Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10956/2013

THE IMMIGRATION ACTS

Heard at Field House
On 23 April 2014

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MR ELON RIZAHI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Ball
For the Respondent: Mr P Nath

DETERMINATION AND REASONS

1. The appellant is a citizen of Albania. It is not in issue that he was born on 17 February 1996. He appealed against the respondent's decision dated 29 November

2013 refusing to grant him asylum under paragraph 336 of the Immigration Rules. His appeal came before First-tier Tribunal Judge Turquet. By a determination dated February 11 2014 the judge dismissed the appeal on all grounds. The appellant sought permission to appeal that decision. The grounds in support of the application were settled by Counsel who appeared for the appellant in the First-tier and they are dated 27 February 2014.

2. The grounds of appeal submit that the judge flagged up various "inconsistencies" on the part of the appellant in interview but failed to properly or adequately take into account that the asylum interview was conducted in a wholly inappropriate manner. There was no appropriate adult present and the interview lasted over three hours with only two short breaks when best practice indicates (the need for) regular breaks. The appellant often indicated difficulty understanding the questions (examples given) and none of this was properly taken into account when the Judge purported to find against the appellant. Furthermore, the judge did not anxiously scrutinise the circumstances leading to the blood feud against the appellant's family. The respondent accepted that a man called Sulejman Sala had been knocked down and killed by a bus, but that the only article the respondent had been able to locate on the internet did not name the driver of the bus. Research on the internet by the appellant's representatives found an article indicating that a man by the name of Agron Rizahi had been the driver of a bus that knocked over and killed a Suleiman Sala and that the employer of Mr Rizahi, a company called Beam Travel, indicated that he did work for the company, was involved in the accident in question and was the subject of a blood feud.

3. Although giving no reasons the judge granting permission to appeal stated that the grounds disclosed an arguable error of law.

The Rule 24 Response

4. The respondent filed a Rule 24 response by letter dated 31 March 2014. It is said that it is clear from paragraph 39 of the judge's determination that she was careful to establish that there had been no unfairness in the conduct of the appellant's interview and that she was prepared to take account of the appellant's age when considering his ability to answer questions. The determination had to be read as a whole. The judge stated clearly at paragraph 9 that she had taken account of all evidence, including documentation from Albania. Her findings show a comprehensive review of the evidence leading to properly reasoned conclusions.

5. I have before me all the documentation that was before the First-tier Judge. This includes the respondent's bundle, an appellant's bundle which is in effect unpaginated, the joint Presidential Guidance Note No 2 of 2010 and case law including **R v Secretary of State for the Home Department on the application of AN (a child) and FA (a child) [2012] EWCA Civ 1636** and JA **(Afghanistan) v Secretary of State for the Home Department [2014] EWCA Civ 450**.

Submissions

6. Mr Ball, representing the appellant, submitted that the Presidential Guidance Note was an important consideration that needed to be taken into account by the judge. Although it was issued in relation to substantive hearings before judges, set out within it at 5.2iii are examples of a responsible adult, e.g. parent, social worker, teacher and foster parent who will be attending the substantive hearing to provide support. A legal representative is not and cannot be a responsible adult.

7. Mr Ball made the point that at the initial screening interview there was no responsible adult in attendance. The only persons present were the interviewing officer, the interpreter and the appellant. Mr Ball made reference to paragraphs 124-126 of **AN** which I set out hereafter where Lady Justice Black wrote:-

> "124. Left to my own devices, without the constraints of existing rules and policy and without the benefit of having seen in advance the judgment of my Lord, Lord Justice Elias, I would have been inclined to say that asylum related answers given by any child in the absence of a responsible adult should not be relied upon at all in the evaluation of his asylum claim. However, I have accepted that it was not *unlawful* to interview the children in the circumstances in which they were interviewed and I accept also that there is nothing in statute or in the Rules, guidance or European directives which prohibits reliance on material obtained as it was from AN. As I have made clear, I have doubts as to the logic of the approach taken in the UKBA's policies in relation to the interviewing of children and I consider that a rigid application of them risks producing an outcome for the individual child which is not compatible with the requirement to have the interests of the child a primary consideration when making decisions about his future whilst, of course, also ensuring effective immigration control. After considerable reflection, I have concluded, however, that it would be going too far to say that my doubts should be translated into a complete acceptance of what Elias LJ has described as the appellants' 'root and branch attack' on the policies of the UKBA which would result in the Secretary of State and the Tribunal on appeal being prevented in every case, as a matter of principle, from relying on answers given in the circumstances in which AN's answers were given.
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> 125. My final conclusion is that Mitting J was right to say that the influence of such answers should be regulated by weight in the particular case rather than by any universal principle of admissibility. Not only does this properly reflect the limits to which I am prepared to push my doubts, it is also largely consistent (as Elias LJ points out) with the approach taken in section 78 of PACE which is to require a tailored decision as to admissibility in each case. However, I hope that any decision maker considering the issue of weight will have regard to what I perceive to be the shortcomings of the present policies, to the

particular vulnerabilities of children in circumstances such as those of FA and AN, and to the real possibility that difficulties created by interviewing them without a responsible adult present cannot be cured by providing an opportunity for the child to explain his earlier answers either in the substantive interview or later in the process. As Mitting J said, it may be right in an individual case to attribute no weight at all to the material that emerged; in that event, the material should be treated as if it had been excluded from the start.

126. Where there has been a clear breach of the principles set out in the various provisions governing questioning about asylum to which I have referred earlier in this judgment, it ought at the very least to be exceedingly difficult to persuade the court to admit material that has been thereby obtained; some breaches will inevitably rule out reliance on the material as was the case with FA's answers following his indication that he was claiming asylum. But decision makers will have to be alert to the possible need to discard material even where matters have not gone that far."

8. Mr Ball then made reference to the judgment in the same case of Lord Justice Kay at paragraph 184:-

"184. I agree that answers given at the outset do not attract a blanket prohibition on subsequent admissibility and that the issue is one of weight, which will require scrupulous assessment. As the preceding judgments reveal, once an application for asylum has been intimated – as it may be spontaneously – the applicant has the protection of paragraph 6.2 of Processing Asylum Applications from Children. This acknowledgement of the risk of the potential unreliability of answers given at that stage by an asylum seeking minor in the absence of a responsible adult or legal representative is a matter which ought properly to be taken into account when considering what weight, if any, should be accorded to the answers of a minor who has not yet claimed asylum."

9. Mr Ball submitted that the determination is sorely lacking in any scrupulous assessment. This is evidenced in paragraph 40 by the judge stating that she noted that in the appellant's screening interview, when asked why he was afraid something bad would happen to him on return, he responded that "They threatened us that they are going to kill us". The judge went on to say that the appellant did not mention that he had already been attacked. If he had been attacked as claimed, she found it reasonable for him to have said so at that stage. This, Mr Ball submitted, was where the judge fell into error in making that finding which was a bedrock one damaging the appellant's credibility. The judge at paragraph 39 refers to the weight that she attached to the interview, but appears to have attached full weight at paragraph 40 to finding against the appellant because he did not mention that he had already been attacked.

10. Looking at the interview itself Mr Ball then said that it was some three hours long and that there should have been a break at some stage. It was then pointed out to him that there had in fact been two breaks during the interview and he accepted that that was so. He went on to submit that there was clearly confusion in the answers given to the interviewing officer, for instance, at questions 98, 102, 125, 146, 147, 187 and 190, which shows additional reasons why the appellant's answers should have been treated with caution and circumspection.

11. Regarding the second ground, upon looking at page 27 of the appellant's bundle (section 2) Mr Ball submitted that there was clear evidence that it was the appellant's father who was driving the bus that resulted in the death of Mr Sala. It was clearly a key finding as to whether this was in fact what happened as it provided the reason for the commencement of the blood feud and was a matter that should have been addressed by the judge, but there is no evidence that she did so at all. The judge was not entitled to place little weight on the documentation produced as evidence that the appellant's father was charged and sentenced as set out in paragraph 50 of the determination. The judge was not entitled to conclude as she did in paragraph 4 that the appellant has fabricated events to bolster his claim. The credibility findings are not safe and the matter should go back to the First-tier Tribunal for a complete rehearing.

12. In his submissions Mr Nath said that there had been sufficient breaks at the interview. The judge was entitled to make findings on credibility for the reasons that she gave in what was a very detailed determination and at paragraph 61, although finding that the appellant had not been threatened by the Sala family, even if he had been there would nevertheless be sufficiency of protection for him in Albania for the reasons that the judge sets out in the subsequent paragraphs.

My Decision

13. Paragraph 352 of the Immigration Rules states as follows:-

> "Any child over the age of 12 who has claimed asylum in his own right shall be interviewed about the substance of his claim unless the child is unfit or unable to be interviewed. When an interview takes place it shall be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child. The interviewer shall have specialist training in the interviewing of children and have particular regard to the possibility that a child will feel inhibited or alarmed. The child shall be allowed to express himself in his own way and at his own speed. If he appears tired or distressed, the interview will be suspended. The interviewer should then consider whether it would be appropriate for the interview to be resumed the same day or on another day."

14. In **JA (Afghanistan)** at paragraph 24 Lord Justice Moore-Bick with whom the other Lord Justices were in agreement had this to say:-

> "24. In the absence of a statutory provision of the kind to be found in Section 78 of the Police and Criminal Evidence Act 1984, I do not think that in proceedings of this kind the Tribunal has the power to exclude relevant evidence. It does, however, have an obligation to consider with care how much weight is to be attached to it, having regard to the circumstances in which it came into existence. That is particularly important when considering the significance to be attached to answers given in the course of an interview and recorded only by the person asking questions on behalf of the Secretary of State. Such evidence may be entirely reliable, but there is obviously room for mistakes and misunderstandings, even when the person being questioned speaks English fluently. The possibility of error becomes greater when the person being interviewed requires the services of an interpreter, particularly if the interpreter is not physically present. It becomes greater still if the person being interviewed is vulnerable by reason of age or infirmity. The written word acquires a degree of certainty which the spoken word may not command. The 'anxious scrutiny' which all claimants for asylum are entitled to expect begins with a careful consideration of the weight that should properly be attached to answers given in their interviews. In the present case the decision maker would need to bear in mind the age and background of the applicant, his limited command of English and the circumstances under which the initial interview and screening interview took place."

15. I do not quote verbatim from other paragraphs in **JA**, but it is apparent that in the absence of a responsible adult care should be taken to avoid asking children interviewed to explain why they are afraid of being returned to their home countries. Clearly it is necessary for welfare purposes that Border Agency officials should be free to ask some questions of children when they first encounter them, but the guidance suggests that they should not be designed to probe any claim for asylum. **AN** recommends that those making decisions about asylum should not rely on details or information obtained from interviews where no responsible adult or legal representative was present unless those details or information have been raised with the applicant during the substantive asylum interview in the presence of a responsible adult or legal representative, and the applicant has been given an opportunity to provide an explanation. (Paragraph 29)

16. I conclude from a perusal of the authorities that the position is as set out in paragraph 34 of **JA (Afghanistan)**, (I paraphrase), namely that a failure to observe the proper procedures when interviewing children does not render their answers inadmissible. It affects the weight to be attached to the evidence, but does not prevent the decision maker from taking it into account altogether. Secondly, the decision maker should exercise a considerable degree of caution before relying on answers given in the course of interviews of children that have not been conducted in the presence of a legal representative or responsible adult.

17. Paragraph 34 of **JA** then goes on to state that given the age of the present appellant (in that appeal) at the time of the interviews the second of those principles is clearly

of relevance. I note that the appellant in that appeal was 14½ years old when he was interviewed. The appellant in the current appeal was 17½ years of age at the date of his screening interview. Absent other distinguishing factors it is reasonable to attach more weight to evidence obtained at interview from a child of 17 than a child of 14.

18. Upon looking at the determination I observe that Mr Collins, who appeared for the appellant at the First-tier hearing, submitted that the decision of the respondent was not in accordance with the law because the appellant was a child and there had not been an appropriate adult at the interview. He cited **AN** and submitted that no reliance could be placed on that interview. He referred also to the Presidential Guidance. The judge was therefore aware from the start of the hearing of what was in issue. I look at her findings.

19. At paragraph 8 the judge expressed herself mindful of the fact that the appellant was still under 18 and that he was accompanied by an interpreter as an appropriate adult (at the hearing). She noted at paragraph 12 that in his screening interview the appellant said that his reason for coming to the UK was because his father ran over a person "by car". That was the reason why the families were in a blood feud. Asked what he thought would happen to him on return he said they threatened that they were to kill them (i.e. him and his family).

20. Although undated there is a statement from the appellant that is referred to by the judge at paragraph 13 as being a statement submitted before the appellant's asylum interview. That statement is typed and must have been prepared by someone with legal knowledge as it concludes with a statement of truth. The named responsible adult at the interview in October 2013 was a legal representative from the appellant's solicitors who was clearly there throughout the process. On the final page that person makes reference to a supposed error in the interpretation of a few words in paragraph 13 of the interview (see response to question 214).

21. I agree with the judge at paragraph 39 where she states that there was an adult with the appellant at the substantive interview, this being the legal representative. The interviewer indicated on the interview record that she read out the explanation of the responsible adult role. Although at the end of the interview the appellant said that he had understood most of the questions, the interpreter commented that there were one or two words where he (or it may have been she) had intervened "but the interpreter had clarified". The questions had been rephrased and the judge, having noted that the appellant was 17 years and 7 months at the date of interview, further commented that he is very mature and a composed young man who was able to make his way across Europe to the United Kingdom. He had gone to Hatton Cross Hearing Centre on his own and had arrived very early. He lives in Kent which is a considerable distance from the court. The judge as a consequence did not find that the record (of interview) is one on which she could place little weight or that it should be disregarded. She did however take into account the appellant's age when considering his ability to answer all the questions.

22. It is a matter of argument as to whether it was reasonable in paragraph 40 the judge found it reasonable for the appellant to have said that he had already been attacked when asked why he was afraid something bad would happen to him on return. His response was "They threatened us that they are going to kill us". This was during the course of the screening interview at a time when he was unaccompanied but the appellant answered a simple question with a simple answer. Of itself however, the judge's comment is not in my finding of particular importance. In the following paragraph the judge finds a number of inconsistencies and implausibilities in the appellant's story, even taking into account that he was only 14 years old at the time of the major incident. The judge was entitled to note the inconsistencies between the statements and interview record and also the oral evidence as set out at paragraph 43.

23. The judge did not deal directly with the Shekulli report referring to the death of Mr Sala following being hit by a bus driven by Mr Agron Rizahi. This accident was given as the reason for the blood feud against his family. However, the judge recognised that the feud lay at the core of the appellant's claim and she found many reasons as to why she did not accept that one had been declared. The reasons for so finding were open to her and disclose no error. Nevertheless, the judge went on to consider the situation in the event that the appellant had indeed been threatened by the Sala family and concluded that there would be a sufficiency of protection for the appellant in Albania. That conclusion is supported by reasons set out in paragraphs 61 onwards, such that any errors that there may be in the determination do not amount to material errors and the decision of the judge is therefore a safe one.

24. For the above reasons the decision of the judge is upheld and the appellant's claims are dismissed.

25. There has been no anonymity direction given thus far, there was no application for one to be made and in the circumstances revealed by this appeal there would seem to be no good reason why an anonymity direction should be made now and therefore I do not make one.

Signed Date

Upper Tribunal Judge Pinkerton