



**Upper Tribunal
(Immigration and Asylum Chamber)**
AA/06705/2014

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Columbus House
Newport
On: 23 June 2015**

**Decision and Reasons
Promulgated
On 1 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

IK

(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant:
For the Respondent:
Officer

Mr B Hoshi, Counsel instructed by Sultan Lloyd
Mr I Richards, Home Office Presenting

DECISION AND REASONS

1. This is an appeal against the determination of Designated First-tier Tribunal Judge McCarthy in which he dismissed the appeal of the Appellant, a citizen of Afghanistan, against the Secretary of State's decision to refuse asylum.

2. The Appellant arrived in the United Kingdom on 11 February 2009 as an unaccompanied minor then aged 13 and claimed asylum. His claim was refused but he was granted discretionary leave to remain until 8 October 2010 in accordance with the Respondent's policy and this was later extended to 1 July 2013. On 27 June 2013 the Appellant applied for further discretionary leave and on 29 August 2014 this application was refused. The Appellant appealed against this decision on asylum and Article 8 ECHR grounds. This is the appeal which came before Judge McCarthy on 10 October 2014 and was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. The application was refused by Designated First-tier Tribunal Judge MacDonald on 8 December 2014 but on renewal to the Upper Tribunal permission to appeal was granted by Upper Tribunal Judge Storey on 24 March 2015 in the following terms

I see no substance in the contention that the judge erred in relation to consideration of the family tracing issues or in relation to the westernisation or delay issues. However, I am troubled by the fact that in the course of finding the appellant to lack credibility, the judge does not appear anywhere to take into account that when the appellant arrived in the UK and was interviewed he was still a minor and the assessment of minors cannot be approached in the same way as assessment of adults.

The Respondent submitted a rule 24 response dated 14 April 2015 opposing the appeal and submitting that the Judge directed himself appropriately.

3. At the hearing before me Mr Hoshi appeared on behalf of the Appellant and Mr Richards represented the Respondent. Mr Hoshi submitted copies of the authorities of AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) and KS (benefit of the doubt) [2014] UKUT 00552 (IAC).

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the appellant left Afghanistan at a very young age being fingerprinted in Greece in July 2008 (aged 12) before arriving in the UK on 11 February 2009. On his arrival in the United Kingdom the Appellant claimed that it had taken him two months to travel to the United Kingdom from his home in Afghanistan and he maintained this account until his application for asylum was refused in October 2009 when it was established that he had been fingerprinted in Greece on 29 July 2008. In claiming that it had taken two months to get to the United Kingdom the Appellant's account was that his father had been killed three months before he left Afghanistan. After his application for asylum was refused the Appellant revised the account of his journey to the United Kingdom

saying that it took one year and two months to get here rather than just two months and, as a result, events he claimed occurred in Afghanistan took place a year before he had initially claimed.

5. The particular event that the Appellant claimed caused him to leave Afghanistan was the death of his father and cousin. The Appellant said that his father had been a Mujahedeen Commander before the Taliban were established. He ran a petrol station with the Appellant's cousin. One night, about 3 months before the Appellant left Afghanistan, whilst his father was guarding the petrol station he and the Appellant's cousin were killed. His father was stabbed and his cousin shot with a machine gun. The Appellant went to live with his uncle but was subjected to threats by letter and in person. The Appellant's uncle sent the Appellant away because he told him that he was in danger.
6. The First-tier Tribunal Judge made an adverse credibility finding. Having found that the Appellant was not telling the truth when he claimed to have left Afghanistan two months before arriving in the United Kingdom the Judge's reasons for disbelieving his amended account are probably best summed up at paragraph 36

"...I realise that if the appellant's latest account of how long his journey took is accepted, then it undermines his accounts regarding when his father and cousin were killed. This is because their deaths could not have occurred in 2008 but would have occurred in 2007. If that were true, then the appellant's answers at interview about how long it was after he left school that his father and cousin were killed must be wrong. The consistent account simply falls apart if the journey took one year and two months."

7. In the grounds of appeal to the Upper Tribunal the Appellant asserts that the Judge failed to give any consideration to the core of the Appellant's claim basing his adverse credibility finding upon the Appellant's account of his journey and in so doing the Judge failed to have proper regard to the fact that the Appellant was, at all material times, a minor.

Submissions

8. For the Appellant Mr Hoshi referred to the grounds of appeal saying that there was a narrow issue concerning the age of the Appellant. He reminded me of the timeline of the Appellant's account. AA (unattended children) refers (at paragraph 38) to Article 4(3) of the Qualification Directive requiring an individual basis of assessment taking into account, inter alia, the age of the applicant. Paragraphs 350-352X of HC395 provide that where the applicant is a child more weight should be given to objective indications of risk. This is

repeated in the Respondent's asylum policy guidance and further this guidance suggests that care must be taken before making an adverse credibility finding and that the benefit of the doubt should be applied more generously. Mr Hoshi referred to KS (benefit of the doubt) and in particular paragraphs 97-99 regarding children.

9. The Appellant's account is rejected on the basis of a single discrepancy. The decision refers to the Appellant's age only twice. At paragraph 24 the Judge refers to the Appellant's age and asks *"why he gave (his first) account and why he only admitted it was wrong after the initial refusal of his asylum claim."* This not the right question and it was not right to assume that the Appellant only admitted it was wrong after the refusal. The Judge should have followed the guidance and considered the objective evidence not drawn adverse inference. The Judge should have asked if the Appellant's account of what happened in Afghanistan was broadly consistent with the objective evidence to which the answer would have been positive.
10. Mr Hoshi added that compelling third party evidence had been ignored referring to the evidence given by the Appellant's foster mother. This was rejected out of hand (paragraphs 47 and 53). It was highly unlikely that the Appellant would have been able to conceal contact with his family from his foster mother. The Judge's criticism of the Appellant's vagueness (paragraph 30) does not recognise that he was being asked at the age of 19 about a journey undertaken when he was 11 or 12 years old. It was unfair to compare his recollection of recent events with his recollection of events long ago. When he was recalling events at interview they occurred two or three years ago whereas at the hearing these events were seven or eight years ago. At paragraph 36 the Judge suggests that if the Appellant's latest account is accepted then his timeline is awry but gives no indication that this was put to the Appellant or that this is the kind of thing that age is likely to distort.
11. The second mention of the Appellant's age is at paragraph 41 where the Appellant's account is rejected. When the decision is looked at in the round it can be seen that proper account was not taken of age. It is accepted that the change in the Appellant's account was significant and material but the Judge did not do enough to consider the age of the Appellant at the relevant times and the third party evidence.
12. For the Respondent Mr Richards said that no material error was disclosed. This is an extremely meticulous and fair determination and the Judge clearly had the Appellant's age in mind at the relevant times. Referring to paragraph 24 Mr Richards said that the

Judge directed himself properly. It was appropriate to examine the Appellant's account. There is an extremely thorough examination of the evidence and full account is taken of the Appellant's age at the material times. It is quite obvious that a child is just as capable of telling a lie as an adult. The thorough analysis results in clear conclusions.

13. The Judge goes on to analyse how the untruths told by the Appellant have a knock on effect on his story generally. This was a proper conclusion to draw. The Appellant's account could not be true. There is no question of applying the benefit of the doubt because on the Judge's analysis there was no doubt. So far as the evidence of the Appellant's foster mother is concerned this, looking at matters in the round, did not have an effect on the findings. The crucial issue is why the Appellant fled. The Judge makes the later finding that even if the Appellant had lost contact with his family then as an adult this has no bearing on risk on return. This is a thorough and meticulous analysis and the grounds do not disclose a material error.
14. I reserved my decision. Both representatives agreed that if a material error of law was found this matter should properly be remitted to the First-tier Tribunal.

Error of law

15. The grounds of appeal to the Upper Tribunal taken together with the grant of permission and Mr Hoshi's submissions are straightforward. It is asserted that the Judge failed to take proper account of the Appellant's age when assessing credibility. The rule 24 response and Mr Richards submissions are equally clear in their rejection of these grounds on the basis that in a commendably meticulous and fair analysis the Judge took proper account of the Appellant's age.
16. In the first place it is essential in considering whether there is an error of law to be clear about the Appellant's age at the relevant times. There is no dispute about the Appellant's age. He was born on 1 January 1996. When he first came to recorded attention in Greece on 29 July 2008 this means he was 12 years old. There is nothing to corroborate his evidence of when he left Afghanistan. His original claim to have left Afghanistan 2 months before he arrived in the United Kingdom (i.e. December 2009) was clearly wrong. His revised claim (made in his statement of 20 August 2010 when he was 14 years old) puts the date of leaving Afghanistan at one year and two months before his arrival in the United Kingdom (i.e. December 2008). Whether this is correct or not it is clear that the

Appellant must have left Afghanistan just before or just after his 12th birthday meaning that the events that he claimed caused him to leave, if they did in fact happen, happened when he was 11 or 12 years of age. The Appellant's initial account of these events was given when he was 13 and his 'revised account' when he was 14. The Appellant was asked to explain the discrepancies between his original consistent account, caused by the timescale in his revised account, when he was 18.

17. It is against this background that the Judge's credibility findings must be examined. Firstly it is clear from a holistic reading of the determination that the Judge was at all times aware of the Appellant's age at the relevant times. Apart from the references to his age highlighted by Mr Hoshi at paragraphs 24 and 41 there is clear reference to his date of birth in the opening paragraph and to his age and placement in foster care in paragraph 2 and to the Respondent's policy concerning unaccompanied children in paragraph 3. The later references to the Appellant's schooling in Afghanistan and his foster family and schooling in the UK make it apparent that his age is a constant factor in this determination and in the Judge's consideration of events.
18. However whereas the Judge was clearly aware of the Appellant's age it is not clear how, if at all, this factor was taken into account in the Judge's credibility assessment. There is no self direction to the Respondent's asylum policy guidance or to the established case law. The reasoning in respect of lack of credibility is indeed meticulous, even forensic, but in my judgement it is at fault in three ways.
19. Firstly the reasoning concentrates exclusively on the Appellant's account of the length of time his journey from Afghanistan to the United Kingdom took. Although there is reference to the core of his claim this reference is brief and is informed by the credibility issues over the Appellant's journey
"The consistent account simply falls apart if the journey took one year and two months" (paragraph 36).
20. Secondly in examining the Appellant's account of his journey the Judge takes as his starting point the account that the Appellant accepted as being incorrect (paragraphs 14 -21) rather than examining the account adopted since 2010. Whereas the Judge correctly says at paragraph 24 that it is appropriate to examine why the Appellant gave the one account on arrival only admitting it was wrong after the initial refusal of the asylum claim the Judge does not give any allowance, despite referring to the Appellant's age, for the fact that an account given by a child of 12 or 13 may well be

intrinsically unreliable or have been influenced by others and therefore go on to examine the objective basis of his claim. At no point does the Judge consider the core of the Appellant's claim having already rejected his credibility on the basis of the varying accounts of his journey.

21. Thirdly there are in any event miscalculations in the forensic analysis, for example at paragraph 16

"The appellant said that his father was killed three months before he left Afghanistan (question 31) and that he had been out of school for two and a half years when his father was killed, although he was not exactly sure (question 32). Given that the appellant arrived in the UK in February 2009, three months earlier would place his father's death in November 2008. Equally, if it occurred two and a half years after he left school, it would have occurred in late autumn 2008. Both calculations tie in with the Appellant's account of his journey having taken two months".

In fact if the Appellant's journey took two months and his father was killed three months before he left Afghanistan his father's death would have occurred in September, i.e. early autumn, 2008. This paragraph indeed is a clear example of the Judge being extremely forensic over dates factoring into his calculation a 13 year olds account of the time he spent at school between the ages of 7 and 9 along with the Judge's inference of the dates of the Afghan school year (paragraph 15) but then making a miscalculation.

22. In my judgement, and looking at the determination as a whole, the Judge has misdirected himself by failing to take proper account of the Appellant's age and thereby taking a child sensitive approach to the standard of proof. This is a material error of law.
23. Finally I turn to the evidence of the Appellant's step mother. At paragraph 47 of the determination the Judge confirms that the Appellant's step mother confirmed that the Appellant had not been able to contact his mother by telephone since a few months after he arrived. At paragraph 53 the Judge finds that he is not satisfied that the Appellant is no longer in contact with his family in Afghanistan as he has been found *"to be generally not reliable as a witness"*. No reason is given why the Appellant's step mother's corroboration of the Appellant's account in this respect is rejected. The general unreliability goes back to the credibility assessment of the Appellant's account of his journey. Whereas this does not go to the core of the Appellant's account it is in my judgement further indicative of an over forensic approach to the evidence of a child that renders the adverse credibility findings unsafe.

24. My conclusion from all of the above is that the adverse credibility findings made are unsafe. The Judge whilst clearly having in mind the Appellant's age has failed to demonstrate that he has had due regard to the Appellant's age in assessing credibility either at the various stages of his account or at the time that he was being called upon to recall events. This is in my judgement a material error of law and the nature of the error of law goes to the root of the adverse credibility finding and is such that the determination falls to be set aside. The only fair and proper course is a full rehearing of this appeal with no findings preserved. As this is a full rehearing and in accordance with the President's direction this matter is suitable for and should be remitted to the First-tier Tribunal.

Summary

25. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision and remit the matter to the First-tier Tribunal with no findings preserved.

Signed:

Date:

**J F W Phillips
Deputy Judge of the Upper Tribunal**