UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: AA/09388/2015

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
on 14 June 2016	**on 13 July 2016**

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

X
(ANONYMITY DIRECTION MADE)

Respondent

Representation
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms R Francis, counsel (instructed by JD Spicer ZEB Solicitors)

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, 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/parties in this determination, identified as X. This direction applies to, amongst others, all parties. Any

failure to comply with this direction could give rise to contempt of court proceedings.

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”

2. The claimant is a national of Afghanistan, born on [ ] 1998. His appeal against the decision of the secretary of state dated 10 October 2015 refusing his claim for protection in the UK on asylum grounds was allowed by First-tier Tribunal Judge Andonian in a decision promulgated on 4 April 2016.

3. The secretary of state appeals with permission by Upper Tribunal Judge Rintoul dated 10 May 2016. In granting permission he stated that it is arguable that the First-tier Tribunal Judge erred in failing to set out what facts he found and why and that the Judge arguably did not explain why he (presumably) accepted the core of the account.

4. The First-tier Tribunal Judge noted that the claimant came to the UK when he was a minor aged 15. He attended an asylum screening unit. When he made his application he was 16. Although his asylum claim was refused he was given leave to remain until he reached 17 and a half.

5. His counsel informed the First-tier Tribunal that since the claimant was a minor, he would not be giving evidence. She relied on the documentation before the Tribunal including his witness statement, stating that his brother, MS, would give evidence. The latter has had refugee status since 2010, having won his asylum appeal.

6. The Judge noted that this created difficulty and that although counsel is not to be blamed it was her instructing solicitors who had given the instructions to counsel not to call the claimant to give evidence because of his age. The Judge thought this was an unwise decision and did not assist this tribunal “whatsoever” as the claimant could have attended with a responsible adult and given evidence. There were matters requiring clarification. The claimant did not “shy away” from giving instructions from the back of the hearing room and talking to counsel [5].

7. The Judge noted that the claimant's older brother's asylum appeal was allowed on 14 September 2010. His brother gave evidence before the Tribunal. At [5] the Judge stated that “... whilst I told counsel that another Judge may have taken a different view as to credibility as to the appellant not giving evidence in these circumstances, I would view the case nevertheless based on the evidence the appellant had given whilst a minor and would not take issue with the fact that he had not given oral evidence.”

8. At [7] the Judge stated that the claimant's current protection claim was based substantially on the same material facts as that of his brother's appeal, namely their father's involvement in the Taliban, his death, the

involvement of SG, a cousin of theirs, and the targeting of the claimant's family by the Taliban of which the cousin was a member. The Judge found that there is therefore a significant overlap arising out of the same factual matrix [7].

9. The Judge had regard to the guidance from Devaseelan. The fact that the claimant's brother was found to be credible and to be in need of international protection by a Judge was a very strong ground in support of the claimant's own credibility and the genuineness of his own need for protection. They are both from the same family and were both unaccompanied minors. (It appears from the decision of Immigration Judge Callender Smith, promulgated on 14 September 2010 that the claimant's brother was born in March 1996 and that he arrived in the UK on 6 May 2010 after an eight month journey).

10. The facts were that the claimant left Afghanistan three months prior to arriving in the UK on 4 December 2014, hidden in a lorry. The claimant accordingly left Afghanistan more than four years after his brother left.

11. In relying on Devaseelan, the Judge noted that the claimant and his brother are from the same family and were both unaccompanied minors. The claimant would be a lone minor and it would not be reasonable to relocate him to Kabul in those circumstances. He is uneducated. He started going to English classes in the UK when he came here and started to educate himself. His brother claimed that he did not know where his parents were and does not know where any members of his family are. There is evidence of contact with the Red Cross to find where his parents were [8]

12. The Judge noted at [9] that the presenting officer accepted that the claimant was Afghan. He and his brothers are from the same tribe. The claimant fears recruitment by the Taliban. His father used to be a fighter for them before he was killed. The Judge noted that the claimant claimed in his witness statement that he was forcibly taken to a madrassa by members of the Taliban on two occasions and they attempted to enlist him as a jihadist and suicide bomber. He did not want to fight for the Taliban or become a bomber.

13. The stated at [10] that the claimant had to establish that there was '… a real risk to him of being forced to be recruited, or be of other adverse interest from the Taliban in his home area on the basis that he has already been targeted by them'. He was at risk through his relationship to a specific individual, namely his cousin, SG. The Judge “deduced nothing” to suggest that the risk would have abated should the claimant be returned to his home area. He had been the victim of an attempted coercive recruitment in the sense that he was forcibly and physically taken to a madrassa and placed under pressure to join the Taliban and as a suicide bomber. The current situation in Afghanistan is one of worsening conflict characterised by an increasing breakdown of such limited law and order [10].

14. The Judge found that the information relied on by the secretary of state dates from 2013 and does not reflect the current situation or demonstrate anything meaningful on the availability or otherwise of state protection in Afghanistan [11]. As to internal relocation, this would not provide the claimant with adequate protection against the risk of being tracked down and harmed by the Taliban. His cousin, a member of the Taliban, may well on the lower standard be influential in his arrest were he to return [11].

15. The Judge noted that the claimant currently lives with his brother. His written evidence was "corroborated" by his brother who gave evidence that he obtained the claimant's telephone number from a member of his village who was in Pakistan whilst the claimant himself was there. His brother had been to Pakistan and had met with that "member" in 2014.

16. The Judge noted that the claimant stated in his written evidence "and corroborated by his brother when giving evidence" that the last time he contacted his mother and sister was before he left Afghanistan and he has no way of contacting them as they have no telephone communication. His grandparents are deceased. His father had no siblings. His mother has one sister whom he cannot recall when he last saw. He has no details of anyone else [13].

17. The Judge noted that the claimant's evidence was that after his brother fled, he, his mother, sister and grandfather moved to live with their uncle in the same village. After his brother fled, the claimant stated in his written evidence that he remembered the Taliban coming to his home twice. On the second occasion, when the Taliban came for his brother, they took the claimant with them to a madrassa. That was about an hour away from their home. He stayed there one night and escaped and returned home the following day. The same day, his uncle came and they all went to stay with the uncle [14].

18. The Judge then stated at [15]:

> "As advised earlier, the evidence I am looking at is the evidence of a child and not an adult and so long as I believe the core of the evidence to be true that suffices. See, for example the case of Chiver."

19. The Judge then referred to the country background information which showed that forced or coercive recruitment is a technique used by the anti-government groups such as the Taliban [16]. Further, a past threat will, "in my view" found a real risk of future harm – paragraph 339K of the Immigration Rules [17].

20. The Judge stated at [18] that there is also insufficiency of protection. The European Asylum Support Office's Afghanistan Security Situation described the current situation confirming that the Afghan authorities are in general unable to provide protection against violence.

21. The Judge stated at [19] that “furthermore, the (claimant's) blood relationship with SG, a Taliban figure and a cousin, would make it even more likely that he could be discovered.”

22. The Judge did not “believe” that relocation to Kabul was a viable alternative as he does not know anyone there and he will be at risk as a lone minor returning “and indeed there is still insufficiency of protection there as well against the violence.” [20]

23. Mr Walker on behalf of the secretary of state submitted that the Judge failed to make material findings of fact on core issues. He has not made a “definitive” finding that he accepts the core of the claimant's claim despite his self direction at [15] and reference to the country information at [16]. The Judge simply went on to consider internal relocation and sufficiency of state protection.

24. Moreover, the finding at [19] is “totally speculative” and is unsupported by any evidence, amounting to a bare assertion.

25. With regard to reliance on Devaseelan and the claimant's brother's determination, the surrounding circumstances relating to his departure from Afghanistan in 2009 cannot in the circumstances form the basis of the appellant's claim. In particular, he submitted that there was a gap of almost four years prior to the claimant's arrival in the UK. The Judge has not made any findings about this “gap”.

26. The claimant asserted that he was visited by the cousin some two weeks prior to his leaving. In his screening statement he claimed that approximately two weeks before leaving Afghanistan, the Taliban came for him. His cousin was with them. He was slapped and taken to the same madrassa again.

27. He had earlier stated that after his brother fled, his mother, sister, grandfather and he moved to live with his uncle in the same village. After his brother fled the Taliban came for him twice at their house. On the second occasion they came for his brother, they took the claimant with them. He stayed there for a night and then escaped and returned home. On the same day his uncle came and they went to live with him.

28. Mr Walker submitted that there was “a total lack of any findings in this determination regarding the evidence.”

29. With regard to the determination in the claimant's brother's appeal, the secretary of state was not represented at that hearing. Nor did the Judge make any findings or reference to the claimant at all.

30. He thus contended that the determination in the claimant's appeal failed to show what the Judge accepted or did not accept. It is not appropriate that attempts should be made in retrospect “to tease out findings which are not clear but are only hinted at.”

31. On behalf of the claimant, Ms Francis relied on the Rule 24 response that had been prepared by Ms Sanders, dated 26 May 2016. She also relied on an additional submission by Miss Sanders dated 27 May 2016. She submitted that the secretary of state's grounds amounted to nothing more than a disagreement with the findings made by the Judge and that no legitimate grounds of appeal had been identified.

32. With regard to the secretary of state's contention that the Judge should have drawn an adverse inference against the claimant for not giving oral evidence as he had no acute vulnerability or medical condition that would preclude him from giving evidence, and that the Judge placed too much weight on his brother's successful asylum appeal and dealt with issues of internal relocation and sufficiency of protection inadequately, she submitted that no presumptions arise from a lack of oral evidence. An appellant's decision whether to give oral evidence has no evidential significance of its own. She referred to the authorities in that respect set out at paragraph 7 of the Rule 24 response. Whether or not to draw an adverse inference in the circumstances was a matter that was entirely within Judge Andonian's own discretion (paragraph 12).

33. She submitted that the claimant was aged 18 at the date of hearing. Although not barred from giving evidence, as a child, he fell into a special category of appellants who are only required to give evidence where special criteria are met. She referred to the Senior President's Practice Direction of 30 October 2008 which defines a child as anyone who has not attained the age of 18. It is stated at paragraph 2 that a child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the Tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so.

34. The secretary of state accordingly wrongly argued that the claimant should have demonstrated an acute vulnerability or medical condition. As a child, he already fell into a special category. The sole question for the Judge was whether he could be satisfied with the child's non oral evidence in all the circumstances of the case. This had been referred to in counsel's skeleton argument placed before the Judge.

35. Nor did the secretary of state show that oral evidence from the claimant was necessary to enable the fair hearing of the case; nor did the Judge make any such finding.

36. Moreover, the claimant had dealt with the few credibility issues raised by the secretary of state in his statements.

37. With regard to the contention that undue weight was given to the claimant's brother's case, she submitted that this amounted to no more than a simple quarrel with the Judge. The Judge made a clear finding at [7] that the claimant's case and his brother's case are based substantially on the same material facts. He reminded himself that his brother's case did

not contain any findings concerning the claimant. However, there was a significant overlap arising out of the same factual matrix. Applying the wording and the principle set out in AA (Somalia) v SSHD [2007] EWCA Civ 1040 at [69], the Judge found that this is a very strong ground in support of the claimant.

38. She referred to the additional submissions and submitted that the Judge's finding at [19] regarding the risk of discovery by the claimant's cousin was in fact not speculative. In the additional submission it is contended that the Judge "clearly accepted the claimant's evidence that he had been persecuted by SG, a Taliban figure." Accordingly, a past threat indicates future risk. The Judge also accepted the submission relating to the claimant's vulnerability as a lone minor or very young adult without family support. Accordingly, even if there had been an error, it was not material.

39. The claimant's claim related to his father and cousin, Taliban members, who had applied coercive efforts to force the claimant to become a member of the Taliban. There was therefore an overlap of the facts found in the claimant's brother's appeal.

Assessment

40. As noted by Upper Tribunal Judge Rintoul, the First-tier Tribunal Judge presumably accepted the core of the claimant's account, albeit that he did not expressly make such a finding at [15].

41. However, the Judge did not set out what facts he found, nor why he accepted them. It had been contended that the findings by Judge Callender Smith regarding the claimant's brother, and in particular that he was found to be credible, is a strong ground in support of the claimant's own credibility and the genuineness of his need for protection.

42. Judge Andonian stated that the claimant feared recruitment by the Taliban. His father used to be a fighter before he was killed. In his witness statement he contended that he was forcibly taken to a madrassa by members of the Taliban on two occasions, and that they attempted to enlist him as a jihadist and a suicide bomber.

43. However, as noted by Mr Walker, the claimant's evidence was set out in his SEF statement dated 28 January 2015. At paragraph 10 he stated that that after his brother fled, they moved in with his uncle. He remembered that the Taliban came for his brother twice at the house. On the second occasion (which is not dated) when the Taliban came for his brother they took the claimant with them to a madrassa. That was about an hour away from their house. He stayed there for a night and the following day he "escaped" and returned home.

44. About three weeks before he left Afghanistan, he contended that the Taliban came for him. His cousin, SG, was with them. On that occasion, he was slapped and taken to the same madrassa. They began preaching to

him about jihad and becoming a suicide bomber. A week later he managed again to escape from them. In his statement dated 1 March 2016, the claimant responded to some of the reasons for refusal in the secretary of state's decision dated 10 June 2015. There he said that SG entered the house on his own, when he came with a group of men.

45. I have also had regard to the witness statement of the claimant's brother, dated 1 March 2016. He stated that he has had no contact with his family since leaving Afghanistan. He had given his number to a person who lived in their village in Pakistan. He gave him the number when he visited in 2014. He had gone to see a friend there. When the claimant rang him, he collected him. He stated that he cannot comment on what happened to the claimant in Afghanistan as he only knows what he has told him.

46. It is accepted that the claimant's brother came to the UK in or about May 2010. The claimant however arrived in the UK on 4 December 2014, about four and a half years later.

47. During that substantial gap the claimant had stated in his SEF statement that after his brother fled, the Taliban came for him twice at the house. As already noted, no detail was given as to when they came for him. On the second occasion, when they came for his brother, they took him to a madrassa. However, the claimant remained there for one night and the following day he escaped and returned home. On the same day, his uncle came and they went to live with him.

48. He also asserted that three weeks before leaving Afghanistan his cousin entered the premises. He was with some members of the Taliban. He was then slapped and taken to the same madrassa. They preached to him about jihad and about becoming a suicide bomber. He again managed to escape and went to stay at his old house and hid there.

49. The finding by the Judge that there was a significant overlap arising out of the same factual matrix presented in his brother's appeal does not however factor in or deal with the substantial gap of four years following the claimant's brother's departure from Afghanistan. During that period the Taliban came for his brother twice at their house. On the second occasion, when they came for him they took the claimant to a madrassa. He then escaped and returned home. His uncle then came and they went to live with him.

50. There was no further reference to any attempts to remove the claimant from his house until about three weeks before he left. There was no evidence of any further attempts by the Taliban to recruit him after he “escaped” and returned home.

51. From the foregoing the Judge has not adequately explained why he (presumably) accepted the core of the claimant's account. Not only has he not set out the facts that he found but did not set out why he accepted them. He did not grapple at all with the paucity of evidence relating to the

extensive gap between the departure of the claimant's brother from Afghanistan and the claimant's own departure some four and a half years later.

52. I accept Mr Walker's submission that a party is entitled to know the basis upon which she failed without having to “tease out findings” which may only be hinted at but which are not clear.

53. I accordingly find that there were inadequate reasons for accepting the core of the claimant's claim. The finding at [19] that his blood relationship with his cousin would make it even more likely that he could be discovered is not explained. There was no evidence that his cousin had made further attempts to find the claimant since his escape from the madrassa on the second occasion, three weeks prior to his leaving the country.

54. I accordingly set aside the decision of the First-tier Tribunal. The parties agreed that in the event that I came to such a decision this was an appropriate case for the appeal to be remitted to the First-tier Tribunal for a fresh consideration.

55. I have had regard to the Senior President's Practice Statement regarding the issue of remitting an appeal for a fresh decision. In giving effect to that approach I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made is extensive. There will be a complete re-hearing. I have also had regard to the overriding objective and find that it will be just and fair to remit the case.

56. In the circumstances I direct that the appeal be remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside and is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made before another Judge.

An anonymity direction has been made.

Signed Date 11 July 2016
Deputy Upper Tribunal Judge C R Mailer