IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01402/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2015	**On 15 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MR WAKEEL ALIZADA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Gibson-Lee of Counsel instructed by Kothala & Co Solicitors (Harrow Road)
For the Respondent: Mr Walker, Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal against the decision of First-tier Tribunal Judge Andrews promulgated on 4 June 2015 dismissing the Appellant's appeal against a decision of the Respondent dated 5 January 2015 refusing to grant further leave to remain and to remove him from the UK.

2. The Appellant is a citizen of Afghanistan. He arrived in the UK in September 2009 and claimed asylum. His application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 3 February 2010. At that time the Appellant's age was disputed. He gave his date of birth as 1 January 1994. The RFRL of 3 February 2010 refers to an age assessment conducted by Croydon Council Social Services in which the Appellant was assessed to be 18 years old and accorded a date of birth of 1 January 1991. This date of birth and concomitant age is used for the purposes of the RFRL of 3 February 2010. Notwithstanding the assessment referred to in the RFRL, there is on file a copy of an age assessment conducted by Croydon Council on 12 January 2010 which assessed the Appellant to have been born on 1 January 1992.

3. The Appellant appealed against the decision to remove him in consequence of the refusal of asylum. His appeal was dismissed by First-tier Tribunal Judge Miller in a decision promulgated on 19 May 2010. The basis of the Appellant's claim in summary was that following the death of his parents he had inherited land but had got into a dispute whilst still a child with the tenants who stopped paying him rent. In consequence he says that he was held for fifteen days by some farmers, who it is said were relatives of an influential commander so he could not avail himself of police protection. The Appellant claimed that during his detention by the farmers he was mistreated by being beaten with sticks: see further in this regard paragraph 10 of the decision of Judge Andrews which quotes paragraphs 11 to 15 of the decision of Judge Miller.

4. Judge Miller *"did not find the Appellant's account to be credible even allowing for the comparatively low standard of proof and did not believe the Appellant has left Afghanistan because he fears persecution"* for the reasons then set out over the next two pages of his decision: see Judge Miller's decision at paragraph 33.

5. In respect of the Appellant's age Judge Miller said, also at paragraph 33, immediately preceding his stated conclusion on credibility:

> "Whatever the actual age of the Appellant I found that he had no difficulty in answering the questions put to him at the hearing and there was no evidence of his being under any stress. In considering his claim however I have taken account of the fact that whatever his true age he is still comparatively young."

6. Judge Miller also referred to the Appellant's age at paragraphs 35 and 36 of the determination. At paragraph 36 he concluded in these terms:

> "Having regard to all that I have stated above, and the fact that I was unable to accept most of the central parts of the Appellant's story, I do not believe he has told the truth concerning his age and I find that the Appellant is 18 years old on all the evidence before me."

7. I pause to note that, in my judgment, it is apparent from that paragraph that Judge Miller's conclusion on age was informed by his assessment of

the Appellant's overall credibility. It was not the case that the dispute on age informed the credibility assessment itself.

8. Be that as it may, on 17 January 2011 it appears Croydon reassessed the Appellant's age on the basis of documents provided by the Appellant and concluded that he was born on 15 May 1994. The Appellant was consequently granted discretionary leave by the Respondent as an unaccompanied minor until 15 November 2011.

9. On 8 November 2011 the Appellant applied for further leave to remain supported by a personal statement dated 1 November 2011. The application was refused for reasons set out in an RFRL dated 5 January 2015, and a decision to remove the Appellant taken in consequence. The Appellant appealed to the IAC. First-tier Tribunal Judge Andrews dismissed the Appellant's appeal for the reasons set out in her decision.

10. Before the First-tier Tribunal the Appellant introduced further elements to his asylum claim not mentioned previously, which are summarised at paragraphs 12 and 13 of the decision of Judge Andrews. For present purposes it is to be noted in particular that it was claimed that the Appellant had been sexually assaulted during the period he was held by farmers - as is emphasised by the Appellant and his representatives in the grounds of challenge to this Tribunal. Judge Andrews did not accept the credibility of the Appellant's account and otherwise found that the Appellant had not established his claim for international surrogate protection and dismissed his appeal accordingly.

11. The Appellant sought permission to appeal which was initially refused by First-tier Tribunal Judge Landes on 23 June 2015 but subsequently granted on renewed application by Upper Tribunal Judge Coker on 10 August 2015. Permission to appeal was essentially granted on the basis that:

> "It is arguable that the judge, in reaching her findings on the appellant's credibility failed to adequately factor in the appellant's accepted age of 16 at the date of his first hearing rather than aged 18 as considered to be at that time and the effect this may have had on the findings of the judge at that time."

12. In this context the Appellant's grounds of appeal, as adverted to above, also took particular issue with findings in respect of the claimed sexual abuse:

> "The appellant's case in 2015 was different as he chose as an adult to reveal the sexual abuse he had suffered prior to arriving in 2009. The appellant stated that he was embarrassed to reveal the same before. Medical expert evidence was provided along with an expert report from the country expert which confirmed what he said. J[udge] Andrews found all the new evidence was a mere attempt to bolster his claim thereby rejecting the appellant's assertion that he was too embarrassed to admit what happened before. It is plausible and in fact highly likely that a 16 year old boy would be ashamed to admit sexual abuse."

13. I pause to note that permission to appeal was expressly refused in respect of the challenge based on Article 8 of the ECHR on the ground that the Appellant's representative before the First-tier Tribunal had withdrawn any reliance upon Article 8.

Consideration

14. I turn then to a consideration of Judge Andrews' approach to the issues that are at the core of the Appellant's challenge to the conclusion in his appeal.

15. It is apparent from the decision of the First-tier Tribunal that the Judge directed herself to the case of **Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702**: see paragraph 26 of Judge Andrews' decision. The decision in the case of **Devaseelan** is a matter of record and it is also reproduced in significant part in the Appellant's grounds of appeal in support of the application for permission to appeal and accordingly it is unnecessary for me to set out the guidelines here.

16. The basis of the Appellant's submissions in respect of the **Devaseelan** guidelines and the contended approach that Judge Andrews was invited to take in respect of the decision of Judge Miller is summarised at paragraph 38 of the decision of Judge Andrews in the following terms:

> "Following **Devaseelan** guideline (1), Judge Miller's 2010 determination is my starting point, as the authoritative assessment of the Appellant's status at the time that determination was made. [Counsel for the Appellant] invited me to consider myself not bound by Judge Miller's 2010 determination for three reasons: (i) because the appellant was very young in 2010, (ii) because proof of torture was not before Judge Miller in 2010, and (iii) because of the night letters."

17. The 'night letters' is a reference to various documents that the Appellant had produced in support of his second appeal which had not been before Judge Miller and which are addressed by Judge Andrews under the heading *"Taliban announcements"* from paragraph 32.

18. At paragraph 38 the Judge went on to address each of the three points raised by the Appellant's advocate - and rejected each of them in turn. What is stated at paragraph 38 in respect of each of these three points is essentially a summary of the analysis that appears in the preceding paragraphs, in particular from paragraph 29.

19. As regards the Appellant's age, the Judge gave consideration to this at paragraph 29 in the following terms:

> "The 2015 Reasons for Refusal Letter says that, in January 2011, the London Borough of Croydon reviewed their age assessment and concluded that the appellant's date of birth was 15 May 1994. At the hearing, [the Presenting Officer] did not seriously argue that the appellant was older than this. I

accordingly find that the Appellant was born on 15 May 1994, and that Judge Miller was mistaken in finding him to be 18 years old in May 2010. However, Judge Miller states at [33]:

> 'Whatever the actual age of the Appellant I found that he had no difficulty in answering the questions put to him at the hearing, and there was no evidence of his being under any stress. In considering his claim, however, I have taken account of the fact that whatever his true age he is still comparatively young.'

Judge Miller was therefore alive to the disagreement about the appellant's age, and clearly took account of the appellant's young age in making his determination. For this reason I do not consider that Judge Miller's mistake about the appellant's age should cause me to veer from his 2010 determination, or that it should diminish the weight I attach to that determination when making my own findings. I take this view particularly in light of paragraph [37] of **Devaseelan** which says: 'it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination'."

20. I interject at this stage to observe that one of the avenues of remedy that Mr Gibson-Lee referred to during the course of his submissions this morning was the possibility that the Appellant might yet make an out-of-time application to challenge the decision of Judge Miller (promulgated in May 2010), and indeed it was part of his submission that consideration might reasonably be given to that in the context of a rehearing before the First-tier Tribunal consequent to the Upper Tribunal now finding an error of law – possibly as 'preliminary issue' discussions on the approach to be taken to Judge Miller's decision. Necessarily that goes some way to seeking to utilise these proceedings as a vehicle to secure time and meaningful opportunity to challenge - some years after the event - the decision of Judge Miller. Be that as it may, that was clearly not a submission canvassed or amplified before Judge Andrews, and necessarily Judge Andrews cannot be criticised for not having had any regard to it.

21. Continuing the quotation from paragraph 29 of Judge Andrews' decision:

> "As the **Devaseelan** guidelines make clear, a tribunal that hears a claim closer in time to the events on which it was based is in a better position to make general findings of fact and to assess credibility than a tribunal which, as here, is going over much the same ground some years later. Taking all this into account, I attach a great deal of weight to Judge Miller's 2010 determination. I particularly highlight his statements at [36], 'I was unable to accept most of the central parts of the Appellant's story' and at [33], 'I did not find his account to be credible, even allowing for the comparatively low standard of proof, and I do not believe he has left Afghanistan because he fears persecution'."

22. In my judgment that was an approach entirely open to Judge Andrews. Judge Andrews was clearly alive to the issues in respect of the dispute over the Appellant's age before Judge Miller and the change of circumstance in that a post-appeal age assessment had reassessed the Appellant's age to be closer to that which he had all along claimed. Judge Andrews was clearly alive to the approach required under the guidelines in

Devaseelan and essayed an application of those guidelines to the particular facts and circumstances of this appeal. In my judgment Judge Andrews reached an evaluation as to how those guidelines should be applied to this appeal that was entirely within the remit of her judgment.

23. Moreover it is clear that Judge Andrews identified and recognised the differences that were advanced in the Appellant's account compared with the way in which the case had previously been put before the First-tier Tribunal: she summarised those differences at paragraph 30 under sub-paragraphs (i) to (iv). Crucially the Judge then said this:

> "These are significant discrepancies. In particular, I consider it extremely unlikely that [the Appellant] would have failed to tell Judge Miller that he was told to carry out a suicide bombing, or about the above manner of his escape from detention, if these things were true. In terms of the claimed sexual abuse, the appellant told me he was too embarrassed and ashamed to mention this before. While I recognise that victims of sexual abuse can be reluctant to disclose what has happened to them, this appellant has been represented by different lawyers, and previously appeared before a Tribunal. Taking this into account, I am not persuaded that this late disclosure of sexual abuse is because of shame and embarrassment. I consider it more likely that all the above new claims were made to attempt to bolster a story that had previously been rejected by Judge Miller."

24. Moreover and in any event the Judge - having emphasised that she had considered all of the evidence 'in the round' (for example see paragraphs 25 and 26), and specifically that *"credibility is a matter for me to decide on the totality of the evidence"* (paragraph 33) - set out further analysis in respect of the Appellant's credibility by reference to supporting documents (see paragraphs 32 and 33), leading her to the adverse conclusion at paragraph 34, which even then is prefaced with a note of caution about the nature of a credibility assessment.

25. In my judgment Mr Gibson-Lee's argument that Judge Andrews should have disregarded Judge Miller's findings is essentially a disagreement with the Judge's evaluation of the approach to be taken within the **Devaseelan** guidelines. It does not, I find, identify an error of law. In all those circumstances I find that the decision of Judge Andrews is not in any way flawed for error of law but in fact is a thorough attempt to address all of the issues raised by the Appellant, including in particular the approach to be taken to Judge Miller's decision in light of the changed premise in respect of his age, and also specifically in respect of the likely or possible reluctance of a victim of sexual abuse to speak freely about such abuse in any particular circumstance.

Notice of Decision

26. The decision of the First-tier Tribunal contained no error of law and stands.

27. The appeal remains dismissed.

28. No anonymity direction is sought or made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed Date: 14 January 2016

Deputy Upper Tribunal Judge I A Lewis