



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/09067/2016
PA/08109/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22nd January 2018

Decision & Reasons Promulgated
On 6th March 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

[A N]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Foot, instructed by Wilson Solicitors LLP

For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born in 1998. He appeals against the decision of First-tier Tribunal Judge K R Moore, promulgated on 27 July 2017, dismissing his appeal against the refusal of his protection claim.
2. The judge did not find the Appellant to be a credible witness and pointed to inconsistencies in his account. Permission to appeal was sought on seven grounds:
 - (i) The judge failed to apply the guidance on vulnerable witnesses;

- (ii) The judge erred in finding that the Appellant's age assessment was Merton compliant and/or he failed to give reasons for such a finding;
 - (iii) The judge erred in considering that the inconsistencies in the Appellant's age assessment interview undermined the Appellant's credibility;
 - (iv) The Appellant's account of his father's role in the Taliban was inconsistent with the expert evidence;
 - (v) The judge erred in finding that the Appellant could recall events in June 2015, but failed to recall them at the appeal hearing;
 - (vi) The judge erred in finding that the Appellant's account was inconsistent with the objective evidence; and
 - (vii) The judge erred in finding that the Appellant could return safely to Kabul and/or his home area.
3. Permission to appeal was granted by Upper Tribunal Judge Blum on 1 December 2017 on the grounds that:

"It is arguable that the judge failed to indicate or determine whether he was dealing with a vulnerable appellant or to make any reference to the Joint Presidential Guidance Note No. 2 of 2010. Significant reliance is placed on AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 that the judge failed to adequately engage with the criticisms of the local authority age assessment, and that the First-tier Tribunal judge was not entitled to rely on inconsistencies in the age assessment interviews in concluding that the account was not credible. The detailed grounds were arguable. The Upper Tribunal may, in particular, wish to consider the differences in purpose and safeguards between an asylum interview and an age assessment interview."

Appellant's submissions

4. Ms Foot submitted two letters from Wilson Solicitors. The letter to the London Borough of Dagenham and Barking, dated 26 June 2017, criticised the age assessment report on the basis that: it heavily relied on the physical characteristics and demeanour of the Appellant; it came to contrary conclusions; it failed to conduct background research; it failed to consider the evidence in the round; the assessors stepped outside their field of expertise in drawing negative conclusions on the Appellant's credibility; there was significant delay in finalising the assessment; it took into account incidents occurring after the meetings; and there was confusion over the persons present and issues discussed at each assessment meeting. The letter, dated 23 June 2017, made a formal complaint against the Appellant's previous solicitors in relation to the handling of the age assessment and their failure to challenge it on judicial review.

5. Ms Foot also submitted a copy of AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 and MS (trafficking: Tribunal's powers: Article 4 ECHR) Pakistan [2016] UKUT 00226 (IAC). She relied on her detailed grounds and submitted that, although the determination was lengthy, the judge had failed to follow the guidance on vulnerable witnesses. He had erred in taking into account the age assessment, which was plainly flawed on its face, as central to the Appellant's credibility.
6. Since there was no challenge to the age assessment, the judge proceeded on the basis that the Appellant was 18, but insofar as his assessment of credibility was concerned he should have given the age assessment limited weight. Considering the vulnerability of the Appellant, the judge erred in adopting the Respondent's view, which was the wrong approach.
7. Ms Foot relied on statements from solicitors, at paragraphs 115 and 128 of the bundle, which were not referred to by the judge. These statements dealt with the Appellant's interaction with a Mr Safi and also an interview with the Appellant's previous foster carer. She described the Appellant as not having any English at all and that he did not understand anything. She also described his relationship with Mr Safi who was in her opinion around the age of 18 and not 50 years old as was described in the age assessment.
8. Ms Foot submitted that the appeal was dismissed, because of inconsistencies in the Appellant's account. However, the inconsistencies relied upon - his failure to recall how long he had remained in Afghanistan after being asked to join the Taliban and whether he had been shown how to use guns - were not significant and were dealt with in the Appellant's statement. The expert evidence supported the Appellant's account. Mr Foxley found that the Appellant's account was plausible.
9. In relation to ground (i), Ms Foot submitted that, despite a reference in paragraph 9 of the decision to the Joint Presidential Guidance Note, the judge had failed to apply it. She relied on paragraphs 30 and 33 of AM (Afghanistan) and submitted that the judge also failed to apply paragraph 27 of JL (medical reports: credibility) China which states:

"Applying this guidance would have entailed the judge asking herself whether any of the inconsistencies in the Appellant's account (as given in her asylum interview) identified by the Respondent in the reasons for refusal and described by the judge as being "cogent" could be explained by her being a vulnerable person. This the judge did not do."
10. Ms Foot submitted that, although the judge referred to the Appellant's age, cultural background and the medical report of Dr Fairweather, he failed to ask himself whether this explained, or was capable of explaining, the inconsistencies in the Appellant's account. Where someone is vulnerable it was necessary to focus on objective indicators of risk, namely the evidence of the expert, Mr Foxley. The judge had reached an irrational conclusion about his evidence at page 14 of the decision in stating that the Appellant's evidence was inconsistent with that of Mr Foxley. It was

not an inconsistency but a different way of describing the role of the Appellant's father. The Appellant's way of explaining his father's role may well be different than to the way he explains the conduct of other Taliban members. The judge had failed to ask himself if the Appellant's account was supported by background evidence and whether it explained the inconsistencies.

11. In relation to the age assessment, ground (ii), Ms Foot submitted that the assessment was obviously flawed and the judge was aware of this from the two letters from Wilson Solicitors (referred to at paragraph 4 above). However, the judge gave no reasons for why he found the report to be Merton compliant. He adopted the findings in the report, but failed to deal with the matters raised in these two letters and the statements from the Appellant's solicitors (referred to at paragraph 8 above).
12. Ms Foot submitted that the purpose of an age assessment was different to the assessment of an asylum claim and she relied on analogy with MS. If a reasonable grounds decision was obviously wrong, although that was within the remit of the High Court, it was still within the Tribunal's jurisdiction to assess it. In this case the age assessment was procedurally unfair, therefore the judge should not hold this against the Appellant in assessing his asylum appeal. The focus on his physical appearance and the fact that the assessors did not give the Appellant a chance to explain meant that the judge should not have relied on the contents of such a report and should not have attached any weight to the assessors' opinions on credibility. If he was to follow their assessment then the judge should have explained why the age assessment was Merton compliant, ground (iii).
13. In relation to grounds (iv) (v) and (vi), these were examples of the heads of complaint already raised. There was no substantive inconsistency between the Appellant and the expert. The judge was wrong to record the Appellant's timing of departure from Afghanistan as relevant, given his vulnerability and the expert evidence. This did not undermine his claim.
14. Ms Foot submitted that there was an error of law in the judge's approach to whether the Appellant could relocate, ground (vii). At paragraph 52 the judge gave no reasons why it was not unduly harsh. Dr Fairweather stated that the Appellant would struggle in Kabul as he needed help to live there. The judge had failed to take into account this assessment in considering relocation, in particular paragraph 8.9.1 at page 45 of Dr Fairweather's report which stated that it was likely the Appellant would struggle to manage on a daily basis if he returned Afghanistan.

Respondent's submissions

15. Ms Brocklesby-Weller relied on the Rule 24 response and submitted that the judge had referred to the guidance at paragraph 9. She accepted there was no explicit finding on whether the Appellant was a vulnerable witness, but the judge had in essence adopted the course set out in AM (Afghanistan). The judge had considered

all the evidence in the round at paragraph 30 and was aware that he must exercise caution and allow for nervousness at the hearing, the interpreter and the Appellant's age. There was no criticism that the procedure during the appeal hearing was unduly adversarial or that the Appellant was not allowed to answer questions and explain himself. The judge was aware of the Appellant's vulnerability in making his credibility findings. At paragraphs 35 and 36, the judge referred to Dr Fairweather's report and he looked at all the evidence in the round before finding that the Appellant was not credible.

16. Ms Brocklesby-Weller referred to page 231, the age assessment, and submitted that all eleven points were put to the Appellant and he was given an opportunity to rebut those findings. It was open to the judge to conclude that the social workers adequately dealt with the age assessment. He took into account the letters, which he referred to at paragraph 9, and was fully aware of the points of contention in the report. The judge did not find it plausible that on some occasions the Appellant could remember dates and times and on other occasions he could not. He took into account Mr Foxley's opinion that the Appellant's account was generally consistent and plausible. At paragraph 37 he accepted the Appellant's lack of education and put all relevant factors into his assessment of credibility. His finding that the Appellant was not credible was open to him on the evidence before him.
17. The judge dealt with internal relocation and his findings at paragraph 52 were sustainable. The Appellant did not fear his family and therefore would have a support network to look after him on return. The Appellant did not lack family support and could rely on them.

Appellant's response

18. Ms Foot submitted that the judge erred in law because he found that, because the Appellant had family elsewhere in Afghanistan, they could support him on return to Kabul. This was not a proper assessment of whether it was unduly harsh for the Appellant to internally relocate. The age assessment was not served until some time later, so the point that the teachers made after the meeting were not put to the Appellant and the previous solicitors had accepted the complaint about their inadequate representation.

AM (Afghanistan)

19. Paragraphs 30 and 33 state:

"30. To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting

President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment.”

“33. Given the emphasis on the determination of credibility on the facts of this appeal, there is particular force in the Guidance at [13] to [15]:

13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those [who] are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
15. The decision should record whether the Tribunal has concluded the appellant or a witness is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and this whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind.”

Dr Fairweather’s report

20. Paragraph 8.9.1 at page 45 states:

“Mr Nasir is likely to struggle to manage on a daily basis if he is returned to Afghanistan. This is based on his likely deterioration in his mental state, which will reduce his ability to organise himself to access accommodation, obtain then maintain employment and manage his daily needs. He also has never had to do this from his reported history. His accommodation in the UK is semi-independent showing he is developing some independent living skills. However, he was provided this and did not have to seek it, there are support staff present, he receives financial support and does not have to work and he is provided opportunities such as college. It is highly unlikely he could replicate this social situation, which he needs, on his own. He would then be vulnerable to exploitation from others in order to survive on a day-to-day basis. Concerns in the UK were raised about his friendship with an older man, which would be concerning, but I understand it is disputed by Mr Nasir. It is not clear what provisions he would find himself with and there is a risk he could become destitute without a similar level of support that he has in the UK.”

21. The relevant paragraphs at pages 46 and 47 state:

- “8.10.1 From a psychiatric prospective there are many factors known to affect a young person’s ability to recount their history.
- 8.10.2 Firstly, his ability to recall and then give his history will be affected by his psychiatric symptoms. It is well recognised that PTSD patients have relatively poor intentional recall of the traumatic events themselves and Mr Nasir suffered numerous traumas over a significant time period of his childhood making it cumulatively more difficult. Their narrative of the events tends to be fragmented and disorganised or poor in quality with little content. Discrepancies in sequential accounts given of traumas by PTSD sufferers are common: this has been established in populations where the fact of the trauma is not at issue. Patients with PTSD not only have deficits in their autobiographical memories of the traumatic events but also the organisation of the autobiographical memory base in general can be affected. In addition, the process of recall even in healthy normal individuals is highly variable as has been shown by a number of studies in which, for example healthy volunteers have given witness statements under experimental conditions. Recall under conditions of psychological distress is further impaired and thus would be expected to be even more inconsistent than normal.
- 8.10.3 It is therefore expected the PTSD sufferers will struggle with providing exact dates, details, timescales and coherent chronologies. This should not necessarily be taken as evidence of a lack of credibility.
- 8.10.4 Mr Nasir was a child when the events took place. Children have a different ability to remember than adults and their sense of timescales will differ. They will remember different details with formal aspects such as dates and times less important. He also reported having very little education, which will affect the way he interacts with adults, the information he conveys spontaneously and the ability he has to provide detail of this type in terms of language. It is not clear how much it has been attempted to gain a full history of Mr Nasir’s background, which would have made it more likely he would have disclosed the domestic violence he witnesses. In addition, there are varying attitudes to domestic violence and culturally it may not be acknowledged as abuse that children should be protected from. This would influence how Mr Nasir viewed these childhood experiences and determine how important he would deem them to be shared.
- 8.11.1 Given the above, Mr Nasir is even more likely to struggle to give a full account of his history when in an anxiety provoking situation, such as a Tribunal hearing or Home Office interview. In order to reduce his anxiety it would be best to conduct any formal interview

in a neutral manner as questioning could be experienced as persecutory if conducted in an overtly adversarial or confrontational manner and this would inevitably result in his becoming distressed, most likely exhibited by him becoming less responsible or complaining of a headache as he did in my sensitively conducted professional assessment.

8.11.2 I also noted Mr Nasir's rather impoverished ability to give details of his account and experiences, relying on my questioning to draw out his state and background. This could relate to his poor educational level and cultural background.

8.11.3 Mr Nasir has capacity to give evidence. He does not have a psychiatric disorder that interferes with his concept or reality nor does he have cognitive impairment that would result in him struggling to understand the procedures of court or a Home Office interview."

Discussion and Conclusion

22. Ground (i): We are of the view that the judge failed to properly apply the Presidential Guidance on vulnerable witnesses. Although he referred to the guidance, he failed to apply it in accordance with AM (Afghanistan). He made no overall finding of whether the Appellant was a vulnerable witness, which he was required to do in accordance with the guidance, and he failed to state whether any such vulnerability could explain the discrepancies in the Appellant account. The judge set out the inconsistencies, but failed to go on to assess whether the inconsistencies could be explained by the Appellant's age, vulnerability or sensitivity. The judge failed to apply paragraph 27 of JL.
23. Grounds (ii) and (iii): the judge failed to give adequate reasons for why he considered the age assessment to be Merton compliant. There were numerous failings, pointed out in the solicitor's letters that were before the judge, which the judge failed to deal with. Some of the matters relied on in the age assessment report, namely the Appellant's ability to speak English and his relationship with an older man, were adequately dealt with by evidence and statements from the Appellant's solicitors and the judge failed to take these into account. It was stated in the age assessment report that the Appellant could speak English and there was concern about his relationship with a 50 year old man who sold phone cards. The evidence from the Appellant's foster carer contradicted this. She stated that the Appellant's English was poor and she had introduced the Appellant to an Afghan boy who sold phone cards; Mr Safi who was about 18 years old. The judge failed to refer to this evidence or to give reasons why he preferred what was stated in the age assessment to the evidence of the Appellant's foster carer.

24. Whilst the weight to be attached to the age assessment was a matter for the judge, we are persuaded by Ms Foot's submission that the assessment of credibility was one for the judge and he erred in law in adopting the points raised by the social workers rather than making an informed assessment of his own. In that respect we find that the judge erred in law in his assessment of the Appellant's asylum appeal and his credibility.
25. The purpose of interviews carried out by social workers in age assessments are to ascertain the age of the appellant. This will undoubtedly involve an assessment of whether the account is a truthful one, but only in so far as it relates to age. Whether an appellant has given a credible account of his asylum claim is a matter for the judge. He/she may rely on inconsistencies between the account given to social workers in interview and the account given in an asylum interview or on appeal, but it is incumbent on the judge to take into account evidence which explains such inconsistencies and to form his/her own view of the evidence, giving adequate reasons for its acceptance or rejection. The judge should be careful to distinguish between what is a factual account given by the Appellant and what is an opinion or inference drawn by a social worker.
26. The remaining points in relation to the inconsistencies, grounds (iv) (v) and (vi), are subsumed within these two points and we find it persuasive that the inconsistencies were not significant when assessed as part of the evidence as a whole. Therefore, it was incumbent on the judge to assess whether the Appellant was vulnerable and whether his vulnerability was an adequate explanation for them.
27. Ground (vii): the judge's assessment of internal relocation appeared to be on the basis that he had family to whom he could return. However, the Appellant would be returned to Kabul on his own and there was expert opinion that he struggled to support himself on a day-to-day basis. On the evidence, it was unlikely that the Appellant could access the support of his family, by travelling to his home area. We find that the judge erred in law in finding that it would not be unduly harsh for the Appellant to return to Kabul.
28. We find that the judge erred in law for the reasons given above and we set aside his decision to dismiss the Appellant's appeal. Given that the judge failed to apply the guidance on vulnerable witnesses, it was submitted by both parties that the matter should be remitted to the First-tier Tribunal for re-hearing. In accordance with paragraph 7.2 of the Practice Statement of 25 September 2012, we direct the Appellant's appeal is remitted to the First-tier Tribunal for re-hearing before a judge other than Judge Moore. None of the judge's findings are preserved.

Notice of Decision

The appeal is allowed.

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.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 5 March 2018

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 5 March 2018