



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

Appeal Number: PA/02778/2017

THE IMMIGRATION ACTS

**Heard at Field House
On August 24, 2017**

**Decision & Reasons Promulgated
On September 4, 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

[S D]

~~(NO ANONYMITY DIRECTION MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gainsford, Counsel, instructed by Elder Rahimi Solicitors

For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
2. The appellant is an Afghan national. The appellant is a minor and he entered this country in August 2016 after a journey of sixteen months. He applied for asylum on September 6, 2016

3. The respondent refused his asylum claim on March 7, 2017 but granted him leave to remain until September 7, 2019 on the basis he was an unaccompanied minor with no reception facilities available upon return.
4. The appellant lodged grounds of appeal on March 20, 2017 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Greasley (hereinafter called "the Judge") on April 20, 2017 and in a decision promulgated on April 25, 2017 the Judge refused his appeal on all grounds.
5. The appellant appealed this decision on May 8, 2017. Permission to appeal was initially refused by Judge of the First-tier Tribunal Grant-Hutchinson on May 18, 2017 but when those grounds were renewed to the Upper Tribunal permission to appeal was granted by Upper Tribunal Judge Finch on July 5, 2017.
6. The respondent lodged a Rule 24 response dated July 20, 2017 in which she opposed all grounds of appeal save for the argument that the Judge had failed to properly consider or give reasons for dismissing the humanitarian protection claim.
7. The matter came before me on the above date. The appellant was present and represented as set out above.

Submissions

8. Mr Gainsford adopted his grounds of appeal and submitted that the Judge had erred in a number of errors. In particular, he submitted:
 - (a) The Judge had wrongly drawn an adverse inference from the appellant not giving evidence. The representatives at the First-tier Hearing dealt with the case on the basis the appellant was not required to give evidence and with the case proceeding only on submissions.
 - (b) At paragraph [53] of the Judge's decision the Judge applied the wrong standard of proof. The correct standard of proof was the lower standard of proof but the Judge applied a standard of "likely to be at risk" due to an association with his father which was too high a test. Whilst the respondent in her Rule 24 response suggested the Judge was merely quoting the expert it was clear from the decision that the Judge was referring to the respondent's own evidence and not that of the expert witness. The Judge also erred when considering the expert evidence by dismissing the expert's reasoned conclusions without giving reasons. Alternatively, if the Judge concluded the appellant's father was a low-ranking member of the military the country evidence demonstrated that the appellant would still be at risk albeit the risk would be lower than if his father was a high-ranking member.
 - (c) The appellant is a minor and he had no family to return to. He therefore remained at risk of being groomed or recruited.

- (d) The Judge was wrong to suggest that because he remained in the country for five or six months that it would be safe in return.
9. Mr Whitwell adopted the Rule 24 and during his oral submissions he made the following concessions:
- (a) The Judge had not properly addressed article 15(c) but the Tribunal can remake this decision on the evidence currently before it.
 - (b) The respondent accepted he was an Afghan national and his father had been targeted as claimed.
10. Mr Whitwell submitted:
- (a) The Judge was entitled to make an adverse finding over the appellant failing to give evidence because there remained an issue over whether the appellant was of interest to the Taliban.
 - (b) Mr Whitwell argued the Judge was fully aware of the correct standard of proof as he properly set this out in paragraphs [9], [51] and [52] of his decision.
 - (c) The Judge's findings in paragraphs [55] and [59] were open to him. The fact the appellant could have been at risk in the past did not mean he would be at risk in the future.
11. Having heard submissions I indicated to Mr Gainsford that if I set aside the refugee decision then on any remaking of the decision the respondent may not agree to the case being dealt with on submissions whereas if the case proceeded solely on article 15(c) then the case could properly be dealt with on submissions only.
12. Mr Gainsford questioned why further evidence would be required and I indicated to him that if he asked me to set aside the decision then we went back to square one whether that be in this Tribunal or back in the First-tier. It was clear from Mr Whitwell's submissions that if the appellant did not give evidence he would be inviting an adverse inference.
13. Mr Gainsford asked for a short recess to take instructions on this issue and after taking instructions he indicated that he was not instructed to concede the refugee issue and he would be asking me to consider firstly whether the appellant's appeal on article 15(c) grounds succeeded and if I found it did not then he invited me to consider the refugee grounds of appeal.
14. In view of the time spent on the hearing I reserved my decision.

FINDINGS

15. Permission to appeal was granted by Upper Tribunal Judge Finch. She found the grounds arguable and today I heard submissions from both representatives.
16. This was a claim brought by a fifteen-year-old claimant who made his way to the United Kingdom passing through Pakistan, Iran, Turkey, Bulgaria, Serbia, Hungary, Austria, Italy, Germany and France.
17. The respondent accepted he was a minor and in her refusal letter the respondent also accepted he was an Afghan national, his father had been threatened, it had not been possible to trace his family due to a lack of resources and there was no evidence of any adequate reception arrangements.
18. The respondent granted him leave to remain as an unaccompanied minor but refused his claims for asylum and humanitarian protection. The Judge upheld those decisions and a challenge is brought against those findings.
19. Five grounds of appeal were raised. One of those grounds has been conceded by the respondent namely it is accepted the Judge's consideration of article 15(c) was inadequate bearing in mind the age of the appellant and his circumstances. The Judge's consideration of article 15(c) can be found in paragraphs [66] to [69]. No reasons are given for refusing the application and the Judge does not refer to the country guidance decision on AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC).
20. This leaves the remaining four grounds up for argument.
21. Ground One centres around the Judge's apparent finding that the appellant's failure to give evidence undermined his evidence. In paragraph [57] of the Judge's decision the Judge wrote, "The appellant has not given oral evidence at his hearing, where he could have been questioned about this." The Judge was considering whether the appellant's family was still in Afghanistan and in deciding that he placed weight on the fact the appellant had not given evidence and therefore did not make himself available for cross-examination. In normal circumstances that would be a finding open to the Judge.
22. In SM (Iraq) 2004 UKIAT 00279 the Tribunal said-

"We entirely endorse the view that merely not giving evidence cannot of itself be a factor tending to show that a person is not to be believed. It is also, however, and equally clearly, not a factor tending to show that the person is to be believed. If doubts have been raised about the credibility or plausibility of certain evidence, and the facts related by that evidence are not supported by other evidence, the position may be that the fact finder remains in doubt if an appellant does not attend to give evidence. The consequence of a fact finder's doubt is or may be

that the burden of proof is not discharged and so the party who has the burden of proof loses his case.”

23. However, the Judge recorded at paragraph [26] of Mr Gainsford’s submissions that the appellant would not be giving evidence and that both representatives agreed that the appellant could ask the Tribunal to consider his latest statement of April 13, 2017 and two earlier statements. In closing submissions, the respondent’s representative took no issue with the appellant not giving oral evidence.
24. As the Judge found the failure by the appellant a factor undermining his credibility I find I am left with no option but to find Ground One of the grounds of appeal is made out. Having found the first ground made out I find that this error must be material to the issue of credibility and I set aside the Judge’s decision both on humanitarian protection (for the reasons given above) and asylum.
25. The remaining grounds also go to the issue of whether there was an error in law in respect of the appellant’s claim for asylum but as I have already found an error I see no reason to deliberate over this.
26. At the hearing, I discussed what should happen to this appeal in the event that the refugee claim was set aside. Mr Gainsford effectively wanted me to remake the whole decision without hearing further evidence on the basis he was an unaccompanied male.
27. However, having read the Judge’s decision I am satisfied this is not open to me. As I indicated to Mr Gainsford if the appellant pursued his asylum appeal before me and I found in his favour I would have asked the parties what evidence would be needed to remake this decision. Mt Whitwell made it clear he would want to cross-examine the appellant and it would then be up to Mr Gainsford to decide whether the appellant gave evidence. However, whereas the respondent may have previously agreed to no oral evidence being given that was now clearly not the case.
28. It seems a finding will have to be made about the availability of family in Afghanistan and there is also the unresolved issue of whether the Taliban have an interest in the appellant.
29. In light of Part 3, Section 7.1 to 7.3 of the Practice Statement I direct the matter should be remitted to the First-tier Tribunal.
30. I do not intend to preserve any findings and the hearing should be a full de novo hearing but the next Tribunal should note that the respondent has accepted (a) the appellant is an Afghan National and (b) his father was threatened. These concessions can be found in the decision letter and should form part of any future deliberation.

DECISION

31. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I remit the asylum and humanitarian protection issues back to the First-tier Tribunal for a fresh hearing.

Signed

Date 26.08.2017

Deputy Upper Tribunal Judge Alis

**FEE AWARD
TO THE RESPONDENT**

No fee award is made because no fee was paid.

Signed

Date 26.08.2017

Deputy Upper Tribunal Judge Alis