



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01184/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 20 August 2013**

Determination Sent

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MASTER TAWABULLAH SAFI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Cohen, Counsel, instructed by Elder Rahimi Solicitors
(London)

For the Respondent: Mr S Allan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Afghanistan, and a minor. He claimed to have arrived in this country on or about 9 October 2011, and he subsequently claimed asylum at the respondent's Asylum Screening Unit in Croydon on 23 November 2011. At that time, he claimed to have been born on 3 August 1998, but it is apparently acknowledged that he is in fact

a year older, having been born on 1 August 1997. For present purposes, it is immaterial whether he was born in August 1997 or 1998. At all material times he was, and remains, a minor.

2. The appellant's asylum claim (or in the alternative a claim to humanitarian protection) was refused by the respondent on 20 January 2012, but in line with the respondent's discretionary policy to grant leave to unaccompanied minors, he was granted discretionary leave to remain outside the Rules until 20 January 2015.
3. The appellant appealed against the refusal to grant him asylum and this appeal is accordingly an upgrade appeal under Section 83 of the Nationality, Immigration and Asylum Act 2002. His appeal is limited to asylum and humanitarian protection.
4. The appellant's appeal was originally heard before First-tier Tribunal Judge St J Wiseman, on 14 March 2012, who dismissed his appeal. However, this decision was subsequently set aside by the Upper Tribunal and the appeal was remitted back to the First-tier Tribunal for a further hearing de novo by another First-tier Tribunal Judge.
5. The appeal then came before First-tier Tribunal Judge Hodgkinson, sitting at Hatton Cross on 27 March 2013, but in a determination prepared on 8 April 2013, and promulgated shortly thereafter, Judge Hodgkinson again dismissed the appellant's appeal.
6. The appellant now appeals against this decision, permission to appeal having been granted by Upper Tribunal Judge Dawson on 23 May 2013.

Basis of Appellant's Appeal

7. The basis upon which the appellant now appeals can be summarised briefly. Judge Hodgkinson's finding that the appellant would not be at risk on return and that his best interests lay in being reunited with his family in Kabul, followed on from the adverse credibility findings which he made. It is submitted on the appellant's behalf that these findings were founded at least in part on answers given in a cross-examination which was inappropriate having regard to the guidance set out at paragraph 351 of the Immigration Rules with regard to cross-examination of minors, and which was also in breach of the UNHCR Guidelines.
8. The core of the appellant's claim is set out at paragraph 4 of the appellant's original application for permission to appeal, but was not accepted by Judge Hodgkinson. It is his case now that Judge Hodgkinson's reasons for rejecting his claim are tainted by his reliance on answers given in the cross-examination which was inappropriate.
9. Upper Tribunal Judge Dawson set out his reasons for granting permission to appeal as follows:

“The renewed grounds challenge the judge's approach in the light of the appellant's age (he was born on 1 August 1997 and so [was] therefore 15 at the date of hearing on 27 March 2013) as to the correctness of the cross-examination and the application of para 351. Reliance is also based on the grounds before the FtT referring to para 351 and the questionable expectation regarding the rationality of persecutors supported by authorities listed.

The judge gave clear reasons why he rejected the core account. He also disbelieved the appellant ... about the attempts to make contact with his mother whom he found to be living with the appellant's maternal uncle in Kabul where he would not be at risk.

It is just arguable that in coming to his conclusions, the judge did not make sufficient allowance for the appellant's age when considering the credibility of the risks that it is claimed arose from the death of his father (when he was about 10 years old). More significantly the reasons why the judge did not ... accept the evidence why the appellant had not been able [to] make more recent contact [with] his family in Kabul arose in part out of an assessment of the appellant's performance in cross-examination. It is arguable that the judge did not make sufficient allowance for the appellant's age when rejecting the account he heard at [76].”

The Hearing

10. I heard submissions from Ms Cohen on behalf of the appellant and also submissions on behalf of the respondent from Mr Allan. In the course of her submissions, Ms Cohen relied upon the skeleton argument which she had submitted prior to the hearing. As I recorded the submissions contemporaneously, and these are contained within the Record of Proceedings, I shall not set out everything which was said during the course of the hearing, but shall refer below only to such parts of the submissions as are necessary for the purposes of this determination. I have, however, had regard to everything which was said to me during the course of the hearing, as well as to all the documents contained within the file, whether or not these are referred to specifically below.

Submissions on behalf of the Appellant

11. Ms Cohen's primary submission was that the “overriding principle” in this case was that, in accordance with paragraph 351 of the Immigration Rules, more weight should be given to objective evidence rather than to a child's state of mind and understanding of the situation. Ms Cohen then referred to the relevant extracts from the respondent's policy guidance, at paragraph 9 of her skeleton, and to the UNHCR Guidance, at paragraph

10. She explained the reasons why this was the overriding principle, and the way in which that principle should be approached in a hearing.
12. Turning to the determination itself, although at paragraph 41, Judge Hodgkinson had noted the principles to be applied, it was the appellant's case that he had failed to apply them. As was set out in the skeleton argument, the judge had not applied the guidance which was set out in Rule 351.
13. Whilst one might forgive a Presenting Officer for asking some of the questions, the difficulty in this case is that the approach adopted permeated the entirety of the majority of the cross-examination, before she went on to cross-examine the appellant about tracing.
14. Although it was accepted that inconsistencies in the appellant's evidence were not entirely irrelevant, because of the limited weight which could be placed on this, it was not proper to concentrate exclusively on this in cross-examination. Even if the cross-examination was approached in this way, and that was the respondent's case, as a matter of law, the judge should not have attached more than limited weight to the appellant's answers.
15. Although no objection was taken to the form of cross-examination while that cross-examination was taking place, this was raised before the judge in submissions. Ms Cohen had not considered it appropriate at that time to jump in in the middle of cross-examination, which is why she waited to make her submissions to this effect until the completion of the cross-examination. It was the appellant's case that the judge had placed undue weight on answers given during this cross-examination. Although the judge had noted the principles to be applied, he had not applied them. As an example, at paragraph 56, the judge had referred to the appellant's evidence about why he had been forced to join the Taliban, which was a reference to his state of mind about his situation.
16. Then again at paragraph 57, the appellant had been asked why Zekria (the man who it was claimed had had a land dispute with his father) could not simply have gone to Pakistan in order to kill the appellant; this flew in the face of the approach which should be taken with regard to minor applicants claiming asylum. Although no objection had been taken to this question at the time, the judge should not have placed any weight on this part of the cross-examination in his determination. Questions as to the appellant's understanding of the situation were not appropriate. A similar point was made with regard to what was set out in paragraphs 59 and 60 of the determination.
17. In answer to a question from the Tribunal as to where in the determination Judge Hodgkinson had relied on the appellant's inability to give sensible answers to the questions he was asked, Ms Cohen referred to paragraph 61. As I noted at the time, this appeared to be a reference to

an inconsistency in the appellant's account, the relevant extract from paragraph 61 being as follows:

“I find it wholly to lack credibility that, on the one hand, the appellant states that Zekria wished the appellant to be killed in battle and, on the other hand, that he did not kill the appellant sooner because he wanted the appellant's thumb print on a document.”

18. Judge Hodgkinson continued as follows:

“I reiterate that there is no reference earlier in the appellant's evidence to Zekria wanting any kind of thumb print or formal acknowledgment from the appellant in relation to the land. I would reiterate that, in the appellant's earlier evidence, he did not even make mention of Zekria actually having taken any land; simply to a land dispute. I find the appellant's evidence, in the circumstances, and even having taken into account his cultural background, lack of education and young age, to be lacking in credibility in material respects.”

19. It was Ms Cohen's submission, on behalf of the appellant, that although the judge had referred to the appellant's failure to mention the land dispute earlier, it had always been his evidence that there had been a land dispute. The appellant's failure to clarify who took the land at a later stage was plausible, in light of the fact that he had always maintained that there was a land dispute. It was the appellant's case that the judge's finding as to the reason why the appellant had not been able to make more recent contact with his family in Kabul depended on his reliance to answers given in cross-examination which went beyond what was appropriate. This arose out of an assessment of his earlier cross-examination.

20. With regard to the appellant's evidence as to why he had not been able to contact his family in Afghanistan, the judge had failed to take into account the appellant's evidence that he did not know that his mother was still in Kabul, such that his inability to get through to her subsequently in Kabul was credible.

21. With regard to the judge's reliance on the apparent inconsistency in the appellant's evidence such that on the one hand he said that someone had picked up the telephone and told him he had dialled the wrong number, but on another occasion he had said it was a computer voice, it was asserted that “the earlier assessment of the appellant's evidence permeated the judge's assessment of this evidence.”

Submissions on behalf of the Respondent

22. On behalf of the respondent, Mr Allan first reminded the Tribunal that no objections had been raised on behalf of the appellant while the cross-examination had been taking place. Ms Cohen's primary assertion was

that because the cross-examination had been inappropriate, insofar as the judge's findings had been founded on answers given during cross-examination, he should not have placed any reliance on these answers.

23. The Tribunal accordingly had to consider first whether or not the cross-examination was inappropriate, and it was the respondent's position that it was not. The policy itself was set out at paragraphs 8, 9 and 10 of the skeleton argument prepared on behalf of the appellant, and the key matter which needed to be highlighted was the distinct absence from any guidelines that a Tribunal could not have regard to inconsistency. At no point was it said that allowance should have been made for inconsistent accounts having been given. Indeed, although it was said that allowance should have been made for variations in levels of understanding of a minor, and with regard to a minor's ability to interpret or understand detail, it is not said that children are likely to be internally inconsistent in their accounts. In that context, the cross-examination was entirely appropriate. For example, at paragraph 61, the judge referred to how the appellant had embellished his earlier evidence, and the purpose of cross-examination had been precisely to test the consistency of the appellant's account. That was where the failure to object during the course of the hearing was material. It was not that Ms Cohen was incapable of objecting during the course of the evidence; indeed, at paragraph 31 of his determination, the judge refers to the challenge she had made with regard to the interpreter. So, clearly, if the appellant's Counsel had considered the line of questioning to be inappropriate at the time, this could have been challenged.
24. What follows from this is that the real meat of the challenge was that the judge had placed too much weight on the answers given, so what the appeal really came down to was a challenge to the weight given to the findings of fact.
25. It was the respondent's submission that the judge's findings with regard to credibility of the appellant's account were open to him. The findings were not based on inappropriately obtained evidence and his view was a broad one with regard to credibility. He had based his assessment not on the level of detail which the appellant had given, nor on his understanding, but on inconsistencies within his evidence. Because this was the basis of the judge's findings, the grounds in effect amounted to no more than a disagreement with these findings.
26. The Tribunal also had to have in mind that the question which had to be determined was not whether it agreed with the findings which the judge had made, but whether these findings had been open to him. Plainly they were.
27. In reply, Ms Cohen submitted that the findings that the appellant's evidence had been inconsistent had been founded on improper cross-examination. Although objection had not been taken during the cross-examination itself, objection had been made during the closing

submissions. It had been argued on behalf of the appellant that more weight should be given to the objective indications, rather than to the appellant's understanding or state of mind. Insofar as the appellant's Counsel should have objected during cross-examination, Ms Cohen relied upon the decision in *FP (Iran)*, where it was made clear that an applicant should not be blamed for the fault of Counsel.

Discussion

28. The issue before this Tribunal is a discrete one. Did the judge make an error of law by making findings which were partly founded on answers given during the course of a cross-examination which had been inappropriate?
29. The difficulty with this submission is that Ms Cohen accepted that she could not argue that no questions could be asked of the appellant which touched on the areas to which regard should not be had. Rather, having not objected during cross-examination itself, it was only after that cross-examination, she says, that she realised that most of the cross-examination had been directed to areas which, in the case of minors, were with hindsight inappropriate, because they went to his state of mind rather than the objective evidence. That was why in her submissions to the judge, she had made this point.
30. I do not consider this argument to be tenable. It is clear from his determination that the judge understood clearly the allowances which had to be made with regard to the appellant's evidence. So, for example, at paragraph 41, he said in terms that:

“In assessing the appellant's evidence, I confirm that I have done so by taking into account fully his young age at the time when certain claimed events would have occurred in Afghanistan, and also his relative youth at the time of the hearing before me, and I have made appropriate allowances, because of his age, in relation to the appellant's ability to recall and understand recent events.”

31. Then, again, at paragraph 61, in the course of making adverse credibility findings, the judge made clear that these findings were made even after giving appropriate allowance for the appellant's age:

“I find the appellant's evidence, in the circumstances, and even having taken into account his cultural background, lack of education and young age, to be lacking in credibility in material respects.”

32. It is clear from the determination that the judge rejected the appellant's evidence because of the inconsistencies in that evidence, and with regard to his account generally, and these inconsistencies are fully set out in the determination. Essentially, therefore, this appeal, although very attractively argued, does not in substance amount to anything more than a challenge to findings of fact which the judge was entitled to make. Ms Cohen is correct that great care has to be taken when assessing the evidence of young people, but as the judge made clear in his determination, he did take great care, but nonetheless felt obliged, for the reasons which he has given, to reject substantial parts of the appellant's evidence despite his young age.
33. Accordingly, I do not consider that the determination contains any error of law, whether material or otherwise, and this appeal must accordingly be dismissed.

Decision

There being no error of law in the determination of the First-tier Tribunal, this appeal is dismissed.

Signed:

Date: 20 November 2013

Upper Tribunal Judge Craig