



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/05037/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre**

**On 9 February 2018**

**Decision & Reasons  
Promulgated  
On 3 April 2018**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**AR  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr F Magennis instructed by Migrant Legal Project (Cardiff)  
For the Respondent: Ms R Petterson, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

**Introduction**

2. The appellant is a citizen of Afghanistan who was born on 1 January 2002. He arrived in the United Kingdom on 17 October 2016. On 17 November 2016 he claimed asylum.
3. On 12 May 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR. However, as the appellant was an unaccompanied minor, the Secretary of State granted him discretionary leave until 1 July 2019.

### **The Appeal to the First-tier Tribunal**

4. The appellant appealed to the First-tier Tribunal against the refusal of his asylum, humanitarian protection and human rights claim.
5. In a decision sent on 7 July 2017, Judge I D Boyes dismissed the appellant's appeal on all grounds. First, he rejected the appellant's account that he had converted to Christianity since being in the UK and would, as a result, be at risk on return to Afghanistan. Secondly, the judge found that, in considering any risk to the appellant on return to Afghanistan, the appellant's case should be considered on the basis that he would not be returned until he was an adult and, on that premise, he was not at real risk of persecution or serious harm contrary to Art 15(c) of the Qualification Directive (Council Directive 2004/83/EC).

### **The Appeal to the Upper Tribunal**

6. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds set out at para 2(a) - (u) of the Grounds.
7. On 11 October 2017, the First-tier Tribunal (Judge Brunnen) granted the appellant permission to appeal.
8. On 17 November 2017, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision.

### **Discussion**

9. Before us, we invited the representatives to focus upon two specific grounds in paras 2(a) and 2(c). In the light of the view we take in respect of these two grounds, and that the judge's decision is legally flawed and as a result cannot stand, it is unnecessary to consider the merit of the remaining grounds.
10. The ground in para 2(a) is as follows:

"The Judge made his decision on the basis that the Appellant would not be returned to Afghanistan until he reaches the age of majority. The correct test is for the Judge to decide whether the Appellant has made out an asylum, protection or human rights claim at the date of the hearing, not at some date in the future. The Judge erred in stating 'I do not have to consider the risk upon return now as the appellant will not be returned until he is an adult';...."

11. Ms Pettersen, who represented the Secretary of State accepted that the judge had fallen into error in seeking to assess any risk on return to the appellant on the basis that he would not be returned as a child. She accepted that any risk to the appellant whether in relation to his asylum claim or under Art 15(c) of the Qualification Directive had to be assessed as at the date of the hearing and, therefore, on the basis that he would be a child. Ms Pettersen did not seek to uphold the judge's decision as a result.
12. We agree. The proper assessment of risk on return in assessing a claim under the Refugee Convention or on humanitarian protection grounds has to be made as at the date of hearing (see, e.g. EU(Afghanistan) v SSHD [2013] EWCA Civ 32 at [34] *per* Sir Stanley Burnton). In failing to do so, and thereby assessing any risk to the appellant on the basis that he would be an adult on return, the judge fell into error and his decision cannot stand.
13. Para 2(c) of the Grounds relates to the judge's assessment of a number of witnesses attesting to, in particular, the appellant's claimed conversion to Christianity. The Ground is as follows:

"The judge refused the Appellant's request to call five witnesses to give evidence. Having so-refused, the Judge then sought to go behind the written testimony of those witnesses in his determination. The Judge erred in failing to allow the witnesses to be called so that any issue he might have wished to take with their evidence could be put to them by the Respondent or by the Judge himself. Having prevented them from giving evidence, he erred in seeking to go behind the factual contents of their written testimony;"
14. At para 24, the judge took an adverse view of the evidence of the witnesses:

"I have considered the evidence of those whom assert they know the appellant's faith. I reject them all ...."
15. Further, at para 26 of his determination, the judge said this:

"It is a judicial function, not anyone else's in this instance, to ascertain where the truth of the matter lies. I have considered the appellant's rudimentary knowledge of Christianity and have reached the conclusion that the letters of support are not reliable. I wondered at one stage whether they were written in support of someone else as they talk of understanding and development in the Christian faith. The appellant, as it stands, is a million miles away from understanding. The notion and idea of a purported conversion has not served this appellant well."
16. Mr Magennis informed us that at the outset of the First-tier Tribunal hearing, the judge had indicated that he would not allow him to call a number of witnesses who were present to give evidence on behalf of the appellant. He submitted that it was wrong in law for the judge to do so and then to reject as "not reliable" their written evidence.
17. Ms Pettersen confirmed that the note of the Presenting Officer at the hearing recorded that as a preliminary issue the judge decided that the witnesses would not be allowed to give evidence at the hearing as no

notice had been given to the Tribunal and that their letters would be taken as evidence.

18. Ms Pettersen did not concede that the judge had fallen into error but, accepting that the issue of the genuineness of the appellant's conversion was in issue, the witnesses' evidence had to be assessed and she did not actively seek to defend the judge's decision not to allow them to give oral evidence in order that their evidence could be assessed.
19. We are in no doubt that the judge erred in law by failing to allow the witnesses to give oral evidence, given that they were present at court and the appellant wished to call to them to give oral evidence and that the subject-matter of their evidence was in dispute between the parties. Their evidence went to the central issue of whether the appellant had genuinely converted to Christianity. The judge denied the appellant (through his counsel) to explore any difficulties with their evidence before rejecting their evidence as "unreliable". This was unfair. It will only be in the rarest and most exceptional of circumstances that it would be just for a judge to prevent a witness being called to give oral evidence on a relevant issue which is a matter of dispute between the parties. In such cases, the forensic process of examination-in-chief and cross-examination is an essential component of fairness to both parties.
20. Consequently, we also accept that the judge erred in this respect as set out in para 2(c) of the Grounds.

### **Decision**

21. For these reasons, the First-tier Tribunal materially erred in law in dismissing the appellant's appeal. That decision is set aside.
22. The proper disposal of this appeal is that it should be remitted to the First-tier Tribunal for a *de novo* rehearing by a judge other than Judge I D Boyes.

Signed



A Grubb  
Judge of the Upper Tribunal

28, March 2018