



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

Appeal Number: PA/04165/2016

THE IMMIGRATION ACTS

**Heard at Stoke
On 12 May 2017**

**Decision & Reasons Promulgated
On 24 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**KAA
(anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Woodhouse of Sultan Lloyd Solicitors

For the Respondent: Mr Bates – Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge A.M.S Green ('the Judge') promulgated on 25 October 2016 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant is an Afghan National said to have been born on 30 September 2000. There is no dispute regarding the appellant's nationality.
3. The appellant entered the United Kingdom on 10 October 2015 and claimed asylum on the same day. It was known the appellant had travelled through several European countries, including Hungary, where he has been fingerprinted. The appellant has been granted discretionary leave as an unaccompanied minor which is set to expire on 30 March 2018.
4. The Judge noted the appellant's claim is based upon an imputed political opinion as his father was in the Afghan national army and the Taliban sent three threatening letters to his family home requiring his father to leave the army or face the consequences. The letters are said to have been sent on the same day and that during that evening the Taliban attacked the appellant's house. The appellant claims that he was woken by gunfire and that a Farsi/Uzbek speaker approached him and told him that his life was in danger. The appellant left with the man, fled the country, and travelled to the UK.
5. The Judge noted the reference in the refusal letter to the fact that after leaving Afghanistan the appellant lived in Turkey for three years, that when questioned about his father's role and duties in the army the appellant gave vague answers, that he was unable to say why the Taliban would have sent three letters on the same day and attacked the family home that same evening which was held to be implausible. The appellant's belief that he would be recruited by the Taliban because his father was in the army was dismissed as speculative as the appellant had never claimed that the Taliban had attempted to recruit him even though his father had been in the army for many years. It was also noted that adverse credibility finding had been made pursuant to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 on basis the appellant had claimed asylum in Hungary but had not waited for the outcome of his application. The respondent did not accept the appellant was entitled to leave on human rights grounds or that he will be of any adverse interest to anybody sufficient to give rise to a well-founded fear of persecution or entitlement to international protection.
6. The Judge clearly considered the evidence with the required degree of anxious scrutiny, including relevant country information as a reading of the determination clearly shows. The Judge sets out his findings of fact at [7] to [21].
7. The Judge considered the section 8 argument in [13] noting the appellant failed to claim asylum in several safe third countries including Hungary before coming to the United Kingdom. The appellant

was fingerprinted in Hungary and lived and worked in Turkey for three years. The appellants claimed to have been forced to leave Turkey because he was stabbed but this was not supported by evidence.

8. The Judge notes in [14] of the decision:

“14. I did not have the benefit of hearing the Appellant giving evidence. Had I done so, I would have been able to assess his evidence and how it stood up to cross-examination. He was present at the hearing and there was no obvious reason why he did not give evidence. There was no suggestion that he suffered from mental health issues that would make it very difficult to give evidence. There was no evidence about his peace of mind being disturbed. He is 16 years old and could have testified. Instead, he simply chose to say nothing. He did not adopt his witness statement. Under the circumstances, I give his witness statement very little weight. I have not even seen copies of the alleged Taliban letters. I simply do not believe what he is saying about the letters or that his father was threatened or that he was even in the army.”

9. The Judge noted the Taliban are recruiting in the appellant’s home province and that the appellant may not be able to return to Logar as he would be a man of fighting age. The appellant would, however, have the alternative of returning to Kabul [15].

10. At [16] the Judge accepted the appellant has family in Afghanistan who arranged an agent to bring him to the UK. The appellant’s claim to have lost contact with his family was not accepted by the Judge in view of the adverse credibility findings in rejecting the appellant’s claim that the Taliban had threatened his father. It was not accepted the appellant did not know of his family’s whereabouts and the Judge did not believe that the appellant’s family will be unable to meet him and care for him in Kabul on his return, or that he will be forced to live alone if he returns to Afghanistan. The appellant is not an orphan and would not be returning as an unaccompanied child. He would be returning as a single able-bodied adult.

11. The Judge found the appellant had expressed a generalised fear of the situation on his return, maintaining his risk of forcible recruitment by the Taliban and other militant groups and that he would be vulnerable given his age and lack of family and clan/tribal support. The Judge noted the appellant had adduced objective country information to fortify his submission that it would not be safe to return him to Kabul [19] before setting out his overall conclusions at [20] and [21] in the following terms:

“20. I believe that the Appellant is frightened of the mere possibility of ill-treatment or forcible recruitment on account of the unsettled situation in his country. He would not be of interest to the authorities as a potential insurgent or foreigner and he would not be targeted and subjected to inhumane treatment. Although he would be a man of military age on his return, I do not accept on the objective evidence

that he would be at risk of forcible recruitment either by AGEs or ALP in Kabul. His fear is purely generalised and not specific to him. He would be returning to Kabul as a single, able-bodied man and may be able to subsist without family and community support in Kabul in an area that has necessary infrastructure and livelihood opportunities to meet the basic necessities of life and are under effective government control. For the reasons given above I do not, in any event, believe that he has lost contact with his family and he should be able to call upon their support on relocating.

21. I am not satisfied that I would be justified in departing from the country guidance set out in AK. I appreciate that the situation in Afghanistan is changing and it may well be the case that by the time the Appellant reaches his 18th birthday the circumstances in that country may have deteriorated to warrant further country guidance from the Upper Tribunal or departing from the existing country guidance. It may be that the Appellant's own circumstances may change. In either case, it would be open to the Appellant to submit a fresh asylum claim if appropriate."

Grounds and submissions

12. The appellant sought permission to appeal to the Upper Tribunal which was initially refused by First-tier Tribunal Judge Saffer but, thereafter, renewed to the Upper Tribunal.
13. The appellant refers to a number of alleged errors in the decision in that:
- a. At [15], [16], [20] and [21] the Judge ignored the fundamental principle that protection claims are assessed on the facts at the date of the hearing and not some future date.
 - b. The Judge erroneously assessed the appellant's case on the basis he would be returned to Kabul as an adult.
 - c. At [13] to the Judge erred in treating the appellant's credibility as damaged for not claiming asylum in Hungary or Turkey when there is evidence of systematic failings and deficiencies in the Hungarian asylum system and Turkey is not a signatory to the refugee convention and as such it is not a safe third country within the meaning of article 27 of Directive 2005/85/EC.
 - d. At [14] draws an adverse inference that the appellant was not telling the truth because he did not give oral evidence or tender himself for cross-examination; said to raise an important point of practice especially in relation to a child applicant for asylum. It is stated the point is material because it is only at [14] that the Judge gives reasons for disbelieving the appellant's account.
 - e. It is asserted it was wrong in law for the Judge at [14] to draw an adverse inference from the child applicant's failure to adduce documentary evidence to support his claim from his country of origin: see JK v Sweden, 59166/2012, 23 August 2016, (Grand Chamber) at [92] holding that a lack of direct evidence cannot be decisive per se of a protection claim.

- f. Notwithstanding [15] the Judge failed to assess the appellant's asylum claim on the basis established by UNHCR's country assessment that the appellant is a man or boy of fighting age is a member of a targeted group in his home province of Logar. As such the Judge failed to direct himself in accordance with the approach of the Grand Chamber in JK v Sweden, above at [103].
 - g. The failure to Judge to take account of the decision in JK v Sweden, is material notwithstanding the appellant would be returned to Kabul as the Judge failed to assess the reasonableness of relocation to Kabul on a correct basis. The Judge found erroneously that because the appellant was not credible for the reasons at [14] and [15] the appellant could expect to be supported by his family on return to Kabul.
14. Permission to appeal was granted by Upper Tribunal Judge Coker on 21st February 2017 for the reason that "it is arguable the First-tier Tribunal judge failed to give adequate or any regard to the appellant as a child; failed to give adequate or any regard to Turkey not being a signatory to the Refugee Convention and the shortcomings of the Hungarian asylum system; that he assess the evidence on the basis the appellant would be returning to Afghanistan as a 'man' rather than a minor, failed to assess the reasonableness of returning to Kabul.
15. The appeal is opposed by the Secretary of State who asserts that the Judge directed himself appropriately and made adequate findings of fact as set out at [16] and was entitled to find that the Taliban had not threatened his father and that he would have family to return to in Kabul.

Discussion

16. On behalf of the Secretary State Mr Bates accepted that the Judge had erred in assessing the issues before him as if the appellant were returning as an adult at some future point in time, when the Judge was obliged to consider the matter in relation to the situation appertaining at the date of the hearing. At this point it is not disputed that the appellant is a minor. The issue is the materiality of any such error.
17. In relation to the assertion the Judge erred in holding against the appellant that he was not telling the truth because he did not give oral evidence or tender himself for cross-examination, this is not an accurate reflection of the Judge's findings made. The finding at [14] is set out above. In this the Judge notes the appellant chose not to give evidence but that had he done so the Judge would have been able to assess the evidence and how it stood up to cross-examination. The Judge makes several observations regarding the fitness of the appellant to give evidence and his age as a 16-year-old who could have testified, but that he chose to say nothing. The Judge does not use this to find that the appellant is not a credible witness or to disbelieve the appellant's account but to explain why, under the

circumstances, the Judge gave the appellant's witness statement very little weight.

18. Whether an individual gives evidence is a matter for them although what weight shall be given to material made available is for the Judge, provided it is shown the Judge considered the evidence with the required degree of anxious scrutiny and has given adequate reasons for findings made, as the Judge arguably did. To the extent this is a weight challenge, the appellant has failed to make out any arguable legal error in the approach adopted by the Judge when assessing the weights to be given to the appellant's evidence. Similarly, the Judge does not seek corroborative evidence but observes that he has not seen copies of alleged Taliban letters which is factually correct. In light of the fact little weight could be given to the evidence which was not tested under cross-examination and in the absence of any evidence other than that referred to by the Judge, the Judge was entitled to conclude that he did not find the appellant's evidence regarding the letters or threats, or the appellant's father's activities in the army, to be convincing. It is arguable the Judge was entitled to apply little weight to the assertion made such as to conclude that he did not believe the appellant's account.
19. If a witness fails to attend the hearing, or attends but elects not to give oral evidence, they must accept that the Judge can only arrive at findings based upon the evidence the Judge accepts he or she can attach due weight to.
20. It is not a case that the conclusions of the Judge relate to matters of which the appellant was not fully aware. In the Reasons for Refusal Letter the decision-maker noted in relation to the appellant's claim that his father was a member of the Afghan National Army that even though he would have been under the age of 13 when he lived in Afghanistan, it would not have been unreasonable to expect the appellant to recall some details of his father's role in the army yet he did not. Similarly, in relation to the issue of the Taliban threats the Judge noted the lack of credibility in a claim the Taliban would have sent three warning letters on the same day and yet attacked the appellant's home on the same evening without giving the appellant's father the opportunity to leave the army, which is the normal way the Taliban appear to expect an individual to react if such warnings are given. It was noted in the Refusal Letter the appellant was unable to provide a reasonable explanation for why the Taliban would have acted in the way in which he alleges.
21. The appellant and his representatives were therefore aware that issues pointing to the lack of credibility in the appellant's account had been raised some time ago by the respondent, in the refusal letter of the 11 April 2016. The appellant had ample opportunity to appear before the Judge to give oral evidence to support his claim and the fact he failed to do so and the resultant impact on the assessment of

the evidence is a specific point the Judge chooses to comment upon. No arguable legal error is made out in relation to this aspect of the decision.

22. The Judge was fully aware of the appellant's age and the need to exercise caution before rejecting as incredible an account by an anxious, young and inexperienced asylum seeker, whose reasons for seeking asylum may well be expected to contain inconsistencies and omissions in the course of its revelation to the authorities investigations on appeal [12]. It is not made out in the grounds that the Judge ignored the need to exercise care when assessing the evidence upon which appropriate weight could be placed, in arriving at the conclusion set out in the decision.
23. Accordingly, no important point of practice arises in relation to the assertion regarding whether it is fair to draw an adverse inference that an applicant is not telling the truth, as it is not made out this is what the Judge was doing. As stated, the issue is that of weight to be given to the evidence not of credibility.
24. It is accepted Turkey is not a signatory to the Refugee Convention meaning the appellant is unable to claim asylum in that country, but the Judge does not specifically claim that the appellant should have claimed asylum there. There appears to be a contradiction in the Judge noting the respondent's claim that the appellant had claimed asylum in Hungary when he was encountered on 29 August 2015 but was unaware of the outcome of the application as he left the country to come to the UK, rather than availing himself of the protection of the authorities in Hungary. The appellant would have been unaware of the decisions of the High Court in relation to difficulties within the Hungarian asylum system and indeed appears to have engaged with the authorities by making an asylum claim without evidence of his experiencing any difficulties. This is therefore not a decision made in relation to a person who did not make a claim but rather a person who did claim asylum but then chose to pursue his claim elsewhere, namely in the United Kingdom. The Judge's conclusions in relation to section 8 of the 2004 Act have not been shown to be infected by arguable material error on the facts. In any event, the Judge did not make the adverse credibility findings based upon the Section 8 elements only but clearly found that the appellant's behaviour contributed to the adverse credibility findings.
25. In relation to the assertion the Judge failed to assess that as a man or boy of fighting age the appellant will be a member of a targeted group in his home province of Logar, the Judge finds at [15] the country information suggests the Taliban are recruiting in Logar and that the appellant may not be able to return to his home province as he would be a man of fighting age. Even if the reference to "man" is arguably incorrect it is clear the Judge accepted the appellant might face a real risk of recruitment by the Taliban if returned to his home province,

leading the Judge to consider the alternative of an internal relocation to Kabul.

26. The Judge did not find that the appellant would be returned to Afghanistan as an unaccompanied minor as the Judge found that the appellant had family in Afghanistan to whom he will be able to turn for assistance. It must be accepted that somebody paid for the appellant to leave Afghanistan. The fact the appellant has been granted discretionary leave by the Secretary of State does not prevent the Judge undertaking this assessment. The Judge found that the appellant is in contact with his family and has failed to make out that his family would not be able to provide assistance on return. The findings at [15] and [16] are reasonably open to the Judge on the evidence including, in the latter paragraph, finding that family could meet the appellant in Kabul. This is of some importance in light of the challenge as the Judge was clearly considering the decision of the tribunal in AK where it was said that where a child has close relatives in Afghanistan who have assisted him in leaving the country, any assertion that family members are un-contactable who 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.
27. As stated, the Judge did not accept the appellant has lost contact with his family or does not know their whereabouts, had no reason to believe the appellant's family will be unable to meet him and care for him in Kabul on his return or that he would be forced to live alone if he returned to Afghanistan. The Judge specifically finds the appellant would not be an orphan and not be returning as an unaccompanied child. Although the Judge refers to return as a single able-bodied adult which repeats the error in considering the merits of the claim at some later date rather at the date of the hearing, the Judge clearly finds that even as a child the appellant will be returned with family support. It has not been shown this decision is not within the range of those the Judge was reasonably entitled to make on the available evidence.
28. The evidence before the Judge did not support a finding that it would not be reasonable to expect the appellant to relocate to Kabul. This was raised in the Reasons for Refusal letter but, yet again, the appellant failed to adduce sufficient evidence, written or oral, to show that it would be unreasonable in all the circumstances to expect him to exercise this alternative.
29. The material did not show that the appellant would face a real risk on return if he relocated to Kabul with the availability of family support. It is possible to infer that such a finding is equally applicable to the appellant as a minor at the date of hearing too. The issue of reasonableness of internal relocation was raised in the refusal letter at [44-54] so the appellant was aware this is an issue but failed to

adduce sufficient evidence to establish the respondent's conclusions in relation to the reasonableness of internal relocation were wrong, even though the decision-maker assessed this issue based upon the appellant's chronological age. It has not been arguably made out that the Judges conclusions are irrational or perverse, or that the conclusion this is a reasonable option was not available to the Judge on the evidence.

30. The appellant's reliance upon the decision of the Ground Chamber in *JK v Sweden* is noted. This is a case in which there was an accepted account of a direct murder attempt on the husband and the death by shooting of their daughter which established a prima facie case for asylum, thus the evidentiary burden fell on the Swedish authorities to prove that the applicants would not be subjected to Article 3 ill-treatment on return. The decision of the Grand Chamber criticised the approach of the Swedish authorities in finding that lack of credibility of the applicants on some issues could nullify the evidentiary value of other facts.
31. In the case before the Judge there was no acceptance the core claim relied upon by the appellant established a prima facie case for asylum meaning that the evidential burden, to the lower standard applied by the Judge, proving an entitlement to international protection remained upon the appellant. Whether that had been discharged was assessed by the Judge taking into account the appellant's age. The findings by the Judge have not been shown to offend the principles set out by the Grand Chamber sufficient to infect the Judges overall conclusions with arguable material legal error, even if the eventual outcome is infected by legal error as it was assessed as the appellant would be as an adult. The grounds, however, fail to establish any evidential aspects of this case that would support a claim that such error is material.
32. The core account was not accepted by the Judge. The Judge noted the appellant's age and the availability of family support. As no credible real risk of persecution in all of Afghanistan had been made out, and any potential real risk in the appellant's home area found to be mitigated by the availability of an internal flight option which the appellant had not shown was unreasonable or unfair, no arguable legal error material to the decision to dismiss the appeal has been made out.

Decision

- 33. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

34. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make

such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson
Dated the 22 May 2017