Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/12732/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 18 July 2016 **On 20 July 2016**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

NAK
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Smyth, solicitor, Kesar & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge CAS O'Garro (hereinafter referred to as the judge), promulgated on 22 February 2016. Permission to appeal was granted on limited grounds on 27 April 2016 by First-tier Tribunal Judge Grant-Hutchinson and thereafter by Upper Tribunal Judge Perkins on further grounds.

Background

2. The appellant, now aged 19, previously applied for asylum, that claim

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being refused on 22 June 2011. He was granted Discretionary Leave to Remain (DLR) until 20 June 2014. On 19 June 2014, he sought further leave to remain in the United Kingdom on human rights grounds, specifically Articles 2, 3 and 8 of the ECHR.

3. The basis of the appellant's asylum claim is that he from a village in Baghlan Province, Afghanistan, where he lived with his parents and siblings. Two of those siblings died when the appellant was very young and his remaining sibling, a brother, resides in the United Kingdom with his wife and children. The appellant's mother died of natural causes in around 2007 and his father was killed by the Taleban in either 2007 or 2008. His grandparents are deceased as is his father's only brother. After the death of his parents, the appellant was cared for by his sole maternal uncle, who was unmarried. After about three years, the said uncle sold the family home and sent the appellant to the United Kingdom via an agent.

4. In refusing his claim, in 2011, the Secretary of State accepted that it was likely that the Taleban would have been recruiting children in the appellant's province and that there was a refugee Convention reason apparent but considered that he had failed to establish that he would be at risk of serious harm on return to Afghanistan. It was also said that the appellant could obtain a sufficiency of protection or relocate. His credibility was said to be damaged owing to his failure to seek asylum in France. The appellant was said to have adduced no evidence of ties in the United Kingdom and his length of residence was not particularly compelling.

5. In his application for further leave to remain, the appellant stated that he had lost contact with his uncle; was concerned following a bomb attack on his village; that he had been in contact with the Red Cross and had asked his social worker to assist him in tracing his uncle; he had developed a close relationship with his brother but could not live with him owing to a lack of space and he feared to return to Afghanistan because the Taleban were 'not happy' with people who returned from Europe or spoke English like him.

6. The Secretary of State's Reasons for Refusal letter of 28 September 2015 explains that the appellant's application was refused for the same reasons contained in the earlier refusal letter. In addition, the appellant's claim that his father was killed by the Taleban and that he was at risk from them was rejected owing to a lack of evidence. It was not accepted that he would be at risk owing to his ability to speak English as he was not an interpreter and had no profile in Afghanistan.

7. Consideration was also given by the Secretary of State to Article 8 within the Rules, however the appellant was said to be unable to meet any of the requirements. There were said to be no exceptional circumstances and it was considered that the appellant's removal from the United Kingdom was appropriate.

8. During the course of the hearing before the First-tier Tribunal, the judge heard evidence from the appellant alone. The judge concluded that the appellant was not at risk of persecution owing to finding him not to be a witness of truth. She found that the appellant had not been disadvantaged by the respondent's failure to trace his uncle. Nor was it accepted that the appellant was at risk of serious harm and therefore entitled to humanitarian protection. The judge considered that the appellant would be able to locate his uncle via word of mouth networks and would have family support on his return. The judge dismissed the Article 8 claim on the basis that the appellant had no family life in the United Kingdom, did not meet the requirements of paragraph 276ADE of the Rules and that his removal was not a disproportionate response.

Error of law

9. Permission to appeal was sought on the basis that the judge's decision was unfair. The appellant, who was unrepresented at the time the grounds were drafted, stated that he feared being tortured or prosecuted without a fair trial. He also referred to his relationship with his brother and nephews.

10. Judge Grant-Hutchinson granted permission, stating that it was arguable that the judge misdirected herself in finding that the appellant had no family life. Permission was refused on the Article 3 ground.

11. The Secretary of State's response of 6 May 2016 indicated that the respondent opposed the appeal as it was considered that the judge appropriately directed herself. It was said that there was nothing on the face of the decision to indicate that the appellant sought to rely upon the relationship with his brother or that there was any evidence as to an established family life between them.

12. This matter was listed for a hearing before Upper Tribunal Judge Perkins on 27 May 2016. However, in advance of the hearing Kent Law Clinic made an application for permission to appeal on further grounds. The first ground concerned the judge's rejection of the appellant's asylum claim on credibility grounds; secondly, that the judge erred in her assessment of the risk to the appellant of forced recruitment and thirdly, the judge erred in relation to the standard of proof, in finding it reasonably likely that the appellant would find his uncle rather than asking if there was a real risk that he would not.

13. Upper Tribunal Judge Perkins granted permission to appeal on the amended grounds, commenting that they were arguable, with particular mention of paragraph 11 of the amended grounds.

14. The respondent sent a further response under Rule 24 on 23 June 2016. Opposition to the appeal was maintained. It was said that the judge had actually found that the appellant's father was targeted by the Taleban and that the respondent did not accept that the appellant's town was

controlled by the Taleban, only that they were active in recruiting in that area. Otherwise, the judge's findings were endorsed.

The hearing

15. Mr Smyth did not pursue the ground on which permission had been originally granted, that is in relation to Article 8 ECHR. He confined his challenged to the grounds advanced to the Upper Tribunal. He was right to do so given the content of the appellant's witness statement which made it clear that his relationship with his brother was strained owing to the latter's view that the appellant had become too westernised. Essentially, the main challenge was to the judge's errors of fact which both went to the core of the appellant's claim as to whether he was at risk in his home area. Firstly, it was argued that the judge said there was no evidence as to the appellant's province, whereas it was said that this information had been provided during the screening interview. Furthermore, the respondent accepted, in the first asylum decision that the appellant hailed from an area where the Taliban recruited.

16. It was further argued on the appellant's behalf that the judge made an irrational finding that it was not credible that the appellant's father was killed for which no or inadequate reasons were provided. Mr Smyth submitted that the aforementioned findings tainted the judge's conclusions in relation to internal relocation and that the judge misapplied the standard of proof in relation to her findings that it would be reasonably likely that the appellant would be able to, eventually, locate his uncle in Afghanistan.

17. Mr Melvin adopted both of the respondent's Rule 24 responses. He conceded that the judge made mistakes as to fact but argued that these were immaterial to the outcome. In relation to materiality, Mr Melvin emphasised that the appellant was now an adult; the view of the Upper Tribunal was that there was little in the way of risk to those removed to Kabul; the appellant was noted to be fit and well and at [46] the judge had considered reintegration packages. While the 2011 decision of the respondent accepted that there was Taliban activity in the appellant's area, there was no explicit acceptance of that in the 2015 decision. He contended that the situation in Afghanistan had improved since 2011. With regard to the issue of the manner in which the judge expressed the likelihood of the appellant locating his family, Mr Melvin described this as semantics. He further argued that for the appellant to be at risk, he would need to show more than his presence in the United Kingdom, westernised appearance or speaking English.

18. At the end of the hearing, I announced that I had found a material error of law in the judge's decision.

Decision on Error of Law

19. At [33] of the decision and reasons, the judge said as follows; "*The*

appellant has provided no evidence of the Province where he lived when he was in Afghanistan…It would have assisted to have that information in order to assess if the appellant lived in a Taliban controlled area…"

20. The judge was mistaken in relation to the aforementioned comments in at least two respects.

21. Firstly, when the appellant applied for asylum in 2011 he provided a detailed account of his origins. This is reflected in the refusal letter of 22 June 2011 where it states "You lived in Kelagay Village, Dushey District, Baghlan Province." The respondent accepted the appellant's account of his nationality owing to his ability to answer specific country questions. Accordingly, had the judge considered this evidence, which I am told the appellant communicated during his screening interview, she could not have made the finding that she did.

22. Secondly, in the 2011 refusal letter, the respondent specifically accepted it was likely that "*the Taleban would have been active in (the appellant's) province trying to recruit children*." Contrary to what was said at [32] of the decision, the evidence as to the appellant's province and whether it was a Taleban controlled area was before the judge and she erred in not taking it into consideration as well as using the apparent absence of this information to undermine the credibility of the appellant's claim.

23. The judge comprehensively rejected the appellant's account in the following manner *"I do not find the appellant's claim that his father was killed by the Taliban credible. I find the appellant has made up this story to enhance his asylum claim*." The sole remaining reason provided in the preceding paragraphs was that the judge did not find it credible that the appellant's father, alone, was killed and no other member of the family. In the absence of evidence before the judge to indicate that the Taleban would be likely to target every member of a family including women and children, the judge's finding, while making a valid observation that the appellant had not been harmed, does not justify the wholesale rejection of his account.

24. Having found that the judge made at least three errors which went to the core of the appellant's claim to be at risk in his home area, I will now examine whether they were material errors. I conclude that the judge's negative credibility findings taint the remainder of her decision, with particular regard to the issue of internal relocation. The judge did not give adequate consideration the reasonableness of the appellant being expected to relocate to Kabul. Owing to her finding that the appellant's claim was an invention and he was not at risk in his home area, she went straight on to consider any risk to him in Kabul. Therefore, there was no individual assessment of his particular circumstances including his age, length of residence in the United Kingdom and western attitude.

25. It is fair to say that the judge did comment upon the appellant's ability to find his uncle, however she also fell into error here. The appellant's evidence was that approximately 4-5 months after his arrival in the United

Kingdom, he had been unable to continue contacting his uncle by telephone. Therefore by the time of the hearing the appellant had not been in contact with his uncle for over 4 years. This was in a context where the appellant's account was that there had been fighting between American forces and the Taleban in his home area. Accordingly, the question for the judge was whether it was reasonably likely that the appellant had lost contact with his uncle and would not be able to re-establish contact. Instead the judge found that owing to word of mouth networks referred to in the respondent's Operational Guidance note, "*there is a reasonable likelihood that the appellant will be able to reunite with his uncle once he is returned to Kabul and he will therefore have that family support on his return*."

26. I concur with what is said in ground three, in that if there is a reasonable likelihood that the appellant would eventually reunite with his uncle, the converse would be that it is even more likely that he would not. Furthermore, the judge's finding is predicated on the appellant being able to re-establish contact only after he is returned to Kabul, which would leave him in the position of being without support as at the time of his return and for an unspecified period of time. There was no assessment of his circumstances in the intervening days, weeks or months while he would making use of word of mouth networks. Indeed, the evidence before the judge was that the appellant had made efforts to trace his uncle via the Red Cross, without success.

27. In these circumstances I am satisfied that there are errors of law such that the decision be set aside, to be remade. None of the findings of the judge are to stand.

28. I considered listing this matter to be heard in the Upper Tribunal, in view of practice statement 7 of the Senior President's Practice Statements of 10 February 2010 (as amended), however the appellant has yet to have an adequate consideration of all aspects of his asylum appeal at the First-tier Tribunal and it would be unfair to deprive him of such consideration.

29. Further directions are set out below.

30. An anonymity direction was made by the FTTJ. I consider it appropriate for anonymity to be continued and therefore make the following anonymity direction:

"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. "

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be re-made.

Directions

- This appeal is remitted to be heard de novo, by any First-tier Tribunal Judge (except Judge O'Garro).
- The appeal is to be listed for a hearing at Hatton Cross
- An interpreter in the Dari language is required.
- Time estimate is 3 hours.

Signed Date: 19 July 2016
Upper Tribunal Judge Kamara