



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: PA/13604/2017

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

**Decision & Reasons
Promulgated**

On 12th October 2018

On 23rd October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

F A

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Fitzsimons of Counsel instructed by Hoole & Co Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Page (the Judge) of the First-tier Tribunal (the FTT) promulgated on 21st March 2018.

2. The Appellant is a national of Afghanistan born 1st January 2004 making him 14 years of age.
3. The Appellant claimed asylum on 27th July 2017 having arrived in the UK earlier that month. His asylum claim was made on two grounds. He claimed to be a member of a particular social group, that being an unaccompanied asylum seeking child, and secondly claimed asylum on the basis of imputed political opinion, having come to the adverse attention of Daesh in his home area of Nangarhar Province.
4. The claim for international protection was refused on 4th December 2017, although the Appellant was granted limited leave to remain because of his age until 23 May 2020. The appeal was heard on 7th February 2018.
5. The judge heard evidence from the Appellant who was treated as a vulnerable witness. Evidence was also given by his foster carers. The judge did not find the Appellant to be a credible witness and did not accept his account. It was not accepted that the Appellant's father had disappeared nor was it accepted that Daesh had killed the Appellant's mother. It was not accepted that the Afghan National Police visited the Appellant's home, nor was it accepted that Daesh had visited his home. The judge did not accept the Appellant's evidence that he had not attended school in Afghanistan.
6. The judge dismissed the appeal on asylum and human rights grounds. The appeal was however allowed pursuant to Article 15(c) of the Qualification Directive.
7. The judge at paragraph 32 found that the Appellant would be at risk if returned to Afghanistan and was therefore entitled to a grant of humanitarian protection under Article 15(c).

The Application for Permission to Appeal

8. The Appellant applied for permission to appeal to the Upper Tribunal relying upon three grounds which are summarised below.
9. Firstly, it was submitted that the judge had erred by not considering the particular social group basis of the asylum claim. It was submitted that the findings made by the judge at paragraphs 5 and 32, demonstrated that the Appellant was entitled to asylum as an unaccompanied child who would be at risk on return. The judge had dealt with the political opinion aspect of the asylum claim, but had failed to deal with the membership of a particular social group aspect.
10. Secondly, it was submitted that the judge had erred in making an adverse credibility finding in relation to the Appellant's education. The judge did

not accept that the Appellant had not been educated. The judge had taken judicial notice that Nangarhar Province had many schools. It was submitted that the judge had been unfair as it was never part of the Respondent's case that the Appellant was not credible because he was not educated. There was no background evidence on this issue that was before the judge, and the judge had not made it clear what evidence he had considered when taking judicial notice of the state of education in Nangarhar Province.

11. The third ground contended that the judge erred in law in giving insufficient consideration to the Appellant's age when assessing credibility.

Permission to Appeal

12. Permission to appeal was initially refused but a renewed application was granted by Upper Tribunal Judge Grubb in the following terms;
 - (i) The First-tier Tribunal (Judge Page) dismissed the Appellant's appeal against the decision to refuse his international protection, humanitarian protection and human rights claims. The judge made an adverse credibility finding and rejected the Appellant's account to be at risk on return to Afghanistan from Daesh.
 - (ii) The grounds raise three points. Grounds 1 and 2 are arguable. It is arguable that the judge failed to consider the Appellant's asylum claim on the basis of being a member of a PSG given his findings in paragraph 32. It is also arguable that the judge's reasoning based upon evidence of which he took "judicial notice" at paragraphs 20 - 22 was impermissible in the absence of background evidence (which the Appellant had an opportunity to deal with) about the education system in Nangarhar Province. I am less persuaded about ground 3, which as a self-serving ground may ultimately have no merit, but would not exclude consideration of it.
 - (iii) Consequently, I grant permission on all grounds.

The Upper Tribunal Hearing

13. Mr Howells confirmed that the Respondent had not lodged a response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, but the Respondent's position was that the judge had not materially erred. Mr Howells confirmed that the Respondent had not entered a cross-appeal, and therefore did not dispute that the Appellant was entitled to be granted humanitarian protection.
14. Miss Fitzsimons relied upon her typed speaking note dated 11th October 2018 which is comprehensive and which need not be reiterated here.

15. In very brief summary Miss Fitzsimons clarified that Ground 1 did not challenge the adverse credibility findings made by the judge, but in fact relied upon findings made by the judge at paragraphs 5 and 32 of his decision.
16. Reliance was placed upon AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC), and LQ (Age: Immutable Characteristic) Afghanistan [2008] UKAIT 0005. I was asked to find that the judge in making those findings, and in finding the Appellant to be at risk and in need of humanitarian protection, had not considered the particular social group basis of the asylum claim.
17. Miss Fitzsimons submitted that it was unclear why the judge had dismissed the Article 3 claim if he had found the Appellant to be at risk and in need of humanitarian protection. I was asked to set aside the decision of the FTT, and substitute a decision allowing the appeal on asylum and Article 3 grounds.
18. It was only if I rejected the above submission that it would be necessary to consider Grounds 2 and 3. Miss Fitzsimons submitted that the judge had drawn an adverse credibility finding from the Appellant's contention that he was not educated in Afghanistan. The judge had not given the parties an opportunity to make submissions on this point. Reliance was placed upon EG Nigeria [2008] UKAIT 00015. As the issue of education had not been raised with the parties at the hearing, the parties had not had an opportunity to make submissions on this point.
19. With reference to the third ground Miss Fitzsimons relied upon paragraphs 25 – 29 of her speaking note.
20. Miss Fitzsimons pointed out that the judge was in error at paragraph 32 in commenting that a grant of humanitarian protection to the Appellant would be academic given that the Appellant had discretionary leave until 2020 as the grant of humanitarian protection would probably coincide with that grant. Humanitarian protection entitles an Appellant to five years' leave.
21. Mr Howells accepted that it was unclear why, if the judge thought a grant of humanitarian protection was appropriate, he had not allowed the appeal with reference to Article 3 of the 1950 European Convention.
22. Mr Howells had little to say in relation to Ground 1, commenting that some of the judge's findings indicated that the Appellant would not be an unattended child on return to Afghanistan.
23. With reference to Ground 2 Mr Howells accepted that the judge erred, as contended in the grounds, but submitted that this was not material, as the

adverse credibility findings made by the judge were not based solely upon his conclusion that the Appellant had not told the truth about being educated.

24. Regarding Ground 3 Mr Howells submitted that there was no error of law, and it was clear that the judge was fully aware of the Appellant's age and vulnerability and took that into account.
25. In response Miss Fitzsimons submitted that the adverse credibility finding made in relation to education was material, as this infected other adverse credibility findings made by the judge.
26. Miss Fitzsimons submitted that if a material error of law was found in relation to Ground 1, the decision of the FTT should be set aside and a decision substituted that the appeal was allowed on asylum grounds on the basis that the Appellant was an unaccompanied asylum seeking child who would be at risk, and the appeal should also be allowed with reference to Article 3.
27. If no material error was found in relation to Ground 1, but a material error found in relation to Grounds 2 and 3 Miss Fitzsimons suggested that the appeal be remitted to the FTT. Mr Howells did not disagree.
28. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

29. I am asked to consider findings made by the judge, with reference to paragraphs 5 and 32 of his decision. At paragraph 5 the judge records that the Respondent, having accepted the Appellant's age, concedes that the Appellant is a member of a particular social group that being an unaccompanied asylum seeking child.
30. On behalf of the Appellant reliance is placed upon paragraph 92 of AA Afghanistan CG and the following is cited in Miss Fitzsimons's speaking note;

"The background evidence demonstrates that unattached children returned to Afghanistan, depending upon their individual circumstances and the location to which they are returned, 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. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining her claim to humanitarian protection."

31. I find that the judge has not demonstrated that he has considered the Appellant's claim to asylum based on membership of a particular social group, as an unaccompanied child at risk of serious harm. It is common ground that a Tribunal must consider the appeal as at the date of hearing, even if the Appellant has been granted leave to remain on account of his age, as in this case. Leave granted by the Respondent was until 23rd May 2020.
32. At paragraph 32 the judge finds that the Appellant would be at risk on account of his age in circumstances where it is not known for certain that there would be adequate reception facilities available to him on return. The Appellant's family cannot be traced. The possibility cannot be excluded that the Appellant has been subjected to trauma which he has not disclosed. The Respondent has accepted that there is armed conflict in the Appellant's area with Daesh.
33. On the basis of the findings set out above, the judge should have considered whether the Appellant was entitled to refugee status on the basis of his membership of a particular social group as an unaccompanied child. In my view, this failure amounts to a material error of law.
34. I do not find that a satisfactory explanation has been given as to why, if the Appellant is at risk in Afghanistan, as accepted by the judge, he would not be at risk of treatment that would breach Article 3 of the 1950 Convention. I find the lack of explanation to be an error of law.
35. In my view, taking into account the findings made by the judge, the Appellant is entitled to refugee status based on his membership of a particular social group as an unaccompanied child who would be at real risk of serious harm. He is therefore entitled to a grant of asylum, and he would be at risk of treatment that would breach Article 3 of the 1950 European Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on asylum grounds and on human rights grounds with reference to Article 3 of the 1950 European Convention.

Because the Appellant is entitled to asylum he is not entitled to humanitarian protection.

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 his 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

Deputy Upper Tribunal Judge M A Hall

16th October 2018

TO THE RESPONDENT

FEE AWARD

No fee has been paid or is payable. There is no fee award.

Signed

Deputy Upper Tribunal Judge M A Hall

Date

16th October 2018