



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11102/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 October 2015**

**Decision & Reasons Promulgated
On 6 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

**H S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Head, Lawrence Lupin Solicitors

For the Respondent: Mr Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan. He was born on 28 March 1999. His application for asylum was refused by the Respondent on 12 September 2014 but in view of his age, discretionary leave was granted outside the Immigration Rules until 28 September 2016. The Appellant appealed that decision under section 83 (2) of the Nationality, Immigration and Asylum Act 2002. His appeal was dismissed by First-tier Tribunal Judge R Cassel in a decision dated 26 March 2015.

2. Permission to appeal against that decision was granted on 6 July 2015 by Upper Tribunal Judge Finch on the following basis. The Upper Tribunal considered that the First-tier Tribunal had dismissed the evidence of three witnesses who had direct knowledge of the Appellant's family history on the basis that their evidence was hearsay, when there was no requirement in asylum law and proceedings that hearsay was not admissible evidence. Further, when considering the Appellant's own evidence the First-tier Tribunal failed adequately to take into account the Appellant's age when the asylum interview was conducted and that these two factors fundamentally undermined his findings of fact. Permission was also granted on the basis that the First-tier Tribunal had given a very cursory consideration of family tracing which needed to be reconsidered in the light of **TN and MA (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40** in which the Supreme Court considered the impact of the best interests principle in family tracing cases. It was also noted in the grant of permission that in any event paragraphs 55 to 58 of the decision failed to give sufficient weight to the likely effect of returning a child to Kabul at the age of 15 when his family had not yet been traced.

The Grounds

3. The grounds to the Upper-tier Tribunal for permission to appeal can be summarised as follows. They argue that the First-tier Tribunal made a material error of law in failing to give sustainable reasons for reaching findings that conflicted with the evidence of the witnesses, failing to give cogent or sustainable reasons for finding the Appellant could return to Afghanistan as a 15 year old without contact with his family and failing to or failing to competently or adequately consider the relevant case law and background in relation to minors in Afghanistan.
4. In particular it is argued that the Judge's finding that the Appellant's claim that his father worked for the Arbaki was implausible was unsustainable. The basis for this finding was that the Appellant's father was able to carry out his role for the Arbaki for nine months without fervent pursuit. The Appellant submits in the grounds of appeal that the finding is unsustainable because it can clearly not be implausible that he carried out a job for nine months without being killed by the Taliban.
5. It is further submitted that the Appellant's uncle who had been tested and found credible by the Tribunal confirmed that he had spoken to his wife who had confirmed that the Appellant's father had joined the Arbaki and had been murdered. It is submitted that the Judge had failed to give any cogent reason why this evidence should be rejected. The Appellant had produced three separate witnesses all of whom confirmed to the court through their own separate sources they knew that the Appellant's father had joined the Arbaki. It is further submitted that the First-tier Tribunal failed to identify in what way there were significant differences in the accounts of the Appellant's father's involvement with the Arbaki, and

failed to acknowledge that the witness MQF confirmed in evidence that he was unsure of the year of the Appellant's father's involvement.

6. It is also submitted that in assessing the risk to the Appellant the First-tier Tribunal ignored the wealth of background material indicating the real risk and vulnerabilities faced by minors in Afghanistan. Whilst the First-tier Judge had asserted at paragraph 55 that he bore in mind the Appellant's youth and the evidence that he had lost contact with the rest of the family, it is said that since the assessment of risk had to be in relation to the Appellant's current circumstances and since it was accepted that he had no contact with his family in Afghanistan it was not open to the judge to find that the Appellant could safely return. It is also submitted that it was inadequate for the Judge to assert that relocation to Kabul was a viable option notwithstanding the Appellant's youth, in view of the fact that he was a 15 year old child and in view of the fact that his best interests were not properly considered.
7. It is submitted that the First-tier Tribunal's findings fly in the face of the relevant case law and the guidance of UNHCR and that the material before the court clearly indicated the Appellant was at risk of treatment such as set out in the Respondent's Operational Guidance. In the circumstances it is argued that the First-tier Tribunal could not properly have reached the conclusion that a 15 year old child without contact with his family would be able to viably relocate.
8. It is submitted that the First-tier Tribunal Judge's findings that it was reasonable for him to return to Afghanistan on the basis that his uncle had unnamed friends there was a legally flawed approach and was unsustainable. It is submitted that when looking at the issue of the Appellant's ability to reside in Kabul the findings of the judge were fatally flawed and despite quoting **AK (Afghanistan)** (Article 15 (c) [2012] UKUT 163 and the requirement to assess both safety and reasonableness the judge failed entirely adequately to consider either.
9. In conclusion therefore it is submitted on behalf of the appellant that the errors raised are material to the decision made and render the determination fatally flawed.

Rule 24 Notice

10. The Respondent contends that the Judge gave clear and sustainable reasons for finding that the Appellant's account was not credible. The Judge considered the case law and background material concerning returning to Afghanistan and made findings that were open to be made.

Submissions

11. Miss Head relied on her grounds of appeal and a skeleton argument. She submitted that there had been three separate witnesses before the First-tier Tribunal and one of those witnesses was the Appellant's father's

brother whose evidence was accepted as credible in his own appeal before the First-tier Tribunal. Reasons should have been given as to why his evidence was not acceptable, particularly because the only ground that was given in relation to rejecting his evidence was that it was hearsay. The finding that his evidence was not reliable was not sufficient.

12. The First-tier Tribunal had found that there were significantly different accounts. Whilst it was accepted that he was confused about what year the Appellant's father had been working for the Arbaki, there was no inconsistency between the Appellant's evidence and the evidence of his uncle and there were no reasons given for the finding in relation to the fact that there were significant discrepancies between the Appellant's evidence and his uncle's evidence. There was no basis for finding that it was implausible that the father had not been killed within nine months. This was not based on any background evidence. There was also no reference in the findings of the First-tier Tribunal to the Appellant's understanding in relation to his age. At paragraph 57 his age was referred to in relation to his return to Kabul but not in relation to the assessment of his evidence and therefore the consideration of credibility was not sustainable.
13. There was also no consideration of Section 55 of the Borders, Citizenship and Immigration Act 2009 and his best interests and it was incumbent on a judge to consider that. At the hearing the Respondent's submissions probably did not assist as the Respondent submitted that risk was hypothetical and implied that the Judge should not consider risk at the date of the hearing. It was accepted by the Judge that there was no family contact and he had no past connections and therefore it was entirely inappropriate to find that the unnamed friends or uncle could assist. In fact all the evidence had been that they had tried to find the Appellant's mother and there had been active attempts to make contact. The findings were therefore unsustainable.
14. Mr Bramble in reply submitted that it was clear that the First-tier Tribunal was aware that the Appellant was a child and had in mind section 55. That was clear from paragraphs 41 and 45 of the First-tier Tribunal determination. At paragraph 48 she said that particular care should be taken because he was a child. In relation to credibility findings, whether the Appellant's father worked for Arbaki as he claimed was dealt with at paragraph 49. The Judge did not just set out the evidence of the Appellant but also the uncle's evidence. There were also two other witnesses and the Judge set out their evidence. The Judge did not need to revisit what was specifically said in the oral evidence. The Judge had dealt with it sufficiently. He had given explanations as to why he believed the Appellant's claim was not credible in the light of conflicting evidence as to why the father would remain if he was employed by Arbaki.
15. The uncle's evidence was based on information provided by others. That was correct because looking at paragraph 21 he discovered through his wife. At paragraph 29 there was a discrepancy in MQF's evidence in

relation to which year the Appellant's father joined Arbaki and the Judge was entitled to come to this finding having given reasons why he did not find the explanation and the claim credible. He had considered the evidence of the witnesses.

16. In relation to the Appellant's youth, it was the Appellant's argument that he had no direct family there. In Mr Bramble's submissions the Judge may not have worded his conclusions well as it appeared to suggest that the uncle's friends would assist the Appellant but the judge was clear that they would support him. The Judge found that that network was sufficient and there was no material error of law in either matter.
17. In response Miss Head submitted that the First-tier Tribunal did not give reasons for accepting that the evidence of the child could be different. There was no evidence to show that that the judge applied section 55 to the facts of the Appellant's case. There were no examples given by Mr Bramble because those examples simply were not there. The Judge had not given any reasons for finding the Appellant's uncle's evidence not to be credible; setting out the evidence and making a finding in relation to the evidence were two separate duties. The Appellant was entitled to know why that evidence was not considered to be credible. Either way, if someone was lying, he needed to give reasons.
18. The Judge's findings did not deal with the fact that this was a 15 year old boy returning to Kabul. In relation to the Supreme Court decision of **TN and MA**, Miss Head submitted that that did not take us any further.
19. I canvassed therefore with the parties what the appropriate forum should be in the event that I should find an error of law. It was agreed that the challenges were to findings in relation to credibility and the appropriate course would be for the matter to be remitted to the First-tier were an error of law to be found.

Findings and conclusions

20. The First-tier Tribunal's findings in relation to the credibility of the Appellant's account are at paragraph 49 of the decision. The first reason for rejecting the Appellant's account is as follows:

"49. I find that the evidence from the Appellant that his father worked for the Arbaki implausible. At question 34 of the screening interview he was asked when his father started working for the Arbaki. He responded it was 9 months before he left the country. He stated he did not witness him doing any work nor did he know what he did as an employee of the Arbaki. He was asked that at question 43. The conclusion reached by the ECO was that it was not credible that his father would remain employed by the Arbaki for 9 months without more fervent pursuit, I agree with that conclusion particularly with regard to the fact that the Appellant's uncle had suffered so badly at the hands of the Taliban within a comparatively short distance from the Appellant's village, in a community where it is said, in effect, by the various witnesses that knowledge of such involvement is widespread."

21. The Courts have recognised the danger of fact-finders regarding aspects of an individual's account to be implausible when based upon cultural or social assumptions not supported by background evidence (see, for example **HK v SSHD** [2006] EWCA Civ 1037). The First-tier Tribunal came to the conclusion that it was implausible that the Appellant's father could work for the Arbaki for nine months without "more fervent pursuit" from the Taliban in the absence of any reference to the background evidence about the Taliban or the Arbaki. Whilst a Tribunal is entitled to draw inferences of implausibility when assessing credibility and to draw on their common sense and ability to identify what was or was not plausible, such findings should be based on hard evidence. A reason was given for the finding, namely that the Appellant's uncle who lived nearby had suffered at the hands of the Taliban. However, I consider that the nature of the finding is one that requires an assessment of background evidence in order to be adequately reasoned.
22. The First-tier Tribunal also rejected the Appellant's account on a further basis, also set out in paragraph 49 of the decision:

"In addition his witnesses gave accounts of his father's involvement with the Arbaki based on information from others. At best they gave hearsay evidence. There are significantly different accounts of the appellant's father's involvement with the Arbaki. MQF gives details of an entirely different time period of the appellant's father's membership in the Arbaki."
23. The First-tier Tribunal did not find the Appellant's account of the interest shown by the Taliban to be credible. Three witnesses gave evidence in his appeal. His uncle, MS, gave evidence. He is a refugee. His account was accepted by First-tier Tribunal Judge Greasley in a determination promulgated on 12 July 2012. His account to have been persecuted by the Taliban and shot in the mouth by them was found credible. In the instant appeal his evidence in his witness statement was that he found out through his wife who was living in Afghanistan at the time that the Appellant's father was being harassed by the Taliban and that the Appellant's father joined the local Arbaki to protect himself. He spoke to the Appellant's father a few times whilst he was working for the Arbaki. He received a phone call in May 2013 from his wife that the Appellant's father had been killed by the Taliban.
24. The Appellant also relied on the evidence of BK who has indefinite leave to remain. According to his witness statement he knew of Appellant's family as a fellow villager. He had left Afghanistan in 1998 and said he received evidence of the Appellant's father's death by telephone. He was told that he had been killed by the Taliban as he had been a member of the Arbaki. He stated in his witness statement that he went to the Appellant's family home in Afghanistan in July 2014 to try and offer condolences but no-one was there and he was told by a farmer that the family had left.
25. The Appellant also relied on the evidence of MQF who has indefinite leave to remain. He said in his witness statement that he travelled to Afghanistan in 2012 and saw the Appellant's father in the village and that

he worked for the Arbaki. He never spoke to him personally but he was aware that he worked for the Arbaki through the villagers. He knew that he was working as a sub-commander within the Arbaki and that he was commanding over people as this was well known around their villages.

26. The First-tier Tribunal did not engage with the evidence of the three witnesses other than to state that it was hearsay. There is no prohibition on the admission of hearsay evidence within either Procedure Rules or established case law in this jurisdiction. However, a Tribunal is entitled to take account of the fact that direct evidence is to be given greater weight than evidence reported to a witness. The First-Tier Tribunal effectively dismissed the evidence of the Appellant's witnesses because it was hearsay. All three witnesses had given evidence that through their own separate sources they knew that the Appellant's father had joined the Taliban. The Appellant's uncle had been found in a previous decision to be a credible witness of fact and to have been persecuted by the Taliban. The First-tier Tribunal did not find that there were any inconsistencies as between the evidence of the Appellant, his uncle and the evidence of BK.
27. Whilst the First-tier Tribunal found that there were "significantly different accounts of the Appellant's father's involvement with the Arbaki", this finding is not sustainable on the facts. There was one discrepancy as between the Appellant's evidence and the evidence of MQF as to when the Appellant's father worked for the Arbaki. In cross-examination he said he was in contact with his family in 2010/2011 and heard that the Appellant's father had joined the Arbaki and but then said that he could not be sure and it could have been 2011 or 2012 (paragraphs 32 and 33 of the decision).
28. I find that the First-tier Tribunal, in rejecting the evidence of the Appellant's three witnesses as hearsay, failed to give adequate and sustainable reasons for finding their evidence not to be credible. The finding that there were significantly different accounts of the Appellant's father's involvement with the Arbaki is irrational in the light of the fact that there was one discrepancy with regard to the period of his involvement about which the witness admitted he was unsure.
29. I also find that First-tier Tribunal failed to give sufficient weight to material matters in finding that the Appellant could be returned to Kabul at the age of 15 when his family had not yet been traced. At paragraph 57 the First-tier Tribunal accepted that the Appellant had not traced his family. In **AA (unattended children) Afghanistan CG** [2012] UKUT 00016 the Upper Tribunal held that:
 - (i) The evidence before the Tribunal does not alter the position as described in HK and Others (minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan CG [2010] UKUT 378 (IAC), namely that when considering the question of whether children are disproportionately affected by the consequences of the armed conflict in Afghanistan, a distinction has to be drawn between children who were living with a family and those who are not. That

distinction has been reinforced by the additional material before this Tribunal. Whilst it is recognised that there are some risks to which children who will have the protection of the family are nevertheless subject, in particular the risk of landmines and the risks of being trafficked, they are not of such a level as to lead to the conclusion that all children would qualify for international protection. In arriving at this conclusion, account has been taken of the necessity to have regard to the best interests of children.

(ii) the background evidence demonstrates that unattached children returned to Afghanistan, depending upon their individual circumstances and the location to which they are returned, may be exposed to risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining a claim to humanitarian protection."

30. The First-tier Tribunal found, at paragraph 57, that the Appellant, through his uncle in the United Kingdom, had "the support of a network of friendships and relationships which on any sensible and reasonable assessment of his circumstances would help him relocate his family". However, on the First-tier Tribunal's findings, the Appellant did not know the location of his family on return and was therefore in the position of an unattached child. The First-tier Tribunal made no finding and there does not appear to have been any evidence to show that any of the unnamed contacts of the uncle would have been able to look after the Appellant. The First-tier Tribunal should therefore have addressed the risks averred to in **AA** and in the background evidence with regard to unattached children and assessed the best interests of the Appellant against this background. Notwithstanding the fact that the First-tier Tribunal referred to the relevant case law I find therefore that adequate reasons were not given on material matters in view of the Appellant's age and circumstances.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision and remit the case to the First-tier Tribunal for re-hearing. No findings of fact are preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge L J Murray