Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04816/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 June 2015	**On 29 June 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

OA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Paul Howard, Solicitor, of Fountain Solicitors
For the Respondent: Ms S Vidyakaran, 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 order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. We make the order because the appellant is a young asylum seeker who might be at risk just by reason of being identified.

2. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal on asylum and human rights grounds against a decision taken on 20 June 2014 refusing to grant him further leave to remain and to remove him to Afghanistan.

Introduction

3. The appellant is a citizen of Afghanistan born on 30 March 1995.

4. The appellant claims that he left Afghanistan in late August or early September 2009. He travelled to the United Kingdom by air, boat and a series of lorries. He arrived in the United Kingdom on 1 December 2009 and claimed asylum on the same day. Following a screening interview on 4 December 2009 and an asylum interview on 11 January 2010 the respondent refused his asylum claim on 12 May 2010 but granted him discretionary leave on the grounds that he was an unaccompanied minor. That leave expired on 30 September 2012 and the appellant submitted his application for further leave to remain on 28 September 2012.

5. The appellant is of Tajik ethnicity and lived in a village in Baglan province. He claims that he attended school for about six years. His father was a teacher at the local school. His mother died a few years ago as a result of complications in pregnancy. His father was in charge of the school but was killed by the Taliban in August or September 2009 because he refused to close down the school when the Taliban asked him to do so. At the time of his father's death, the appellant was visiting his maternal uncle in Andarab. His uncle told him that prior to killing his father the Taliban had threatened his children. The appellant's younger brother stayed with the uncle but arrangements were made for the appellant to leave Afghanistan with an agent about a week later. The appellant fears that if he is returned to Afghanistan he will be killed or recruited by the Taliban who control his home area. He also fears that people in Afghanistan will sell him or sexually abuse him.

6. The respondent accepted that the appellant is an Afghan national from Baglan province but did not accept that he was forced to leave Afghanistan for the reasons given. The appellant could return safely to Baglan province and there was an internal relocation option in Kabul.

The Appeal

7. The appellant appealed to the First-tier Tribunal. The judge did not find the appellant to be credible witness and rejected his account of his father's death and his claim to have been threatened by the Taliban. The appellant could choose to go back to his home area or to relocate to Kabul. There was no credible evidence that the Taliban were searching for the appellant and that they would target him wherever he goes in Afghanistan. The respondent had made efforts to trace the appellant's family by passing details to the British Embassy in Kabul. The appellant was now 19 and lives independently in a flat provided by social services. There was no

credible evidence that he was a vulnerable person and that he would be at real risk of being subject to sexual abuse on return.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal on four grounds. Ground one asserts that the judge fell into a material error of law in finding that the appellant has family members in Afghanistan. The judge accepted that the appellant had attempted to contact his family through the Red Cross but gave no reasoning and cited no support from the objective evidence for the assertion that, "*with only addresses of villages in provinces in Afghanistan it can be difficult even for those on the ground to find and trace family members*" which is the basis for the finding that the appellant's family members are still in Afghanistan. The reasoning is insufficient to support that finding, especially in the face of clear evidence from the British Red Cross, whose professional duty is to trace family members in these circumstances, that they have been unable to trace the appellant's family. The judge also did not take account of the respondent's failure to endeavour to trace the appellant's family in a timely fashion; no attempt was made to trace until February 2014 and no response had been received as at the date of hearing.

9. Ground two asserts that the judge erred in failing to give a reasoned decision as to the risk to the appellant of return to Afghanistan as a young single male. The judge's finding that there was no credible evidence that the appellant is a vulnerable person or that he would be at real risk of being subjected to sexual abuse upon return flies in the face of JS (Former unaccompanied child – durable solution problem) Afghanistan [2013] UKUT 00568 (IAC) and other case law to the effect that sending young men who are barely out of childhood to Afghanistan as unaccompanied returnees places them at risk of exploitation and ill-treatment not limited to sexual abuse but including forced recruitment, sexual violence and kidnapping. The judge also failed to apply the relevant guidance in her assessment of risk based upon the individual circumstances of the appellant.

10. Ground three asserts that the judge erred in making broad credibility findings between paragraphs 25 and 30 of the decision without correctly applying the relevant guidance in assessing the credibility of young witnesses or relevant guidance on how to approach factual evidence in asylum cases. The judge has not applied the guidance in AA (unattended children) Afghanistan CG [2012] UKUT 00016 in which Owen J stated that the standard of proof is low and this principle should be applied more generously to children who should liberally be given the benefit of the doubt. This principle is established by the UNCHR Refugee Children Guidelines on Protection and Care 1994 ("the UNHCR Guidelines") and is consistent with the Joint Presidential Guidance Note No 2 of 2010 ("the Presidential Guidance"). The judge has not taken into account that the appellant gave a lucid and internally consistent account of his experiences in Afghanistan as well as giving credible responses to the respondent's refusal letter in his witness statement of 5 August 2014.

11. Ground four asserts that the judge erred in her approach to Article 8 by failing to fully consider the claim under the Immigration Rules. The judge materially erred in failing to consider whether the appellant met the requirements of paragraph 276ADE(vi) in that he would face very significant obstacles to integration into Afghanistan as a vulnerable young man who would be entirely alone and lacking the protection of an extended family network.

12. Permission to appeal was granted by Upper Tribunal Judge Coker on 8 January 2015 on the basis that it was arguable that the judge failed to consider the evidence before her in accordance with the Presidential Guidance and that infected her findings. All grounds were arguable.

13. In a rule 24 response dated 20 January 2015, the respondent sought to uphold the judge's decision on the basis that the appellant was a 19 year old young man as at the date of hearing and there is no evidence that the judge did not consider that fact. The judge considered the evidence, made well-reasoned findings and applied the relevant case law. There were no material errors in the judge's findings and the lengthy grounds amounted to no more than disagreements with the judge's findings.

14. Thus, the appeal came before us.

15. In his oral submissions, Mr Howard relied upon the 356 page bundle submitted by the appellant's representatives for the appeal hearing and noted that the appellant was 13-14 when he arrived in the UK. There is a lack of explanation throughout the findings. How could a 13-14 year old explain why the school was not attacked? The appellant does not know where his family are and neither the British Red Cross or the Home Office can find them. The respondent has not discharged its duty to ensure that there are adequate reception arrangements upon return. The judge made no finding in relation the risk of the appellant being recruited by the Taliban.

16. Mr Howard relied upon paragraphs 14, 15 and 18 of the Presidential Guidance. Vulnerability must be taken into account. What has happened to the appellant's family? The very fact that he came to the UK as an unaccompanied minor is telling. There is no bright line between a child and an adult. The appellant came to the UK as a young child. Paragraph 34 of the decision is not rational without further explanation – no reason is given for why the appellant is not vulnerable. In relation to ground four, this is a significant obstacles case and that was not addressed by the judge.

17. Ms Vidyakaran submitted that the Presidential Guidance applies to children and vulnerable people. It was not incumbent on the judge to refer to the Presidential Guidance in this case. The judge gave sufficient reasons throughout the decision. The judge reminded herself of the burden of proof and made adequately reasoned credibility findings. The appellant was 13 at the time and it is not available to him to say that he knew nothing of the

threats made to his father by the Taliban, particularly as he said that he often saw the Taliban coming to the school. The appellant claims to have had uninterrupted education for six years.

18. The judge did not specifically refer to paragraph 276ADE but it is clear throughout the decision that there is no significant obstacle to return. If the Upper Tribunal identifies a material error of law then the appeal should be remitted for a fresh hearing.

19. We asked Ms Vidyakaran how the judge could have concluded that the appellant's family were still living in the same place in Afghanistan? Ms Vidyakaran submitted that the judge found the appellant not to be credible and therefore did not believe that his family had disappeared. He is now 19 and living independently. He is not vulnerable in any event.

Discussion

20. We have considered the Presidential Guidance. We find that the following paragraphs are relevant;

> "10.3 **Assessing evidence**
>
> Take account of potentially corroborating evidence
>
> Be aware:
>
> 1. Children often do not provide as much detail as adults in recalling experiences and may often manifest their fears differently from adults;
> 2. Some forms of disability may result in impaired memory
> 3. The order and manner in which evidence is given may be affected by mental, psychological or emotional trauma or disability.
> 4. Comprehension of questioning may have been impaired.
>
> 14. Consider the evidence, allowing for possible degrees of understanding by witnesses and appellant compared to those who are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
>
> 15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect that the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind….
>
> 18. Documents, process and procedure which fail to take into account vulnerability may compromise the quality of the evidence produced; a failure to take into account procedural requirements may result in evidence being potentially inadmissible or unreliable (the UKBA have a number of

> protocols and guidance documents which set out standards to be complied with when interviewing children….)."

21. We have also considered the UNHCR Guidelines which state at page 101 that;

> "(e) The problem of "proof" is great in every refugee status determination. It is compounded in the case of children. For this reason, the decision on a child's refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child's story, the burden is not on the child to provide proof but the child should be given the benefit of the doubt."

Similar guidance appears in the UNHCR Guidelines on International Protection No 8: Child Asylum Claims under 1A(2) and 1(F) of the 1951 Convention; which provide that, due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims. For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. If the facts of the case cannot be ascertained the examiner needs to make a decision on the basis of all known circumstances which may call for a liberal application of the benefit of the doubt. Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his claim.

22. The UNHCR Guidelines and the respondent's Asylum Policy Guidance are fully set out at paragraphs 39-42 of AA (unattended children) Afghanistan CG [2012] UKUT 00016 and plainly represent the starting point for consideration of evidence given by child asylum seekers. It is common ground in this appeal that the appellant was around 13-14 when he arrived in the UK and was interviewed. The judge made strong adverse credibility findings at paragraphs 24-30 of the decision. In particular, the appellant was criticised for being unaware that the Taliban had made threats to his father, not enquiring of his father what the Taliban had come to the school to speak about, being unaware that the Taliban were against education and schools, failing to provide any credible explanation as to why his father's school was not attacked or forcibly closed down when other schools in the area were attacked or forcibly closed down and failing to refer to the UNICEF tents in the asylum interview.

23. There is no reference to any of the guidance cited above in the decision and there is no indication that the judge has considered the age or vulnerability of the appellant when considering the evidence given during his interviews and at the oral hearing. There is certainly nothing to indicate that the judge has given any benefit of the doubt to the appellant. We recognise that the judge was required to make findings regarding the credibility of the appellant. However, we find in all of the circumstances of this appeal that the failure of the judge to refer to relevant guidance or to

demonstrate that the guidance was applied to the assessment of credibility amounts to a material error of law.

24. The respondent's bundle for the First-tier hearing includes at M1-M5 a number of letters from the British Red Cross. It is evident from those letters that the appellant sought the assistance of the British Red Cross to trace his family and that the British Red Cross have failed to locate any members of the family, despite their best efforts. The respondent has also been unable to locate any members of the appellant's family. We consider this to be a significant feature of the evidence in terms of assessing the level of family support available to the appellant upon return to Afghanistan and the risks that he faces upon return. Our view is consistent with the approach taken by the Upper Tribunal at paragraph 35 of JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00568 (IAC);

> "In making that assessment we must take into account all relevant factors including his age, his background, his family and general circumstances including any particular vulnerability. We must consider whether an appellant will have family or other adult support upon return to his home country appropriate to his particular needs, and in the context of Afghanistan to take into account the guidance in AA (Afghanistan) about the risks to unattached children in the light of the reminder in KA (Afghanistan) in the judgment of Maurice Kay LJ at [18] that there is no bright line across which the risks to and the needs of children suddenly disappear."

25. The judge found at paragraph 32 of the decision that she did not accept that the appellant's father was killed by the Taliban and then confirmed at paragraph 33 that she took into account the correspondence with the Red Cross in the bundle. The judge then stated that; "*However, I find that with only addresses of villages in Afghanistan it can be difficult even for those on the ground to find and trace family members. I find that it does not follow that the appellant's paternal and maternal uncles and their families are not living where he last left them in Afghanistan*". There is no further analysis in the decision of the implications of the failure to trace family members.

26. We find that the substantive issue for the judge in relation to this issue was whether it is reasonably likely that the appellant will be able to contact his family members and obtain support from them. The judge did not cite any objective evidence to support her finding regarding the difficulty of finding and tracing family members. We find that the judge failed to give any weight to the inability of the British Red Cross and the respondent to locate any members of the appellant's family and failed to make a clear finding of fact regarding the level of family or other adult support available to the appellant if he is returned to Afghanistan. That is a further material error of law.

27. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of errors of law and its decision cannot stand.

Decision

28. Both representatives invited us to order a rehearing in the First-tier Tribunal if we set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* we consider that an appropriate course of action. We find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

29. Consequently, we set aside the decision of the First-tier Tribunal. We order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed David Archer Date 27 June 2015

Judge Archer
Deputy Judge of the Upper Tribunal