



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05709/2016

THE IMMIGRATION ACTS

Heard at Field House
Oral decision given following hearing
On 24 August 2017

Decision & Reasons Promulgated
On 4 October 2017

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

NF

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel, instructed by Times PBS Ltd
For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Afghanistan who was born on 21 July 2001; accordingly she is now 16 years old. She applied for asylum and humanitarian protection in this country but her application was refused by the respondent. She was 13 years old at the time when she had entered the UK and claimed asylum on 30 March 2015, which was the day after she had entered. Unusually the respondent not only refused the claim for asylum but did not grant her discretionary leave to remain. Also, and this would appear not to be standard practice, the respondent did not make any attempt to trace whether or not if returned to Afghanistan as a minor adequate reception arrangements would be made. It is the appellant's case that she

had told the respondent not only the name of the village where she had been living in Afghanistan but also the name of the school and her teacher. It was her case that her parents were currently living in Pakistan where they had fled and would accordingly not be available to receive her.

2. It is not necessary for the purposes of this decision to set out in great detail the case which the appellant put; the reasons why this is not necessary will appear from what is set out below.
3. The appellant appealed against the respondent's decision and her appeal was heard before First-tier Tribunal Judge Chana sitting at Hatton Cross on 22 March 2017. In a Decision and Reasons promulgated on 11 April 2017 the appeal was dismissed.
4. Regrettably the decision itself is riddled with typographical and grammatical errors which would (or should) have been discovered and corrected following a proper exercise in proofreading; they were not. Amongst the more egregious errors which should have been corrected the appellant's Counsel, Mr Edward Nicholson, is described throughout the decision as Ms Nicholson. Also, (and it is not clear whether this was as a result of the judge sending an incomplete decision or pages being left out following the sending of the decision by the judge for promulgation and the Tribunal then sending that decision to the parties) it appears that two or three pages were missing from the decision when it was sent to the parties. Also, regrettably, Mr Nicholson before this Tribunal today has confirmed that it is his understanding that the appellant did not in terms ask for a copy of the full decision to be sent which the appellant's solicitors should have requested formally. If they had it would undoubtedly have been sent; to the extent that the appellant then needed further time to lodge their appeal or draft their grounds, this would undoubtedly have been granted because clearly it is inappropriate for a party to be expected to draft grounds of appeal in respect of a decision which they had not received. Rather than doing this, however, grounds were settled which included a ground that the decision should be set aside for the reason that the complete decision had not been sent. Although this Tribunal has a discretion to set aside a judgment where a complete decision has not been sent, in these circumstances, where no prejudice has resulted because this error can be corrected, it is neither necessary nor appropriate to exercise this discretion. I accordingly turn now to consider this appeal on its merits.
5. The appellant now appeals against the decision, permission having been granted by Upper Tribunal Judge Kebede on 3 July 2017. I note in passing that although the first ground, which, as I have stated, was that the appeal should be allowed because the complete decision had not been sent, was not excluded Judge Kebede did state in her reasons for granting permission that "I find little merit in the first ground".
6. At paragraph 5 of her decision Judge Chana had said that "she claims that she would [sic] be at risk of persecution in Pakistan [sic] as she will be forced to marry a former Mujahedin commander". The case was that she would be at risk of persecution in Afghanistan but nothing turns on that. The reason why the appellant claimed that she would be at risk was because it is said the commander wanted to exact his

revenge on the appellant's family because her father had killed his (the commander's) son in a road accident. Her claim (supported by expert evidence by Dr Giustozzi) was that she would be forced into a *baad* marriage, which occurs when girls are "given" to persons in order to compensate for a crime which has been committed. The expert evidence given referred to a UNICEF report from 2008, which set out that although marriages of girls under 15 were not allowed, in practice this law is not respected.

7. The respondent did not accept that the appellant's case was credible and did not carry out the tracing obligations which it was incumbent on her to carry out in order to ensure that the best interests of the child were properly considered and looked after in light of her obligations within Section 55 of the Borders, Citizenship and Immigration Act 2009, which provides as follows:

"55 Duty regarding the welfare of children

- (1) The Secretary of State must make arrangements for ensuring that -
- (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
 - (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
- (2) The functions referred to in subsection (1) are -
- (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
 - (b) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer;
 - (c) any general customs function of the Secretary of State;
 - (d) any customs function conferred on a designated customs official.
- (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1). ..."

8. The general practice of the respondent in cases like this is to grant discretionary leave to remain to a minor until that minor reaches his or her adulthood, and certainly this would not usually be departed from unless the respondent was satisfied that there will be satisfactory arrangements made for that child to be properly received in the country to which that child was to be returned.

9. Without needing to go through the decision in any great detail there are a number of assumptions made within the decision which should not have been made. I need only refer to the most obvious, because these have been accepted on behalf of the respondent as being sufficiently serious that the decision itself is not sustainable. I note that at the hearing Mr Nicholson (referred to as “Ms Nicholson” at paragraph 24) made an application for an adjournment in order to provide the respondent with a proper opportunity to carry out her tracing obligations with regard to the circumstances which would greet the appellant on return to Afghanistan, the appellant having given the name of her school and her teacher. However, at paragraph 67 the judge found as follows:

“67. The appellant and her uncle [who had given evidence at the hearing] know exactly where the appellant’s parents are because they are in contact with each other constantly. This relieves the respondent of their duty to trace the appellant’s parent’s [sic] whereabouts. It is not enough therefore for the uncle now to say that he will not take the appellant to be with her parents”.

10. It was, as noted above, the appellant’s case that her parents were in Pakistan, and it is not clear what standard of proof the judge applied when two paragraphs later at paragraph 69 she stated that “I do not accept that the appellant’s parents went to Pakistan after the appellant came to the United Kingdom”. Also it is unclear how the judge could properly find that the uncle would take the appellant to Afghanistan when he had said in terms in evidence that he would not.

11. At paragraph 56 of her decision, the judge stated as follows:

“56. If the commander met the appellant he would have seen the appellant has a disability in her hand. The appellant claims that she is missing fingers and toes. Background evidence on treatment of people with disabilities in Afghanistan states

‘thirdly, the value given by this approach to human diversity and the interactions between disability, gender, cultural and ethnic dynamics and religion [presumably meant to be ‘religious’] implications is also particularly important in view of the research carried out in Afghanistan. The difference entailed by these variations has to be accounted for when addressing the demands of the quality. The burden of physical disability on men injured during the war is considerably less than that of the same disability on a young unmarried woman disabled at birth’.

It further states ‘disability, especially those that result from congenital problems, disease and cannot be attributed to clear-cut cause, is often considered as a problem brought on by divine punishment or a person’s bad luck. [Presumably there should be a close quotation mark there].

57. I therefore do not find it credible that [presumably this should then be 'a'] high-ranking and influential commander would want to marry a girl aged 13 years old with a disability she has had since birth”.

12. I will refer below to the submissions made on behalf of the respondent with respect to this aspect of the decision.

13. At paragraph 54, having set out what was said in the UNICEF report of 2008, which I have referred to above, in which it was stated that the law was not respected with regard to the minimum age of marriage, the judge stated as follows:

“However, the dates of the report are from 2008 – 2009 and therefore it is not the current situation”.

14. What is missing from this decision is any reference to any evidence at all that the position had changed since the date this report was made. It is also unclear from within the decision that the judge appreciated the correct standard of proof. Although it is the responsibility of the judge to consider overall whether a person is at real risk on return, the judge did speculate as to what the explanation was for the appellant having been sent to this country and this is contained at paragraph 66 of her decision:

“66. In her witness statement at paragraph 3, the appellant stated that her disability makes it difficult for her to do what other kids are doing. She also said that she has pain in her hands and legs especially when she does sports. She said that she did not go to a doctor in Afghanistan because there are no medical facilities in Afghanistan. Her uncle said all that the appellant can get in Afghanistan are painkillers because there are no adequate medical facilities. This demonstrates to me that the appellant and her parents would like the appellant to have good medical facilities for her condition. In the circumstances, I find that the more likely explanation for why the appellant has come to this country for for [sic] medical reasons and not because she fears anyone in Afghanistan. I find that the appellant’s asylum claim is an elaborate ruse in order to come to this country to live with her uncle for medical treatment”.

15. On behalf of the respondent, Mr Singh very properly conceded that he could not seek to persuade the Tribunal to uphold this decision. I set out his words as follows:

“The parts you have read [I had referred him to some of the aspects of the decision with which I had concern] clearly amount to material errors of law, particularly in relation to the assumption of what the commander would feel about marrying a girl with a disability.

There is nothing in the papers which suggests that the appellant came to the UK solely because of her medical difficulties. Therefore, the judge’s conclusion to this effect is not sustainable. Also I cannot maintain either that the parents are still in Pakistan and can receive the appellant”.

16. I entirely agree and I agree also with the submissions made on behalf of both parties that the appropriate course is for this appeal to be sent back to the First-tier Tribunal to be reheard de novo completely afresh with no findings retained. The reason is because the appellant has not had yet a fair hearing, and I shall so order.
17. It may be appropriate in this case for the respondent in the meantime to make proper attempts to trace whatever family the appellant may have either in Afghanistan or in Pakistan if it is feasible for the appellant to be returned to that country, but that is not a matter for me to decide at this stage.

Decision

The decision of First-tier Tribunal Judge Chana is set aside as containing a material error of law. The appeal will be remitted to the First-tier Tribunal, sitting at Hatton Cross, to be reheard by any First-tier Tribunal Judge other than Judge Chana. No findings will be retained.

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 her or any member of her 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:

A handwritten signature in black ink, appearing to read "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Upper Tribunal Judge Craig

Date: 29 September 2017