



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04100/2018

THE IMMIGRATION ACTS

Heard at Field House
On 28 August 2018

Decision & Reasons Promulgated
On 10 September 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K B

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Ms A Patyna instructed by Montague Solicitors LLP

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of the Judge of the First-tier Tribunal who allowed K B's appeal against the Secretary of State's decision of 12 March 2018 refusing asylum.
2. Although the judge came to a number of adverse credibility findings, about which I shall need to say a little more later on, he allowed the appeal on the basis that the appellant was an unaccompanied minor. The main thrust of the Secretary of State's

appeal was that it was not open to the judge to find that the appellant was an unaccompanied minor in light of his other findings and in light of relevant legal tests. Permission was granted on the Secretary of State's grounds.

3. I shall hereafter refer to K B as "the appellant", as he was before the judge, and to the Secretary of State as "the respondent", as he was before the judge.
4. The appellant was born on 15 May 2000. He came to the United Kingdom in 2015. He claimed to be at risk on return from the Taliban as his uncle had put pressure on him to join the Taliban but he did not want to do so. It is accepted that he is from the Barakzai tribe: the town whose name he gave is located in the Kunar Province and not in Kundoz.
5. The judge gave careful consideration to the appellant's claim and did not find him to be credible. As regards the issue of contact with his family, the judge considered his oral evidence not to have had any contact with his family since he first came to the United Kingdom to be "all over the place". The judge considered that it defied belief that those who must have paid a great deal of money to get him to the United Kingdom did not expect to be kept informed as to how things were going, particularly given how young he was when he first left Afghanistan. Viewing this alongside his constantly changing oral evidence about his last contact, the judge did not believe that he had not maintained some contact with his family in Afghanistan. He also said in his screening interview that he knew the phone number for his family back home but he did not have it.
6. The judge also referred to the person with whom the appellant travelled, with whom he currently lives. This person was allowed to be present at the meeting that took place referred to in the child report, made in January 2018. The judge did not find it credible that the council in whose care the appellant remains and those charged with oversight of his semi-independent living would allow this man to be present throughout the meeting, and refer to him repeatedly as his cousin unless they were confident that he was indeed a cousin and not just a friend of the appellant and tell the judge he was. It was also clear from that report that he was not just a cousin already living in the United Kingdom, but was referred to as a cousin who was picked up in a lorry with the appellant at a service station. The judge went on to say that in order to believe that the appellant had not had contact with his family, one would either have to believe that he did not want to have contact with them, which he had not asserted, or that he had had since 17 July 2015 lost the family number, which he had not asserted, and that even with the assistance of his cousin he had not been able to contact them.
7. The judge concluded that it was highly likely that the appellant had had at least occasional contact with his family, but had subsequently chosen to say otherwise, and not to reveal his family's telephone number.
8. The judge went on to say that in the circumstances appertaining in Afghanistan, that would probably make it "impossible" for the council or the Home Office to trace his

family with a view to arranging for them to meet him on return to Afghanistan. The judge considered that the appellant came across throughout the process as not by any means being inarticulate or unintelligent, and he had little doubt that the appellant soon became aware that the respondent had a problem all the time he was a minor and gave insufficient details of the tracing. By not providing a number he had created a situation where as a minor he could not presently be removed. The judge considered that had he been returned at the date of hearing without arrangements in place for him to be met by his family, he might have faced the significant risks referred to in the country guidance case of AA (unattended children) [2012] UKUT 16 (IAC). This was despite the fact that he was, perhaps unusually as a minor, already well into a period of semi-independent living in the United Kingdom. He was due to complete his present course on 20 July 2018, had no physical issues and no medically documented mental health issues. Those relating to the latter which were not medically corroborated related to memories of his journey to the United Kingdom and anxiety within the United Kingdom about having lost his ID here. The judge concluded that he was already well on his way to independent living.

9. The appeal having been allowed on asylum and humanitarian protection grounds on the basis solely of him being an unaccompanied minor, the Secretary of State in his grounds of appeal argued that the appellant was no longer a minor (which was true by the time of the grounds being put in, but was not true at the date of the judge's decision on 27 April 2018). It was also argued that the judge had failed fully to assess risk on return or internal relocation.
10. Mr Wilding argued, in reliance on the grounds, that the decision was unreasoned and indecipherable as to why the judge decided the appellant was an unaccompanied minor, as that phrase did not simply mean the situation in the United Kingdom but required a holistic assessment, taking into account his family in Afghanistan and elsewhere, and what he faced on return as someone coming to the age of 18. There had been no findings as to why he could not return to Afghanistan for that sole reason. Age was not a bright line but in light of the judge's views as to the independent nature of the appellant's life that could cut both ways. There were no real findings as to the situation in his home area. The decision was clearly flawed.
11. In her submissions Ms Patyna argued that the notion of age not being a bright line was there to protect those who are vulnerable after the age of 18. It was clear that what had been said in AA was still good law, having been maintained more recently by the Upper Tribunal in considering risk on return to Afghanistan. The judge had to assess the situation as at the time of the hearing when the appellant was still a child. With regard to the issue of being unaccompanied, Ms Patyna referred in particular at paragraph 9 of the speaking note she had put in. It was clear in AA that the issue was whether a child would have the protection of his family and therefore the issue of previous contact with the family was not determinative. The judge's reference to the appellant having had at least occasional contact with his family did not automatically make him an "attached" child. Paragraph 26 of the judge's decision required to be read as meaning that the judge was satisfied that the appellant would not be able to

avail himself of his family's assistance. It would be impossible for his family to meet him on return to Afghanistan. It was therefore properly open to the judge to find that despite his credibility concerns, at the time of the decision the appellant was still a child who would not be able to rely on the support of his family. Paragraph 26 of the judge's decision addressed the point made in the grounds about the judge's claimed failure to consider whether the family could meet him elsewhere. It was unclear where he was from as both the potential areas were contested areas or under heavy Taliban control. One could not assume that he could relocate. The decision was open to the judge.

12. By way of reply Mr Wilding argued that the bright line point could not only be a one way street. For example, at 15 or 17 year old could be living a much more independent life than another child of that age. It was a question of the need for a factual analysis. It was unrealistic and fanciful to say it would only work in the appellant's favour. It was not this case, but it was relevant that he was found to be somewhat independent. That needed to be factored in. The main point was however that there was a lack of clear finding as to whether he was an unaccompanied child, bearing in mind the negative findings.
13. I reserved my decision.
14. The essence of the judge's reasoning in allowing the appeal appears to be on the basis that by not providing a telephone number the appellant had created a situation where as a minor he could not be removed and as at the date of hearing without arrangements in place for him to be met by his family he might have faced the significant risks referred to in AA (unattended children) as a minor despite the fact that he was perhaps unusually as a minor already well into a period of semi-independent living in the United Kingdom.
15. Leaving the issue of his relative independence aside for a moment, it was relevant to bear in mind the point made by reference to JS [2013] UKUT 568 (IAC) in the grounds to the effect that where an appellant has not co-operated in providing family details then it is improbable that a failure of the tracing duty is likely to be material. The decision in EU [2013] EWCA Civ 32 makes the point that where an unaccompanied child has been sent from Afghanistan by their family the costs will have been considerable and the family are unlikely to be happy to co-operate with an agent of the Secretary of State for the return of the child, therefore the appeal was dismissed on the basis that there was no link between the Secretary of State's breach of duty to endeavour to trace his family and the appellant's claim to remain in the United Kingdom. It is clear from the judge's decision that he did not believe that the appellant had not maintained some contact with his family in Afghanistan. He considered that it was highly likely that the appellant had had at least occasional contact with the family but had chosen subsequently to say otherwise and not to reveal his family's telephone number. This would make impossible any efforts to trace his family with a view to arranging for them to meet him on return to Afghanistan.

16. In AA at paragraph 133 it is clear that the appellant there was found to be at real risk of persecution as an unattached child from his particular home area who had lost all contact with his family so that family protection would not be available to him. That is not the situation of this appellant in light of the judge's findings as set out above. In my view in light of those findings, it was not open to the judge to find that the appellant was an unattached child and as a consequence entitled to international protection. The points made at paragraphs 2.1 to 2.3 of the grounds have clear force in this regard. In my view the judge was wrong to find that the appellant is an unattached child, in the sense that he is able to obtain help from his family, on the judge's findings, and his claim to international protection cannot be saved by his decision not to provide the relevant details. Accordingly I find that the judge erred as a matter of law.
17. As regards the disposition of the appeal, Mr Wilding was neutral on the point that argued that the negative findings were to be preserved. Ms Patyna preferred the matter to be remitted to the First-tier Tribunal as almost all the findings would need to be set aside, she argued, as the Tribunal would be looking at the integrity of the factual findings and as the appellant was now over 18 the case needed to be looked at afresh.
18. I agree that the matter needs to go back to the First-tier Tribunal bearing in mind the change in the circumstances, but I do not agree that the adverse findings are to be abandoned. The judge came to clear adverse credibility findings which were not challenged on a cross-appeal by the appellant. Accordingly the adverse credibility findings will be preserved and the matter will be remitted for a rehearing taking into account those findings at Hatton Cross by a judge other than Judge Baldwin.

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 his 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
Upper Tribunal Judge Allen

Date: 05 September 2018