



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

Appeal Number: AA/11803/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February 2016**

**Determination Promulgated
On 19 February 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

**I E A
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford, Counsel instructed by Barnes, Harrild, Dyer solicitors

For the Respondent Mr S Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As a protection claim, it is appropriate to continue that order.

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge J J Maxwell promulgated on 5 March 2015 (“the Decision”) dismissing the Appellant’s appeal against the Secretary of State’s decision dated 12 December 2014 refusing his asylum and humanitarian protection claim.
2. The background facts so far as it is necessary to recite them are that the Appellant who is a national of Afghanistan arrived in the UK and claimed asylum on 31 March 2014. The Appellant is accepted by the Respondent to have been born on 1 January 2003 and accordingly he has been granted discretionary leave to remain as an unaccompanied asylum seeking child. His appeal therefore relates only to the refusal of his asylum and humanitarian and protection claim and proceeds under section 83 Nationality, Immigration and Asylum Act 2002 (“section 83”). The issue - indeed the only issue - therefore for the Judge was whether the Applicant is a refugee or a person entitled to humanitarian protection.
3. It is also relevant to note by way of background that the Appellant arrived in the UK with his cousin, Master A M J. His cousin’s appeal also under section 83 was allowed by First-Tier Tribunal Judge Oakley in a decision promulgated on 13 January 2015. The Appellant submits that since his appeal relies on the same facts, his appeal should be allowed on the same basis.
4. Permission to appeal was refused by First-Tier Tribunal Judge Pooler on 30 March 2015 but granted by the Upper Tribunal on 29 July 2015. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Discussion and conclusions

5. The Judge noted at [25] of the Decision that the Appellant has discretionary leave in the UK. Having noted that his discretionary leave may in fact endure for longer than currently granted due to his accepted age, the Judge continued as follows:-

“[26]... the appellant will be required to seek further leave if he wants to remain in the United Kingdom; at that point, by reason of his then age, LQ could not be further relied on. Even if the appellant were granted asylum now on such a basis, the security situation in Afghanistan would, at that point, need to be considered afresh. I see little or no practical difference for this appellant whichever status he holds until the time comes for him to apply to renew his leave; if indeed that is what he decides to do. It follows the appellant has not, in the light of my findings in respect of future persecution by the Taliban, been disadvantaged by any failure to trace; whether currently or in the future.

[27] I am aware that the appellant’s cousin was successful in his appeal against a refusal of asylum and a copy of the decision to allow his appeal is in the appellant’s bundle. That decision does not bind this Tribunal although I have read it. In the light of my own analysis of the

authorities and this appellant's circumstances, it is not a decision I am minded to follow."

6. Having referred to JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00568 (IAC) and AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC), the Judge concluded that the Appellant had a durable solution in the form of the discretionary leave which he had been granted and thereafter concluded at [31] that the Appellant does not have a well-founded fear of persecution for a Convention reason and is not entitled to humanitarian protection.
7. Mr Wilford submitted that the Judge erred by dealing with the appeal on the basis that there would be no risk for the Appellant on return if his family could be traced when in fact they had not been. Applying Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97, Mr Wilford submitted that the Judge was bound to consider the issue of risk as at the date of the hearing and not at some later date when the Appellant might face removal.
8. Mr Walker in response very fairly conceded that the Judge had failed to answer the very question which he was bound to consider namely whether the Appellant was a refugee or entitled to humanitarian protection at the date of the hearing. He was right to make that concession. Mr Walker accepted that the Appellant's cousin's circumstances were if not the same then very similar to the Appellant's and it was difficult to discern from the Decision what evidence there was before the Judge which entitled him not to follow the outcome of that appeal or, more importantly, to find that the Appellant was not a refugee or entitled to humanitarian protection at the date of the hearing.
9. The headnote in AA (Afghanistan) and the case of LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005 are key to understanding the issues of fact which the Judge needed to determine and which, by reason of his flawed approach, he has not considered. As indicated in AA (Afghanistan):-

“[2] ... the background evidence demonstrates that unattached children returned to Afghanistan, depending upon their individual circumstances and the location to which they are returned, may be exposed to risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining a claim to humanitarian protection.”

LQ (Afghanistan) found that age is an immutable characteristic so that Afghan minors can form a particular social group when considering whether a minor is entitled to refugee status.
10. At [20] of the Decision, the Judge notes the Respondent's concession that even when an appellant is not a de facto orphan, he may still

need to be considered as such if surviving close relatives are traceable. He notes that this is the Appellant's claimed position. Having reviewed the case law in relation to tracing, the Judge goes on to consider the Respondent's duty in relation to tracing. It appears to be in that context that he considers that the Respondent has offered a durable solution by way of the grant of discretionary leave. Of course, as a matter of fact and law, that means that the Appellant will not be required to leave the UK. However, as I note at [2] above, the only issue which arises in a section 83 appeal is whether the Appellant is at the date of the hearing entitled to refugee status or humanitarian protection. Since section 83 is only operable when a person has been granted a period of discretionary leave, it cannot be an answer to that issue to say that they will not in fact be removed until discretionary leave expires and so cannot be entitled to refugee status or humanitarian protection. There is an obvious circularity in that approach.

11. The Judge noted at [24] that the Respondent's efforts to trace the Appellant's parents had thus far been unsuccessful. Having made that finding, it was incumbent on the Judge to go on to consider whether that fact meant that the Appellant would be entitled to refugee status or humanitarian protection if assessed on the basis of a removal at the date of the hearing. That is the consideration which the Judge failed to carry out and for that reason the Decision does contain a material error of law.
12. Mr Wilford invited me to allow the appeal on the same basis that the Appellant's cousin's appeal was allowed. That decision is of course not binding on me any more than it would be on another First-Tier Tribunal Judge. There is a lack of consideration in the Decision of the background evidence when judged against findings about what would occur to the Appellant if returned at the present time. Those are findings which need to be made in order to allow or dismiss the appeal. The absence of those factual findings makes this appeal one which is unsuitable to be determined initially by the Upper Tribunal. Mr Wilford accepted that if I was not persuaded to allow the appeal on the basis of reliance on the fact that the Appellant's cousin's appeal had been allowed, then the appropriate course would be to remit the appeal to the First-Tier Tribunal. Mr Walker agreed that this is the appropriate course. He noted also that the Tribunal should continue to link the Appellant's file with that of his cousin (appeal reference AA/08517/2014) and for his part, he agreed to ensure that the two Home Office files would remain linked.

DECISION

I am satisfied that the Decision contains a material error of law. I set aside the Decision. I remit the appeal to the First-Tier Tribunal for re-hearing before a different Judge. The Tribunal file in this appeal is to remain linked with the file in appeal reference AA/08517/2014.

Signed 

Date 12 February 2016

Upper Tribunal Judge Smith