



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/00270/2014

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court  
On 9<sup>th</sup> May 2014

Determination Promulgated  
On 10<sup>th</sup> June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR N. K.  
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Beckett Bedford (Counsel)  
For the Respondent: Mr Neville Smart (HOPO)

DETERMINATION AND REASONS

1. This was an appeal against the determination of First-tier Tribunal Judge Freer promulgated on 21<sup>st</sup> February 2014, following a hearing at Birmingham Sheldon

Court on 11<sup>th</sup> February 2014. In the determination, the judge dismissed the appeal of the Appellant, who applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of Afghanistan, and has a disputed age, which arises on account of his alleging that he was born on 26<sup>th</sup> November 1996, but it being formally determined that he was instead born on 8<sup>th</sup> October 1994. His claim has three aspects. First, that he is entitled to asylum on account of his imputed political opinion. Second, that he is entitled to humanitarian protection as a result of the risk of indiscriminate violence in Afghanistan. Third, that he is entitled to Article 8 right to family and private life in the UK.

### **The Judge's Findings**

3. This appeal has a tortuous history. Judge Freer determined the appeal against the background of a previous appeal by Judge Graham, observing that, "as Judge Graham dealt only with an extremely narrow point, I find that I am the first judge to deal with all other issues" (paragraph 4). The "extremely narrow point" that is referred to in Judge Graham's determination relates to the finding by Judge Graham that Section 55 of the BCIA 2009 was not properly considered so the appeal was allowed to the very limited extent that the Respondent Secretary of State should consider Section 55. (See paragraph 3).
4. Judge Freer made a number of findings, two of which are of particular note, and importance in this appeal. First, Judge Freer dealt with the Appellant's asylum claim as follows:

"The matter went back to the drawing board because of Section 55 point. I see no evidence that the Respondent (or Judge Graham) has ever positively accepted the core account at all. The burden of proof remains on the Appellant and, due to his very poor credibility, I find that he does not meet the low threshold for asylum or other claims, as I will go on to elaborate" (paragraph 50).

Second, the judge now dealt with the Appellant's claim for humanitarian protection, with express regard to the fact that he was of a tender age. Judge Freer observed that, "the Appellant is now aged 19 years and is not shown to be especially at risk of the factors listed [in **AA (unattended children) Afghanistan CG [2012] UKUT 00016**], given my findings on the evidence (see paragraph 64).

5. The appeal was dismissed.

### **Grounds of Application**

6. The grounds of application state that the expert, Dr Birch, had undertaken an age assessment, finding that the Appellant was 14½ years of age, on 26<sup>th</sup> May 2011, given

his date of birth of 26<sup>th</sup> November 1996, and that he had only reached majority on 26<sup>th</sup> November 2014. Therefore, age was clearly an issue. Judge Freer had not dealt with the issue of age at all. He had simply accepted the age assessment as formally given to him. Second, the judge had made no findings as to the Respondent Secretary of State's assertion of non-cooperation regarding the tracing of family members of the Appellant in Afghanistan. There was evidence in the form of a letter from the Red Cross, which had rebutted any suggestion that the Appellant had been less than compliant in providing information about his family members in Afghanistan.

7. On 12<sup>th</sup> March 2014, permission to appeal was granted.
8. On 25<sup>th</sup> March 2014 a Rule 24 response was entered by the Respondent Secretary of State to the effect that, in this appeal their real concerns centre around the age of the Appellant, but this was not necessarily material as the evidence before the Respondent led her to the conclusion that the Appellant was an adult. Furthermore, the judge was entitled to conclude that the Appellant's evidence that his uncle was a Taliban commander was not credible and that he would not face persecution when returned.

### **Submissions**

9. At the hearing before me on 9<sup>th</sup> May 2014 Mr Bedford, appearing on behalf of the Appellant, submitted a skeleton argument, which contained four essential points.
10. First, he submitted that Judge Freer was simply wrong to adopt the reasoning of Judge Graham before him in holding that the core account of the Appellant had been rejected previously, because that decision had been appealed, and comprehensively allowed, so that all matters fell to be re-determined again. In particular, submitted Mr Bedford, it was the case that the Respondent's submissions before Judge Freer now were such that they needed to be expressly rejected by the judge. These submissions were that the appellant faced a threat from his uncle who was actively looking for him and had influence in Afghanistan, that there had been no change in the evidence of the Appellant since 2011, that he was no longer a boy, and that his age should be considered as it was now (see paragraph 31). Mr Bedford submitted that the decision letter of 2011 was withdrawn following an appeal. Therefore, matters fell to be considered afresh by Judge Freer. The fact that Judge Freer stated at paragraph 50 that he would take as his starting point the findings of Judge Graham, were misconceived.
11. Second, the age assessment was contested. Yet, apart from the judge stating at the outset (at paragraph 11) that the Appellant was "so it is thought, born on 8<sup>th</sup> October 1994", there was no assessment of what the age of the Appellant was. This was particularly serious given that Dr Birch, the expert, had given a view on this. The Respondent had submitted that the Appellant was 19 years old (see paragraph 33) and the judge then simply went on to adopt this by holding that the Appellant was indeed 19 years of age (see paragraph 64). There was no assessment.

12. Third, there was no assessment of the Appellant's evidence that his parents had died and the Appellant's witness statement in relation to this was simply not discussed by the judge.
13. Finally, the letter from the Red Cross maintaining that the Appellant had not been obstructive in relation to the tracing of his family in Afghanistan was not addressed by the judge at all.
14. For his part, Mr Smart submitted that he would rely upon the Rule 24 response. This appeal had a chequered history. However, there is no error. At paragraph 4, Judge Freer had made it clear that Judge Graham had determined his appeal on a narrow point alone and that it fell to Judge Freer now to deal with all the issues. Therefore, Judge Freer was clearly aware of the fact that he had to deal with all the issues. Judge Freer then makes his assessment at paragraph 50. As for the age assessment, the one and a half page Grounds of Appeal before Judge Freer, running into fourteen paragraphs, take no issue with the assessment of age at all. Moreover, nothing was said about being disadvantaged by the Secretary of State failing to deal with the matter early.
15. In reply, Mr Bedford submitted that the Grounds of Appeal before Judge Freer, of fourteen paragraphs, do make the challenges that would be made today, and certainly it was not the case that there had been no suggestion (see paragraph 8) that the Appellant had not been disadvantaged. Furthermore, paragraph 13 draws attention to the Appellant's witness statement, and this should have led the judge to enquire into the witness statement, and consider the Appellant's age, which was not done. The plain fact was, that if Dr Burgess' report was to be taken at face value, then the Appellant was a child when he arrived and is still a child, because he only becomes an adult in November 2014.

### **Error of Law**

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision. My reasons are as follows.
17. The judge appears to have fallen into a fundamental error in this appeal by taking the position, after recognising that this was a matter which "went back to the drawing board because of the Section 55 point" following the determination of Judge Graham, but then observing that, "I see no evidence that the Respondent (or Judge Graham) has ever positively accepted the core account at all". It was for the present judge to determine the Appellant's "core account in terms of its reliability and veracity. To suggest that the burden of proof remains on the Appellant "and due to his very poor credibility" that "he does not meet the low threshold for asylum or other claims" (paragraph 50) is not helpful because the fact that his claim is not accepted by the Respondent, still requires the judge, as a fact-finding Tribunal to make these findings of fact. Yet, the findings were not made, save for the adoption of the refusal letter.

18. In the same way the fact was that the age of the Appellant was contested. The judge, however, stated that “the Appellant is now aged 19 years” (paragraph 64) when discussing the report of Dr Birch and considering where the issue of liability lay. The errors are so fundamental in this respect that there must be a finding of an error of law, and the decision should be set aside.
19. I cannot, however, under Section 12(2) of TCEA 2007, remake the decision because the evidence has to be reheard again in the proper manner to enable the Appellant to have the benefit of a First-tier Tribunal ruling in accordance with the Practice Statement 7.2, as there has been a failing to accord the Appellant a fair hearing at the First-tier Tribunal.
20. Accordingly, whilst I make a finding of an error of law, this matter is remitted back to the First-tier Tribunal to be determined again on a de novo basis with all issues outstanding.

### **Decision**

21. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge Freer, on all issues on a de novo basis.
22. Anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

9<sup>th</sup> May 2014