



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

Appeal Number: HU/16345/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd November 2018**

**Decision & Reasons
Promulgated
On 15th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

**MR SS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Burrett, Counsel instructed by J D Spicer Zeb Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan whose date of birth is 3rd September 1995. His date of birth had earlier been recorded in proceedings before the Tribunal as 1st January 1994. He arrived in the

United Kingdom illegally on 3rd February 2010 and claimed international protection as a refugee the following day. That application was refused on 11th June 2010, though he was granted discretionary leave until 1st July 2011 presumably because of his age. On 29th June 2010 he appealed. On 16th September 2010 he obtained an adverse decision. He then made an out of time application for further leave to remain in the United Kingdom; that application being made on 19th July 2011. On 5th February 2013 following a refusal to grant him international protection as a refugee he was granted further leave to remain valid until 3rd March 2013.

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.

2. On 21st February 2013 he made an application on human rights grounds. He received an adverse decision dated 10th June 2016 against which he appealed. On 6th November 2017 his appeal was heard by Judge of the First-tier Tribunal R L Walker sitting at Hatton Cross. As a preliminary matter, at that hearing, there was an application to adjourn when details of the Appellant's criminality were produced. The application was refused, and the matter proceeded with the focus of the appeal being on whether or not there would be obstacles to the Appellant's reintegration into Afghanistan.
3. The Appellant contended that there was new evidence sufficient for there to be a fresh protection claim, being evidence of the recognition that the Appellant's date of birth, as initially recorded, was wrong so that he was about eighteen months younger when the matter first came before Judge Beck who dismissed the earlier asylum appeal and there was evidence of the Appellant's attempts to trace his family through the Red Cross, which I am told was to the effect that the Appellant's family were no longer in the area where he had contended that they were as well as evidence of the Appellant's private and family life with his girlfriend Syra Khan as well some country evidence.
4. Judge Walker dismissed the appeal.
5. Not content with that decision by Notice dated 10th May 2018 the Appellant made application for permission to appeal to the Upper Tribunal which was initially refused on 4th June 2018 by Designated Judge of the First-tier Tribunal McCarthy. In respect of the second ground upon which Mr Burrett has principally focussed his submissions (I should say that the first ground related to the refusal by the Judge to grant the adjournment and the second ground relates to the judge not engaging with the further

evidence amounting to a protection claim in the context of the human rights appeal) Judge McCarthy was of the same view as the judge at first instance that the decision of the previous judge in relation to the earlier asylum claim was not relevant.

6. On a renewed application, Judge of the Upper Tribunal McWilliam, in a decision dated 25th September 2018, granted permission on the basis principally that it was arguable that the refusal to grant an adjournment had been unfair. Upper Tribunal Judge McWilliam thought that there was rather less merit in Ground 2 though she did grant permission on it.
7. In the event ground 1 was not pursued before me. That was because Mr Burrett acknowledged that there could be nothing material argued because there was no further evidence that he could now produce. His principle point is to be found at paragraph 42 of the Decision and Reasons in which Judge Walker said,

“There is no new evidence that I can take into account and which is particularly pertinent or relevant.”
8. Judge Walker had already come to the view that there was no sufficient evidence to found a new protection claim but if there were, the proper course was for it to be made to the Secretary of State.
9. I observe that no application was made, albeit out of time, to appeal the decision earlier made. Whilst it was appreciated that the only decision with respect to whether or not the Appellant was entitled to refugee status had been made premised on the Appellant’s wrong date of birth, that was a course open to the Appellant and one which Mr Burrett acknowledges could have been followed. Whether the Appellant would have been successful cannot be known.
10. Mr Burrett urges me to find however is that there was a failure to engage with the new evidence in determining whether or not there were obstacles to the Appellant safely returning to Afghanistan, going to the issue of proportionality, as well as to the requirement within in paragraph 276ADE. It was submitted that Judge Walker had erred by not engaging in the point.
11. I recognise that Judge Walker was wrong to say that there was “no evidence” that could be taken into account. There was evidence. There was evidence from the Red Cross, but in my judgment it was not material, and it was not material not only because the starting point for the judge in this case, applying the principles of ***Devaseelan*** was that the Appellant was not a witness of truth, referred to at paragraph 39 of the decision, but in every other material respect Judge Walker found the Appellant to be a witness who was unreliable and indeed rejected the substance of the evidence being advanced.
12. Given that the burden of proof was upon the Appellant, I cannot see how it can be said that Judge Walker, even if the evidence of the Red Cross had

been taken into account, could then have found that the Appellant had proved, as part of his case, that he was not able to communicate or contact his family. The only evidence was that the Appellant's family were not where he said they were. However, the Appellant, as I have already said was found to be an unreliable witness.

13. I find in all the circumstances that the Appellant has not established that there was any material error of law in the decision of the First-tier Tribunal.
14. There was otherwise sufficient engagement with the relationship with the Appellant's girlfriend which was dealt with and in all of the circumstances the appeal to the Upper Tribunal is dismissed.

Notice of Decision

The appeal to the Upper Tribunal is dismissed.

Signed

Date: 9 November 2018



Deputy Upper Tribunal Judge Zucker