



IAC-FH-CK-V1

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

Appeal Number: AA/01965/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1 March 2016**

**Decision & Reasons Promulgated
On 8 April 2016**

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE WARR**

Between

**[B H]
(~~ANONYMITY DIRECTION NOT MADE~~)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Loughran, Counsel instructed by Wick & Co Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal promulgated 30 November 2015 dismissing the appellant's asylum appeal. The appellant is a national of Afghanistan whose date of birth became the subject of some dispute during the course of the hearing before the First-tier Tribunal to which we refer below.

2. On 23 June 2009 he attempted to board a flight to Luton from Charles de Gaulle Airport with six other individuals, all using stolen passports and counterfeit immigration stamps. He was released. On 11 July 2009 he entered the United Kingdom at Prestwick Airport claiming to have no passport. However, the bio data page from his passport was found on the aircraft having been ripped out. It was a stolen passport. It appears that his date of birth was recorded at this stage as 1 January 1996. He claimed asylum but that claim was refused on 7 October 2009. On 17 March 2014 the respondent refused to grant leave to remain and ordered him to be removed to Afghanistan.
3. It has been accepted throughout by the respondent that the appellant is a national of Afghanistan. In the decision letter of 9 October 2009 the appellant's date of birth was given as 1 January 1996. The respondent rejected his claims for asylum finding him to have given inconsistent and incredible accounts of his reasons for claiming asylum. But, since he had come to the United Kingdom as an unaccompanied minor and in line with current policy, he was granted discretionary leave to remain for three years until 9 October 2012.
4. On 2 October 2012 he made an application for further leave to remain which was the subject of the decision of 17 March 2014. At that stage, it appears to have been again accepted that the appellant's date of birth was 1 January 1996 and, accordingly, he was at the date of the decision 18 years of age.
5. His position at that time was that he had a fear of persecution in Afghanistan because of the history which he related. His father had been kidnapped by the Taliban. The family house had been set on fire as a result of which his younger brother [F] had been injured. Thereafter the appellant's uncle assisted the younger brother to flee to the United Kingdom. In 2009 the appellant and his father were attacked. One of the attackers was said to have been wearing a police uniform. The father was kidnapped and held for a ransom of \$100,000. Thereafter further demands were made for money and the appellant's father made arrangements for the appellant to leave Afghanistan. He eventually arrived in the United Kingdom in July of 2009 and was placed in the care of South Ayrshire Social Services. He was interviewed on 3 September 2009 in relation to his asylum claim which the respondent refused.
6. In about June 2011 the appellant's younger brother [F] entered the United Kingdom aged 10. He also applied for asylum.

The Proceedings before the First-tier Tribunal

7. The judge heard evidence from the appellant but considered that he had given inconsistent accounts about the nature of the threat faced by his family in Afghanistan. Further, significant discrepancies in the accounts given by the appellant and his uncle [Mr F], in relation to the whereabouts

of the appellant's parents and what happened to them, existed. The judge considered that [Mr F] had "connived with the appellant and/or the appellant's family in Afghanistan to present a false claim" in relation to the respect in which the Taliban had targeted his family. She found that neither the appellant nor his uncle were witnesses of truth upon whom any reliance could be placed. She considered that the appellant could be safely returned to Kabul. She rejected an Article 8 claim on the basis of the appellant's family life with his younger brother. That was on the basis that the appellant was not [F]'s parent nor had he any parental responsibility for him. The appellant was an adult who had not lived with his younger brother in the United Kingdom. She found that Article 8(1) was not engaged in respect of family life. In respect of private life it was accepted that the appellant had established private life in the United Kingdom. He had lived here for six years, attended school and had a network of friends and extended family, including his uncle. However, he had no right to be in the United Kingdom, did not meet the requirements of the Immigration Rules. On balance, the judge considered that it was proportionate to remove him and the appeal under Article 8 was dismissed.

8. An issue arose during the cross-examination of the appellant by the Home Office Presenting Officer in relation to a statement contained in the report of an independent social worker, Christine Brown, instructed by the appellant's representatives. At paragraph 3.1 of her report it is narrated that during her meeting with him the appellant indicated that he was born on 11 September 1994. It then proceeds to narrate that he was thus "almost 11 years of age" when he entered the United Kingdom in July 2002 rather than "13 as recorded". Plainly, had he been born on 11 September 1994 he would have been 14 upon entering the United Kingdom not 11. It was pointed out to the appellant in cross-examination by the respondent's representative that he had told Christine Brown that he had been born on 11 September 1994 and was asked why he had said that. The appellant reasserted that that was his actual date of birth but the date of 1 January 1996 had been given to him by the United Kingdom authorities. At paragraph 26 of the determination the judge narrates that she put it to the appellant that he was not in fact a minor and, on the basis that he was born in 1994, that meant that he was now 21 and not 19.
9. After the hearing the Tribunal Judge received a letter from the appellant's solicitors dated 13 November 2015 enclosing an email received from the social worker Christine Brown confirming that the date of 1994 was a typing error and that, in fact, the appellant had told her that he had been born in 1998. However, the judge was not prepared to accept the late filed evidence. She observed that the social worker had not attended the Tribunal to be cross-examined and that the evidence before the Tribunal from the appellant himself was clear and unequivocal that his date of birth was 11 September 1994. She found that when off guard he had given the social worker his actual date of birth which he had subsequently accepted to be correct in cross-examination by the respondent's representative.

She found as a matter of fact that the appellant's date of birth was 11 September 1994 and that the appellant had lied about his age on arrival in the United Kingdom. He was accordingly 15 years of age on entry to the United Kingdom.

10. The judge then went on to assess the substance of the appellant's claim and, as narrated above, found the appellant to be incredible in a number of important respects.

The Proceedings before the Upper Tribunal

11. Before us Ms Loughran submitted that the First-tier Tribunal Judge had materially erred in law. She had failed to have regard to clearly relevant evidence in respect of the social worker's explanation as to the typing error contained in her report. In addition there was irrationality in finding that his date of birth was 11 September 1994 when his evidence as recorded by the judge at paragraph 27 was that when he spoke to the social worker he was not paying attention to the year mentioned, he had "a wrong interpreter". The failure to have proper regard to this material had important consequences in assessing credibility since the Tribunal Judge found that he had deliberately deceived the authorities on arrival in the United Kingdom and it was deliberately carried out in order to gain an advantage.
12. Ms Loughran argued that the First-tier Tribunal also materially erred in law in failing to have proper regard to the evidence of the appellant's younger brother [F]. At paragraph 41 the judge had stated that the younger brother had been granted asylum based solely on his young age on arrival and not because anything he had said about events in Afghanistan had been accepted. Accordingly, the Tribunal had given no consideration at all to the brother's evidence. That evidence supported the appellant's account both in its detail and because of the presence of injuries which themselves supported the appellant's account. That evidence was of direct relevance and the judge materially erred in law in failing to have regard to it.
13. Ms Loughran submitted that the judge erred in finding that the appellant did not meet the suitability requirements of the Immigration Rules set out in S-LTR in particular. It appeared that the judge proceeded on 1.6. of that Rule and concluded that the presence of the applicant in the UK was not conducive to the public good because of his conduct, character or associations making it undesirable for him to remain. However, the only evidence in relation to this matter related to a conviction for driving whilst uninsured, two cautions for theft and common assault and three abduction notices in respect of young girls. There was evidence from DC Wood which demonstrated that these matters were of no materiality since the circumstances of the abductions demonstrated that the appellant had been found in the company of young girls in his support unit. No

unlawfulness was involved in that and it was clear that the appellant had not breached any of the abduction notices served upon him.

14. Mr Whitwell for the respondent in addressing ground of appeal 1 pointed out that it was three weeks after the hearing that the judge received information in relation to the social work report. No application to adjourn the case when the point arose during cross-examination was made and it was difficult to see what option the First-tier Tribunal Judge had at the stage when this matter was raised. In any event, it was not simply the question of age which affected credibility as was clear from the approach of the Tribunal to the substance of the appellant's claim which is dealt with in paragraph 38 onwards. His asylum claim had been dismissed due to the inconsistencies of the account given by the appellant himself and the discrepancies in the account given by the appellant when compared to that of his uncle, Mr Faqiri. Furthermore, the appellant had a history of deception in the use of false passports in order to gain entry to the United Kingdom. In the circumstances, it could not be said that the issue of the appellant's age could be said to be a material factor in the decision. However, it was conceded by Mr Whitwell that, if we considered this issue to be of materiality, then the decision could not stand and would require to be remitted to the First-tier Tribunal. However, he did accept that the issue as to the age of the appellant both at the time of his entry into the United Kingdom in 2009 and at the time of his appeal before the First-tier Tribunal might be relevant to the assessment of his credibility.

Discussion

15. The matter of the appellant's age appears to have been raised for the first time during cross-examination of the appellant. The terms of the social worker's report at paragraph 3.1, in which she stated that the appellant himself had indicated that he was born on 11 September 1994 and the answers to questions put to him, both in cross-examination and by the judge herself, led the judge to the conclusion that a different date of birth was the correct one, namely 11 September 1994. It is also apparent that that finding was considered to be one of importance in relation to the appellant's credibility as a witness before the Tribunal. At paragraph 37 she states in terms that what she terms the appellant's deceit about age impacts on his credibility.
16. We accept that thereafter the Tribunal proceeded to deal with the substance of the appellant's claim and, for the reasons which are given, his account was not accepted. Nevertheless, because of the impact that the judge found the deceit in relation to age to have upon his credibility, we consider that the judge materially erred in refusing to consider the late evidence of the social worker. Looking at the terms of the social worker's original report, the very fact that she states therein that the appellant must have been almost 11 rather than 13 on the basis of the information he had given her, indicates that the date of 1994 might well be an error on the part of the social worker. Having regard to the fact that this evidence

was given through an interpreter and was itself of a somewhat confusing nature, we consider that the conclusion that the appellant deliberately lied about his age previously and unwittingly revealed his actual age to the social worker and accepted it was such during the exchange in cross-examination, should not have been reached without giving the appellant's advisers an opportunity to advance the explanation which was proffered and for that to be considered.

17. In addition, we consider that the judge's conclusion on credibility generally was influenced by that conclusion and must have had a material part to play in the assessment of the appellant's credibility generally.
18. The explanation of the social worker was tendered some weeks prior to the promulgation of the decision and the judge states at paragraph 36 that she was not prepared to accept the late filed evidence on the basis that the social worker did not attend the appeal hearing and her evidence had not been subject to cross-examination and no application was made at the time to submit late evidence. The judge does not appear to have balanced these considerations against the cogency of the explanation tendered by the social worker or its potential effect on the decision under appeal (see **R (on the application of Azkhosravi) v Immigration Appeal Tribunal [2001] EWCA Civ 977**).
19. At the date on which the evidence was received the decision had not been promulgated and it was open to the judge to accept the evidence advanced. She could have called upon the respondent to provide any comments upon it. The failure to do so, appears to us in the particular circumstances of this case to be an error of law which has resulted in material unfairness. Her finding of deceit in this respect was clearly material to the findings on credibility. For these reasons we consider that this ground of appeal is well-founded and the decision cannot stand.
20. In the circumstances, it is not necessary for us to give any views in relation to the other grounds of appeal which are advanced. We shall allow this appeal and remit the case to the First-tier Tribunal for a rehearing.

Notice of Decision

The appeal is allowed. The appeal is remitted to the First-tier Tribunal for a fresh hearing.

No anonymity direction is made.

Signed

Date 14 March 2016

Lord Burns
Sitting as a Judge of the Upper Tribunal