



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05251/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28 November 2017

Decision & Reasons Promulgated
11 December 2017

Before

UPPER TRIBUNAL JUDGE WARR

Between

MR SARFARAZ KHAN HELALKHAIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T D H Hodson, Counsel, instructed by
Elder Rahimi Solicitors (London)

For the Respondent: Ms A Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 1 January 1999. He appeals the determination of a First-tier Judge following a hearing on 6 July 2017 to dismiss his appeal against a decision of the Secretary of State to refuse his asylum claim on 18

May 2017. The appellant entered the UK on 16 September 2015 and applied for asylum as an unaccompanied minor on 9 October 2015.

2. Although a point was taken by the Secretary of State under Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 this issue and the issue of the appellant's date of birth were resolved in his favour by the First-tier Judge and there has been no cross-appeal against that aspect of her decision.
3. The judge helpfully summarised the appellant's claim as follows:

"In summary the Appellant claims he is Pashtoon and resided in Bajaur Agency district in Khyber and his father and brother were involved in a land dispute with his parenteral [sic] uncles, who belonged to the Taliban, they shot the uncle and kidnapped the Appellant's brother and sister, so he fled Pakistan in September 2014 (when aged 15 years of age). The Appellant fears he will be killed or forcibly recruited by his father's paternal cousins who belong to the Taliban due to a family land dispute or that the government will support the Taliban in using the Appellant in attacks."

The judge noted that the identity and nationality of the appellant were accepted by the respondent but issue was taken on other matters. The judge accepted that the appellant was a minor when he had completed his SEF Form and had submitted his first witness statement but was an adult at the date of his substantive asylum interview. In paragraph 36 of her decision the judge concluded:

"The core of the Appellant's account is attended by such vagueness as to cast serious doubt upon its credibility. The cumulative effect of all these serious causes for concern is such as to cause me to conclude that the Appellant has failed to submit satisfactory evidence to establish, even to the standard of a reasonable degree of probability, that his factual account is true. I therefore make a finding of credibility adverse to the Appellant in respect of the entirety of his account."

4. The challenge in this case is to the judge's negative credibility assessment. A large part of her reasoning is set out in bullet points in paragraph 33 of her decision.
5. Argument focussed in particular on the first of the judge's reasons, and it is convenient to set out the first two bullet points as the reasoning is to an extent connected.
 - Although having been in the care of social services, having the legal services of an adviser throughout these proceedings, and also advised during his substantive interview by the Respondent to seek the support of the Red Cross/Red Crescent to access contact with his family, it appears that the Appellant has failed to do so. Although asserting he has contacted the Red Cross/Red Crescent no letters or other documentary evidence are before me to support this mere assertion. I simply do not accept that his uncle would have paid an agent about £4,346 to bring the

Appellant specifically to the UK (despite having no family here) without arranging a conduit of communication to confirm the Appellant arrived here safely. Nor do I accept that the Appellant is unable to recall any telephone number of his numerous maternal uncles or his own parents in order to contact them, or to merely send a letter to them at the family home in order to contact them. This claim is simply implausible considering the access to a lawyer and social worker and foster carers that the Appellant has and the professional support he has received from them, in an area of the country that is fully conversant with the issue of unaccompanied asylum seeking children.

- If he had contacted his family directly, the identity cards he claims to have and those of his father he would have access to, would have been easily accessible. More pertinently the death certificate and will of his grandfather regarding who inherited the family land, the death certificate of his maternal uncle claimed to be shot, and also letters or support or witness statement could have been obtained from his parents and uncles to confirm that the shooting of the uncle by the Turbur/Taliban uncles occurred. That this simple task was not undertaken from 16 September 2015 to date of hearing on 6 July 2017, a period of one year and nigh on 10 months, tends to significantly undermine the claims of the Appellant.”

6. In the grounds of appeal against the judge’s decision the appellant’s solicitor filed a witness statement dated 10 August 2017. There had been an appointment with the appellant on 9 September 2016 in which the appellant had agreed for her to contact the Red Cross, and an attendance note and an e-mail received from the Red Cross confirming the on-line request for international family tracing had been received. After the judge’s determination the appellant had said that he had asked his friend to forward an e-mail attaching the letter he had received from the Red Cross dated 20 April 2017. The solicitor records that during the meeting she discovered the e-mail and the attachment had been sent to her junk mail which was the reason why this was not received and put before the Tribunal. The Tribunal Judge had taken the view that the appellant did not contact the Red Cross “however the attached evidence is confirmation that he did in fact do so ... “. In the grounds although it was accepted that the judge was not aware that the letter existed reliance was placed on **MM (Unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)**. It was argued that the facts of the instant appeal and that case was similar in that a letter from the appellant’s solicitors to the Home Office containing a list of clarifications to the appellant’s asylum interview was omitted from the appellant’s and respondent’s bundles. Even though the First-tier Tribunal Judge was unaware of this, the finding that the appellant had lied about the letter could not stand due to procedural unfairness. Reference was made to paragraph 24 of the decision:

“The judge, in terms, found the appellant to be mendacious and this became one of the important building blocks in his overall assessment that her claims were not worthy of belief. The resulting unfairness to the appellant is palpable.”

A number of other points were taken in the grounds. It was said that the judge had not dealt properly with the expert report compiled by Dr Giustozzi. This had been dealt with after the negative credibility findings that had been made in paragraph 33. The judge had erroneously compartmentalised the expert evidence and had failed to consider it in the round. Country background evidence was particularly important when assessing the evidence of a minor. The judge had erroneously assumed that death and birth certificates would exist in written form or be obtainable which the appellant had never asserted. The judge had made various mistakes in assessing the appellant's evidence and had misunderstood the evidence provided in the second of the appellant's witness statements in finding this "raises more extreme issues, such as villagers being beheaded and forced to pay money to the Taliban, which included his uncles". It was pointed out that the appellant's witness statement in fact made no mention of anyone being forced to pay money to the Taliban; the reference was actually to the Taliban paying money to families in return for their sons. The evidence about beheadings did not relate to the Taliban - the appellant was actually describing the outcome of other land disputes in his village. The point was intended as context and was not an attempt to import more "extreme" elements into the appellant's claim.

7. Among other points the judge had found that there had been no catalyst for the appellant's departure from Pakistan and this "defies common sense". The obvious catalyst was the kidnap of the appellant's older brother and sister and also that the Turbur had said that they wanted the appellant to join them.
8. In relation to the ages of the appellant's siblings the judge had commented that the appellant was vague on whether they were older or younger than him. The appellant had in fact set out the ages of his siblings in his witness statement. Moreover dates were unimportant in the appellant's country.
9. The judge had gone on to find after making her negative credibility assessment that the appellant would not be at risk upon return to Pakistan and accordingly issues of relocation did not arise. However she noted in paragraph 38 that the appellant would have the support of all his family and would be able to relocate and would integrate back into the Pakistan community upon return. A point was made that issues of internal relocation and sufficiency of protection had not been raised by the respondent in the refusal letter and there had been no Presenting Officer before the First-tier Judge. The judge had not raised the issue of sufficiency of protection at the hearing according to Counsel previously instructed.
10. In granting permission to appeal the Upper Tribunal commented that the document from the Red Cross could not be deciphered and a readable copy should be provided if the point were to be made good. Permission to appeal was granted although no view was expressed as to the ultimate outcome.
11. At the hearing Mr Hodson gave Ms Holmes the best copy he could of the Red Cross letter which was dated 20 April 2017. Having had the opportunity to study the

material Ms Holmes accepted that the appellant had contacted the Red Cross as claimed.

12. There was an e-mail from the Red Cross on 9 September 2016 to the appellant thanking him for submitting a request for international family tracing.
13. The judge had concentrated on this issue in the first of her bullet points to which I have referred above. Counsel submitted that there was “a definite air of disbelief” when considering the appellant’s evidence. It had in fact been true that the appellant had contacted the Red Cross as long ago as September 2016 – nine months before the hearing. There had been procedural unfairness which had caused the judge to start with a negative perspective which had coloured the rest of her findings. There had been no Presenting Officer to assist the judge in focussing on the salient issues. There had been no challenge to the documentary evidence. In relation to the expert report Counsel submitted that the judge’s approach had been uncomplimentary and hostile and dismissive and it had been dealt with after the negative credibility assessment. The credibility findings should have been made after properly considering the expert report. The report should have been considered in the round. The judge had been distracted by the issue of blood feuds. Counsel took me to the evidence in relation to the point made by the judge that the appellant had contradicted himself by saying that his father held the title to the disputed land where it was clear that the appellant had always said that his father held the title. In his first witness statement dated 9 September 2016 – the same date as contact had been made with the Red Cross – it was apparent that the land was in the appellant’s father’s name. The same was clear from the appellant’s interview. Reference was also made to the recent witness statement of the appellant in relation to the finding by the judge that it raised more extreme issues. The judge had adopted a scatter gun approach. In relation to the ages of the appellant’s siblings and the finding that the appellant was vague there was the worrying sense that the judge had not gone back and looked at the appellant’s statement. There were enough underlying errors to cause concern.
14. While Ms Holmes acknowledged that internal flight had not been raised as an issue in the refusal letter there was a need to look at the risk all over the country. This was an obvious point and had been raised by the appellant in his second statement and moreover it was raised in the expert report and it was incumbent on the judge to deal with it.
15. In relation to the Red Cross issue it was accepted that the appellant had contacted the Red Cross and there is no reason why the appellant who had given evidence before the First-tier Judge should not have been believed on this issue.
16. However Ms Holmes pointed out that the judge had not accepted matters such as the uncle paying an agent over £4,000. In relation to the documentary evidence referred to in the second bullet point Ms Holmes referred to **TK (Burundi) [2009] EWCA Civ 40** – the judge was entitled to take into account the failure to provide evidence which was or should have been readily available. A major credibility issue had been raised

in the third bullet point concerning a discrepancy in the chronology provided by the appellant. The judge had been entitled to find the appellant vague having taken into account his level of education. There was no perversity as claimed in the judge's reasoning in the seventh bullet point. It was accepted that the judge had made a slight mistake – as Ms Holmes put it – in her reference to what was said to be more extreme issues in the appellant's recent statement. The appellant as she put it, had "raised the tone" and had brought in the issue of beheading.

17. A point had been raised about the expert's report referring to blood feuds but this was apposite in relation to the recently introduced claim.
18. In conclusion although there were flaws in the credibility findings these were minor. They were small misunderstandings and not sufficient to undermine the overall negative credibility assessment.
19. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.
20. I bear in mind that the appellant was a minor at the date of the events on which he relied to found his claim. Anxious scrutiny has to be applied in all asylum cases and in particular to a case such as this.
21. I appreciate that the judge in paragraph 21 of her decision states that the order of addressing matters was not indicative of any relative amount of weight attached but was adopted for convenience. However it is particularly unfortunate that the judge commenced her credibility assessment with a finding which is conceded to be based upon an error. In fact what the appellant was saying was perfectly truthful and he had indeed contacted the Red Cross and the Red Cross had responded. The initial approach had been acknowledged as Counsel submits many months before the hearing in September 2016.
22. Although the order of findings may not ordinarily be of significance I accept Counsel's submission that this particular flaw set the judge off on the wrong foot. It is not unconnected with the findings made in the second bullet point and may have coloured her subsequent approach to the evidence. I accept that the First-tier Judge was not to blame for the assumption that there was no evidence to support the appellant's account but the finding on this particular issue does appear to have assumed some importance in the judge's overall approach.
23. Ms Holmes referred to **TK (Burundi)** and what is said in paragraph 16 of the judgment of Thomas LJ is of relevance:

"Where evidence to support an account given by a party is or should readily be available, a judge is, in my view plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. This may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons. ..."

24. Unfortunately, as is now accepted, the point was a bad one. The evidence to support the appellant's account had ended up in his solicitor's junk e-mail.

25. Reliance is placed by the appellant on **MM (Sudan)**, a decision chaired by the President. The headnote reads as follows:

"1. Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal to be set aside.

(2) A successful appeal is not dependent on the demonstration of some failing on the part of the First-tier Tribunal. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered, with resulting unfairness (**E & R v Secretary of State for the Home Department [2004] EWCA Civ 49**)."

26. As in this case, **MM (Sudan)**, raised the question of errors by an appellant's representative. The President stated as follows at paragraph 25:

"The pivotal importance of the error of fact upon which the reasoning of the judge was demonstrably based helps to explain why, in appeals raising issues of international protection, there is room for departure from an inflexible application of common law rules and principles where this is necessary to redress unfairness. This is especially so where the respondent has, in the words of Carnwath LJ in **E & R**, paragraph [66], failed to co-operate to achieve a correct result. As we have seen, generally, the first of the **Ladd v Marshall** principles requires that the new evidence which was not considered at the earlier hearing could not with reasonable diligence have been obtained at that stage. Plainly that cannot be said here because the letter was written by the very solicitors who were presenting the case before the Tribunal and so it *was* available. It is established that neither the rule in **Al-Mehdawi v SSHD [1990] 1 AC 876** (that a procedural failure caused by an appellant's own representative did not lead to an appeal being in breach of the rules of natural justice) nor a failure to meet the first of the **Ladd v Marshall** principles applies with full rigour in asylum and human rights appeals: see, e.g. **FP (Iran) v SSHD [2007] EWCA Civ 13**. The decision of the Court of Appeal in **E & R v Secretary of State** points towards a broader approach, in which the common law right to a fair hearing predominates. We consider that this appeal must succeed accordingly."

27. Ms Holmes did not argue against this approach but submitted that the reasoning of the judge when read as a whole was not undermined by this or other failings.

28. While some of the points made in the decision when looked at in isolation are arguably sustainable there are concerns with aspects of the factual findings as

highlighted by Counsel. It is accepted by Ms Holmes that apart from the unfairness issue there are other possible errors or “misunderstandings”. These may have sent the judge on the wrong course when considering other matters. She was of course not assisted by the absence of a Presenting Officer who might have been able to clarify to what extent the questions of sufficiency of protection and internal relocation were relied upon.

29. For the reasons I have given I am satisfied that the outcome of the appeal was tainted by unfairness given among other things the appellant’s young age and the need for anxious scrutiny in these cases. The determination is affected by a material error of law. As I have said there is no cross-appeal from the finding about the appellant’s date of birth and the finding in that respect is not affected by the error of law.

Notice of Decision

The appeal is remitted to be heard de novo before a different First-tier Judge. The finding about the appellant’s date of birth to stand.

Appeal allowed to the extent indicated.

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

Fee Award

The judge made no fee award and I make none.

Signed

Date 11 December 2017

G Warr, Judge of the Upper Tribunal