



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

Appeal Number: PA/05099/2016

**THE IMMIGRATION ACTS**

**Heard at Birmingham Employment Centre  
On 13<sup>th</sup> June 2017**

**Decision & Reasons  
Promulgated  
On 27<sup>th</sup> June 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**[H A]  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr B Bedford (Counsel)  
For the Respondent: Ms H Aboni (Senior HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Dhaliwal, promulgated on 8<sup>th</sup> November 2016, following a hearing at Birmingham Sheldon Court on 30<sup>th</sup> September 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant

subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of Afghanistan, who was born on [ ] 1998. He appealed against the decision of the Respondent Secretary of State dated 27<sup>th</sup> April 2016 refusing his asylum claim and his claim for humanitarian protection under paragraph 339C of HC 395.

### **The Appellant's Claim**

3. The Appellant's claim is that at the age of 11 years, he was at home with his mother, and his brothers, when a person came from the village to tell them that his father had been killed on his farm. When the mother and the Appellant and his siblings went to the farm they found his father lying in a pool of blood having been shot. His father's body was brought home and a funeral was arranged the same day. At the funeral itself, some villagers were all heard to be saying that the Appellant's father was a spy and that the Taliban had found this out, and had killed him. Thereafter, the Appellant and his family remained at the same family home for five months, following which, fearful that the Appellant will be targeted, his mother made arrangements for the Appellant to move to another village, and from there agents were contacted, to enable the Appellant to escape to the United Kingdom.

### **The Judge's Findings**

4. The judge accepted that the Appellant's core claim was credible, namely, that the father was working on his farm, when he was killed, and all the family went to the farm to find him lying in a pool of blood, such that the judge held that, "I accept this aspect of the claim as the Appellant has been able to give sufficient detail" (see paragraph 15(i)).
5. The judge rejected the Appellant's claim that he was in fear of persecution and ill-treatment for the following reasons. First, that the Appellant claimed to come from the Logar Province, where there was a large Taliban presence in his village, and this meant that if the Taliban were interested in the Appellant, they would have been able to locate him during the five months that he continued to live in the same house as his father. Second, the suggestion that villagers were overheard saying that the Appellant must have been killed by the Taliban because he was a spy was "based solely on speculation and in the absence of any adverse interest by the Taliban, there was no risk" (see paragraph 15). Third, the Appellant did not make a claim for asylum en route to the UK when he disembarked in Italy and was fingerprinted there. He was approximately 13 years of age at the time and, "if he was in such a danger, then the expectation is that he would claim asylum immediately" (paragraph 17). Finally, the judge, having referred to the applicable authorities in relation to Afghan asylum seekers, concluded that, "I find it is more than likely that the Appellant will

have a family network on his return to support him and he can be reunited with his family” (paragraph 25). The judge also held that, “it thus appears that the Appellant is not likely to be at risk if returned from the United Kingdom” (paragraph 26). She went on to conclude that, “I am of the view that it is more than reasonably likely that he will be able to locate his family ...” (paragraph 26). The judge then held that, “taking into account all of these factors, I conclude that the core of the Appellant’s claim is not reliable” (paragraph 27). The appeal was dismissed.

### **Grounds of Application**

6. The grounds of application state that the judge took insufficient account of the risk to a group, namely men and boys of fighting age in a contested province, who would face a real risk on return of ill-treatment and persecution. Second, the judge also did not take account of what has been said in **JK v Sweden (Application No. 59166/12)** dated 23<sup>rd</sup> August 2016, where the Grand Chamber of the European Court stated that where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, then the general situation of a general peril in the country of destination cannot be used to deprive such a person of protection. It is unnecessary to show further special distinguishing features. The judge also failed to apply the correct standard of proof to the issue of whether the Appellant would have a family network to support him upon return to Afghanistan because the judge used language such as “more than likely” (at paragraph 25) and “not likely” (at paragraph 26), and “more than reasonably likely that he will” (at paragraph 26).
7. On 23<sup>rd</sup> January 2017, permission to appeal was granted by the Upper Tribunal on this basis, together with the basis that the judge erred in treating the failure of the Appellant to claim asylum en route to the United Kingdom as a matter adverse to his overall credibility, given that he was aged only 13 years when that journey was undertaken.
8. On 10<sup>th</sup> February 2017 a Rule 24 response was entered by the Respondent Secretary of State.

### **The Hearing**

9. At the hearing before me on 13<sup>th</sup> June 2017, Mr Bedford, appearing on behalf of the Appellant, made the following submissions. First, the Upper Tribunal had granted permission on the basis that the standard of proof had been misunderstood by the First-tier Tribunal Judge at a number of places in the determination. The Upper Tribunal made a reference to paragraphs 25, and 26. What the judge had effectively done was to have applied the civil standard on a balance of probabilities which was inappropriate for an asylum claim. This was not least because here one was considering the possibility of internal relocation for the Appellant and such a standard was simply not the correct standard. Second, the conclusions that the judge had come to were unsustainable in the light of

the express acceptance by the judge that the Appellant's core story was correct in that his father had been killed while working on a farm and that the Appellant had given detailed evidence in relation to this. Third, in terms of internal relocation, the Appellant was now faced with the prospect of moving with his mother, a lone woman, from a rural area to a urban area and the UNHCR 2016 Guidelines (at page 324 at paragraph 2) makes it clear that this would not be a viable option for a woman. Fourth, the Grand Chamber of the European Court had decided in **JK v Sweden (Application No. 59166/12)** that the Appellant need only put forward a cogent and plausible claim and then the burden shifted on the Secretary of State to explain why any doubts about internal relocation were unfounded. Finally, the judge had wrongly applied jurisprudence in the case of **PM (Afghanistan) CG [2007] UKAIT 00089**, because that case referred to adults who were claiming asylum, and in that case there were hard bitten insurgents, whereas the instant case involved a minor child (see the judge's reference to this case at paragraph 19).

10. For her part, Ms Aboni, appearing on behalf of the Respondent stated that the usual term such as "more than likely" or "not likely" or "more than reasonably likely" may have been a poor choice of words, but they did not demonstrate that a higher standard of proof had been applied. The Appellant's claim simply had not been made out. Second, the reason given by the judge at paragraphs 21 to 26 showed why the appeal could not succeed. Third, the Appellant could rightly be criticised for not claiming asylum in Italy, because this was not a case where he had simply passed through Italy, but had actually been fingerprinted in that country, and should at that point have claimed asylum.
11. In reply, Mr Bedford submitted that the Appellant was 13 years old when he passed through Italy, and he could not be expected to claim asylum as a minor in that country. He was also a person coming from "Logar Province". Furthermore, his story that his father had been killed at the farm through a gunshot wound had been accepted. In these circumstances, it was enough if the Appellant could show that he came from the Logar Province and that his father had been shot, for him to have been granted sympathetic consideration as a minor. He was not required to give direct evidence of how his father was killed. His direct evidence was that he and his family heard about the killing while they were at home, whereupon the rush to the farm to find the father's blood soaked body there.

### **Error of Law**

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
13. First, the judge has plainly applied the wrong standard of proof by using language such as "more than likely" and "not likely" and "more than reasonably likely" at paragraphs 25 to 26.

14. Second, this has had a practical effect on the decision actually reached by the judge because this is a case where the judge made a clear finding that, "I accept this aspect of the claim as the Appellant has been able to give sufficient detail" when referring to the "consistent account" that the Appellant's father was working on a farm when he was shot and killed.
15. Third, the suggestion that the account of the father being shot and killed "is based solely on speculation" (paragraph 15) is unsustainable because the direct evidence of the Appellant, which the judge accepted as being plausible, was that he and his family were at home when news got to them that the father had been shot and killed, and the judge actually refers to the Appellant being able to "give sufficient detail" (at paragraph 15). It is not "speculation" for the Appellant to give direct evidence on what he was told by villagers coming to his home. This is especially given that when the Appellant and his family returned to the farm they found his father's blood soaked body there.
16. Fourth, the Appellant was only 13 years old when he was passing through Italy, and although he may have been fingerprinted there by the authorities, it cannot be held against him that he did not claim asylum.
17. Fifth, the judge recognises that the Appellant's claim was that "there was a large Taliban presence in his village and indeed, country guidance supports the fact that the Taliban have presence in the Logar Province" (paragraph 15(ii)(c)). This being so, it is simply wrong for the judge to conclude that, "taking into account all these factors, I conclude that the core of the Appellant's claim is not reliable" (paragraph 27).

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Dhaliwal, in accordance with Practice Statement 7.2(1). This appeal is allowed only to that extent.

An anonymity direction is made.

### **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 their 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.

Signed

Date

Appeal Number: PA050992016

Deputy Upper Tribunal Judge Juss

26<sup>th</sup> June 2017