Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03814/2016**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 30 June 2017	**On 12 September 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

JF

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr B Bedford	(Counsel)
For the Respondent:	Mrs Aboni	(Senior Home Office Presenting Officer)

DECISION AND REASONS

Introduction and decision in brief

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of the Vice President of the Upper Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal"), whereupon it dismissed his appeal against the Secretary of State's decision of 16 March 2016 refusing to grant him international protection. My decision is that the tribunal's decision, as explained in written reasons of 19 October 2016 (promulgated on 21 October 2016) involved the making of an error of law. Accordingly, that decision is set aside. The case is remitted

for a complete rehearing before a differently constituted tribunal (effectively before a different judge of the First-tier Tribunal).

Anonymity

2. The claimant was granted anonymity by the tribunal. I have assumed that that was done because, at that stage, he was a minor. Nothing was said regarding anonymity at the hearing before me but I have decided it is appropriate, at this stage, for the status quo to be maintained. If it is thought necessary or appropriate that matter may be revisited before the tribunal at the rehearing. So, I have not named the claimant and I have used initials rather than the full names of other individuals referred to in the documentation before me.

How the matter comes before me

3. The claimant is a national of Afghanistan. He has been treated as having been born on 1 January 1999. He made his way from Afghanistan to the United Kingdom and claimed asylum. Pursuant to his claim he attended what is often referred to as a "screening interview" which took place on 16 September 2015. He then provided the Home Office with a witness statement of 23 November 2015. That is a short document but sets out, building upon some limited information he had given in the screening interview, the basis for his claim. On 1 February 2016 he attended a substantive asylum interview at which he was accompanied by a representative from the firm of solicitors which has been assisting him throughout. It is recorded that there was also present a Dari speaking interpreter. That interview was relatively lengthy, running to some 147 questions. On 12 February 2016 his representative wrote to the Home Office seeking to clarify certain things he had said in interview and making some further points on his behalf. On 16 March 2016 the Secretary of State decided to refuse the claim.

4. It is perhaps appropriate, at this stage, for me to set out the detail of the claim in summary form. The claimant said that he was from a place called Kajak in the Parwan Province in Afghanistan. He had said that his parents are deceased and that he had been raised by a maternal uncle. He said that one day he was playing football with his maternal uncle's son and some of the locals. His maternal uncle's son became involved in some fighting and stabbed another child. The maternal uncle told the claimant that he had to take the blame for the stabbing. The claimant says that he did not do so and that, in consequence, the maternal uncle now wishes to kill him and will do so if he is returned to Afghanistan. It was also a part of the claimant's claim that he would, upon return, suffer persecution as a result of his being of Hazara ethnicity.

5. The Secretary of State, having decided to refuse the claim, set out her reasoning in a document attached to the decision notice and which bears the heading "detailed reasons for refusal". In summary, though I shall refer to the content of that document in a little more detail later, it was said that the account involving the uncle and his son was disbelieved such that there would be no risk, on that account, upon return. Further it was said that he had failed to substantiate his claim to be at risk solely on the basis of his ethnicity.

6. The claimant appealed and, as already noted, his appeal was unsuccessful. The Tribunal, like the Secretary of State, did not accept the proffered account of events nor did it find material to support the proposition that he would be at risk simply as a consequence of his ethnicity. The appeal having been dismissed he sought permission to appeal to the Upper Tribunal which was refused by a judge of the First-tier Tribunal and then by a judge of the Upper Tribunal. The Upper Tribunal judge refusing permission, though, did make the comment that the tribunal's written

reasons had a "slightly impatient tone" which was said to be regrettable. The refusal of permission was not the end of the matter though because the claimant's representatives applied for a judicial review. I have not seen the grounds of application but it is apparent from the documentation before me that that two separate grounds were advanced. The flavour of those grounds is apparent from the decision of the High Court granting permission to bring judicial review proceedings. The salient part of that decision, which was made on 9 February 2017, reads as follows:

> "**Observations:**
>
> It appears that the First-tier Tribunal (F-tT) judge failed properly to consider and decide the appeal on the basis that the claimant, aged 17, was a minor, and failed to apply the Country Guidance in AA (Unattended Children) Afghanistan CG [2012] UKUT 15 at [129] – [135] (whether a child can safely be returned to Kabul and travel thereafter to his home area). Permission to appeal ought to have been given. I am satisfied that this ground meets the test in CPR 5.54.7A(7).
>
> I refuse permission on ground 2, as the F-tT judge was entitled to find the claimant's evidence contradictory or inconsistent even in the absence of cross-examination by the Secretary of State's representative."

7. On 24 April 2017 the decision of the Upper Tribunal judge refusing to grant permission to appeal from the decision of the Tribunal was quashed without further argument from the parties. Thereafter, the matter came before the Vice President of the Upper Tribunal who, on 16 May 2017, granted permission to appeal to the Upper Tribunal. As there was some argument before me as to whether the Vice President was doing something more than merely granting permission to appeal I shall set out, here, the salient part of that decision. It reads:

> "**Notice of decision of application for permission to appeal**
>
> Permission to appeal is now granted.
>
> **Reasons**
>
> Permission is granted in the light of the decision of the High Court in this case. The parties are reminded that the Upper Tribunal's task is that set out in s.12 of the 2007 Act."

8. So, the appeal was listed before the Upper Tribunal (before me) with a view to its being considered whether the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative.

The hearing before me

9. There was agreement between the parties on a number of matters but disagreement between them on two matters. There was disagreement as to what the Vice President of the Upper Tribunal had been deciding. Read at face value it seems entirely clear that what he was doing was simply granting permission to appeal to the Upper Tribunal. That was the view taken by Mrs Aboni. Mr Bedford, though, referred me to the sentence which reads "the parties are reminded that the Upper Tribunal's task is that set out in s.12 of the 2007 Act". His argument, I think, was that section 12 is concerned with the Upper Tribunal's powers once a decision of a First-tier Tribunal has been set aside. So by implication, runs the argument, the Vice President of the Upper Tribunal in referring to section 12 must have been actually been setting aside the decision of the tribunal.

10. Assuming, however, that there was simply a grant of permission to appeal to the Upper Tribunal, there was agreement between the parties (although I will say a little bit more about

this below) that the grant of permission was not to be regarded as limited to what had been ground 1 of the application for permission to bring judicial review proceedings.

11. Importantly, there was agreement that the Tribunal's decision had involved the making of an error of law. Specifically, Mrs Aboni accepted that the Tribunal had erred in the manner it had been suggested it might have done by the High Court with reference to ground 1 before it. In other words it had failed to consider whether it might be safe to return the claimant to Kabul and whether he might be able to safely travel from Kabul to his home area.

12. The parties agreed that, in consequence of the Tribunal having erred, its decision had to be set aside. They disagreed as to what should follow. Mrs Aboni urged me to remit to the First-tier Tribunal for a complete rehearing on all matters. Mr Bedford, however, urged me to remake the decision myself. It is important to make clear the basis upon which he was doing that. He was not asking me to simply rehear all the evidence myself and stand in the shoes of the First-tier Tribunal with respect to fact-finding. Rather, his argument was that since the claimant had not been subjected to cross-examination at the hearing before the tribunal, the tribunal had been obliged as a matter of law to accept the truthfulness of the entirety of his account. It followed from that said Mr Bedford that I should, indeed must, not only set aside the tribunal's decision but allow the appeal myself because if the account is true the claimant is inevitably a refugee. He relied upon authorities to which I will refer below for the proposition that an account is effectively accepted or must be treated as having been accepted if not challenged by way of cross-examination.

My resolution of the disputed issues

13. The first matter to consider is the Vice President's decision of 16 May 2017. Since I have accepted the agreed position of the parties that the tribunal's decision has to be set aside in any event, it does not really matter now whether I conclude that its decision has already been set aside by the Vice President or not. Nevertheless, there was some argument about this before me, albeit not lengthy argument, so I shall address the issue but can be brief in doing so.

14. I am satisfied that the Vice President of the Upper Tribunal was doing no more than grant permission to appeal. The decision bears the heading "Notice of decision of application for permission to appeal". It contains the wording "permission to appeal is now granted" and then the wording "permission is granted …". It says nothing about the decision of the tribunal being set aside. That, in my judgment, is comfortably enough to lead me to conclude that the decision being taken was a decision to grant permission to appeal and nothing more than that.

15. As to reference to section 12 of the Tribunals, Courts and Enforcement Act 2007, I do not agree with what I understand to be Mr Bedford's view that section 12 is only concerned with what happens when a decision has been set aside. That view seems to me to ignore the wording of section 12(1). To be clear, the relevant part of that section provides as follows:

> " **12. Proceedings on appeal to Upper Tribunal**
>
> (1) Subsection (2) applies <u>if</u> the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal and
>
> (b) if it does, must either –

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) remake the decision."

16. The limited underlining is mine. But it is clear from section 12(1), it seems to me, that section 12 is concerned, first of all, with the threshold question of whether a decision of a First-tier Tribunal involved the making of an error on a point of law. So, the reference to section 12 by the Vice President cannot be construed as an indication that the decision has been, at that stage, set aside. As I say, though, having regard to matters set out above the question is now somewhat academic.

17. There was agreement that the grant of permission was not limited in its scope. On one reading I suppose it might be thought that the wording "permission is granted in the light of the decision of the High Court …", might imply that the grant was only limited to the argument which formed ground 1 of the application for judicial review. I think Mr Bedford had anticipated that either I might take that view or that Mrs Aboni might urge me to do so. However, she did not. Absent disagreement perhaps I need say no more at all about the matter but, just briefly, and insofar as it might be necessary to say anything about this, the Upper Tribunal's consideration of an application for permission to appeal is governed by rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008. When sub-paragraph (4) and sub-paragraph (5) of rule 45 are read together it is clear that where the Upper Tribunal is giving permission to appeal only on limited grounds it must provide reasons why permission is being refused on the other grounds together with notification of any rights to challenge the refusal on the unsuccessful grounds. There is no evidence that any of that was done. So, even absent the agreement between the parties, I would have construed the grant, on the material before me, as being an unlimited one.

18. As to error of law itself, as indicated, there is agreement between the parties. Mrs Aboni accepts that the Tribunal did err with respect to ground 1 of the application to the High Court and, since she also accepts that the grant is unlimited and that there should be a complete rehearing before the First-tier Tribunal, it would not be necessary for me to say any more were it not for Mr Bedford's interesting argument which underpins his contention that I should remake the decision and can lawfully only remake the decision in the one way he contends. So, I shall move straight on to that.

19. Mr Bedford, relies, to a large extent, upon what was said by the Supreme Court in a judgment which has the neutral citation number *[2005] EWCA Civ 267*. The judgment, in turn, refers to a rather old judgment of the House of Lords in *Browne v Dunn [1894] 6 R 67* and an Australian case, that of *Allied Pastoral Holdings v Federal Commissioner of Taxation (1983) 44 ALR 607*. He argues that the judgment of the Supreme Court approves the two earlier decisions, the eldest of which has clearly he says withstood the test of time and that it is not for the First-tier Tribunal to effectively overrule what is decided therein. This, in fact, was the real issue before me.

20. It is perhaps worth setting out certain of the passages in the judgment of the Supreme Court upon which Mr Bedford relies. I quote, as indeed did Mr Bedford, from the judgment of Lord Justice Jacob:

> " 57. Prior to the hearing before us we drew the attention of the parties to the decisions of the House of Lords in *Browne v Dunn (1894)* 6 R 67 and the Australian case of *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607. One member of the court was aware that Australian

practitioners were very alive to the rule in *Browne v Dunn* (so also, he has ascertained, are Canadian practitioners). The case reference and the *Pastoral Holdings* decision were supplied to him through the helpfulness of Justice Heerey of the Australian Federal Court.

58. *Browne v Dunne* is only reported in a very obscure set of reports. Probably for that reason it is not as well-known to practitioners here as it should be although it is cited in *Halsbury* for the following proposition:

> 'Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.'

59. Because the decision is so difficult to lay hands on we take the opportunity here of citing all the material passages. We do so via the decision of Hunt J in *Allied Pastoral* because his judgment also contains his own valuable comments. He said (p.623):

> 'It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67.
>
> No doubt because that decision is to be found only in an obscure series of law reports (called simply "*The Reports*" and published briefly between 1893 and 1895), reliance upon the rules said to be enshrined in that decision seems often to be attended more with ignorance than with understanding. The appeal was from a defamation action brought against a solicitor and based upon a document which the defendant had drawn whereby he was to be retained by a number of local residents to have the plaintiff bound over to keep the peace because of a serious annoyance which it was alleged he had caused to those residents. Six of the nine signatories to the document gave evidence on behalf of the defendant that they had genuinely retained him as their solicitor and that the document was really intended to be what it appeared on its face to be. No suggestion was made to any of these witnesses in cross-examination that this was not the case and, so far as the conduct of the defendant's case was concerned, the genuineness of the document appeared to have been accepted. However, the defence of qualified privilege relied upon by the defendant depended in part upon whether the retainer was in truth genuine or whether it was a sham, drawn up without any honest or legitimate object but rather for the purpose of annoyance and injury to the plaintiff. This issue was left to the jury. The plaintiff submitted to the jury that the retailer was not genuine and was successful in obtaining a verdict in his favour. In support of that submission, the plaintiff asked the jury to disbelieve the evidence of the six signatories who had said that the retainer was a genuine one.
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> Lord Herschell LC said (at 70-71): 'Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'
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> His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is 'perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling'. His speech continued (at 72): 'All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which

> he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.'
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> Lord Halsbury said (at 76-77): 'My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.'
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> Lord Morris (at 77-79) said that he entirely concurred with the two speeches which preceded his, although he wished (at 79) to guard himself with respect to laying down any hard-and-fast rules as regards cross-examining a witness as a necessary preliminary to impeaching his credit. The fourth member of the House of Lords, Lord Bowen, is reported (at 79-80) to have said that, on the evidence of the six signatories, it was impossible to deny that there had been a real and genuine employment of the defendant. But his Lordship made no statement of general principle.
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> These statements by the House of Lords led to the formulation of a number of so-called 'rules'. They have been stated in various ways in the cases and by text-book writers, and it is fair to say that there is some room for debate as to their correct formulation.
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> For example, in *Cross on Evidence* (2nd Australian ed, 1979) the authors state (at para 10:50): 'Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence in chief.'
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> In Phipson (12th ed, 1976) the authors state the rule somewhat more discursively (at para 1593): 'As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share … If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account and he will not be allowed to attack it in his closing speech, nor will he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point … Where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit … Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character.'

60. Hunt J concluded (p.634):

> 'I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings.'

61. We think all that applies here. It is not necessary to explore the limits of the rule in *Browne v Dunn* for this case falls squarely within it. Indeed the position is stronger here, for the Judge was not even asked to disbelieve the witnesses. Mr Watson was right not to support the Judge's findings – the only puzzle is why he did not take that position earlier."

21. I should make it clear that the above underlining is mine. By way of reminder, Mr Bedford says that the above decisions, when taken together, clearly establish a rule that a failure to challenge an account by way of cross-examination means that the account has been accepted. Applying that to the instant case, he says that because the Secretary of State's representative did not

cross-examine the claimant before the tribunal, the tribunal had to proceed on the basis that that account was true.

22. In looking at the Record of Proceedings it is right to say that the claimant did, in evidence in chief, adopt two witness statements. Those witness statements are dated 23 November 2015 and 26 September 2016 respectively. It appears, according to that record, that there were no supplementary questions asked in examination-in-chief and that, indeed, there was no cross-examination. So Mr Bedford is right when he says that the Secretary of State's representative could have cross-examined the claimant (since he had been called to give evidence) but had chosen not to do so.

23. But I do not agree with Mr Bedford that the judgment of the Supreme Court upon which he relies and which in turn relies upon the two other judgments cited above, sets out a rigid principle. On my reading the passage which I have set out above makes it clear that concern arises where a party or a witness has not, before closing submissions are made regarding credibility, been put on notice that his/her credibility is being challenged. It seems to me that the passages I have underlined illustrate that.

24. In the case of the claimant before me, there can have been no doubt in his mind or that of his representatives prior to the hearing that his credibility was, indeed under challenge. So, he knew the case he was required to meet, as did his representatives, at the time he was preparing his written case and at the time he was called to give evidence. I have referred above to the Secretary of State's "detailed reasons for refusal". In so far as it relates to credibility I will now quote from that document as follows:

> "Neighbour Murdered by Uncle
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> 10. You have claimed that your maternal uncle who you resided with from being a small child murdered your neighbour's son [I]. As a result of this you were asked an array of questions in regard to this at asylum interview.
>
> 11. You state that you were playing football with your maternal uncle's son, [I] and some other boys when your maternal uncle's son and [I] started to argue and a fight broke out. You have stated where you were playing and how far that was from your uncle's house (AIR Q 38). You were asked why the argument started, but you claim not to know, stating they were playing with the ball when an argument broke out. It is considered that given you were present when the argument broke out that a more informed reasoning of why this happened be given (sic).
>
> 12. You state that [I] was older than your maternal uncle's son and punched him, resulting in him crying and going to tell his father, your uncle (AIR Q 44). Further you have stated that your uncle came to the scene of where you were playing and stabbed [I] in the neck. You claim he stabbed him because he was older than his son and would bully your maternal uncle's son. You were questioned further, as to the reason why the two would play together if they were bullying. You state you don't know. It is considered internally inconsistent that the two would be playing together on regular basis as neighbours, given that one was bullying the other.
>
> 13. You were asked what you did when your uncle stabbed [I], to which you respond nothing (AIR Q 55). Further you were asked about who witnessed the incident. You state that you and two others were present and there were other people working away on the land also. You were asked more about these people, claiming they were just working on the land (AIR Q 58).
>
> 14. Further, you state you returned home with your uncle and his son and your uncle told you to take the responsibility for the murder of [I]. As a result of this you were questioned as to why your uncle was asking you to take the blame given that witnesses were present. Notably you state that 'he said when you are questioned by the police tell them you did it' (AIR Q 60). It is considered that your response to this question is generally evasive. It is considered that given it was clear other people had witnessed your uncle commit the

murder, a more thorough and detailed explanation be given as to why your uncle was forcing you to take responsibility for the murder of [I].

15. You state that the police came to your uncle's house the same night. However in your witness statement you state that the elders came to your village and there was many an argument and the police were contacted coming to your house this next day. This appears internally inconsistent. At asylum interview you didn't not specify and substantiate the fact that the elders came to your village. Moreover, you were asked about this at interview stating the incident happened at 6-8 pm and the next day the police arrived at 7-8 am. This is not considered a reasonable response.

16. Moreover when the police came to your house you state that you were arrested and taken with you're uncle to the police station. You have stated that [I's] father was with the police when they came. You state that he wasn't there but turned up at the police station later on. When questioned about this further you state that he wasn't present and you were taken at different time (AIR Q 74-75). This is considered to be internally inconsistent. You have failed to provide a response as to why [I's] father, knowing you didn't kill [I], didn't tell the police about this but you claim not to know stating that the police were low rank and couldn't make a decision (AIR Q 77).

17. You and your uncle were both placed in a room together where he was continuously threatening you and saying he was going to kill you, maintaining that you killed [I] (W/S 8).

18. It is considered that this aspect of your account is generally lacking in detail. You have also been internally inconsistent through aspects of your account. Therefore, taking into consideration the written above, it is considered that this aspect of your claim be rejected.

19. It is therefore rejected that your uncle murdered Islam and you're at risk because you didn't take responsibility."

25. The tribunal's own adverse credibility finding is explained in this way:

" Consideration of Evidence and Findings

13. The Appellant's claim is based on two contentions that he is in fear of a return to Afghanistan because his uncle has threatened to kill him and more generally is at risk because of his being of Hazara ethnicity.

14. With regard to the uncle the Appellant claims that he was playing football with his uncle's son and other locals. His uncle's son got into an argument with another boy, by the name of [I] and a fight broke out. [I] punched his uncle's son, who then went to his father and his father being informed of this returned and stabbed [I] to death. The Appellant's uncle then insisted that the Appellant take the blame for the killing and if he did not said he would kill him. At the police station the Appellant denied killing [I] and as a result his uncle's threatened to would kill him.

15. The first point I would make is that the story does not have a general ring of truth about it. The Appellant has lived with his uncle, on his account, since he was a small child. The Appellant in his witness statement says that if he admitted to the crime the case would be closed and the matter resolved. That however would surely not have been the case for the family of the dead boy. I struggle to believe that someone who has been in "loco parentis" with regard to the Appellant, namely his uncle, would insist on him taking the blame for something he has not done with all the problems that that might subsequently cause.

16. The Appellant says an argument broke out between the two boys whilst playing football. He does not know what the argument was about, AIR Q42, despite the fact he was present at the time. The boy [N] (his uncle's son) is apparently regularly bullied by [I], AIR Q54.

17. I must ask myself why if he was regularly bullied by [I] he was playing with him? If he was regularly bullied and therefore presumably the one who was forever on the receiving end would he become involved in a fight with the bull? In answer to the first question the Appellant can only say he did not know. In answer to the second that they played together because they lived near each other and would fight and play. But if [N] was regularly fighting with [I] I struggle to understand what it so remarkable about the fact that [I] punched him. So remarkable that he has to rush home, tell his father and his father has to arm himself and kill him.

18. There were a number of witnesses to the stabbing, not just the boys playing but working people, neighbours, AIR Q58. A neighbour reported the matter to the police. Given that that is the case it is unlikely that the uncle should insist on the Appellant taking the blame. One must presume that in the village everyone would know that the uncle was the killer. When this was put to the Appellant, he replied 'he said when you are questioned by the police tell them you did it The neighbours such as [GN] said I didn't and that is why I was released and [GN] took me to his home' (AIRQ60).

19. I agree with the Respondent that that answer is evasive; it does not do justice to the question. However if there were multiple witnesses who were testifying to the fact that the Appellant did not kill the boy could the uncle suggest that he did.

20. The Appellant in his witness statement of 26th September 2016 seems to be suggesting anyone could admit to it because all the police were looking for was an excuse to close the case. If that was indeed the case I am surprised that the police decided to arrest anyone.

21. At AIR Q67 the Appellant indicates that a neighbour and three elders had given evidence that it was the uncle who killed the boy. In those circumstances I reject the suggestion that the Appellant could in any meaningful way take the blame.

22. At AIR Q98 it is said that the uncle is rich and powerful and has connections with the government 'if he didn't have links he wouldn't have been able to kill somebody'. I am obliged to ask myself why if the uncle was in that position was he worried about admitting it, as the Appellant goes on to say 'if you have many livestock you can get away'.

23. In his witness statement the Appellant says that the elders came to the village that night and the police came to the house the next day (paragraph 7, witness statement). At AIR Q61 he says it was the same night. Given the seriousness of these events I regard that as a significant inconsistency. In his witness statement the Appellant says that [GN] the dead boy's father travelled to the police station in the same police car as the Appellant and his uncle. At AIR Q73 he says that [GN] was not present at the police station. When this was put to him at AIR Q76 he states 'we were in the same vehicle but not sitting close to each other'. I can only presume it was a very large police car.

24. Despite the police officers being low rank (AIRQ77) they beat the powerful and well connected uncle with a Kalashnikov. These presumably being the same policemen who have so little concern for getting at the truth and they would be prepared to simply close the case knowing they had the wrong person.

25. [GN] though he has no apparent connection to the Appellant beyond the fact that his uncle has killed his son puts him up in his house. He does not return to his own house because [GN] tells him his uncle will kill him. He remains at the house for about a month but no attempts are made by the rich and powerful uncle or his sons to come to the house and kill him though it must have been obvious that that was where he was. [GN] then pays out of his own pocket for his exit to Europe.

26. I am satisfied that his account riddled as it is with contradictions and inconsistencies is such that the Appellant has not established that he would be at risk from his uncle if he were returned to Afghanistan. I am satisfied the whole storey is a complete invention, invented to support a claim for asylum."

26. It is clear that, in fact, the Tribunal relied upon a number of points which had already been raised in writing by the Secretary of State, prior to the hearing and which the claimant and his representatives had had much time to consider, for the adverse credibility finding. Since the judgment of the Supreme Court does not lay down an inflexible rule I would conclude that, in the particular circumstances of this case, notwithstanding Mr Bedford's determined putting of the point, that, whilst it might have been better had the Secretary of State's representative cross-examined (albeit there might possibly have been a reluctance to do so given that the claimant was then a minor), the Tribunal was not obliged, as a matter of law, to accept the account proffered by the claimant notwithstanding that failure to cross-examine. Perhaps there might have been some scope for the reaching of a different view on the particular circumstances if the tribunal had relied

substantially upon credibility points other than those previously raised in writing but that was not the case.

27. In light of the above, whilst I am setting aside the Tribunal's decision for the reasons referred to above and already agreed between the parties, I am not remaking the decision myself in the terms and on the basis argued for by Mr Bedford. Rather, I am remitting for a complete rehearing.

Observations for the First-tier Tribunal

28. The tribunal rehearing the appeal will, effectively, be starting with a blank canvass. It will not be bound by any of the findings and conclusions of the previous tribunal and will reach its own decision on all matters raised by the appeal on the basis of the evidence before it which may include further written material and, perhaps, further oral evidence. As to that, I do not know why the claimant was not cross-examined given that credibility clearly is (as matters currently stand) in issue. If the lack of cross-examination was in whole or part connected with the claimant then being a minor it should be noted that (on the assumption that the above date of birth is correct) he is now an adult. If, therefore, that was felt to be an impediment to cross-examination it is one which no longer exists. It will be for the Tribunal to decide the significance (assuming it decides he is) of the claimant now being an adult. No doubt that is something which the representatives will wish to address. Since I am remitting for a complete rehearing I will say nothing further about that.

29. I have issued some brief directions concerning the rehearing. They are brief because I do not wish to tie the hands of the First-tier Tribunal in any way.

Directions for the remaking of the decision

A. Since the previous decision of the tribunal is set aside in its entirety, there shall be a complete rehearing of the appeal before a differently constituted tribunal.

B. The rehearing shall take place at the Birmingham Hearing Centre.

C. The claimant shall be provided with a Dari speaking interpreter unless his representatives shall indicate otherwise within 14 days of this decision being issued.

D. These directions may be replaced, amended or varied at any time by any salaried judge of the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The case is remitted for a complete rehearing in accordance with directions set out above.

Signed: Date: 11 September 2017

Upper Tribunal Judge Hemingway

Anonymity

The First-tier Tribunal made an anonymity order. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, therefore, the claimant and members of his family are granted anonymity throughout these proceedings. No report of these proceedings in whatever form shall directly or indirectly identify the claimant or any member of his family. Failure to comply with this order could lead to a contempt of court.

Signed: Date: 11 September 2017

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

Since no fee is paid or payable there can be no fee award.

Signed: Date: 11 September 2017

Upper Tribunal Judge Hemingway