



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/08853/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1 October 2015

Decision and Reasons Promulgated  
On 4 December 2015

Before

**THE HON. LORD BURNS**  
(Sitting as a Judge of the Upper Tribunal)  
**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

Between

**S J**  
(ANONYMITY DIRECTION MADE)

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Chelvan of Counsel, Lawrence & Co Solicitors  
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction**

1. The appellant, a national of Afghanistan, has appealed against the decision of the First-tier Tribunal of 26 May 2015 to dismiss his appeal against the respondent's decision to refuse him asylum and remove him from the United Kingdom.

2. The appellant is male and arrived illegally in the United Kingdom to claim asylum on 26 January 2010. He gave his date of birth as 1 July 1976. His application for asylum was refused on 19 March 2010 but he was given discretionary leave to remain until 1 March 2013. No appeal against that decision was made. He applied for further leave to remain on 14 March 2013. On 13 October 2014 the respondent refused his application for asylum, humanitarian protection and under ECHR.
3. The appellant claimed that his father had been abducted by the Taliban, was released after about a month and then proceeded to work for them. After some time the appellant's father informed the appellant that the Taliban wanted the appellant to join the Taliban. The appellant's mother was unhappy with that arrangement. Six police officers came to his house and asked about the whereabouts of the appellant's father. The following day they returned and the appellant was assaulted with a butt of a gun which broke the appellant's arm. He thereafter fled and was handled by an agent who took him out of Afghanistan in a lorry.
4. The appellant was subjected to a screening in January 2010 and substantive interview in February 2010. The respondent did not accept that the appellant was at risk in Afghanistan or that his father was a member of the Taliban. She did not accept that the appellant had to flee as a result of a police raid on his house. At the screening interview on 26 January 2010 the appellant claimed to have been 13 years and 5 months old placing his date of birth at about 1 August 1996.
5. An age assessment was carried out on 18 December 2009 which had assessed his date of birth as being 1 July 1995, about seven months older than the appellant claimed to be.
6. The First-tier Tribunal heard evidence from the appellant and it also had a witness statement from him dated 14 February 2014. In a skeleton argument before the First-tier Tribunal counsel for the appellant argued that the appellant's evidence was supported by the fact that he had entered the United Kingdom with his arm in a sling and that the evidence of Dr Juistozi, in a report in the appellant's supplementary bundle, corroborated the appellant's claim. In relation to Article 8, reference was made to *R (AA) Afghanistan v SSHD* [2012] EWCA Civ 1643, a Court of Appeal case, which addressed the position in respect to restitution for incorrect age assessment.
7. It was argued that the screening and substantive interviews in January and February 2010 had to be viewed in the light of the appellant's true age at that time which was approximately 13 years and 5 months. In view of the respondent's policy in respect of unaccompanied asylum seeking children (UASC) the appellant ought to have been granted discretionary leave until he was 17½ years of age and on that basis the period of discretionary leave ought to have expired on 1 March 2014. Instead, his period of discretionary leave expired on 1 March 2013 on the basis of an incorrect age assessment.

8. That had caused “gross procedural unfairness” and in terms of *R (AA) Afghanistan* he was entitled to restitution.
9. At paragraph 22 of the determination of the First-tier Tribunal the question of the appellant’s age is dealt with. The judge was prepared to accept that the appellant’s date of birth was as claimed in July or August 1996. He then proceeds as follows:

“Thus at the time his asylum claim was first refused on 19 March 2010 he was aged 13 year and 8 or 9 months. On this basis he would have been 17 years and 7 or 8 months when the period of discretionary leave expired on 1 March 2013. That is in accordance with Home Office policy.”

Unfortunately, the penultimate sentence quoted contains a mathematical error since the appellant would in fact have been 16 years and 7 or 8 months when the period of discretionary leave expired on 1 March 2013. Accordingly, to refuse discretionary leave and to return him to Afghanistan when the period of discretionary leave expired on 1 March 2013 would, in fact, have been contrary to Home Office policy.

10. Having considered the evidence, the Tribunal rejected the appellant’s contention that his father was a member of the Taliban and that his home was raided by the police. It was not accepted that he was at risk in Afghanistan from the authorities, the Taliban, or from his father.
11. The Tribunal recognised that at the time of the First Tribunal’s hearing the appellant was over 18 and therefore no longer a minor. Reference was made to *KA (Afghanistan) and Others v SSHD* [2012] EWCA Civ 1014 in which the Court of Appeal made it clear that the Secretary of State’s duty towards unaccompanied minors included a duty to trace family members and that was not discharged simply by giving them leave until they reached the age of 17½. A breach of that duty, however, did not automatically result in a successful appeal and a grant of asylum or indefinite leave to remain. Some tangible disadvantage required to be identified to the appellant which would have resulted in a grant of asylum or humanitarian protection. In *EU and Others* [2013] EWCA Civ 32 the Court of Appeal stated that an appellant had to show that on the particular facts there was a causative link between the Secretary of State’s breach of duty and the claimant’s claim for protection. The Tribunal did not find any such causative link in the current case nor did they find any prejudice that would render it unfair now to remove the appellant to Afghanistan (see *R (on the application of Jabarkhail) v SSHD* [2013] EWHC 1798 (Admin)). In respect of his being returned to Afghanistan he had his parents and other relatives there. Since he had only been in the UK for 5 years his cultural and linguistic ties were Afghanistan. Notwithstanding the fact that he was just over 18 years of age, he was fit and well and could get support in Afghanistan. The Tribunal concluded that the wrong age assessment had not caused him prejudice. The decision to refuse his claim for asylum was not disproportionate.
12. In respect of his Article 8 claim it was accepted that the appellant had established private life in the United Kingdom and that the decision to remove him interfered with his right to private life. However, in balancing the competing interests of the

appellant and the respondent's duties and obligations to the community at large the Tribunal found that the balance fell in favour of the respondent and that his decision to return the appellant to Afghanistan was lawful and proportionate.

13. The appellant appealed to the Upper Tribunal upon the basis that various points which had not been put to the appellant and which would have been relevant in respect of findings of fact made were not put to him and that had caused such unfairness as amounted to a material error of law. Further, the Tribunal's acceptance that the appellant's date of birth was in August or July 1996 together with the finding that the appellant was 17 years or 7 or 8 months at the expiry of discretionary leave in March 2013 was wrong and the fact that he was denied entitlement to discretionary leave in line with the Home Office policy was a further material error and the appellant entitled to restitution therefore. Accordingly that factor, which was not taken into account in the overall proportionality exercise under Article 8, rendered the removal disproportionate. Accordingly, the Article 8 claim ought to be allowed.
14. Mr Chelvan for the appellant advanced his argument primarily on the second ground of appeal. He referred to *AA (Afghanistan)* where the Appeal Court at paragraph 21 referred to Morris Kay LJ's judgment in *KA (Afghanistan)* [2012] EWCA Civ 1014 at paragraph 46. There Lord Justice Kay refers to the need to provide some sort of causative link between the Secretary of State's breach of duty and a claim to protection. At paragraph 47 his Lordship emphasised that there is a burden of proof on the applicant not simply to establish the failure to discharge a duty (in that case the duty of tracing relatives in the country of return) but also that he is entitled to that which he seeks.
15. At paragraph 10 in *AA (Afghanistan)* Lord Justice Laws emphasised that no relief or remedy for a breach of policy on the part of the respondent can be given unless the appellant can point to an error of law by the Secretary of State. He defined at paragraph 13 the real question in that case as being whether it could be said that, even if there was no specific legal wrong in the Secretary of State deciding the case when she did, nevertheless in the events which had happened there was a legal duty to recognise in the substance of the decision complained of that the appellant had lost or may have lost "potential benefits by virtue of his being over 18 at the time of decision".
16. In the result, the decision complained of ought in law to have proceeded on "a notional basis" that the appellant was under 18 (paragraph 29). In those circumstances the court declared that the Secretary of State was obliged to consider whether, in the light of the position as it ought to have been if the case had been decided before the appellant reached 18, some order should now be made in his favour.
17. Mr Chelvan argued that was a clear breach of the Home Office policy in this case. The appellant had not received discretionary leave to remain until he was 17½. The consequences of that were not clearly articulated but appeared to be that the

appellant would or might have been given another substantive interview some time later than February 2010 had he been granted discretionary leave until March 2014. In that event his account of his fear of persecution may have been assessed differently. In any event, he was denied a year's discretionary leave to which, under Home Office policy, he was entitled.

18. Mr Chelvan also pointed out that that policy involved recognition that unaccompanied children should not be returned to their home country unless there are adequate reception arrangements in that country it is for that reason the duty of making enquiries to trace relatives in the home country exists. Indeed, as pointed out in *AA (Afghanistan)* at paragraph 23 tracing enquiries are central to the resolution of claims by a UASC. In this case the result of tracing enquiries had not been known at the date of the decision but reference was made to a letter dated 21 May 2015 from the British Red Cross which stated that efforts to obtain information about the relatives of the appellant in Afghanistan had been unsuccessful.
19. Mr Melvin, on behalf of the respondent, advanced little by way of rebuttal of the submissions advanced by the appellant's counsel. He acknowledged that there had been a technical error on the part of the First-tier Tribunal. He stated however, that there was no material prejudice occasioned by that error. By the date of the First Tribunal's hearing the appellant was, on any view, not a minor.
20. Mr Melvin, however, did not make any application to obtain further instructions or assistance and did not move for any continuation of the hearing for that purpose.
21. It is clear that the First-tier Tribunal fell into error when it concluded at paragraph 22 that the period of discretionary leave which expired on 1 March 2013 was in accordance with Home Office policy because the appellant would have been over 17 at that time. That is plainly incorrect since he would, on the findings of the Tribunal itself, been only 16 years and 7 or 8 months. Accordingly, the refusal of further discretionary leave amounts to a breach of the policy of the Home Office to which we have referred. Applying the same sort of reasoning as the Appeal Court did in *AA (Afghanistan)*, we consider that there is a legal duty to recognise that the decision to refuse discretionary leave on 13 October 2014 meant that the appellant may have lost potential benefits because it was thought at that time that he was one year older than he in fact has now been found to be by the First-tier Tribunal. Had his true age been recognised he would have been entitled to further leave to remain until March 2014. As a result he may have been re-interviewed and the credibility of his responses at that time would have had to be assessed of new. Furthermore, the decision to grant him discretionary leave to remain until only 1 March 2013 was one which breached Home Office policy. He ought to have been granted that leave until 1 March 2014.
22. In the circumstances it seems to us, in the light of that breach of policy together with its potential consequences, right to grant him a remedy. Accordingly, we consider that the appeal on Article 8 grounds ought to be allowed in order to give the appellant an opportunity to make such further application as he considers appropriate and for the respondent to deal with any such application in a regular

and proper manner. It is not necessary for us to express any view on the first ground of appeal which is directed at the alleged failure to put to the appellant certain matters on which findings of fact were based.

23. We accordingly allow the appeal.

**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

Lord Burns