Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/00399/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2017	**On 29 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MR MAHRUDDEN AHMADY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Easty of Counsel instructed by Duncan Lewis
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Clapham promulgated on 3 August 2017 brought with the permission of Designated First-tier Tribunal Judge Murray granted on 26 October 2017.

2. The Appellant is a citizen of Afghanistan born on 14 April 1997. Approximately four months before his arrival in the United Kingdom he left Afghanistan accompanied by his younger brother. He arrived in the United Kingdom on 26 March 2011. During his journey to the United Kingdom he sustained an injury which necessitated the amputation of one of his little fingers. He says that it was, in part, because he was recovering from this injury that he did not claim asylum immediately upon arrival. Nonetheless, he claimed asylum shortly thereafter on 7 April 2011. A

screening interview was conducted on 20 April 2011 and the Appellant provided a witness statement setting out the basis of his claim on 19 May 2011 - a day before his substantive asylum interview.

3. On 3 June 2011 the Respondent refused the Appellant's application for asylum for reasons set out in a 'reasons for refusal' letter ('RFRL') of that date. However, given that by June 2011 the Appellant had only just turned 14 years of age, he was granted discretionary leave to remain as an unaccompanied minor.

4. Between August and September 2013 the Appellant visited his mother who at that time was in Pakistan.

5. Towards the end of the period of his discretionary leave the Appellant made an application for further leave to remain. In support he provided a witness statement dated 28 May 2014 which added further information to his earlier witness statement and the information given at the interview, on the basis of matters that he had learned from an older brother since being in the United Kingdom. The witness statement also sought in part to address certain aspects of the 2011 RFRL. The Appellant also offered something by way of explanation for not having challenged the refusal of protection decision of 3 June 2011: at paragraph 8 he stated -

> *"I did not appeal against the decision as I did not really understand it. I knew that I had been granted leave to remain in the UK and that I did not have to return to Afghanistan. I was very young at the time and I understand that my elder brother and a solicitor decided not to appeal because it was too much for me especially as I was still getting treatment for my injuries and I would have to go to the hospital regularly for months."*

6. The Respondent considered the Appellant's application for further leave to remain - including necessarily a protection claim - but refused it on 18 February 2016 for reasons set out in a RFRL of that date.

7. The RFRL of 2016 makes reference to the earlier refusal letter of 2011, which in turn helpfully summarises the basis of the Appellant's claim. In particular, reference is made to events in and around the Appellant's home village which had, on his case, culminated in the kidnap and murder of one of his brothers and arrangements being made shortly afterwards for the Appellant and his younger brother to leave Afghanistan. The Appellant claimed that the Taliban were responsible for harassment of villagers, and it was in such circumstances - and in furtherance of coercive recruitment - that the Appellant's brother who had been resistant to the idea of joining the Taliban had been killed to make an example of him '*pour encourager les autres*'.

8. The Appellant appealed the decision of 18 February 2016 to the Immigration and Asylum Chamber.

9. The appeal was dismissed for reasons set out in the Decision of Judge Clapham.

10. I have set out above some of the details of the basis of the Appellant's claim for protection in substantial part because the First-tier Tribunal Judge has failed to do so. Although sometimes short-hand reference to the facts of a case by, for example, cross-reference to the key paragraphs of the RFRL, is both convenient and appropriate, it is nonetheless, in my judgment, unsatisfactory that the First-tier Tribunal Judge in this particular case does not otherwise identify the basis of the claim within the body of his decision, or engage in any of the facts that were said to have been the trigger for the Appellant's departure from Afghanistan - and necessarily the basis upon which he fears to return.

11. The First-tier Tribunal Judge makes passing reference to the fact of the RFRL of 18 February 2016 in his opening paragraphs - see paragraph 2. Brief reference is also made to the 2011 RFRL. However, at no point does the Judge set out with anything approaching adequate specificity the details of either RFRL - whether in respect of the claimed facts of the Appellant's case, or in respect of the Respondent's reasons for rejecting the case. The basis of claim is not manifest from the First-tier Tribunal's Decision. In such circumstances the reader cannot be sure that the Judge has considered the basis of claim or made proper findings on it.

12. In my judgment it is wholly unsatisfactory that the key elements of this case are not identified in the body of the Decision; far less are they engaged in; and far less are there any findings of fact in respect of them.

13. Instead there appears to be a general adverse credibility assessment of the Appellant. The Judge has set out in some detail aspects of the live evidence that was heard before him. However, the passages seem entirely to relate to the circumstances surrounding the contact that the Appellant had had with his mother in 2013 - her whereabouts in Pakistan, the people with whom she had stayed in Pakistan, and the date upon which the Appellant had last had any form of telephone contact with her. In this regard the Judge considered that the Appellant had contradicted himself between his written witness statement and his oral evidence as to the month in which he had last spoken to his mother; the Judge also observed that the Appellant's supporting witnesses whilst consistent with the Appellant's written evidence contradicted his oral evidence.

14. The Judge took this discrepancy forward to the assessment of the Appellant's credibility - see paragraphs 55 and 56. Paragraph 55 commences with the sentence *"I have considerable reservations about the Appellant's evidence"* and then identifies what is said to be the clear contradiction in respect of the circumstances of the Appellant's mother. Paragraph 56 engages with the level of the Appellant's understanding of the calendar months. Little else is identified in the Decision, notwithstanding its 10 pages, as to why the Appellant might not be considered to be a credible witness. Moreover, as observed above, there is no specific engagement with the particular events that were said to have precipitated the Appellant's departure from Afghanistan.

15. Notwithstanding the Judge's focus on matters surrounding contact with the Appellant's mother and her circumstances, the Judge purports to answer a submission made by the Appellant's representative as to the preference for relying upon the supporting evidence of the witnesses in respect of the date of last contact by saying this,

> *"Whether the contact with the mother was in the January or in the June does not seem to me to be particularly relevant to the question of whether the Appellant would be at real risk on return to Afghanistan."* (paragraph 59).

16. I agree that the Judge was entirely correct to identify that the circumstances surrounding the mother's position more recently in Pakistan, and the extent to which the Appellant had had contact with her, was at best peripheral to the core issues in the appeal. This makes it all the more remarkable that the Judge should have seemingly placed substantial reliance upon the evidence in regard to these matters in adversely determining credibility and thereby the appeal.

17. I have already noted that the Judge has not set out in any detail anything of the Appellant's claim, but has rather made brief reference to the RFRLs of both 2011 and 2016. In respect of the 2011 decision, the Judge has placed particular and significant reliance both on the unfavourable outcome of the asylum claim and the fact that the Appellant did not appeal the asylum decision at the time. I note the following:

> *"Clearly, if the Appellant believed that the Home Officer were wrong in their view the Appellant could and should have appealed at the relevant time but I consider that as the Appellant did not appeal against the 2011 asylum decision the Appellant is in a weak position now in terms of his assertion that his family was targeted by the Taliban."* (paragraph 54);
>
> *"I am in a position where it seems to that the Home Office reasons for refusal letter of 2011 must stand."* (paragraph 57);

> *"However, given the findings that the Home Office made in 2011 I am not able to accept that this Appellant has a negative profile."* (paragraph 60).

18. I am troubled in particular by the Judge's phrases "*I am in a position where it seems to that the Home Office reasons for refusal letter of 2011 must stand*", and "*...given the findings that the Home Office made in 2011...*". In my judgment it suggests that the First-tier Tribunal Judge had in effect abdicated responsibility for making his own findings in the case. He appears to have treated the 2011 decision as one that stood and was binding irrespective of the Appellant's present challenge to it. This was in error: it was incumbent upon the Judge to engage with the findings therein 'in the round' with the Appellant's evidence, and not to treat it as a fixed starting point.

19. In this context it is also to be that particular issue has been raised in the grounds of challenge to the Judge's approach to the Appellant's decision not to pursue an appeal in 2011.

20. Ms Easty acknowledged that the decision not to pursue an appeal may be a relevant factor in an overall consideration of a subsequent case. However, complaint is made that in using the words "*if the Appellant believed that the Home Officer were wrong in their view the Appellant could and should have appealed*", the Judge did not engage with, and/or was otherwise, without offering reasons, unduly dismissive of the Appellant's evidence by way of explanation for not appealing in 2011.

21. I accept that submission. I have reproduced at paragraph 5 above the reasons for not pursuing the appeal set out in the Appellant's witness statement of 28 May 2014. The Appellant also advanced similar reasons in the appeal witness statement that was before the First-tier Tribunal (see paragraph 2). In 2011 not only was the Appellant a vulnerable person by reason of his minority, but there were good reasons to think that he was a vulnerable person by reason of his experiences on his journey to the United Kingdom. He had sustained a significant injury during that journey. There is elsewhere supporting medical evidence as to the Appellant's mental health; the Judge does at least acknowledge that in the circumstances of the Appellant's travel to the United Kingdom and being here in uncertain circumstances, that it was understandable that he has mental health difficulties. However none of this finds its way into an analysis by the Judge of the reasons advanced by the Appellant for not pursuing an appeal in 2011.

22. I am persuaded that in such circumstances the Judge fell into error in considering that the Appellant's position was weakened in any material way by reason of his failure to challenge the 2011 decision. As I say, in any event I am troubled by the fact that the Judge thereafter appears to

have accorded the 2011 decision seemingly determinative weight rather than making his own findings in respect of the incidents and narrative account that the Appellant had advanced both in 2011 and in the context of the instant appeal. In those circumstances I am persuaded that there is significant material error of law justifying the setting aside of the First-tier Tribunal Judge's decision.

23. Given the foregoing, it is unnecessary for me to engage further with the other challenges to the reasoning of the First-tier Tribunal.

24. The Appellant has not had a full and fair adjudication of the issues in his appeal, and it follows that the remedy must be by way of the appeal being remade before the First-tier Tribunal with all issues at large by a Judge other than First-tier Tribunal Judge Clapham.

25. I am told by Ms Easty that the Appellant's younger brother has since been successful in his own appeal. Necessarily that may be expected to be a matter advanced in support of the Appellant's case. However, it is, of course, a matter for the Respondent whether or not to consider such a circumstance prior to the rehearing of the appeal, and if so, to reach her own view as to how it should be factored in to the Appellant's case. It is not a matter upon which I make any particular observation.

26. Finally, Ms Easty has invited me formally to record the Appellant's attendance at the hearing today. This is because, I am told, that he was due to report in accordance with his restrictions this morning, but his attendance at Field House today means that he may have missed his reporting slot. Ms Easty seeks a formal record to show his whereabouts in case there should be any issues arising by reason of his non-attendance. In hereby recording the Appellant's presence here I express no view as to whether that puts him in breach of any other condition - it merely confirms his whereabouts at the following times: the Appellant arrived at the Tribunal hearing room today shortly after 10 o'clock and the hearing is now being disposed of at noon.

Notice of Decision

27. The decision of the First-tier Tribunal contained material errors of law and is set aside.

28. The decision in the appeal is to be remade before the First-tier Tribunal with all issues at large by a Judge other than First-tier Tribunal Judge Clapham.

29. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **25 January 2018**

Deputy Upper Tribunal Judge I A Lewis