



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/07667/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 May 2015

Determination Promulgated
On 22 May 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

AFG
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A Eaton, instructed by Brighton Housing Trust
For the respondent: Ms E Sage, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, AFG, with notional date of birth of 1.1.00, is a citizen of Afghanistan.
2. This is his appeal against the decision of First-tier Tribunal Judge Webb promulgated 2.2.15, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 11.9.14, to refuse his asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 5.12.14.
3. First-tier Tribunal Judge White granted permission to appeal on 25.2.15.

4. Thus the matter came before me on 11.5.15 as an appeal in the Upper Tribunal.
5. The appellant did not attend the appeal hearing. At the conclusion of the submissions of the parties I reserved my decision on error of law, which I now give.
6. The relevant background can be briefly summarised as follows. The appellant claims that he lived in Ghazni Province with his parents and 4 younger siblings. He attended the local mosque for Islamic studies. When his old Qari (religious teacher) left he began studying with a new Qari, who told him that he would, or would like to, take him to Pakistan. When he recounted this to his family, his father was angry and went out, the appellant presuming that he intended to speak with the Qari. His father was murdered. As his mother feared he would be taken to Pakistan or otherwise harmed, it was decided to send him out of the country. He claims to have arrived in the UK in April 2014. His asylum claim was made on 30.4.14.
7. The Secretary of State's decision refused his asylum, humanitarian protection and human rights claims. However, as the appellant was just 14 years of age, he qualified for discretionary leave as an asylum seeking child until he turned 17.5 years on 1.7.17, but the Secretary of State would not seek to remove him until contact had been made with his family, or until he turned 18 on 1.1.18.
8. Following detailed and careful assessment of the appellant's various accounts, Judge Webb rejected the appellant's core claim as not credible and thus found he had failed to demonstrate to the lower standard of proof that he faced a real risk of persecution on return for a Convention reason, or that there was a real risk of serious harm on return. Article 8 ECHR, whilst addressed in the Secretary of State's refusal decision, does not appear to have been pursued at the First-tier Tribunal appeal hearing and no decision was made in respect of the same. Neither is article 8 addressed in the grounds of application for permission to appeal and thus there is no material error of law in not addressing article 8.
9. The grounds assert:
 - (a) That the judge did not adopt the correct approach in assessing the evidenced of an unaccompanied minor and placed undue weight on what are contended to be minor or non-existent discrepancies in the evidence, failed to consider concerns raised about the conduct of the asylum interview;
 - (b) Failed to consider the expert evidence of Dr A Guistozzi when assessing the appellant's credibility;
 - (c) That having accepted that the Secretary of State failed to carry out her tracing duties, the judge failed to consider whether the appellant would be (in theory) returned to Afghanistan as a minor without family support;
 - (d) Failed to properly consider the risk of returning an unaccompanied minor to Afghanistan in a situation of internal armed conflict.

10. In granting permission to appeal, Judge White considered it arguable that the judge had not given due allowance for the appellant's age; failed to properly engage with the expert report; and that insufficient consideration was given to the (hypothetical) risk of returning the appellant to Afghanistan as an unaccompanied minor without adequate reception facilities.
11. The Rule 24 response submits that the First-tier Tribunal Judge directed himself appropriately. "The Immigration Judge has noted at paragraph 23 the advice of the UNHCR on interviewing minors and there is no indication that the Immigration Judge has not paid heed to this advice in the determination. Further at paragraph 26 onwards the Immigration Judge has given an extensive recital of the questions and answers of the appellant and has at paragraph 27 highlighted some of the more important inconsistencies. He records at paragraph 31 the complaint from the appellant's solicitors concerning the interview record and comes to a conclusion open to him at paragraph 33 that he simply does not believe the core account given. Further the Immigration Judge is required to make a finding on the expert evidence of Dr Giustozzi and it is submitted that the finding he has made at paragraph 25 is entirely open to him. It is submitted that there is no material error in the determination."

Error of Law

12. For the reasons set out below, I find that there was no material error of law in the making of the decision of the First-tier Tribunal such as to require the determination of Judge Webb to be set aside.
13. My attention has been drawn to KS (benefit of the doubt) [2014] UKUT 552 (IAC), where the Upper Tribunal held that in assessing the credibility of an asylum claim, the benefit of the doubt as discussed in the UNHCR Handbook is not to be regarded as a rule of law, but is a general guideline. The benefit of the doubt adds nothing of substance to the lower standard of proof. The UNHCR Handbook proposition that in assessing the evidence of a minor there may need to be a liberal application of the benefit of the doubt is also not to be regarded as a rule of law, or statement of universal application and adds nothing of substance to the lower standard of proof.
14. The appellant left Afghanistan when he was only 13 and was aged 14 at the date of the First-tier Tribunal appeal hearing. At §23 the judge took KS into account and it is clear from reading the decision as a whole that the judge very much had the appellant's young age at the forefront of his mind when considering the factual credibility of his claim. It is mentioned at §1, §9, §13, §23, §24, and §33. For example, the judge took care to remind the representatives to be sensitive and aware of the appellant's age and to ensure that questions were phrased appropriately, in simple terms. The judge also acknowledged Mr Eaton's submissions that a liberal approach should be taken to the benefit of the doubt in assessing the appellant's evidence. At §33 the judge stated that, "The fact that the appellant was only a young teenager at the date he states the relevant events occurred in Afghanistan is obviously something that must be considered when assessing the credibility of his account." However, the standard of proof in demonstration his factual claim remains the lower standard of

proof. Despite making allowances for the appellant's age and maturity, the judge concluded at §33 that he had not established his core account to that lower standard. The judge is entitled to reach such a conclusion notwithstanding the appellant's youth. Frankly, his account was not believed and the judge concluded that the submission that he was at risk from the Taliban was no more than speculative. I find no error of law in respect of this issue. It cannot be said that the judge's findings were perverse or irrational.

15. Related to this ground is the complaint that in making the credibility findings the judge relied on so-called discrepancies which were "by and large not significant" according to Mr Eaton, and that some of them were mistakes of fact. It is further submitted that far too much weight was put on the discrepancies. With respect to Mr Eaton the question of weight to be placed on the evidence is a matter for the judge. I note that whilst the judge has very carefully set out the appellant's different accounts, extending to some 10 pages of the decision, the judge did not rely on all of those matters but at §27 stated, "I shall now highlight the matters I believe are of particular relevance," and proceeded to identify those matters between §27 and §32, taking into account at §31 and §32 the complaint made by the appellant's representative, expressing concern at the conduct of the asylum interview. As a result of that concern, the judge paid particular attention to the substantive asylum interview record. On analysis, the judge was not satisfied that the complaint was made out and found that it did not, in any event, address the inconsistencies between the interview and other statements of the appellant, and could not, of course, address the further inconsistencies identified by the judge from the oral evidence at the appeal hearing.
16. I have carefully considered the matters relied on by Mr Eaton in his submissions, as well as the grounds of appeal, but find that this ground is no more than a disagreement with the findings of the judge and does not disclose any material error of law. The findings and conclusions therefrom were entirely open to the judge on the evidence and for which he has provided cogent reasoning. The submissions of Mr Eaton are in effect that because of his youth the appellant's unsupported account should have been accepted in its entirety, despite the vagueness and inconsistencies with the core claim. That is not a correct view of the Tribunal's task. Despite giving careful consideration to his youth, the appellant still has to meet the lower standard of proof. It was clearly open to the judge to consider the criticisms of the interview process, look into the interview record and make his own conclusions. In the circumstances, there is no error of law in this regard.
17. Mr Eaton also complained that the judge failed to properly engage with the expert report of Dr Guistozzi. Frankly, the expert and professional opinion of Dr Guistozzi is rather undermined by a series of somewhat astonishing pure speculations as to what may have happened in Afghanistan, as the judge analysed at §25 of the decision. For example, suggesting that the father may have been in an altercation with the Qari over money, or pressure put on the family, and that Qari have may reacted violently. Or that the Qari is likely to have reported the killing of the appellant's father as a execution of a spy or collaborator. There is absolutely no factual basis for these speculations and they only serve to undermine the credibility

of Dr Giustozzi as an objective and impartial expert. I am satisfied that an expert properly applying himself to his professional duties would not have promoted such speculation in a so-called expert report. However, it is clear from reading the decision as a whole that the judge did not ignore the expert report. For example, at §24 the judge noted the expert's evidence that the Taliban do not practice forced recruitment, but that some children are taken from villages for religious training against the wishes of the family. The judge expresses the view at §24 that more evidence from the expert on this issue would have been helpful. It is thus clear that the report was not dismissed wholesale. In the circumstances, I find no error of law in the judge's engagement with the expert report. The conclusions in respect of the report were entirely open to the judge.

18. Finally, Mr Eaton complains that, putting aside the claimed specific risk to the appellant, the judge failed to address the general risk for a 14 year old youth, returning to Afghanistan. The judge noted that the particular vulnerability of unaccompanied minor children led to special provisions in handling their cases. At §22 the judge noted from the case authorities that a failure to discharge the tracing duty may be relevant to judicial consideration of an asylum or humanitarian protection claim, but that such consideration is fact specific, requiring the appellant to provide a credible account. "When one is considering asylum or humanitarian protection the burden of proof lies on an appellant not just to establish the failure by the respondent to discharge the duty to endeavour to trace but also that he (the appellant) is entitled to what he is seeking." At §35 the judge noted that the appellant's family had not yet been traced and so there was no evidence that he would be able to be met by family at Kabul Airport on return to Afghanistan. However, the judge found in the same paragraph that the appellant has relatives in Afghanistan, including a parent who arranged or financed his departure and a paternal uncle in Kabul itself. The judge took these matters into account but found that the appellant had failed to discharge the burden on him to demonstrate that he is at risk of persecution or serious harm on return. His account was not accepted at all, which would include his claim as to his family circumstances and that his father was murdered. The appellant did not therefore demonstrate that he would be without family support on return. In the circumstances, it was for the appellant to demonstrate that his family would not be able to meet him on return to Kabul Airport.
19. In assessing this issue, the judge had regard to AK (Article 15(c) Afghanistan CG [2012] UKUT 163 (IAC), noting that the level of indiscriminate violence, including in the appellant's home area in Ghazi Province, is not at such a level as to mean that a civilian, solely by being present, faces a real risk which threatens his life or person. However, the judge also recognised the continued applicability of AA (unattended children) Afghanistan CG [2012] UKUT 0016 (IAC), to the effect that when considering whether children are disproportionately affected by the consequences of the armed conflict in Afghanistan, a distinction should be drawn between children living with a family in Afghanistan and those who are not. 'Unattached' children returned to Afghanistan face a real risk of serious harm from indiscriminate violence, forced recruitment, etc.

20. In HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC) the Tribunal had said amongst other things that where a child has close relatives in Afghanistan who have assisted him in leaving the country, any assertion that such family members are uncontactable or are unable to meet the child in Kabul and care for him on return, should be supported by credible evidence of efforts to contact those family members and their inability to meet and care for the child in the event of return.
21. Ms Sage also drew the Tribunal's attention to EU (Afghanistan) [2013] EWCA Civ 32, a case on similar facts to the present, where the two appellants were in the UK as unaccompanied minors, aged 15 and 16, whose asylum claims were refused but who were granted discretionary leave to remain until the age of 17½. The appellants failed to establish a need for international protection or an entitlement to asylum, but relied on the Secretary of State's breach of duty to endeavour to trace their respective families. The Court of Appeal applied the principles of KA, accepting that the failure may be relevant to the assessment of risk on return.
22. Sir Stanley Burnton stated at §6 that, "Of course, breaches of the duty of Secretary of State in addressing a claim may lead to an independent justification for leave to remain, of which the paradigm is the Article 8 claim of an asylum seeker whose claim has not been expeditiously determined, with the result that he has been in this country so long as to have established private and family life here. But to grant leave to remain to someone who has no risk on return, whose Convention rights will not be infringed by his return, and who has no other independent claim to remain here (such as a claim to be a skilled migrant), is to use the power to grant leave to remain for a purpose other than that which it is conferred. In effect, it is to accede to a claim to remain here as an economic migrant. The principle in Rashid has been referred to as 'the protective principle,' but this is a misnomer: the person seeking to rely on this principle needs to do so only because he has been found not to be in need of protection. I do not think that the Court should require or encourage the Secretary of State to grant leave in such circumstances either in order to mark the Court's displeasure at her conduction, or as a sanction for her misconduct." However, it was accepted that the breach of duty may be relevant to the assessment of risk on return and the Tribunal should take into account the lack of evidence from the Secretary of State as to the availability or otherwise of familial support.
23. The Court of Appeal also considered as a point of substance that submission of the Secretary of State that unaccompanied children who arrive in the UK have done so as a result of someone, presumably their families, paying for their fare or an agent to arrange their journey to the UK. They are unlikely in the circumstances to be happy to cooperate with an agent of the Secretary of State for the return of their child to Afghanistan, which would mean the waste of their investment in the child's journey to the UK.
24. On the particular facts of the appellant EU, the Court of Appeal noted that the tribunal had dismissed his appeals, finding his account a fabrication designed to gain him access to the UK. The First-tier Tribunal Judge found that no reliance could be placed on his claim not to be in touch with his family. He had an aunt who lived in

Kabul and the First-tier Tribunal Judge found it was a matter for him and his family whether he remained in Kabul or returned to his village, but it was not unreasonable to expect him to relocate to Kabul. The Court of Appeal found that the findings of fact by the First-tier Tribunal included rejection of the assertion that he was not in touch with his family and it thus followed that there was no link between the breach of tracing duty by the Secretary of State and EU's claim to remain in the UK. His case was unmeritorious.

25. Similarly, in the case of SU, the Tribunal did not accept that he had lost contact with his family. The Court of Appeal did not accept that the corrective principle should be applied given the rejection of his claim. The appeals of each appellant were dismissed.
26. It follows from the above, that on the factual findings of First-tier Tribunal Judge Webb, the appellant is not entitled to the application of the 'corrective principle' just because the Secretary of State had not traced the appellant's family. The judge was entitled to conclude, for the reasons stated, that the appellant had failed to demonstrate a risk on return, either in relation to his specific claim, or the general risk on return of a minor.

Conclusions:

27. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I continue the anonymity direction.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

A handwritten signature in black ink, appearing to read 'J. Pickup', is centered on the page.

Signed

Deputy Upper Tribunal Judge Pickup