



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10135/2012

THE IMMIGRATION ACTS

Heard at Glasgow
on 13 August 2013

Determination Sent

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LATIFULLAH ORIAKHEL

Respondent

For the Appellant: Mr A Mullen, Senior Home Office Presenting Officer
For the Respondent: Mr N Ruddy, Jain Neil & Ruddy Solicitors

DETERMINATION AND REASONS

- 1) This determination refers to parties as they were in the First-tier Tribunal.
- 2) The appellant identifies himself as a citizen of Afghanistan, born on 13 August 1996. The SSHD did not accept his age as claimed, and attributed to him the date of birth of 1 January 1994.
- 3) The SSHD refused the appellant's asylum claim for reasons explained in a letter dated 25 October 2012.
- 4) First-tier Tribunal Judge Quigley allowed the appellant's appeal by determination dated 17 December 2012.

5) These are the SSHD's grounds of appeal to the Upper Tribunal:

Failing to give reasons or any adequate reasons for findings on material matters

a) At paragraph 38 of the determination the Immigration Judge said:

I witnessed the appellant give evidence before me, and, although certainly not an expert on age assessment, I found his appearance and manner to be that of a young person under the age of 18 years. For all these reasons, I accept the appellant's testimony that he is 16 years old as claimed.

... there is an absence of reasoning in this finding: the Immigration Judge does not say what it was about the appellant's appearance and manner which led [her] to conclude that the appellant was under 18. Given [her] admission that she is "certainly not an expert on age assessment", it is submitted that at the very least, the Immigration Judge should have explained what in [her] view made the appellant appear to be younger than 18, particularly given [her] criticism at paragraph 37 that "there is no evidence before me as to how the UK Border Agency arrived at its conclusions on age assessments."

b) ... that latter comment is also erroneous: it is incorrect to say, as the Immigration Judge does, that there was no evidence before [her] as to how the UK Borders Agency arrived at its conclusions on the age assessment, when the thinking behind this conclusion is clearly set out in the Reasons for Refusal Letter of 25 October 2012 at paragraphs 13, 14 and 15 which read as follows:

13 *You claim to be 16 years old with a birth date of 13 August 1996. When you were first encountered, Cambridgeshire Social Services assessed you as being over the age of 18 years old.*

14 *Since that time, the UK Border Agency has not received any additional information that would substantiate your age as being as you claim. No notification has been received to indicate that you have attempted to challenge the decision made by Cambridgeshire Social Services.*

15 *The authority of local authority social work teams to make decisions on a person's age is established in a number of court judgements, including R9B) v London Borough of Merton [2003] EWHC 1689 (Admin). In light of there being no evidence to establish your age and no challenge to the local authority age assessment, weight has been attached to the Cambridgeshire Social Work Services and **it is not accepted that you are 16 as you claim. Instead it is considered that you are over the age of 18 years old.***

Making a material misdirection in law

c) At paragraph 14 of the determination the Immigration Judge states:

I note from paragraph 14 of the Respondent's Reasons for Refusal Letter that, in view of the Respondent, no notification has been received to indicate that the appellant has attempted to challenge the decision made by Cambridgeshire Social Services. That statement is clearly not correct as the appellant has been consistent throughout that his date of birth is 13 August 1996. To that extent, it is clear that he does not agree with the decision made by Cambridgeshire Social Services.

... this statement is erroneous: the appellant may well have consistently maintained that his date of birth is 13 August 1996, but that by itself does not indicate that any attempts was made to challenge the finding of Cambridgeshire County Council that he was older than 18.

d) At paragraph 47 the Immigration Judge states:

It seems to me that the Respondent has accepted the core aspect of this appellant's claim. That is that he has already received here threatening letters from the Taliban. It is clear that the appellant has not waited until he was physically harmed or killed before his father decided that he had to leave Afghanistan. I find that this appellant would be at threat from the Taliban if he were to return to Afghanistan.

... far from accepting the core of the appellant's claim, the Secretary of State did not accept it, and the Immigration Judge erred in finding that she did. See paragraph 33 of the Reasons for Refusal Letter:

*As detailed in the objective evidence above, "night letters" have a significance in Afghan culture and it is considered likely that you would be aware of the use of such letters, whether your family received them or not and such information could be used to fabricate an asylum claim. Taking into account the inconsistent evidence you have given about these letters, as detailed above, **it is not accepted that your family received letters from the Taliban as you claim.***

- 6) Mr Mullen submitted that the judge gave too much weight to her impression of the appellant, rather than to the evidence, and that the appellant had not challenged the assessment of his age in his grounds of appeal to the First-tier Tribunal or at the hearing.
- 7) I pointed out that in the statement which he provided for purposes of that hearing, the appellant maintained his claim about his age. Mr Mullen said that it was not enough for the appellant simply to say that his age was 16, and it was not enough for the judge to go by her impression. The appellant had the opportunity to challenge the age assessment but did not do so. He did not provide evidence of his identity or his date of birth, such as an Afghan passport. It has been possible to obtain such a document for a number of years.
- 8) I also observed to Mr Mullen that the SSHD's bundle of documents provided to the First-tier Tribunal included "Age Assessment Documentation", but this comprised only a record of the conclusion by Children's Services of the local authority in Peterborough that the appellant was "over 18". The bundle contained a copy of only the front or cover page of the document, not the assessment itself.
- 9) Mr Mullen accepted that the grounds going to age assessment were weakened by the facts that the SSHD had not provided its own age assessment and had not been represented in the First-tier Tribunal. However, he referred to SH (Assessment of Age) Afghanistan [2005] UKIAT 00156, headnoted:

If the evidence does not establish the claimant's age, the Adjudicator is entitled simply to say so. If age is disputed, it is unlikely to be appropriate for an Adjudicator to assess the claimant's age on the basis of his appearance in the court room.

- 10) Turning to paragraph (d) of the grounds, Mr Mullen submitted that the judge misread the SSHD's position, which was that the appellant's family had not received threatening "night letters" from the Taliban.
- 11) Mr Mullen said that even if the grounds relating to age assessment were not made out, the error as to whether a concession had been made about the threatening letters required a rehearing of the case.

- 12) I indicated to Mr Ruddy that I was not satisfied that any error was made out in relation to the age assessment, but he would require to deal with the point at paragraph (d) of the grounds.
- 13) Mr Ruddy submitted that if the determination was read as a whole it was not based on a misunderstanding of the SSHD's position, but on a proper analysis of the claim. He accepted that taking only the first 2 sentences of paragraph 47 of the determination along with the end of paragraph 33 of the refusal letter, the judge appeared to have got matters wrong. However, the refusal letter at paragraphs 30-32 was rather to the effect that threatening letters might have been received, although not from the Taliban, and not representing a serious threat. The judge at paragraph 43 of her determination thought that the SSHD was not disputing the fact that the Taliban sent 3 letters to the appellant's home, in spite of the general denial at paragraph 33, but that the respondent was rather disputing the potential consequences for the appellant. The judge went on at paragraphs 44 and 45 to analyse the SSHD's logic, which she thought was to the effect that because the appellant had not yet been harmed there was no real risk of harm on return. Mr Ruddy said that the judge correctly saw that as flawed, and at paragraph 47 found that the appellant and his father had not waited for harm to ensue before reaching the decision that the appellant should leave Afghanistan. The judge returned to this issue at paragraph 56, where she again said that the fact that the appellant had not been subject to violence following upon the letters did not mean that he was not at real risk at some future date. She referred to background evidence that night letters are followed up with real violence, even murder. That clarified any error into which the judge might have fallen at paragraph 47. The judge reached her conclusion not based on a misunderstanding of the concession, but on a detailed consideration and analysis of the evidence. Notably she had made no adverse credibility findings against the appellant in the determination, and the SSHD's grounds alleged no error in that.
- 14) In reply, Mr Mullen sought to raise the point that the judge failed to deal with the question whether the appellant would be at risk on return even if his evidence was credible, pointing out that the refusal letter maintained that even if the claim were "taken at highest" he could relocate. I indicated that the attempt to raise that argument came too late. There was no ground of appeal directed to the point.
- 15) On the age assessment issue, I consider that the judge was entitled to take *some* account of her own observation. She reminded herself that she is not an expert. She was correct to observe that the appellant had consistently maintained his age as originally stated. The SSHD's grounds at paragraph (c) are unclearly stated, but perhaps the underlying point is that the appellant did not bring any expert or other evidence of his own. He had that opportunity but he was not bound to do so. There was no cross-examination, because the respondent did not field a representative. The judge had to make a decision on such evidence as she had. I do not think that she erred.
- 16) The grounds identify an apparent error by contrasting paragraph 47 of the determination with paragraph 33 of the refusal letter, but once both the letter and the

determination are read in full I prefer Mr Ruddy's submission that the judge did not decide the case by misapprehending the SSHD's position but by considering the totality of the SSHD's reasons and the totality of the evidence before her.

- 17) The SSHD's appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal, allowing the appellant's appeal, shall stand.
- 18) No anonymity order has been requested or made.

A handwritten signature in black ink, appearing to read "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial 'H'.

14 August 2013
Judge of the Upper Tribunal