



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

Appeal Number: AA/05914/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February 2015**

**Decision & Reasons
Promulgated
On 17 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**W T (AFGHANISTAN)
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Specialist Appeals Team

For the Respondent: Ms S Radford, Counsel instructed by J D Spicer Zeb Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing on asylum grounds the claimant's appeal against the decision by the Secretary of State to refuse to vary his leave to remain, the claimant having previously been granted discretionary leave

to remain as an unaccompanied asylum seeking minor. The First-tier Tribunal made an anonymity direction, and I consider it is appropriate that the claimant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of Pakistan. He attended the Asylum Screening Unit on 4th October 2010, stating he had arrived in the United Kingdom earlier that day, hidden in the back of a freight vehicle. He was given a screening interview for children. In answer to question 1.6 which was how old he was, the following answer is recorded: "13 years (disputed)". In answer to question 1.7 which was about his date of birth, the following answer is recorded: "1-1-96 (disputed)".
3. His reason for coming to the UK was that his life was in danger from his enemies who were distant relatives (4.1). He passed through Iran on his way to the United Kingdom, but Iran was not a safe country. His grandmother told him not to stay in Iran (4.4). In answer to supplementary questions (in the continuation sheet) he said he did not know the names of his enemies, but his father had told him about them two to three years ago. This was when his father went missing (Q & A, 1 and 5).
4. On 20th October 2010 a witness statement was taken from the claimant. He gave as his date of birth 1st January 1997. His father had worked as an imam in the local mosque until he was forced to flee the village with the appellant's older brother more than one year ago. His father had a dispute with his distant cousins. As stated in his screening interview, this dispute had been ongoing from his grandfather's time. All he knew about the dispute is what his mother had told him. After his father disappeared, his mother had explained that his father had an ongoing dispute with his distant relatives over some farm land. He did not know the date that his father and brother disappeared, but he was aged 12 years at the time. He and his mother remained at the family home for six to seven months after his father and brother's disappearance. A few days after their house was raided by the authorities, and documents relating to the disputed land were seized, they all moved to a rented house in Peshawar in Pakistan. They stayed there for three to four months. As they had no money to survive on they returned to the family home. His grandmother then sold their house, together with the land next to their home, to send him to a safer place.
5. The day before the appellant signed his witness statement, his age was assessed by the London Borough of Croydon Unaccompanied Minor's Team. The assessing workers were Hayley Kelly and Anand Kumar. Their conclusion was that the appellant was aged 14 years with a date of birth of 1st January 1996. Their reasoning in the summary of the decision was as follows:

[W] did not provide any evidence/document to confirm his claimed age or his date of birth. He claimed that he is 13 years old in the age assessment

interview. But [W] could not provide his date of birth. The Home Office has given him a date of birth of 01/01/1996 which makes him 14 years. [W] was not sure about his accurate age while he was interviewed by the Home Office. He claimed he was approximately 13-14 years old at that interview.

[W] claimed that his mother told him his age before he started his journey. However she could not give him his DOB. [W] claimed that his mother is illiterate and she did not know his DOB.

[W's] physical appearance suggests that his developmental functioning and physical developmental features appear to be someone who is older than 13 years old ... he appeared to be tall for his claimed age.

It appears he has recently developed facial hair which has not been shaven. His demeanour suggests that he could be older than his claimed age.

Assessors have been guided by experience of working with other young persons from same or similar ethnic backgrounds. The assessors were of the view that [W's] overall physical appearance suggests that he is older than his claimed age of 13.

[W] claimed that he started attending mosque when he was about 7/8 years and attended mosque 4/5 years. His father disappeared more than a year ago and that was the last time he attended the mosques.

Assessors have considered all other factors in respect of the assessment and also given careful and balanced thought to the weight of the benefit of the doubt as indicated throughout the assessment. The assessors are therefore of the view that W is assessed to be a child aged 14 years and with a given date of birth 01/01/1996.

6. The content of the document communicating the outcome of the age assessment was interpreted in full by a face-to-face interpreter. The claimant signed a declaration to this effect, confirming he had been advised of the outcome of his age assessment. He understood that the signing of the document did not suggest he agreed with the decision made about his age but it did show that, if he wished to challenge the decision, he had three months from the date of decision to bring his claim. He had further been advised that if he decided to challenge his assessed age, he could seek independent legal advice either through the Refugee Council, a law centre, the Citizen's Advice Bureau or a firm of solicitors of his choice.
7. It is apparent from other documents in the Home Office bundle that the claimant was at all material times represented by Duncan Lewis Solicitors.
8. The claimant did not challenge the outcome of the age assessment, and he did not seek to appeal the subsequent decision of the Secretary of State to refuse to recognise him as a refugee, but to grant him discretionary leave to remain as an unaccompanied asylum seeking minor. This decision was made on 19th November 2010.
9. In June 2013 the claimant applied for further leave to remain. In his application, he maintained that his date of birth was 1st January 1997. In

the reasons for refusal letter of 7th August 2014 it was noted that he had not challenged the outcome of the age assessment conducted by Croydon Social Services, whereby he was assessed as being 14 years old at the date of birth of 1st January 1996. So he was now considered to be an Afghan national aged 18 years and 7 months, with a date of birth of 1st January 1996; and his application for further leave was being considered on that basis. Accordingly, he did not qualify for recognition as a refugee on inter alia **LQ** grounds.

The Hearing Before, and the Decision of, the First-tier Tribunal

10. The claimant's appeal came before Judge Callender Smith sitting at Taylor House in the First-tier Tribunal on 18th September 2014. Ms Radford of Counsel appeared on behalf of the claimant, and Mr Sedgwick of Counsel appeared on behalf of the Secretary of State.
11. In his subsequent decision, the judge noted the Secretary of State's case that as an adult aged 18 years and 7 months the claimant could adapt to life in Afghanistan, even if it involved internal relocation. He also noted the claimant's oral evidence that when he arrived in the UK, his age was disputed but he still maintained that he was born on 1st January 1997.
12. The judge's findings of fact were set out in sub-paragraphs (a) to (w) of paragraph [26]. In sub-paragraph (d) the judge held that the claimant was under 13 years old when he lived in Afghanistan. In sub-paragraph (m) he found that the claimant was currently 17 years old and had no family to return to, putting him at risk of persecution on the basis of his age: **LQ (Afghanistan)**. In sub-paragraph (n) he said:

The assessment of his age in 2010 was not **Merton** compliant because it mis-stated his own evidence about his age. He knows his age from his mother and I find that the evidence he has given throughout the process since his arrival in the UK has been credible and consistent even if the direct, first hand evidence that he can give is limited. I accept his asserted age on the lower standard of proof.
13. In sub-paragraph (q) the judge held that, given his finding on the claimant's age, and the fact that he would be an unattended child if returned to Kabul, there would be insufficient state protection from non-state agents, applying **AA (unattended children) Afghanistan CG [2012] UKUT 0016 (IAC)**. In sub-paragraph (u), he found that if the claimant was returned to Kabul this would not be safe or reasonable because – having regard to his earlier findings in relation to his age – he was still a young, dependent unattended “adult”. In sub-paragraph (v), he held that the claimant was still a “child leaving care” and he had never lived independently.

The Application for Permission to Appeal

14. The Secretary of State applied for permission to appeal. Ground 1 was that the judge had failed to give adequate reasons for finding that the

claimant was 17 years old. The judge did not explain how the claimant's age was mis-stated within any age assessment, or how this would affect the outcome of a holistic assessment of the claimant's disputed age by a local authority. The claimant was assessed as a minor in 2010 and was in the care of local authorities for a significant period of time subsequent to this, and no local authority had sought to re-visit the assessment of the claimant's age made in 2010. On the facts of this case, it was arguably not open to the judge to re-visit the age assessment.

15. Ground 2 was that the judge had failed to apply country guidance case law, in particular **PM and Others (Kabul, Hizb-i-Islami) Afghanistan CG [2007] UKAIT 0080** which established sufficiency of protection in Kabul. The judge also fell into error in his reliance upon "expert evidence" that was not before the court and which the Secretary of State was thus not in a position to comment upon.

The Grant of Permission to Appeal

16. On 16th December 2014 First-tier Tribunal Judge P J G White granted permission to appeal for the following reasons:

I am satisfied that in reaching his decision the judge arguably made an error of law for the following reasons:-

- (a) It is argued that the judge has given adequate reasons for finding that the claimant is 17 years old and therefore would be returned to Afghanistan as an unaccompanied minor.
- (b) It is notable in this regard that the hearing took place on 18th September 2014 and that at paragraph 1 the judge states that the claimant was born on 1 January 1996 (on which basis the claimant was aged over 18 years old at the date of the hearing).
- (c) He finds it is arguable in assessing the risk on return the judge has failed to give adequate consideration to the appropriate country guidance cases concerning the return of adults to Afghanistan.

The Hearing in the Upper Tribunal

17. At the hearing before me, Ms Radford mounted a robust defence of the judge's decision. It was obvious to anybody who attended the hearing in the First-tier Tribunal that what the judge was referring to in sub-paragraph (m) was the following statement in the age assessment: "He claimed that he was approximately 13-14 years old at that interview."
18. As she had submitted before Judge Callender Smith, that statement was clearly wrong. The claimant had consistently maintained that he was aged 13. This error meant that the age assessment was **Merton** non-compliant. She did not have with her the case of **B v London Borough of Merton [2003] EWHC 1689 (Admin)** and no copy of this decision was in my file. There was also no reference to the decision in the judge's

manuscript Record of Proceedings, although there was a reference to the argument that the age assessment was **Merton** non-compliant.

19. Ms Radford observed that the nature of the error of law challenge was inadequacy of reasons, not procedural unfairness. She agreed that the issue of non-compliance had only been raised for the first time at the hearing. But the Secretary of State was legally represented, and it would have been open to Counsel for the Secretary of State to seek an adjournment. They had relied instead on the position taken by the Secretary of State in the refusal letter, and it was open to the judge to resolve the age dispute in the claimant's favour, for the reasons which he gave. His reasoning was not simply that the age assessment was **Merton** non-compliant, but also that the claimant had been credible and consistent throughout the asylum process.

Reasons for finding an Error of Law

20. In his substantive asylum interview the claimant did not vacillate between asserting that he was 14 years of age as opposed to 13 years of age. His position was that he did not know his date of birth but that his mother had told him that he was 13 when he left Afghanistan, and so that is why he had said he was 13 when he arrived here (Q & A, 32 to 34).
21. But the social workers could not have been referring to the substantive asylum interview, as it had not yet taken place. The substantive asylum interview did not take place until 5th November 2010. They can only have been referring to the screening interview.
22. As I have highlighted earlier in this decision, there is a blatant inconsistency between the information given in answer to question 1.6 and what is recorded as an answer to question 1.7. Prima facie, the claimant asserted that his date of birth was 1st January 1996, which would make him 14 years of age, not 13 years of age as stated in 1.6. In the light of what the claimant said subsequently, it is reasonable to question whether the date of birth recorded at 1.7 is that attributed by the Home Office and not, as it was supposed to be, the date given by the claimant. But equally there is no actual evidence that 1.7 is a misattribution. It should also be noted that in the screening interview the claimant's chronology of events differs from his later chronology. In his subsequent statement of case dated 20th October 2010, and also in his substantive asylum interview, he said that his brother and father disappeared, and he learnt of the family feud, when he was aged 12; and that he had left Afghanistan just over a year later, when aged 13. But the implication of the chronology given in the screening interview is that the disappearance of his father had taken place two to three years ago, which would make the claimant now 14 or 15 years of age if he was aged 12 at the time of his father's disappearance.
23. So, giving anxious scrutiny to this aspect of the claim, it is not at all clear that the social workers were wrong to characterise the claimant as being

uncertain about his asserted age when interviewed by the Home Office. In any event, it was incumbent on the judge to explain why he found that the assessment of the claimant's age in 2010 mis-stated the claimant's own evidence about his age.

24. Furthermore, having identified the precise nature and scope of the mis-statement of the claimant's own evidence about his age, it was incumbent on the judge to explain why the error rendered the entire age assessment **Merton** non-compliant such that it could be totally disregarded.
25. As is apparent from the summary of the decision, the age assessment was not solely based on the answers attributed to the claimant in an interview conducted by the Home Office. The social workers had also questioned the claimant directly, and their assessment was in part based on what he had told them.
26. The judge does not appear to have been directed to **Merton** compliant age assessment guidelines, or to the authority from which such guidelines originate. So Ms Radford's submission as to the effect of the alleged error was not supported by authority.
27. The judge also appears to have overlooked the point that even if the claimant was 13 at the date of his departure from Afghanistan, it did not follow that he was still 13 when he arrived in the United Kingdom. Nowhere in the decision is there an acknowledgement by the judge that the claimant's asserted date of birth of 1st January 1997 was a complete guess as the claimant professed not to know his actual date of birth.
28. Moreover, the judge is inconsistent about the claimant's age in Afghanistan. On the one hand, he accepts the claimant's evidence that he was 13 when he left, because that is what his mother told him, but at subparagraph (d) of paragraph [27] he finds that the claimant was "under 13 years old". The judge is also inconsistent on the claimant's current age, in that at paragraph [1] he says he was born on 1st January 1996 and in subparagraph (u) of paragraph [26] he says he would be returning to Kabul as a young adult, as opposed to an unattended child.
29. The judge's failure to give adequate reasons for (a) departing from the age assessment and (b) finding in consequence that the appellant qualifies as a refugee on **LQ** grounds, constitutes a material error of law such that the decision of the First-tier Tribunal should be set aside in its entirety, and re-made. The judge's findings on risk on return are predicated on the claimant continuing to be a vulnerable child rather than an adult who passed his 18th birthday some time ago, and who in the normal course of events could reasonably be expected to relocate internally to Kabul even if he did not have relatives living there. Accordingly, I do not find it necessary to consider the second ground of appeal.
30. As the resolution of the dispute over the claimant's age turns in part on the claimant's credibility, a complete rehearing of his appeal is necessary,

and it is agreed that such a rehearing should take place in the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, such that it should be set aside and re-made.

Directions

This appeal is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge apart from Judge Callender Smith.

None of the findings of fact made by the previous Tribunal shall be preserved.

The time estimate for the fresh hearing is three hours, and an Afghan Pushtu interpreter will be required.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Deputy Upper Tribunal Judge Monson