



Upper Tribunal
(Immigration Chamber)

Appeal Number: AA/08494/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 21st October 2015

Decision & Reasons Promulgated
On the 3rd November 2015

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR GHULAMOHAIN ATSAKZAI
(No anonymity direction made)

Respondent/Claimant

Representation:

For the Appellant (The Secretary of State): Mr Staunton (Home Office
Presenting Officer)

For the Respondent/Claimant (Mr Atsakzai): Ms McCarthy (Counsel)

DECISION AND REASONS

1. This is the Secretary of State for the Home Department's appeal against the decision of First-tier Tribunal Judge Flynn promulgated on the 29th July 2015 in which he allowed the Appellant's appeal against the Respondent's decision against the Secretary of State's decision dated the 4th October 2014 on asylum and human rights grounds. The purposes of clarity throughout this decision, I will refer to Mr Atsakzai as "the Claimant" and to the Secretary of State as "the

Secretary of State”.

Background

2. The Claimant in this case is a citizen of Afghanistan who was born on the 15th September 1996, and who is therefore now aged 19 years old. The Claimant claimed asylum on the 29th September 2011, stating that he had entered the United Kingdom illegally on the 19th September 2011. His case is that he feared the Taliban, who it is said had kidnapped him following the death of his father and wanted him to be a suicide bomber. It was the Claimant's case that he ran away having been left unsupervised at the side of the road, but that he was kidnapped again and managed to escape and sought refuge with his uncle, who arranged for him to leave Afghanistan. It was the Claimant's case that he had been targeted by the Taliban for 3 years, during which time they had sought to kidnap him. The Claimant's initial asylum claim was rejected by the Secretary of State, but he appealed to the First-tier Tribunal, and that original appeal was heard by Judge of the First-Tier Tribunal Taylor on the 5th January 2012 at Taylor House, London.
3. First Tier Tribunal Judge Taylor did not accept that the Claimant was recruited by the Taliban as a suicide bomber or that he had managed to escape as claimed. Judge Taylor had found that the Claimant had given three different accounts of when his problems with the Taliban had begun. Judge Taylor found that it was also implausible that the Taliban had attempted to recruit him for up to 3 years, but were unable to do so and that he had given inconsistent answers on the frequency of the visits by the Taliban after his father's death and found that it was not credible that the Taliban had never come at night or at a time when the Claimant was likely to be at home. Further, Judge Taylor initially found that it was not credible that the Taliban would have left the Appellant on his own on two occasions unsupervised, leaving him free to escape and discard his suicide belt having spent a great deal of time and effort to recruit him on the Claimant's case.
4. However, following the refusal of his asylum claim the Claimant was granted discretionary Leave to Remain, as a minor, and on the 13th March 2014, the Claimant made an application of extension of his stay in the United Kingdom in accordance with the Home Office Policies on Discretionary Leave and that application was considered in accordance with the Home Office Asylum Instructions on Consideration of an Asylum Claim, Refugee Leave, Humanitarian Protection and Discretionary Leave. His claim for asylum was reconsidered, but again was rejected in the Refusal Notice dated the 23rd September 2014, which led to the appeal before First-tier Tribunal Judge Flynn. The Claimant's account that if returned he would face mistreatment due to his imputed political opinion, such that he was entitled to asylum, or that he was entitled to

humanitarian protection on the basis of there being a state of international or internal armed conflict or indiscriminate violence such that he as an individual would be at a real risk upon return, such that he was entitled to protection, and his claim that his removal would be a breach of his rights under Article 8 were rejected.

5. However, First-tier Tribunal Judge Flynn, in his decision found that having heard from a witness AK, that this was sufficient justification for reaching a different conclusion from First-tier Tribunal Judge Taylor and that AK was a truthful witness and that the Claimant did have a well-founded fear of persecution for a Convention reason and that he was entitled to asylum and that his return would breach his human rights under Article 3. The full reasons for the decision are set out within the judgement of First-tier Tribunal Judge Flynn. This is a matter of record and therefore is not repeated in full here. The Secretary of State sought to appeal that decision.
6. Permission to appeal has been granted by First-tier Tribunal Judge Cox on the 24th August 2015, on both of the grounds of appeal submitted by the Secretary of State and that it was arguable that the First-tier Tribunal Judge had materially erred, in respect of ground one, in that the Judge arguably failed adequately to take into account the adverse credibility findings in the previous determination, failed to resolve a conflict in the evidence and failed to give adequate reasons for preferring one account to another and that further the Judge had arguably erred in respect of ground two by not addressing adequately the issue of potential family support upon return from the Claimant maternal uncle. It was on this basis that the appeal proceedings before me in the Upper Tribunal.

Submissions

7. In his submissions on behalf of the Secretary of State, Mr Staunton argued that First-tier Tribunal Judge Flynn had not given sufficient weight to the decision of First-tier Tribunal Judge Taylor and had been wrong at [30] in finding that the core of the Claimant's account concerned the death of his father, which she found reasonably likely to be truthful, whereas the core of the Claimant's account related to being targeted by the Taliban after the death of the Claimant's father. He further argued that the Judge had been wrong to find the witness AK credible, without comparing and contrasting it to the Claimant's own evidence and that whereas the witness AK had said that the Claimant's father had been killed several years before, the Claimant himself said that his father had died from a heart attack and that the Judge had failed to deal with this inconsistency in the evidence. He further argued that the Judge had not given clear reasons or adequate reasons as to why she accepted the evidence of AK. Mr Staunton further argued that Judge Flynn had failed to properly explain why the Claimant's maternal uncle would not be able to provide support if the Appellant were to be returned. He sought to rely upon the Grounds of

Appeal.

8. Ms McCarthy on behalf of the Claimant Mr Atsakzai, argued that First-tier Tribunal Judge Flynn had been entitled in light of the new evidence available from witness AK to depart from the findings of First-tier Tribunal Judge Taylor. She argued that the Judge had explained between [31] and [33], why she considered him to be a truthful witness and as to why she had found that the Claimant's father had died and that there was now new evidence from AK that the Claimant's village was under Taliban control and that his family had been killed and that the Judge had simply gone on to consider the risk to a boy of fighting age, who as a result could not be returned. She argued that witness AK did not have to displace the Claimant's evidence, as the new witness had simply given evidence regarding the up-to-date circumstances that the Claimant would face upon return and the attack on the Claimant's village. She agreed that the Judge had not clearly set out that the evidence of AK simply related to the new risk faced by the Appellant upon return, irrespective of the Claimant's own account, but indicated that this was clear and could be inferred from the evidence that AK gave. She argued that the new witness evidence was not contaminated by any previous adverse credibility findings against the Appellant.
9. In respect of ground 2, she argued that the Judge had taken account of the fact that attempts have been made to trace the Claimant's family and that the reasons given as to why she found that family support would not be available were sufficient.
10. Both representatives asked me to remit the case back to the First-tier Tribunal, if I were to find that there was a material error of law in the case.

My Findings on Error of Law and Materiality

11. Although First-tier Tribunal Judge Flynn did mention the case of Devaseelan at [29], she did not set out the guidance given within that case as to the circumstances in which a Judge on a second appeal could or should depart from finding of facts made by a previous First-tier Tribunal Judge, at a subsequent appeal hearing. Judge Flynn's reasoning at [30] for departing from the conclusions reached by First-tier Tribunal Judge Taylor at [30] were wholly inadequate and insufficient. Her finding that she agreed with Mr Palmer that the evidence of AK was independent confirmation core of the Claimant's claim which entitled her to reach a different conclusion, and her finding that the core of the Claimant's account concerned the death of his father that she found reasonably likely to be truthful, was insufficient reason for departing from the conclusions reached by First-tier Tribunal Judge Taylor, in circumstances where she also accepted and adopted the discrepancies that First-tier Tribunal Judge Taylor had found in the Claimant's evidence at [30]. She has failed to

explain why simply the death of his father being considered truthful is sufficient reason to depart from the conclusions of First-tier Tribunal Judge Taylor regarding the credibility of the manager the appellant's account regarding him being targeted by and kidnapped by the Taliban. The reasoning in this regard is not adequately explained, such as to mean that the losing party knows why they lost.

12. Although it had been argued by Ms McCarthy on behalf of the Claimant that the evidence of AK was new evidence regarding the risk faced by the Appellant upon return, irrespective of the previous adverse credibility findings against the Claimant, this has not been stated specifically by Judge Flynn, who makes no reference to the evidence of AK being new evidence regarding the risk currently faced by him upon return, such as to justify departing from the findings of Judge Taylor and the only reason given by Judge Flynn is the fact that AK's account is independent confirmation of the core of the Claimant's account.
13. First-tier Tribunal Judge Flynn further erred in finding that the core of the Claimant's account did relate to the death of his father. It is clear that the core of the Claimant's account in fact related to the risk to him having been targeted by the Taliban, after the death of his father, having eventually being kidnapped by them and then wanting him to be a suicide bomber, and him having escaped twice from the Taliban, having been kidnapped by them. The First-tier Tribunal Judge has therefore misinterpreted the core of the Claimant's account. This clearly amounts to an error of law.
14. I further find that First-tier Tribunal Judge Flynn erred in law in simply agreeing that AK's evidence was independent confirmation of the Claimant's account of the death of his father, when the Claimant's evidence was that his father died from heart attack, whereas AK's evidence was that he had been killed several years previously. First-tier Tribunal Judge Flynn failed to deal with this discrepancy within the evidence and again, her failure to deal with this discrepancy means that her reasoning for departing from the findings of First-tier Tribunal Judge Taylor are inadequately reasoned and insufficient. I therefore find that the reasoning given by Judge Flynn for departing from the previous determination of First-tier Tribunal Judge Taylor are both inadequate and insufficient and do amount to material errors of law.
15. In respect of the second ground of appeal, although First-tier Tribunal Judge Flynn at [41] accepted that the Claimant's maternal uncle may still be alive, the Judge found that the Appellant would be without the support of his paternal family, the normal unit of supporting in Afghanistan, such that the Claimant would still be described as a vulnerable person, despite having recently obtaining his majority. However, although the paternal family may be the normal unit of support in Afghanistan, the Judge has not adequately dealt with the question as to whether or not in fact the Claimant could obtain

support from his maternal uncle and has not made a clear finding as to whether or not his maternal uncle was actually still alive or able to provide such support. The Judge should have more fully considered the issue regarding whether or not support was available from the Claimant's maternal uncle, and her failure to do so again amounts to material error of law.

16. In my judgement, for the reasons set out above, the decision of First-tier Tribunal Judge Flynn does contain material errors of law, such is appropriate for the decision of First-tier Tribunal Flynn to be set aside. Given that the material errors go to the assessment of the Claimant's account and the risk that he faces upon return, such evidence would have to be heard fresh in respect of the case, and wholly new findings of fact made, I consider that it is in the interests of justice that the case be remitted back to the First-tier Tribunal, in order for the case to be reheard. The decision of First-tier Tribunal Judge Flynn having therefore been set aside the case is to be remitted to the First-tier Tribunal, to be heard by any Judge other than First-tier Tribunal Judge Flynn.

Notice of Decision

The decision of First-tier Tribunal Judge Flynn containing material errors of law, the decision is set aside;

The case is remitted back to the First-tier Tribunal to be reheard before any Judge other than First-tier Tribunal Judge Flynn;

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before me. No such order is made.

Signed

Dated 23rd October 2015



Deputy Upper Tribunal Judge McGinty