



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/12138/2011

**THE IMMIGRATION ACTS**

Heard at Birmingham Centre City Tower  
On 27 April 2015

Determination Promulgated  
On 28 April 2015

Before

UPPER TRIBUNAL JUDGE PITT

Between

JA  
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Bedford, instructed by Sultan Lloyd Solicitors

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a national of Afghanistan and was born in 1994.
2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court

proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

3. This appeal is against the decision promulgated on 14 December 2011 of First-tier Tribunal Judge Ritson which refused the appellant's asylum and human rights appeal.
4. Following the decision of Judge Ritson, permission to appeal to the Upper Tribunal was granted regarding the credibility findings of the First-tier Tribunal and the approach taken to the respondent's failure to carry out her tracing duty under Regulation 6 (1) of the Asylum Seekers (Reception Conditions) Regulations 2005.
5. In a decision promulgated on 20 June 2012 Deputy Upper Tribunal Judge Juss found that the respondent had acted unlawfully in failing to carry out the tracing duty and allowed the appeal to the extent that the respondent carry out that duty.
6. That decision was successfully appealed to the Court of Appeal. Remittal to the Upper Tribunal was ordered on 9 April 2014. Deputy Upper Tribunal Judge Juss was found to have failed to consider the ground of appeal relating to the credibility findings made by the First-tier Tribunal, in particular in relation to inconsistencies across his interviews, the approach taken being contrary to the principles in R (Dirshe) v SSHD [2005] EWCA Civ 421.
7. The Court of Appeal order dated 9 April 2014 states the appeal should be "remitted to the Upper Tribunal of the Immigration and Asylum Chamber for reconsideration." Mr Bedford's initial submission was that this meant that the decision of First-tier Tribunal Ritson had been set aside by the Court of Appeal and that the matter before me was an entire remaking of the appellant's asylum and human rights claim.
8. I did not agree. The Court of Appeal's view is set out in full in JA (Afghanistan) v SSHD [2014] EWCA Civ 450. At [36] and [37], the Court of Appeal states:

"[36] ... The Tribunal should, therefore, have considered for itself ... whether the appellant had been prejudiced by the failure of the Secretary of State to perform her [tracing] obligations under the regulations. However, if as I propose, the matter is remitted to the Upper Tribunal *to enable it to consider the outstanding ground of appeal*, its order will be set aside and it will have the opportunity to reconsider that aspect of the matter as well.

[37]. The failure of the tribunal to deal with the appellant's challenge to the use against him of the answers given in his initial and asylum interviews goes to the heart of its decision. Moreover, for the reasons I have given, I do not think that it was appropriate in this case for the tribunal to remit the matter to the Secretary of State, even if it had the power to do so. I would therefore allow the appeal, *set aside the order below* and remit the matter to a

different constitution of the Upper Tribunal for reconsideration as a whole in the light of the views expressed by this court. (my emphasis)"

9. The matter appears to me to be entirely clear. The Upper Tribunal order of Judge Juss was set aside by Court of Appeal and the grounds challenging the approach taken by First-tier Tribunal Judge Ritson to credibility and the tracing duty are to be addressed by me.
10. Mr Mills submitted that the First-tier Tribunal erred in regard to credibility and the tracing duty but that the errors were not material. He accepted that the initial interview which consisted of comments made by the appellant at a police station just after he arrived in the UK when a minor with no responsible adult and no interpreter present was not something on which the Tribunal was entitled to place any weight given the manner in which it was conducted. He accepted also that Judge Ritson failed to assess properly the weight to be afforded to the screening interview which was also conducted when the appellant was a minor without a responsible adult present and with an interpreter assisting over the telephone. It remained the respondent's position that there were other adverse credibility findings at [6(d),(e),(f),(g)(h),(i) and (k)] which were sufficiently untainted that they could stand and that no material error arose.
11. I did not agree. The Court of Appeal in JA set out at [1] the circumstances in which the appellant's initial interview of 7 October 2008 was conducted. He had just arrived aged 14 ½, went to a UKBA office late at night and "spoke only the most basic English". No responsible adult was present. As a result of the circumstances of the initial interview of 7 October 2008 and the statements the appellant made about his father being so different from his other accounts, the court noted at [18] that "it seems at least likely that the note [of the interview] reflects a misunderstanding."
12. The Court of Appeal set out at [2] the circumstances of the screening interview conducted on 5 November 2008. He was unaccompanied and the interpretation was provided over the telephone. The interview was not taped. At [19], the court commented that the appellant's evidence in the screening interview about the whereabouts of his family:
 

"... was understood by both the Secretary of State and the tribunal as a statement that both the appellant's parents were currently living in Afghanistan, but it was clearly nothing of the kind, particularly when read in the context of the rest of the interview."
13. At [23] the Court of Appeal questioned whether the initial interview or screening interview "should properly have been admitted in evidence or, if admitted, accorded any significant weight."
14. The court concluded at [25] that had the Upper Tribunal considered the challenge to the approach taken by the First-tier Tribunal to these


interviews it could not be said that it would have concluded that the challenge to the credibility findings lacked merit or materiality.

15. As indicated above, the respondent concedes that the First-tier Tribunal did err in its credibility assessment at [6(a), (b), (c), (e) and (j)]. These findings relate to the core of the appellant's claim. The Court of Appeal went further than merely identifying a failure to consider the weight to be placed on the comments in the initial interview and screening interview given the circumstances of those interviews and questioned the failure to assess whether to admit those records in evidence at all. In my view, it is unarguable that the reliance placed on the initial interview and screening interview played a material part in the findings reached by First-tier Tribunal such that the credibility findings as a whole are tainted and cannot stand.
16. For what it is worth I would also question whether a failure to pursue an asylum upgrade appeal by a 14 year old child is something upon which much weight can be placed (6(a)). Mr Mills also accepted that judicial notice could be taken of the use of "jan" in Afghan culture between family members and friends such that the appellant's credibility was not undermined by stating that his father was known as both "Malik jan" and "Abdul Malik", as suggested at 6(k).
17. It was my view that the error in the credibility findings against the appellant amounted to an error on a point of law such that the decision of the First-tier Tribunal had to be set aside and findings on his protection claim re-made *de novo*. Where the findings of fact fall to be made afresh it is appropriate here to remit the appeal to the First-tier Tribunal to be re-decided following paragraph 7.2 of Part 3 of the Senior President's Practice Statement dated 25 September 2012.
18. The second challenge to the decision of Deputy Upper Tribunal Judge Juss concerned his decision to remit the matter to the respondent for her to carry out her tracing duty. The respondent does not contest that this was an erroneous approach and accepts that she did not initially comply with her tracing duty. Mr Mills maintained, however, that the failure to trace had not left the appellant unable to make out his protection claim such that he needed effective relief now. This was so in particular where this appellant was not credible and could not expect to benefit from "corrective relief". Mr Mills also maintained that the failure to trace could not be said to have had a material impact on the appellant's protection claim as the Red Cross had attempted to find his family but had been unable to do so.
19. It is common ground that the First-tier Tribunal erred in failing to consider the respondent's non-compliance with her tracing duty when addressing the appellant's protection and human rights claims. In my view, the

outcome of the appellant's claim to be entitled to "corrective relief" had to be uncertain where his credibility remains to be decided. The respondent's failure to comply with her tracing duty must therefore be part of the assessment of the First-tier Tribunal remaking the appeal.

Decision

20. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.
21. The appeal is remitted to the First-tier Tribunal to be re-made *de novo*.

Signed   
Upper Tribunal Judge Pitt

Date 27 April 2015