



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

Appeal Number: PA/02551/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22nd October 2018**

**Decision & Reasons  
Promulgated  
On 6 November 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**MS  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms S Iengar of Counsel, instructed by Elder Rahimi Solicitors (London)

For the Respondent: Ms K Pal, Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify MS or any of his family members. This direction applies to, amongst others, all parties. Any failure to comply

with this direction could give rise to contempt of court proceedings. I do so as it is a protection claim and MS is a minor.

The Respondent refused the Appellant's protection claim on 15<sup>th</sup> December 2016. Discretionary leave to remain was granted until 30<sup>th</sup> June 2020 as the Appellant is a minor. The appeal against the dismissal of the protection claim was dismissed by First-tier Tribunal Judge Plumptre ("the judge") following a hearing at Hatton Cross on 4<sup>th</sup> April 2018.

### **The Grant of Permission to Appeal**

Upper Tribunal Judge Grubb granted permission to appeal (17<sup>th</sup> September 2018) as:

"It is arguable that the judge erred in law: (1) in not assessing the risk to the Appellant on return for the purposes of his asylum and humanitarian protection claims at the date of hearing (para 49); it was irrelevant that he would not be returned at present because he is a minor; (2) in not properly and fully assessing the risk on return as a minor in accordance with **AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)**. Para 51 is arguably an inadequate assessment even disregarding (1)."

Permission to appeal was refused in relation to the adverse credibility findings and tracing.

### **The Respondent's Position**

There was no Rule 24 notice. Ms Pal conceded that the judge should have considered the risk to the Appellant as at the date of hearing and that this was a material error of law in relation to the Appellant's human rights. She submitted that the adverse credibility finding in relation to the asylum claim stood. She agreed that there was a material error of law in not considering where the Appellant was from and the risks to him being returned to his home area.

### **The Appellant's Position**

Ms Iengar applied to re-open the grounds that had been refused by Judge Grubb. She submitted that there should be a de novo hearing and that the findings at [34 to 49] of the decision of the judge should not be preserved.

The judgment was tarred because of the assessment on credibility and flawed as the judge had not given the Appellant benefit of the doubt, being a minor.

The judge had not adequately considered each individual point as identified in **KS (benefit of the doubt) [2014] UKUT 00552 (IAC)** in that each individual fact must be assessed against the lower standard.

**TN and MA (Afghanistan) v SSHD [2015] UKSC 40** was inadequately considered as [64] "the tracing process must be treated as part of the process of deciding the asylum claim and it was therefore right to consider what

evidence might have been elicited if the duty had been properly performed". I point out here that this was what Underhill LJ had stated in the Court of Appeal in **AA**. These observations were considered by the Supreme Court in **TN** at [69-74] where the approach in an asylum appeal where the Respondent has failed in her tracing obligation was considered.

### Discussion

At [51] of the judge's decision the judge says:

"51. In relation to any risk on return as a young man and failed asylum seeker I am not prepared to speculate about the position regarding family tracing and what may happen before or after 20<sup>th</sup> June 2020. I disbelieve that the Appellant has lost all the contact phone numbers for all his family members and do not find it credible that even as a young person he would be so careless as to have no means of informing his family that he had arrived safely in the UK."

That is a finding that was open to the judge on the evidence she had. Tracing is therefore available to enable contact with family members in Afghanistan to be made. Accordingly, I am not satisfied that it is appropriate to grant permission to appeal to include the question of tracing to be re-assessed.

I am not satisfied that it is appropriate to set aside any of the findings within [34 - 49]. That is because the findings made were available to the judge. The judge repeatedly referred to the fact that she was considering credibility. That is referred to in [34, 40, and 47]. The judge refers to the lack of plausibility of the account at [48]. The judge repeatedly identified that the Appellant as a minor (e.g. [38]). This was plainly in her mind throughout the proceedings. Of greatest importance, however, is that at [8] the judge identified the burden and standard of proof correctly. Nowhere in the decision is there any indication that the judge strayed from that, or that she applied anything other than the appropriate level of scrutiny to each individual fact identified with the exception of the risk on return to the Appellant's home area and the risk upon getting there.

I do not therefore extend the grant of permission to appeal.

In relation to the substance upon which permission to appeal was granted, I accept that [51] is an inadequate assessment of the circumstances the Appellant would find himself in on returning to Afghanistan. The judgment identifies the village the Appellant is from in [11]. It is Akakhail village. Nowhere in the decision does it say where that is. There is no assessment as to what the position is in his village or the province in which the village falls. There is no evidence as to whether the Taliban or Afghan authorities are in control. In the screening interview it identifies that Akakhail village is in Tagab, which is in the province of Kapisa in Afghanistan. There is no evidence within the decision of the judge having considered whether the Appellant could safely reach there from Kabul, or how he would get there. Accordingly, I am satisfied that the judge materially erred.

I am satisfied that it is appropriate to remit the matter to the First-tier Tribunal for consideration of the risks to the Appellant on return to his home area, and whether he could reach there safely given the lack of evidence in relation to the issues still requiring consideration, and this matter goes beyond those contained within the Presidential Guidance for retention in the Upper Tribunal. The remittal is against the factual matrix of there having been no past interest in him by the Taliban for any reason, that he has not established he has lost all the contact phone numbers for all his family members, and that it is not credible that even as a young person he would be so careless as to have no means of informing his family he had arrived safely here. It is not a de novo hearing. [34 - 49] inclusive are preserved.

### **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. [34 - 49] are preserved. I agree with the Representatives that it is appropriate to remit the matter to the First-tier Tribunal to be heard by a judge other than Judge Plumtre.

Signed  
Date 26 October 2018  
Deputy Upper Tribunal Judge Saffell

