Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/10683/2017
PA/10680/2017

THE IMMIGRATION ACTS

At: Bradford IAC	**Decision Promulgated**
On: 25th April 2018	**On: 26th April 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

IA
RA
(anonymity direction made)

Appellants

And

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: **Ms S. Khan, Counsel instructed by Legal Justice Solicitors**
For the Respondent: **Mr Diwnycz, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellants are both nationals of Afghanistan. They are accepted to be first cousins. It is accepted that upon their arrival in the UK in May 2016 they were both 12 years old. At the date of the appeal before me they are both 14. They appeal with permission the decision of the First-tier Tribunal (Judge Arullendran) to dismiss their linked asylum appeals.

2. The background to the appeals before the First-tier Tribunal was that both boys had claimed asylum soon after they arrived in the United Kingdom in May 2016. They asserted a fear of return to Afghanistan on the grounds that they were minors who had been trafficked, and who would be vulnerable to similar exploitation again. Their cases had been referred to the Competent Authority (CA) through the National Referral Mechanism. The CA had found 'conclusive grounds' to believe that the Second Appellant had been trafficked, but did not so find in respect of the First Appellant, whose case, insofar as it related to a claim of trafficking, was rejected at the 'reasonable grounds' stage. The Respondent refused protection in both cases. She did not accept the boys' claims that their respective fathers had both been killed or that they were at risk of exploitation as internally displaced children in Kabul.

3. In line with her published policy the Respondent granted both Appellants limited 'discretionary' leave to remain until they reached the age of 17½. they were both placed with a paternal uncle who lives in the UK but latterly the Second Appellant has left his home and is now under the care of the local authority.

4. When the matter came before the First-tier Tribunal the matter in issue was therefore whether the boys were entitled to protection under the terms of the Refugee Convention. The burden lay on them to establish a "reasonable likelihood" that they would face persecution for reasons of their membership of a particular social group, variously identified in the papers as 'children without family protection', 'children' or 'trafficked children'.

5. The Tribunal made the following findings of fact:

    i) The First Appellant's father was killed by an explosion although the cause of that explosion is unclear [§74]

    ii) The Second Appellant's father was killed, "possibly" by the Taliban in Laghman province after he notified the police of a bomb that had been planted by the Taliban [§74]

    iii) After the deaths of the adult men in the family the remaining family members – all women and children – moved to Kabul [§74]

    iv) After arrival in the city the Appellants worked on the streets in Kabul. They were collecting scrap metal and selling telephone cards when they were approached by some men in a vehicle who invited them to work for them. They agreed to do so with the knowledge of their mothers and grandmother. They earned

between 3000 and 3500 Afghani per day which they would take home to their family. The work was domestic service. They cleaned a house, washed dishes and provided massages. If they made mistakes or did not do their job 'properly' the men would shout at them and beat them. It was these men who arranged the boys' passage to Europe, with the knowledge and consent of their family [§80].

v) The Appellants have a number of family members still living in Kabul. The family unit is headed by their paternal grandmother, and living with her are the boys' mothers, aunts, younger siblings and cousins [§75]. They remain in contact with the Appellants [§77-78].

6. As to the question of whether the experiences that the boys narrated amounted to trafficking or modern slavery, the Tribunal rejected the CA's decision in respect of the Second Appellant. It determined that it had more evidence before it than the CA had been shown and that accordingly it was in a better position to make a decision about whether he had been trafficked. Key to the Tribunal's reasoning, and this appeal, is the following passage [§79]:

> "I am not satisfied that the Appellants were abducted or forced to leave Afghanistan because the evidence from the Appellants is that they were working selling scrap metal and telephone cards, but they earned more money working for the people who brought them to Europe and their families were happy that they were earning this money. Further, the evidence is that the Appellants worked for more than one month for the new employers, in return for wages, returning home and back to work willingly each day, before they were asked if they wanted to work in Europe. The assertion that the employers shouted at and beat the Appellants if they did something wrong is not indicative of forced labour, when viewed in the round, as there appears to be no evidence of compulsion as indicated in the objective material on trafficking".

7. As to future risk the Tribunal said this [§81]:

> "….However, even if I am wrong and the Appellants were trafficked, I find that this does not place them in a particular social group and the Appellants are not at increased risk of being re-trafficked if returned as they would have the protection of the their families (given that their uncle knows where the family lives and is in touch with his mother): AA (unattended children) Afghanistan CG [2012]. Thus, I find that the Appellants are not at increased risk of being re-trafficked, even taking into account their particular vulnerabilities, as

> they will have the protection of their immediate and extended family members in Afghanistan as they all live in the same household".

8. The appeals were thereby dismissed on protection grounds.

9. In applying for permission to appeal Ms Khan made six particularised complaints about the approach taken by the First-tier Tribunal. Given the way that the argument developed before me I need only address two.

The CA Decision

10. The first ground concerned the Tribunal's decision to depart from the finding of the CA and go behind the express concession of fact made by the Respondent that the Second Appellant at least was a victim of modern slavery. The Respondent had accepted that to be the case and had not resiled from that position at the hearing before Judge Arullendran. Neither party were given any notice that the Tribunal intended to reject the conclusion of the CA and the Respondent. Ms Khan submitted that this was a fundamental error of procedural fairness and Mr Diwnycz agreed. He further agreed that since this matter was of central importance to the risk assessment – of both Appellants- the decision as a whole was unsafe. He invited me to remit the matter to the First-tier Tribunal.

11. For reasons that will become clear I have not considered that to be necessary. I agree that the Tribunal had in these circumstances no business going behind a concession of fact made by the Respondent. If the Tribunal had concerns about the terms of the concession, or whether it had been properly made at all, the correct approach would have been to inform the parties of the same and invite submissions on the point. I note that in the recent decision of Secretary of State for the Home Department v MS (Pakistan) [2018] EWCA Civ 594 the Court of Appeal made clear that absent obvious perversity it is not for Judges to take a different view to that reached by the CA on questions of trafficking. Judge Arullendran did not have the benefit of that decision and was perhaps under the impression, given by McCloskey J in MS (Pakistan) [2013] UKUT 1469 (IAC), that 'kindred public law misdemeanours', such as a failure to consider all relevant evidence, could open the door to a full scale review by the Tribunal. As the Court of Appeal have made clear, that is not the case. As the parties have rightly agreed, in these appeals there was moreover the additional matter of fairness and procedural propriety. Ground (i) is therefore made out.

Risk as Children

12. Ms Khan gratefully accepted the Respondent's concession in respect of ground (i) but urged me not to remit the appeals. That was because, she submitted, on a

proper analysis of the law as it stands, the Refugee Convention claims of both boys were made out on the findings of fact made by the Judge.

13. I have set out above the crux of the reasoning on future risk, at the First-tier Tribunal's §79 and 81. That was that they could return to their family and live much as they did before. Crucially, they would have the 'protection' of their family, and would face no "increased" risk.

14. I am satisfied that in approaching that risk assessment in the way that it did the First-tier Tribunal made several errors of law.

15. First, it failed to have regard to the nature of the family in question. The Judge herself had accepted that the family unit consisted of the boys' grandmother, mothers, aunts and other children. It had accepted that both male heads of family had been killed. There was, according to the country background material, the Respondent's own policy and the Upper Tribunal's country guidance, a particular significance in the fact that this was now a female-led household. This is, again, a matter not contested by the Respondent so I do not need to set out here all of the many references there were in the papers before the First-tier Tribunal to the vulnerability of female-led households. It suffices to refer to the decision in AK (Article 15(c)) Afghanistan [2012] UKUT 00163 (IAC) in which the Tribunal agreed with the Respondent that it would be unreasonable to expect lone women and female heads of household to internally relocate to Kabul (see headnote (v)). That position has been expressly maintained in the most recent decision of the Upper Tribunal: AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC) (at headnote 7). It is, Ms Khan submits, implicit in that finding that it is not only unreasonable for the female 'heads of family' to internally relocate, but it must also be unreasonable for those in their care. Mr Diwnycz made no submissions to the contrary and I agree with Ms Khan that hers is a sensible reading of the guidance.

16. Given that the First-tier Tribunal accepted that these two children are from Laghman, and that their family now resides in Kabul as IDPs, it follows that their appeals must be allowed on Refugee Convention grounds. They would be internally relocating to Kabul as minors in a female-headed household and according to the Respondent's own position and country guidance, that would not be reasonable.

17. Ms Khan did not however stop her submissions there. She pointed out that in fact the experiences of these children, accepted by the Tribunal, serve as a potent illustration as to *why* it is unreasonable to expect female-led households to relocate to Kabul. In the absence of any male adults who could go out to work to support the family, it fell to these two boys to go out onto the street and make a living with which to support their numerous relatives. On the chronology presented it would seem that they started doing that from the age of about ten. In AA (unattended children) Afghanistan CG [2012] UKUT 00016

(IAC) the Tribunal found that "unattached" children living or working on the streets in Afghanistan "may be exposed to risk of serious harm, *inter alia* from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection" (headnote 2).

18. In response Mr Diwnycz rightly pointed out that these boys will have a roof over their head and will have their mothers with them. This is not the paradigm AA case of an unaccompanied minor being returned to live on the street. I accept that this is correct. It is also however the case that on the finding made by the First-tier Tribunal these boys have already been subjected to serious harm, having been compelled – by necessity and by their own family members – to work on the dangerous and polluted streets of Kabul, and being beaten and abused if their work was not up to the standard of the men who employed them. This is precisely the sort of ill-treatment that so concerned the Tribunal in AA. The key test would appear to be that set out in the earlier case of HK & Ors (minors-indiscriminate violence-forced recruitment by the Taliban-contact with family members) Afghanistan CG [2010] UKUT 378 (IAC), and adopted at paragraph 90 of AA: the evidence "presents a bleak picture for children who are returned to Afghanistan and *who do not have a family that will care for them*". Where that family are prepared, as found by the First-tier Tribunal here, to allow ten-year olds to work long hours in exploitative and dangerous situations, it cannot be said that they are "caring" for those children as we would understand it.

19. The final point I would make about the First-tier Tribunal's decision is its approach to past persecution and future risk. Paragraph 79 of the decision gives the unfortunate impression that in order to be 'trafficked' a victim must be abducted or forced to leave his country of origin. That is of course no part of the definition. Many, if not most, victims of trafficking find themselves in situations of exploitation through some degree of "consent": "consent" to travelling abroad in search of a better life, or as in this case the "consent" of controlling family members. That these children were forced to work because of economic necessity and because social convention prevented their female relatives from doing so does not lessen the dangers or exploitation that they faced. At paragraph 81 the determination indicates that in order to succeed in their appeals the Appellants would need to demonstrate an *increased* risk of harm. There was of course no need for them to do so. They simply had to point to their past experiences, and the fact that in Kabul, nothing had changed. As ten and eleven-year-olds their family had sent them out to work in dangerous conditions where they were regularly beaten by the employer. There was nothing to suggest that this would not be the situation again. That harm constituted persecution for reasons of their membership of a particular social group and in the absence of any significant change in circumstances it was reasonably likely to happen again.

20. I therefore decline Mr Diwnycz's invitation to remit this matter for further hearing. On the findings made by the First-tier Tribunal the appeal should have been allowed, and I therefore substitute its decision dismissing the appeal on protection grounds with one allowing it with reference to the Refugee Convention.

Anonymity Order

21. The Appellants are both children seeking protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

22. The decision of the First-tier Tribunal is set aside for error of law.

23. The decision in the appeals is remade as follows:

"the appeals are allowed on protection grounds with reference to the Refugee Convention"

24. There is an order for anonymity.

Upper Tribunal Judge Bruce
25th April 2018