



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/04811/2013

THE IMMIGRATION ACTS

Heard at Field House  
On 29 October 2014

Determination Promulgated  
On 3 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MASTER A M  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Raza Halim, of Counsel  
For the Respondent: Mr Chris Avery, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING NO MATERIAL ERROR OF  
LAW

Introduction

1. The appellant appeals to the Upper Tribunal against the decision of Immigration Judge Kelsey (“the Immigration Judge”) to dismiss his appeal against the refusal of the respondent to grant him humanitarian protection or leave to remain on the basis

that he is a refugee or that his human rights under Article 3 of the European Convention on Human Rights (ECHR) would be unlawfully interfered with.

2. Upper Tribunal Judge Macleman gave him permission on 28 February 2014 because he considered that the grounds “may disclose significant errors of approach” which justified the grounds being properly argued before the Upper Tribunal. There was also a potential lack of clarity in paragraph 27 of the Immigration Judge’s determination.

### **Background**

3. The appellant is an Afghan national whose claimed date of birth is 1 January 1998.
4. The appellant claims to have fled Afghanistan in fear of the Taliban at the end of 2011 or beginning of 2012. He then travelled through Iran, Turkey, Greece, Austria, Italy and France before arriving in Dover hiding in a lorry on 4 July 2012. He claimed asylum on 20 July 2012 in Croydon. He had a screening interview on 6 February 2013 and on 13 February 2013 a substantive asylum interview. The respondent assessed his claim and gave detailed reasons for refusal on 3 May 2013. Having rejected the appellant’s asylum claim the respondent, in view of the appellant’s age, nevertheless decided to grant him leave to enter on a discretionary basis outside the Immigration Rules “for a specified period”. The specified period is set out in paragraph 71 of the refusal letter: 1 July 2015 when the appellant turns 17½.
5. The appellant appealed that refusal of asylum by notice of appeal dated 21 May 2013, claiming that expert evidence about Afghanistan as well as a psychological report and the in-country evidence supported his claim to being a credible witness to events in Afghanistan. The appellant’s father was “in the Taliban” who were aware of the whereabouts of the family. The appellant claimed that his father had been killed “by the British” and as a consequence the Taliban would be arriving to “take the appellant”. The police came to get him instead and knocked him unconscious. He was taken to hospital where he stayed for two or three days. After he returned home the Taliban came to his house, told him that they would put him in the car and took him to a deserted building. The appellant escaped with the help of a hidden mobile telephone which enabled him to contact his uncle, who took him “back home”. The journey to the UK took seven months.
6. The hearing of the appellant’s appeal came before the Immigration Judge on 14 November 2013 and he prepared his determination on 16 December 2013. He determined that the appellant had not been a truthful witness, indeed he was described as “contradictory and inconsistent” in paragraph 21 as well as “extremely vague”. The Immigration Judge dismissed the expert evidence of Peter Marsden having noted its contents. He had also seen a psychological report which he claims was “not drawn to my attention until after the hearing” but noted the appellant had learning difficulties. He also noted that he appeared to be a willing witness and was able to answer questions put to him without apparent difficulty. The Immigration

Judge found the appellant had no formal education. He found that there was “some factual basis for the account” but the appellant had not told the whole truth. He noted the contents of Mr Marsden’s report and found that although there were deficiencies on the part of the police service in Afghanistan there was not sufficient evidence that the appellant would be subject to a real risk of harm or indiscriminate violence if he returned there. Although the Immigration Judge recognised that forcible recruitment into the Taliban was a feature of life for young men like the appellant in Afghanistan, particularly in areas of high militant activity, nevertheless, the evidence did not support the view that the appellant would be recruited into that organisation. He therefore dismissed the appeal on all grounds argued.

### **Proceedings before the Upper Tribunal**

7. There are two sets of grounds of appeal before the Upper Tribunal. It seems that the first set of grounds was submitted with the application for permission to appeal to the Upper Tribunal from the First-tier Tribunal. This resulted in First-tier Tribunal Judge Heynes refusing permission to appeal on 29 January on the basis that the judge had reached findings open to him on the evidence which did not reveal an arguable case that those findings contained a material error of law. The “renewed grounds of appeal” are dated 10 February 2014 and are settled by Counsel. They assert that the report of Mr Marsden not only deals with the background information but applies that to the consideration of credibility of the appellant’s claim. Secondly, the report from a chartered educational psychologist found the appellant to suffer from “moderate learning difficulties” with an extremely low threshold of perception. Given his “significant difficulties” these were matters to take into account when looking at his willingness and ability to recount events in Afghanistan. These were the two principal grounds argued before the Upper Tribunal.
8. The respondent submitted a Rule 24 response stating that the Immigration Judge had plainly considered the expert evidence including the psychological assessment and found the appellant nevertheless to be incredible. He was entitled to make those findings and they were neither perverse nor irrational. The Immigration Judge had rightly not considered the issue of human rights because the appellant had leave to remain in the UK until 1 July 2015 and removal was not due to take place before 1 January 2016.
9. Standard directions were sent out by Mr Southern specifying that any new evidence not before the First-tier Tribunal had to be the subject of formal notice to the Upper Tribunal indicating the nature of that evidence and explaining why it had not been submitted to the First-tier Tribunal.

### **The Hearing**

10. The hearing lasted approximately one hour, at the end of which I reserved my decision as to whether or not there was a material error of law and if so to what extent the decision of the First-tier Tribunal needed to be set aside.

11. Mr Halim said that expert evidence was highly material and that the Immigration Judge had erred in his references to it. I was referred to page 44-45 of the appellant's bundle submitted for the hearing on 23 October 2014. That sets out the passages that are considered important in Mr Marsden's report. The Immigration Judge failed to have proper regard to the whole report which contains frequent references to the appellant's situation compared with the objective evidence. The Immigration Judge failed to properly assess credit and Mr Halim was particularly critical of paragraph 27 of the determination. The expert evidence should have been assessed in the round rather than being "tagged on" to the end of paragraph 27. The Immigration Judge had been wrong to say that he had not had his attention drawn to the psychological report until after the hearing. All passages should have been considered anyway, the evidence having been submitted in advance of the hearing. The expert had found consistency in the account of the appellant and that the appellant's evidence had been consistent with the objective evidence.
12. Secondly, the Immigration Judge was criticised for failing to attach proper weight to the expert educational psychologist's report. This too was drawn to his attention and should have gone to the issue of credibility. The appellant ought to have been found to be truthful. The educational psychologist's report had not been properly considered and that was a material error.
13. The third ground of appeal related to the Immigration Judge's subjective view of credibility. It was wrong of the appellant to be characterised as being "unable to answer simple questions" when the expert evidence makes clear that there is an explanation for that. The appellant was especially vulnerable to the approaches of the Taliban and could easily have been involved in a suicide attack.
14. Finally, the Immigration Judge was criticised for applying the wrong test to the question of risk on return. I was particularly referred to paragraph 21 and later paragraphs where the Immigration Judge found that unless and until the appellant is actually returned he did not regard him as being at risk of harm within Article 3 of the ECHR. This was the wrong approach. The fact that removal may be in the future did not absolve the Immigration Judge from making findings. I was referred to **AA (Afghanistan) [2012] UKUT 00016 (IAC)**. I was invited to treat the appellant as a person who would be returned as at the date of the hearing. But were this to occur, as a child, he would be forcibly recruited into the Taliban and there was a real risk of this. The determination was unsustainable and I should remit it for a *de novo* hearing to the First-tier Tribunal. I pointed out to Mr Halim that this was not the normal practice and that now the matter was before the Upper Tribunal any future hearing would be before that Tribunal if it were necessary.
15. The respondent said that the fundamental problem was not with the expert evidence but with the appellant's own evidence which had been rejected. It is clear that the psychological report was not actually in the bundle, although a copy may have been provided to the Immigration Judge. The Immigration Judge had recorded the

appellant's educational difficulties at paragraph 15 of the determination. He had regard to that evidence but rejected the appellant's allegation that he would be a suicide bomber. Overall the assessment of credibility was not something that the Upper Tribunal should interfere with.

16. Dealing specifically with ground 4 the Immigration Judge had looked at the background situation. It was not particularly clear as to what parts he accepted and what parts he did not. However, the judge accepted that there was no risk based on his adverse credibility findings. The Immigration Judge should have more carefully distinguished between the asylum situation and the claim under Article 3 of the ECHR. But this could be addressed by re-making that part of the decision rather than setting aside the entire determination.
17. Mr Halim's response was that the treatment of the expert evidence had been unreasonable. The determination was unsustainable in its present form. Given the consistency with the objective evidence this was a key factor in deciding the credibility of the appellant's account. I was urged to have regard to both reports. At the end of the hearing I reserved my decision, as I have indicated. I also indicated that if a fresh hearing became necessary I would make directions but that evidence would be limited to any developments since the hearing before the First-tier Tribunal. It would also be held in the Upper Tribunal not in the First-tier Tribunal.

## **Discussion**

18. The appellant appealed to the First-tier Tribunal against the decision of the respondent to refuse him leave to remain on the basis that he was a refugee/a person in need of humanitarian protection/entitled to remain on human rights grounds. He claims that as an Afghan child (allegedly born on 1 January 1998 – disputed) his father, a Taliban member, was killed by the British. He claims to fear that he will be recruited into that organisation following a period when he was taken captive for eight to ten days and trained in the techniques of suicide bombing. He claims that his reaction to these events was to embark on a long journey by lorry across Turkey, Greece, Austria and France, finally arriving in the UK on 4 July 2012 and submitting a claim to asylum. It seems this was the second such claim, the first being submitted in Austria but not having been determined by the authorities there, if the appellant is to be believed. The appellant fears that if he returns to Afghanistan he will become a suicide bomber under the control of the Taliban. The above events forced him to escape with the aid of an uncle in the manner described.
19. The Immigration Judge comprehensively rejected the appellant's account, finding it "contradictory and inconsistent". He took account of the appellant's young age and his limited education and made more than one reference to his learning difficulties. He also took full account of the country background information by reference to the report of Mr Peter Marsden and other information including the leading case law of **HK and Others [2010] UKUT 378**.

20. There are three principal lines of attack on the decision of the First-tier Tribunal:
- (1) that the Immigration Judge failed to have adequate regard to the detailed contents of Mr Marsden's report;
  - (2) that the Immigration Judge should not have made adverse findings as to the appellant's account given his learning difficulties;
  - (3) the Immigration Judge ought to have assessed the risk on return at the date of the hearing and not have assumed, as it is suggested he did, that were he to do that he ought to have reached the conclusion that the appellant was at risk and should be granted asylum/humanitarian protection/human rights protection.
21. I have examined these contentions very carefully and I am assisted by Mr Halim's persuasive submissions. However, having done so I have concluded that there was no material error of law in the decision of the First-tier Tribunal.
22. The Immigration Judge did consider the expert evidence and made more than one reference to it but he was entitled to set that evidence against the other credibility findings he made. The fact that the appellant had travelled through several safe countries and had submitted a claim in one of those countries (Austria) without allowing it to be concluded was a relevant factor for the Immigration Judge to take into account in judging credibility. A child conscript who was able so easily to escape from the Taliban's control and who was unable to give any details of the methods they used in terms of preparing suicide bombers, are also relevant factors. The Immigration Judge demonstrated that he had regard to the appellant's lack of education and also considered his learning difficulties. Indeed, the respondent's representative before the First-tier Tribunal conceded that the appellant suffered from "learning difficulties". But the Immigration Judge demonstrated that he took account of these factors in paragraphs 14 and 21 of his determination. He took full account of Mr Marsden's report and its conclusions as he also demonstrated (see paragraph 27 of his determination). It was not incumbent on the Immigration Judge to set out fully each and every item of evidence that he accepted and each and every item of evidence that he rejected. He was entitled to look at the overall cogency of the appellant's case.
23. Mr Halim also pointed out that it is necessary to assess the hypothetical risk of persecution/humanitarian protection need/human rights grounds at the date of the hearing. The burden rested on the appellant but that was to be discharged to a low standard of proof, that of a reasonable degree of likelihood. It is trite law that the appellant had to establish that he had been pursued with malignancy and that there would be a risk on return to Afghanistan.
24. The reference to the absence of removal directions in paragraph 20 of the determination is curious but it must be read with the previous paragraph which states that in judging whether the appellant has a right to be granted humanitarian

protection the issue is decided at the “date hereof”. Therefore, I am not satisfied that it is a material error on the part of the Immigration Judge having regard to the whole decision that he has reached. In particular, in paragraph 27 the Immigration Judge recognised that there is “some indiscriminate violence in Afghanistan” and he accepted that the objective evidence was broadly consistent with the appellant’s account. The problem for the appellant is that the Immigration Judge did not believe his account. I am satisfied that the Immigration Judge did take into account the correct test, namely whether there was a real risk to the appellant if he were returned to Afghanistan at the date of that hearing. The fact that the appellant was not at risk of imminent removal was merely a background matter that the Immigration Judge took into account and was not central to his decision.

25. Finally, the Immigration Judge took into account Article 8 of the ECHR but did not find any evidence had been produced to support a family or private life in the UK such as to discharge the burden of showing that the appellant qualified under either the Immigration Rules or under the ECHR on this basis.

### **Conclusion**

26. In conclusion, the First-tier Tribunal was entitled to conclude that the appellant had not met the requirements for the forms of international protection that he relied on and I find no material error of law in the decision of the First-tier Tribunal.

### **Decision**

There was no material error of law in the decision of the First-tier Tribunal and the decision to dismiss the appeal against the decision of the respondent to refuse the appellant’s claims therefore stands.

The Immigration Judge made an anonymity direction and that direction stands.

The Immigration Judge made no fee award as no fee was payable.

Signed

Date

Deputy Upper Tribunal Judge Hanbury