



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

Appeal Number: AA/05109/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 January 2015**

**Decision & Reasons
Promulgated
On 20 February 2015**

Before

JUDGE OF THE FIRST-TIER TRIBUNAL RIMINGTON

Between

**O A
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Heller, Counsel instructed by Barnes Harrild & Dyer Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellant is a citizen of Afghanistan born on 1 January 1996. He first came to the United Kingdom on 2 August 2009 aged 13. He claimed asylum the following day and his application for leave to remain was refused on 23 November 2009 but he was granted discretionary leave to remain in the UK until 22 November 2012. Before that leave expired the appellant applied for an extension and received a decision dated 7 July 2014 refusing to vary his leave to enter or remain in the United Kingdom

following a refusal to grant him asylum, humanitarian protection and protection under the European Convention. A decision was made further to Section 47 of the Immigration, Asylum and Nationality Act 2006 (removal person with statutorily extended leave) to remove the appellant from the UK. A reasons for refusal letter dated 3 July 2014 was issued.

2. Essentially the appellant claimed that his father was a commander in the Taliban and later left to join the government and three months after he joined the government the Taliban came to the appellant's house, called his father outside and shot and killed him. It was stated that this was inconsistent with the appellant's claim that his father had worked for the government for about a year after joining. When the appellant was asked to explain this discrepancy on two occasions he failed to give a satisfactory explanation. In his asylum interview the appellant stated "one year the Taliban came one night and shot him" (AIR, question 77). It was considered that there was a large discrepancy between three months and one year.
3. When asked during his asylum interview what date his father was killed he initially stated it was three months prior to his departure from Afghanistan (question 64) and then changed his account and stated the Taliban killed his father approximately five years ago (AIR, question 64-65).
4. Consideration has been given to his age and level of education but it was considered reasonable to expect him to be consistent about when his father was killed and when he went into hiding from the Taliban. It was concluded that the information in his witness statement, paragraphs 5 to 8 indicated that he went into hiding and left Afghanistan in a much shorter time period than the five year gap he described in his asylum interview (AIR, question 64-65). The inconsistencies damaged his credibility.
5. First-tier Tribunal Judge Afako made an adverse credibility finding against the appellant and dismissed the appeal on both asylum and human rights grounds.
6. An application for permission to appeal on which Miss Heller relied at the hearing submitted that the judge fell into a material error of law in finding that the appellant had family members in Afghanistan. The judge gave no reasoning and cited no support from objective evidence for the assertion that the respondent was "under constraints" due to the lack of personnel to trace the appellant's family. The respondent had failed to provide any evidence about what action had been taken by the FCO and the outcome or whether it was undertaken in a timely fashion. The respondent took no steps to carry out tracing until February 2014. The appellant asserted that the respondent had not complied with the duty to trace pursuant to **KA (Afghanistan) & Others v Secretary of State for the Home Department [2012] EWCA Civ 1014**. In accordance with **KA** the respondent's failure to comply with his duty potentially deprived the appellant of the best evidence that his family could not be traced and therefore he had no family protection in Afghanistan. **EU (Afghanistan and Others) v Secretary of State for the Home Department [2013]**

EWCA Civ 32 considered AK and established there should be a causative link between the breach of the Secretary of State and the appellant's claim for protection. The causative link here was shown that the failure was relevant to an assessment of risk on return.

7. In the second ground of complaint the judge erred in failing to give a reasoned decision on the risk to the appellant on return to Afghanistan as a young single male and failed to consider the private guidance at paragraph 18 of **KA (Afghanistan)** "apparent or assumed age is more important than chronological age" given the kinds of risk in issue which included the false recruitment or the sexual exploitation of young vulnerable males. The case law in **JS (former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00568** reiterates the point that Section 55 of the Borders, Immigration and Citizenship Act 1999 no longer arose but when making the assessment whether removal would lead to a breach of Article 8 all relevant factors should be taken into account including age, background, length of residence in the UK, family and general circumstances including any particular vulnerability and **whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs.**
8. The judge stated that he was satisfied that the appellant was not an orphan without family members in Afghanistan and that the appellant had sufficient skills to navigate successfully any process of return to Kabul.
9. Further the judge failed to consider the findings in **AK (Article 15(c)) Afghanistan [2012] UKUT 163 (IAC)**. In other words the judge failed to apply the relevant guidance to its assessment of the risk of return to Afghanistan of young unaccompanied males which constituted a material error of law.
10. The judge had erred in making credibility findings between paragraph 17 and 20 and had not correctly applied the relevant guidance in assessing the credibility of young witnesses or relevant guidance in how to approach factual evidence in asylum claims. As stated by Owen J in **AA (unattended children) Afghanistan CG [2012] UKUT 00016** the standard of proof is low and the principle should be applied more generously to children who should liberally be given the benefit of the doubt. This was consistent with the Joint Presidential Guidance Note Number 2 of 2010. The judge had not taken into account the fact that the appellant gave a detailed and internally consistent account of his experiences in Afghanistan as well as giving credible responses to the Secretary of State's reasons for refusal letter in his witness statement of 19 August 2014. The judge has not noted or given reasons as to why he did not accept the appellant's explanation at paragraphs 1 and 2 of his witness statement about his lack of knowledge of the length of his father's involvement with the Taliban.
11. The judge failed to apply the relevant criteria in assessing the appellant's evidence to which is a material error of law.
12. The judge also erred finally in her approach to Article 8 and the assessment of proportionality affected by erroneous findings that the

appellant had family members in Afghanistan to return to. This was a vulnerable young man who had been entirely alone having spent the previous five years of his life in a foreign country and would lack protection of extended family network.

- 13.** In her submissions at the hearing Miss Heller stated that the appellant had given responses to the reasons for refusal letter that the judge had not engaged with those despite the fact that the judge relied on the discrepancies. The appellant was at the top end of the spectrum with respect to **KA**. The appellant had given his last address clearly in his SEF and at the start of his asylum interview. There has been no attempt by the appellant to conceal his home address and there was no evidence before the Tribunal save for the reasons for refusal letter that there had been any action on the part of the respondent. This appellant was a victim of the failure of the Secretary of State to comply with the tracing duty and there is a causal link between that failure and his increased risk on return as he has no family to support him.
- 14.** He was a single young male and only 13 when he came to the UK. The importance of a family link was set out in the grounds of appeal.
- 15.** Mr Melvin strenuously resisted the application. The judge had adequately assessed credibility and had made references to the appellant's age when assessing his interviews at paragraphs 16 and 17 of the determination. The current case law demonstrated that an adult could be returned to Kabul and there were numerous packages available on return for integration. This was clear from **AK**, the case law. **AK** demonstrated that the appellant could be returned to Kabul. There was no causal link to show that the appellant could be recruited by the Taliban or that the conditions in the country were relevant. The Taliban had little influence in Kabul. There was a backdrop of the adverse credibility findings in relation to whether the appellant had family in Afghanistan and the judge was entitled to make this finding. The judge had found that the appellant had been living independently for two years before the hearing and was able to take care of himself. They first refusal letter was not challenged and the judge had looked at the evidence of an 18 year old male whose case presented nothing exceptional.

Conclusions

- 16.** It is not entirely clear who was present with the appellant at the date of his first screening interview on 3 August 2009. He stated at question 11.2 "I have no one back home and my father was a commander and he was killed". Following that screening interview, there was a London Borough of Croydon age assessment report which stated "based on OA physical appearance, demeanour and social history, assessors and duty manager joint decision is that OA is age 13. OA brought no documentation to UK." The appellant when interviewed stated that he left Afghanistan three months before his arrival. The age assessment took place on 6 August 2009 which would appear to *postdate* the screening interview. The SEF form was completed on 3 September 2009.

- 17.** One of the issues which is essential to this appeal is the credibility of the appellant both in terms of his claim for asylum and his ability to be able to return to Kabul bearing in mind his age.
- 18.** Although the judge at paragraph 16 and 17 makes reference to the fact that the appellant was very young the judge makes no reference to the guidelines as referred to above and on an analysis of paragraph 17 it does not appear that the judge has in fact applied those guidelines in practice. The judge states “as for discrepancies I consider that the respondent was right to observe that the appellant had had given two versions of the length of his father’s involvement with the Taliban: he gave the period of one year and then also three months.
- 19.** The appellant stated that in his witness statement at paragraph 4 that “after about three months of leaving the Taliban the Taliban came to our house and called my father outside. They killed him in front of our house.” At question 75 of his asylum interview he was asked the question “do you know approximately how many years ago this happened?” and he stated when he left the Taliban. At question 76 asked when he left the Taliban to join the government, he replied “it happened a long time ago. He worked for the government for about a year after joining. After that the Taliban found out and came to our house”. It was then put to the appellant again in interview “in your statement you said that the Taliban found out about your father working for the government three months after he left the Taliban. Now you have said he worked for the government for about a year after joining. Can you please explain this discrepancy?”. It would appear from the witness statement that the appellant claimed the father was murdered after about three months, and, in his asylum interview that he worked for the government for about a year which could not be possible but equally the appellant stated “it happened a long time ago”. In his witness statement dated 19 August 2014 the appellant addressed the question of how long his father had worked for the government before he was killed and he stated that as a child his father did not tell him who he worked for or for how long.
- 20.** The difficulty would appear that the appellant in fact gave two different responses which were contradictory and then in fact at a later date stated that he had no idea. Nonetheless the judge did not appear to acknowledge this or even address any explanation. I note from the interview is that there were some difficulties with the interpretation. At [Q63]the interpreter stated:
- “My father was killed three months prior to my departure from Afghanistan. 4 or 5 years (interpreter – I did not get clearly what he said – interpreter asks applicant to repeat). I was very young. The Taliban would come to our house to our village. The Taliban would come to our house. My maternal uncle would hide me.”
- and when asked to clarify exactly when his father was killed he had stated “about 5 years ago”.
- 21.** The judge albeit that he recorded at [16] that the appellant was very young merely stated “even making allowance for the appellant’s age, this

is something that he should have been in a position to get straight” with reference to the length of time that his father worked for the government.

22. In essence the credibility assessment seems to hinge on one particular discrepancy, albeit that the judge states “as to his capacity to provide detail I note from the contents of his interview and statement that he was able to provide considerable detail regarding the situation in Jalalabad and of the journey that brought him to the United Kingdom”.
23. I turn to the question of tracing the family and the judge stated at paragraph 26 that he accepted there was a nexus between the issue of tracing and the protection issue and it could only be concluded as there had been no further information received from the FCO regarding the appellant’s family from a request made by the respondent that the Tribunal was left “without additional material with regard to the appellant’s claim about his family”. Bearing in mind the issues that I have raised with regards to the findings and credibility it appears that it was on this finding of credibility that the judge had based his conclusion at [35], “I have already found that he continues to have family members in that country”. The fact is the respondent’s enquiries through the FCO have not yielded results.
24. I find that the key to this is the assessment of the appellant’s evidence which was taken when he was 13 years old. The credibility findings go to the heart of this appeal. This is not a case where the appellant was not co-operative in providing the address and details to the Secretary of State and, as pointed out in the skeleton argument of Miss Heller, it is submitted that the nexus between the failure to trace and the appellant’s asylum claim is that he may have been corroborating his account in its material particulars i.e. villagers who knew of or were witnesses to his father’s murder and the Taliban’s attempt to take young men from the village to join them.
25. There was also the question of the assessment under Article 8 whereby the Secretary of State had not complied with the duty under Section 55. It is clear that this duty was not undertaken in 2009 when that duty may have had a relevance.
26. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Notice of Decision

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify

him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 12th February 2015

Judge Rimington
Judge of the First-tier Tribunal