Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/05047/2014**

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 18th November 2014	**On: 21st January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

GN
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms Smith, Counsel instructed by Kesar & Co Solicitors
For the Respondent: Ms Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan date of birth 1st January 1995. He appeals with permission[1] the decision of the First-tier Tribunal (Judge Burns)[2] to dismiss his appeal against the Respondent's decision to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum

[1] Permission granted on the 1st October 2014 by First-tier Tribunal Judge Landes
[2] Determination prepared on the 25th August 2014

and Nationality Act 2006. That decision followed rejection of his claim to international protection.

Background and Matters in Issue

2. The Appellant made his claim on the 16th June 2009, the day after he arrived in the UK in the back of a lorry. It is now agreed that this was two weeks after his fourteenth birthday.

3. His claim, in short, was that he feared forcible recruitment by the Taliban. His case was that his paternal uncle, M, was a Talib and his own sons had joined the Taliban many years ago. The Appellant's father was studying English in Kabul and whilst he was away the Appellant fell under the sway of his uncle who had spent the past two years showing him DVDs of Taliban propaganda and encouraging him to support jihad. He had now fled Afghanistan because his father had confronted M and had subsequently been kidnapped. He feared that he would now be forced to work for the Taliban and/or fight on their behalf.

4. He was interviewed and on the 9th December 2009 his claim was rejected. The Respondent did however grant Discretionary Leave until the 1st July 2010; this followed an Age Assessment which concluded that he was sixteen.

5. The Appellant appealed to the First-tier Tribunal on asylum grounds. In a determination dated 30th December 2010 Judge Roopnarine-Davies accepted that the Appellant had indeed been 14. She took into account new evidence about his age from an independent social worker, a doctor and a teacher who had been working with the Appellant for some time. Her own observations of the Appellant chimed with this evidence. She noted his physical appearance and manner were of a much younger child than the 18 he would have been had the Respondent's position been accepted. She wrote:

> "13. The Appellant was anxious at the hearing to provide almost pat, memorised responses to Mr Richie without attention to the questions being asked and displayed an open almost naïve manner….I found him lacking in listening skills and to some extent, comprehension skills. He did not display the mien or capacity to manipulate information indicative of an older child, regardless of formal education though he was selective in recall."

Having made those observations she accepted his claimed age, and assessed his credibility in light of that finding. She did not however believe his account of events in Afghanistan which she found to be vague and contradictory. She dismissed the appeal on asylum grounds noting that "age and a lack of education are not bars to truthfulness".

6. On the 18th June 2012 the Appellant applied to extend his Discretionary Leave and to 'upgrade' it to refugee status. These representations were rejected and the Respondent issued a fresh refusal letter along with a refusal to vary his leave and a

decision to remove the Appellant pursuant to s47 of the Immigration Asylum and Nationality Act 2006.

7. It was against that decision that the Appellant brought a further appeal to the First-tier Tribunal. He relied on new evidence:

   a) His solicitors had managed to obtain disclosure from Croydon Social Services of notes taken by the social workers who had conducted the first Age Assessment; these notes were said to reveal evidence which might have gone some way to assuaging Judge Roopnarine-Davies' concerns about the account concerning his father.

   b) The Respondent's attempts to trace the Appellant's family had yielded no results;

   c) The Appellant now had an Article 8 'private life' claim, having lived in the UK for a number of years;

   d) A new medical report had assessed him as having PTSD, anxiety and depression but more significantly an IQ "well below" the expected level and to have learning difficulties

   The latter was a detailed report by a Dr Neil Egnal, a Clinical Psychologist with over forty years experience. Dr Egnal conducted a battery of tests on the Appellant and concluded that he had an intellectual disability which gave him a "low to borderline" level of functioning. In Dr Egnal's opinion "this would explain his limited account of events, as well as his poor performance in the Home Office interviews. I would also attribute his poor performance as being due to his mental state. In my opinion it is most unlikely that he has the intellectual ability or emotional maturity to be able to relocate to Afghanistan or to find work there or to support himself there".

8. The matter came before Judge Burns who noted the contents of Judge Roopnarine-Davies' "careful and sympathetic determination". He properly directed himself to the authority of Devaseelan [2002] UKAIT 00702 and took the earlier determination as his starting point. Of Dr Egnal's evidence the determination says the following:

   > "20. …. In my view, Dr Egnal's report, had it been before the First-tier Judge, would simply have confirmed the judge's own careful and sympathetic assessment of the Appellant, his difficulties, his potential and his limitations. There was in my view nothing in the report that in substance went beyond what the judge had already determined. The technical language of the assessment and its clinical description of course would not have been her words, but the gist or substance of the matter remained unaffected."

9. On that basis, Judge Burns dismissed the appeal by placing reliance on the findings of Judge Roopnarine-Davies.

10. The grounds of appeal are that this approach was unlawful for irrationality. It is submitted that there was a material difference between the Tribunal giving the Appellant some leeway because of his youth and lack of education and the attention merited by medical evidence that he has an intellectual impairment affecting his ability to give a coherent and detailed account.

11. The Respondent submits that there was nothing wrong in the reasoning at paragraph 20 of the determination. The Respondent adopts Judge Burns' characterisation of the first determination as "careful and sympathetic" and submits that the Tribunal could not properly have given the Appellant any greater benefit of the doubt than he had already been given.

Error of Law

12. I am satisfied that the decision of the First-tier Tribunal must be set aside.

13. The unchallenged findings of Dr Egnal were not simply that the Appellant was young and lacked education. His clear findings are that the Appellant has an intellectual disability, the diagnostic criteria for which include "deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgement, academic learning, and learning from experience". In Dr Egnal's view this had two consequences pertinent to the resolution of his status. Firstly the disability, combined with his PTSD, anxiety and depression meant that his ability to give a clear account was impaired. Secondly Dr Egnal considered that it would operate against him should he try and establish himself in Afghanistan. These were both matters relied upon as *Devaseelan* new evidence.

14. Neither of those points are adequately addressed in the determination. As to the first I agree that there is a material difference between approaching a young Appellant with sympathy and care and approaching him knowing that he has learning difficulties which are obstructing his ability to give evidence. It is irrational to cast the expert opinion of a Consultant Clinical Psychologist as having the same "gist or substance" as a Judge's observation that this witness was young and uneducated. As to the second, this does not enter into the analysis at all. The fact that the Appellant has PTSD, depression, anxiety and diagnosable learning disabilities was highly pertinent not only to the assessment of future risk, but to his ability to internally relocate within Afghanistan and enjoy his Article 8(1) rights. The Tribunal's finding at paragraph 66 that the Appellant is a "resourceful, determined and persistent person" does not sit easily with the results of any of the tests undertaken by Dr Egnal.

15. I find that the error identified in the grounds infects the findings overall and the decision is set aside in its entirety.

The Re-Made Decision

16. Before me Ms Smith agreed that there would be little point in calling the Appellant to give oral evidence again. He has already given his account on numerous occasions – to his solicitor, to the Respondent, to social services, to Judge Roopnarine-Davies and to Judge Burns. I was therefore invited to re-make the decision on the evidence before me. I heard helpful submissions from Ms Smith and Ms Kenny and reserved my decision.

17. I deal first with asylum. I remind myself that the burden of proof lies on the Appellant at all times and that he must show it to be "reasonably likely" that he faces a risk of persecution/serious harm in Afghanistan. This formulation reflects the lower standard of proof applicable in asylum cases and is the test I must apply to his historical account as well as in my assessment of future risk. It is submitted on the Appellant's behalf that he faces a real risk of forced recruitment by the Taliban and/or punishment for refusal to comply with their demands. My starting point must be the decision of Judge Roopnarine-Davies and in particular her negative credibility findings about the Appellant's reasons for leaving Afghanistan. I am asked to depart from those findings on the basis of the new evidence, and in particular the report of Dr Egnal. That report could potentially shed new light on this case in two ways. It is relevant to the assessment of the historical facts, but even if those facts remain unproven, it may be relevant to the level of risk faced by the Appellant in Afghanistan today.

18. I accept that Dr Egnal is qualified to make the assessment that he does. I accept that he is an impartial and objective witness and that his diagnosis of the Appellant's difficulties has been made with reference to the appropriate diagnostic criteria.

19. Judge Roopnarine-Davies found that neither the Appellant's young age nor his lack of education were bars to telling the truth. Dr Egnal's evidence goes some way beyond that. It is his conclusion that the Appellant's learning disabilities result in "deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgement, academic learning, and learning from experience": he has an extremely low IQ. Dr Egnal believes that these factors, taken with his mental health issues – PTSD, anxiety, depression - would have a significant impact on his ability to give a clear account:

> "His difficulty in remembering important dates and facts and recounting of events would, in my opinion, most likely be due to his low intellect as well as his emotional state…
>
> According to my assessment of him and his responses to the tests and interview, his symptoms would appear to be consistent with his account of his experiences which in my opinion have led to his current psychological state".

20. It is now accepted that when the Appellant left Afghanistan he was 13 years old. I find, in light of Dr Egnal's evidence, that he was a thirteen year old with learning

difficulties. I am satisfied that this is evidence which warrants departure from the findings of Judge Roopnarine-Davies. Had the Tribunal been aware of the Appellant's low intellectual functioning it is in my view unlikely that it would have approached his evidence in the way that it did.

21. It is trite asylum law that any asylum claim should be evaluated against the 'objective' country background material, but that is particularly so where the claimant is impeded, by virtue of age, disability or other vulnerability, from articulating his case. In fact in such cases the decision-maker must look to a variety of sources of information. See for instance the UNHCR Handbook:

> 206. It has been seen that in determining refugee status the subjective element of fear and the objective element of its well-foundedness need to be established.
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> 207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.
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> 208. The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case (see paragraph 205 (a) above). The conclusions of the medical report will determine the examiner's further approach.
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> 209. This approach has to vary according to the degree of the applicant's affliction and no rigid rules can be laid down. The nature and degree of the applicant's "fear" must also be taken into consideration, since some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution. Where there are indications that the fear expressed by the applicant may not be based on actual experience or may be an exaggerated fear, it may be necessary, in arriving at a decision, to lay greater emphasis on the objective circumstances, rather than on the statements made by the applicant.
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> 210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.
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> 211. In examining his application, therefore, it may not be possible to attach the same importance as is normally attached to the subjective element of "fear", which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.

> 212. in view of the above considerations, investigation into the refugee status of a mentally disturbed person will, as a rule, have to be more searching than in a "normal" case and will call for a close examination of the applicant's past history and background, using whatever outside sources of information may be available.

22. I have no reliable[3] information from other sources such as family members, but I do have a clear, that is to say fairly uncontentious, picture of the objective situation in Afghanistan. In July 2012 the European Asylum Support Office reproduced research[4] which indicated that instances of forced recruitment by the Taliban are now "exceptional". This is set out at paragraph 3.10.15 of the 'Country Information and Guidance' (CIG) note of August 2014[5]. That research, or rather its conclusion, has been subject to some criticism, notably from UNHCR and Amnesty International[6], who note that the definition of the term 'forced recruitment' is there too narrowly drawn. Amnesty argue that the apparent "willingness" of Afghans to join the Taliban has to be assessed in context. It is not only those at gunpoint who are "pressured". The EASO conclusion cited in the CIG illustrates the point: "To gain support and recruit fighters, they relied on economic needs, fear and coercion, pride and honour, tribe and tradition, religious persuasion, etc". Both UNHCR and Amnesty advocate that 'forced recruitment' must have a wide definition to include the varied situations that unwilling recruits have found themselves in:

> The report defines "forced recruitment" narrowly, limiting its scope of application to situations where individuals are forced to join the Taliban under the use or threat of immediate violence. The report does not include in this definition Taliban recruitment mechanisms based on broader coercive strategies, including fear, intimidation and the use of tribal mechanisms to pressurize individuals into joining the Taliban[7].

In respect of these broader coercive strategies the background material consistently indicates that these are being widely used in areas of strong Taliban presence. This includes familial, social and religious pressure on children to become "martyrs". See for instance Amnesty's view:

> …it has been acknowledged by human rights and other non-governmental organisations, as well as United Nations bodies, that children – mainly male children, although there have been recently reports of girls - are targeted for

[3] Evidence from the Appellant's friend Tofan about the current whereabouts of the Appellant's family was found to be unreliable by Judge Burns; the grounds contain no challenge to those findings.

[4] EASO "Taliban Strategies- Recruitment" – citing for instance the Danish Immigration Service Fact Finding Report of May 2012.

[5] Afghanistan: *Security*

[6] EASO COI Report "Afghanistan: Taliban Strategies – Recruitment", July 2012

[7] UNHCR cited at paragraph 3.10.17 of the Operational Guidance Note v11 reissued September 2014

> recruitment as combatants, suicide bombers, porters of munitions and informants by armed groups such as the Taleban.

23. The claim consistently advanced by the Appellant in his SEF, asylum interview, witness statements and live evidence is that he is from Baghlan province in central Afghanistan. This does not appear to be in dispute. Baghlan lies in north of Kabul, in the north east of the country. The country background material indicates that this is an area where the local population have been under Taliban control for some time[8]. Amnesty International reference 2012 UNAMA research in reporting that local houses have been taken over at night by insurgents who have ordered them to leave their doors open so that they can gain entry. Civilians from Baghlan, interviewed in IDP camps within Afghanistan, reported fleeing their homes after receiving "night letters" to that effect. Children and the vulnerable continue to be targeted in the area, not just by insurgents but by traffickers. See for instance the United States Department of State 2014 report:

> According to the government and the UN, insurgent groups use children as young as nine years old as suicide bombers. Boys from Badakhsan, Takhar, Baghlan, Kunduz, and Balkh provinces in the north region of Afghanistan, as well as those travelling unaccompanied, were reportedly at the highest risk of trafficking. Exploiters often used drugs to control their victims. Sometimes entire Afghan families, including children, are trapped in debt bondage in the brick-making industry in eastern Afghanistan. Traffickers recruit Afghan villagers to Afghan cities and then sometimes subject them to forced labor or forced prostitution after their arrival.

24. This is the background against which this claim must be assessed. The information indicates that a) the Taliban are known to use various means to pressurise local people into joining or otherwise assisting them b) the Appellant's home area is specifically mentioned in the reports as being a place where the Taliban – and traffickers – recruit young boys, and the vulnerable, for debt bondage, drug trafficking, sexual exploitation or suicide bombing. I draw three conclusions from this evidence. First of all that the Appellant's historical claims are entirely plausible, second that the situation has not improved at all, and thirdly that the Appellant, as a young man with significant mental health issues and learning disabilities, would be particularly vulnerable to being 'used' in the manner outlined in these reports.

25. I have started with the findings of Judge Roopnarine-Davies. Her findings, in summary, were that the Appellant had learned a story and was sticking to it. Given his young age and intellectual impairment, this may well be true. That is not however determinative of his appeal. The fact that his mother/parents were prepared to put their particularly vulnerable child in a lorry at the age of thirteen years old would suggest that they were fearful about his future should he remain in the village. The objective material indicates that such a subjective fear would have been well-founded. Whether the actor of persecution was his uncle, or any other

[8] The material in the bundles indicates that Baghlan continues to be a centre of the insurgency and government attack: see for instance Radio Free Europe dated 31st May 2014 at page 498 Appellant's bundle

Talib, is in my view rather immaterial. The focus of my enquiry is whether this 19 year old would face a risk in Afghanistan today.

26. The Appellant is from Baghlan. The objective material supports Ms Smith's submission that this is an area under heavy Taliban influence, if not control. It further supports her submission that the Taliban will use various means to coerce young men into joining their cause. I find as fact that a young man with learning difficulties is likely to be more at risk than the average 19 year old. He is a 19 year old who has been out of Afghanistan for some 6 years. He has in that time missed a crucial developmental stage in growing up in Afghanistan – a period in which other young men would learn how best to keep themselves safe and avoid trouble. There is no evidence that either the Appellant or the Respondent have managed to locate his family but I am not satisfied that they could, even if he could find them, offer him protection from the Taliban or other actors of persecution in these circumstances. He is extremely vulnerable and I find that there is a real risk that he will be subject to forcible recruitment and/or trafficking.

27. The Respondent submits that should there be a risk in Baghlan, there will be no such risk in Kabul. The objective information indicates that whilst there is no overt Taliban presence in the city there certainly are other dangers. I remind myself of Dr Egnal's view: "In my opinion it is most unlikely that he has the intellectual ability or emotional maturity to be able to relocate to Afghanistan or to find work there or to support himself there". He is still a very young man, and in this respect the dicta of Maurice Kay LJ in KA (Afghanistan) and Ors v SSHD [2012] EWCA Civ 1014 is pertinent:

> "18…At this point, it is appropriate to refer to what I call "the eighteenth birthday point". Although the duty to endeavour to trace does not endure beyond the date when an applicant reaches that age, it cannot be the case that the assessment of risk on return is subject to such a bright line rule. Given that the kinds of risk in issue include forced recruitment or the sexual exploitation of vulnerable young males, persecution is not respectful of birthdays – apparent or assumed age is more important than chronological age."

28. There is no suggestion that the Appellant has a support network in Kabul who could protect him and offer him guidance. He lacks the capacity to find work or support himself and in those circumstances he is at real risk of being preyed upon by criminal gangs, traffickers or terrorists. Even if he could manage to avoid such dangers I find the overwhelming likelihood would be that the Appellant would end up on the streets. I find that this would be unduly harsh. He is not in the position to avail himself of a reasonable internal flight alternative.

29. I find that the Appellant is a refugee. Given my findings I am also satisfied that the Appellant's removal would put the UK in breach of our obligations under the ECHR.

Decisions

30. The determination of the First-tier Tribunal contains errors of law and it is set aside.

31. I re-make the decision in the appeal as follows:

"The appeal is allowed on asylum grounds.

The Appellant is not entitled to humanitarian protection because he is a refugee.

The appeal is allowed on human rights grounds."

Deputy Upper Tribunal Judge Bruce
19th January 2015