



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

Appeal Number: PA/04990/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Heard on 20<sup>th</sup> of December 2017**

**Decision & Reasons  
Promulgated  
On 26 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**[S A]**

**(Anonymity order not made)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr E. Nicholson of Counsel

For the Respondent: Mr S Kotas, Home Office Presenting Officer

**DECISION AND REASONS FOR FINDING AN ERROR OF LAW**

**The Appellant**

1. The Appellant is a citizen of Iran born on [ ] 2002 and is now aged 16 years. He appeals against a decision of Judge of the First-tier Tribunal Cohen sitting at Taylor House on 23<sup>rd</sup> of June 2017 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 12<sup>th</sup> of May 2017. That decision was refused to grant the Appellant asylum and humanitarian protection.

## **The Appellant's Case**

2. The Appellant's claim was that his father and a Mr [K], the husband of his mother's cousin, were arguing over a land dispute. The Appellant began a relationship with Mr [K]'s daughter, N, about a year before he left Iran. The Appellant and N were found together by N's mother who threatened to call Mr [K], N's father. The Appellant escaped. The Appellant's father and Mr [K] were subsequently involved in a fight and the Appellant's father was arrested. The authorities were now looking for the Appellant. The Appellant feared he would be arrested and imprisoned upon return or killed either by his own father, Mr [K] or the Iranian police. The Judge had before him an expert report from Dr Khaki indicating the level of risk that the Appellant would face upon return to Iran due to his relationship with N.

## **The Proceedings in the First-tier**

3. The Judge found the Appellant's account was vague and lacking in detail and pointed to a number of inconsistencies in the determination which undermined the Appellant's credibility. He dismissed the appeal.
4. The Appellant appealed against that decision on grounds settled by counsel who had represented the Appellant at first instance and who appeared before me. The grounds submitted that the Judge's focus on the issue of the Appellant's credibility was not compatible with the Court of Appeal decision in **AM (Afghanistan) [2017] EWCA Civ 1123** handed down on 27<sup>th</sup> of July 2017 a month after the hearing in this case. The Judge had noted that the Appellant was still a minor but insufficient account, the grounds complained, had been taken of the Appellant circumstances. The text of the determination was criticised for a number of typographical errors which gave it the appearance of being an uncorrected draft. The Judge should have asked himself whether the discrepancies in the Appellant's evidence pointed out in the determination could have been explained by the Appellant being 14 years old at the time of the hearing and substantially younger than that at the initiation of the relationship with Mr [K]'s daughter.

## **The Onward Appeal**

5. The application for permission to appeal came on the papers before First-tier Tribunal Judge Grant-Hutchison on 19th of October 2017. In granting permission to appeal she found it arguable that the Judge had misdirected himself by failing to: (a) properly determine the appeal in accordance with **AM (Afghanistan)** endorsing the 2008 practice direction and the 2010 Presidential Guidance Note No 2 and (b) give clear findings of fact particularly at [22, 23, 24, 25 and 28].
6. The Respondent replied to the grant of permission by letter dated 7<sup>th</sup> of November 2017 submitting that the Judge had directed himself

appropriately. There may have been spelling errors but such were minor and did not undermine the findings of fact made by the Judge. The Judge properly considered the core of the Appellant's claim and found there were discrepancies in the evidence.

### **The Hearing Before Me**

7. At the hearing before me it was conceded by the Presenting Officer that there were indeed material errors of law in the determination particularly the treatment of the Appellant's evidence by the Judge given that the Appellant was 14 years old at the date of hearing. Both the Appellant and the Respondent urged on me that the appeal should be remitted back to the First-tier to be heard de novo.

### **Findings**

8. The Judge was dealing with a vulnerable witness, given the Appellant's age at the date of hearing. Prior to the decision in **AM Afghanistan** it may well be that the Judge's approach to the case would not have been criticised. However, the common law operates retrospectively and so the Judge's determination falls to be criticised for not following authority which had not been handed down when this case was before him. What **AM Afghanistan** was underlining was that guidance on how to deal with vulnerable witnesses was already in existence and the Court of Appeal was emphasising how that guidance should be followed. The treatment by the Tribunal of vulnerable witnesses such as the Appellant must be in accordance with the case law and the Practice Directions cited therein.
9. The Appellant had had a lengthy interview with the Respondent consisting of some 193 questions and had submitted a statement for the hearing which ran to 8 pages. There was little if any need for further oral evidence save perhaps where the Appellant wished to proffer an explanation for discrepancies. If the Respondent did wish to ask the Appellant further questions they could have been submitted in writing in advance.
10. In the first place, the burden is on the Appellant's representatives to indicate what they say the arrangements and/or adjustments should be made to take into account the Appellant's vulnerability to ensure access to justice. This must be right since vulnerabilities will vary from Appellant to Appellant and the Appellant's representatives are best placed to identify them. In this case the vulnerability was the Appellant's very young age and, potentially, the trauma alleged.
11. It is not apparent from the determination that that was done in this case but the more difficult question is how the Tribunal should have gone about the assessment of the merits of the case taking into account the Appellant's vulnerability. At [19] of the determination the Judge noted that the Appellant was still a minor and attached "a lower burden of proof

applicable to the assessment of his evidence". The difficulty was that the Judge needed to explain in more detail how he intended to do this.

12. Some guidance can be gleaned from Paragraph 351 of the Immigration Rules which provides that "account should be taken of an applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation. An asylum application made on behalf of the child should not be refused solely because the child is too young to understand his situation or to have formed a well-founded fear of persecution. Close attention should be given to the welfare of the child at all times".
13. The Judge found at [32] that the Appellant had fabricated his claim in its entirety. That was not of itself a conclusion that the Judge was prevented from coming to simply because of the Appellant's age. However, in arriving at that decision it was necessary to have ensured that proper arrangements for the hearing had taken place, that the Appellant's evidence had been looked at in a holistic way and that it could be demonstrated that more attention had been paid to objective indicators of risk (such as those set out in the expert's report) than, for example, the Appellant's understanding of his situation. He was younger than 14 when he first became involved in a relationship with Mr [K]'s daughter, N.
14. I therefore set this decision aside and remit the appeal back to the First-tier to be heard at Taylor House de novo by any Judge other than Judge Cohen, on the first available date. The Appellant's solicitors should write to both the Respondent and the Tribunal at least four weeks before the date of hearing indicating: (a) what further evidence they intend to submit and (b) what particular arrangements are considered suitable for the fresh hearing bearing in mind the guidance in **AM Afghanistan**. It will be a matter for the First-tier Tribunal to decide whether to make further case management directions upon receipt of the Appellant's indications.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I direct that the matter be remitted back to the First-tier for a de novo hearing before any Judge except Judge Cohen.

The Appellant's appeal is allowed to that limited extent.

I make no anonymity order as there is no public policy reason for so doing no such order was made at first instance.

Signed this 19th of January 2018

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Judge Woodcraft

Deputy Upper Tribunal Judge

**TO THE RESPONDENT**  
**FEE AWARD**

No fee was payable and therefore there can be no fee award.

Signed this 19<sup>th</sup> of January 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge