirming the US practice of detaining family and associates of known Taliban fighters and commanders to provide information that would make it easier for forces to track such people down. However, it is noted that the report suggests that most civilian targets that were swept up in night raids were released within a few days.

21 By contrast the UNAMA report at page 9 noted:

“Of 635 detainees UNAMA interviewed, 552 were held on suspicion or were convicted of offences related to the armed conflict.… many of these detainees were also suspected members of Anti-Government Elements (AGEs) or relatives of AGEs. UNAMA included these detainees in the sample because NDS and AMP treated them as conflict-related detainees and held them with other conflict-related or political detainees.”

22 Judge Adio accepted (at paragraphs 31 and 32 of the decision) Dr Guistozzi’s evidence that the appellant will be seen as a suspected insurgent by the Afghan authorities, and detained and tortured, and that detention conditions are persecutory and suspects can be held indefinitely. He accepted other higher levels of violence and insurgent attacks in Kandahar and accepted that the appellant is at risk on account of his imputed politics from which there is no effective state protection.

The Respondent’s Submissions

23 Ms O’Bryan agreed that we had to re-make the decision on the basis of the First-tier judge’s primary findings of fact. Her core submission was that it was not appropriate to draw the inference of reasonable likelihood of risk to the appellant because:-

i.
There was no reason to believe that a brother in law would have accused the appellant of membership of the Taliban since the appellant denied supporting the Taliban.

ii.
There was no reason that the Government would be interested in a fifteen year old male supporter of the Taliban in 2008 or 2009.

iii.
As it was reported that Aziz Rahman had been transferred from US Military custody to Afghan, there was no reason to believe that the appellant would still be at risk of adverse attention.

iv.
If the Afghan authorities had only sent a letter to the appellant asking him to attend for questioning it did not indicate that they had significant interest in him.

The Appellant’s Submissions

24 Ms Cronin had summarised the appellant's case in a skeleton argument supplied shortly before the hearing.

25 In response to Ms O'Bryan's submissions she pointed out that the appellant had told the judge (as recorded in the determination) that the authorities fear the Taliban: in particular, that they may be attacked by the Taliban when they came to his village, which is why they sent letters. She further pointed out that the fate of Mr Rahman since his transfer to Afghan forces is not known. She pointed out that if the appellant were to be detained for questioning by reason of his contacts he could be transferred to a prison in his home province of Kandahar, where documentary reports of ill-treatment were substantial. She further pointed out that the process of living in Kabul required an identity card and that is when those of interest to the authorities may come to light.

26 As to what Mr Rahman may have said in custody, she pointed out that if torture is used on detainees, people can make false implications of others. The chronology of the detention and the letter accepted by the judge indicated a strong likelihood of a link between the brother in law's detention and the authorities interest expressed in the appellant. He had disobeyed the request to attend for interview and was now older.

Conclusions

27 The task for a judge determining a claim for asylum or related protection is an assessment of all the evidence, applying the standard of a reasonable degree of likelihood or substantial grounds for real risk.

28 The judge does so by assessing the individual narrative to the extent that it is found credible against background conditions informed by country reports, expert assessment and Country Guidance case law. The nature of the task precludes full information that would enable a judge to make a precise prediction as to future events. The mere possibility of ill-treatment or a speculative risk is insufficient to found a claim for international protection.

29 In our judgement the combination of factors identified in part by the judge in the recitation of the evidence and more thoroughly by Ms Cronin in her skeleton argument and oral submissions does suggest that the combination of risks faced by this young man who left Afghanistan on the threshold of manhood by local standards was more than speculative.

30 We note in particular, the following:-

i.
The appellant's home area is a place of a high degree of insurgency where the Taliban apparently operate with impunity. This makes it more likely, both that there is pressure by the Taliban to recruit him (as was the case), and that the authorities would perceive the inhabitants and young men on the verge of manhood in particular as being more likely to be Taliban supporters. It may well be for this reason that Kandahar is reported as a place where particularly repressive measures of detention and tortures are frequent.

ii.
The repressive practices of the Afghan Security Forces, particularly in areas of insurgency actual or suspected, apparently include the detention of families of people who are assessed to be anti-government entities. This may either be to obtain information about others known to be Taliban activists or possibly to deter such family members following family tradition and joining insurgent forces. There does not have to be primary facie evidence that a person is a Taliban supporter or an

admission that they have supported the Taliban for such detention to take place. The period of detention may be variable but the UNAMA report indicates that at least some relatives of anti government entities are detained longer than for the short periods that was the case with ISAF detention.

iii.
The credibility of the appellant's case received significant support when it was subsequently confirmed that a person matching the description of his brother in law had been detained at the Bagram Airbase, a centre for high-profile detainees operated by the US Forces, and where allegations of oppressive methods of interrogation and ill-treatment have been widespread. Whilst the nature of the interrogation of Mr Rahman is not known to the Tribunal, it is highly likely that it would have included details of his family's whereabouts, his local village and who he had met in the months that preceded his detention and thus that the appellant's name would have been mentioned by him in some context.

iv.
It is a reasonable inference from the country evidence that the Security Authorities in Afghanistan would be more interested in a young man from an area of insurgency who was a relative by marriage of, had stayed at the house of, and had attended the Madrassa with, a high profile Taliban supporter who had been detained in Bagram, and whose own brother espoused Jihadist sentiments and had been killed in combat.

v.
Although we see strength in Ms O'Bryan's submission that it is odd that the Afghan authorities would have written to the appellant asking him to report; if they had have been interested in detaining and persecuting him, it is nevertheless the case that the First-tier Judge found as credible and true the appellant's account of having received such a letter. It seems probable that the first letter he mentions was the Red Cross letter informing the sister of her husband's detention at Bagram. The finding that such a letter had been sent and the timing of the letter in relation to the brother's detention do indeed indicate a government interest in this appellant through his close links to his brother in law, with whom he had been staying.

31 Although these matters were not spelt out at paragraphs 31 and 32 of the judge's decision, with the detail that we have employed above, we conclude that, having regard to the totality of the material before him, he was entitled to reach his conclusion. The standard of proof does not require the appellant to speculate on matters that he cannot answer, such as precisely what the brother-in-law may have told the authorities.

32 We again recognise there is strength in the submission that all this was long ago in 2009, matters have moved on and the appellant is less likely to be of interest to the authorities now. However, as Ms Cronin points out in reply, on the basis of the judge's findings, the appellant had left his province when asked to attend for questioning and that might heighten suspicion against him. He is now more mature in age and of greater potential assistance to an insurgency movement.

33 Although determination of an asylum appeal continues to the date of the decision and the appeal process is, in part, a continuation of the fact-finding procedure, we note that it will be unjust, if the appellant should have been recognised as a refugee in 2009, to deprive him of that status simply because the law only granted a right of appeal in 2012.

34 In any event, the recent UNAMA report of January 2013, relied upon by Ms Cronin, indicates that there is no fundamental change of circumstance. In particular, it appears that detention of relatives of anti-government entities continues. Once the primary facts were found to the First-tier judge's satisfaction, he was entitled to give weight to the opinion of a well known expert in Afghan affairs. Dr Guistozzi, assessing the appellant's account even without the benefit of the supporting data relating to the brother in law's detention at Bagran Airbase, said " Because of his family connections to the Taliban, there is a high chance that Mr Shizad could be seen as a suspect insurgent by the authorities" and this would place him at risk of detention and ill treatment by the authorities.

35 For these reasons, although inevitably there remain uncertainties in the evidence, we conclude that the judge's conclusions were supported by the evidence before him and before us. Based on the primary findings as to the credibility of the appellant's account, there is no reason to reach a conclusion other than that he has a well-founded fear of persecution and should therefore be recognised as a refugee.

36 We accordingly re-make the decision on appeal by perfecting the reasons for reaching it, as above. The appellant's appeal against the Secretary of State's decision is allowed.

President of the Upper Tribunal

Immigration and Asylum Chamber

1 February 2013