



**Upper Tribunal
(Immigration and Asylum Chamber)**
Number: PA059052016

Appeal

THE IMMIGRATION ACTS

**Heard at: Birmingham
On: 29th June 2017**

**Decision Promulgated
On: 3rd July 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**Q J
(Anonymity direction made)**

Appellant

And

The Secretary of State for the Home Department

Respondent

**For the Appellant: Mr Howard, Counsel instructed by Fountain
Solicitors**

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

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born in 2001. He has

permission¹ to appeal against the decision of the First-tier Tribunal (Judge Butler) to dismiss his protection appeal. The determination was promulgated on the 4th January 2017.

Anonymity Order

2. This case involves a claim for international protection by a minor. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Decision of the First-tier Tribunal

3. The Appellant arrived in the United Kingdom in August 2015, concealed in the back of a lorry. He told officers that he was from the Paghman district of Kabul, where he lived with his mother, maternal uncle and aunt. His father had died when he was a baby. His uncle was a member of the Taliban and his mother sent him away because she became afraid that he was going to take the Appellant away to become part of the group. The day that the Appellant left Afghanistan he discovered that his mother had terminal cancer.
4. The Respondent has doubted the account on the grounds that it was vague; the Appellant had for instance been unable to say what role his uncle had in the Taliban, or adequately explain why the risk had suddenly grown. The Respondent found that the Appellant had family living in Kabul and that he could therefore go back there to be with them.
5. The Appellant was granted a period of Discretionary Leave in accordance with the Respondent’s published policy. He was accepted to be a minor, and the Respondent’s attempts to trace his family had ended without success. He has DL until the 19th November 2018.
6. The Appellant appealed the decision to the First-tier Tribunal. The

¹ Permission was refused on the papers by Designated First-tier Tribunal Woodcraft but granted by Upper Tribunal Judge Taylor on the 14th December 2016

Appellant gave oral evidence. The Tribunal's conclusions start at paragraph 31. Having reminded itself of the Appellant's young age the Tribunal says this [at 35]:

"It is unfortunately not uncommon for parents in countries such as Afghanistan to pay agents to transport their children to the UK in order for them to have what they consider will be a better life. Their accounts often have a familiar ring to them, as is the case with the Appellant"

7. The Tribunal then gives the following reasons why it does not accept the account given to be credible:

- i) The Appellant's evidence that his mother and aunt would have been powerless to defy the wishes of his uncle is inconsistent with the evidence that they conspired together to remove him from the country;
- ii) The Appellant's belief that his uncle would not have tried to recruit him until his mother died is "pure speculation";
- iii) The Appellant's claim that he had previously been unaware of his uncle's plans was inconsistent with his evidence that he had once overheard his uncle and mother discussing his education. His uncle had wanted to send him to a *madrassa* rather than mainstream school but had dropped the subject when this was resisted by his mother. Of this particular 'inconsistency' the Tribunal said: "this adversely affects the credibility of the Appellant's subsequent evidence".
- iv) The Appellant had no direct knowledge of his uncle's involvement with the Taliban;
- v) There is no corroboration of the account in the form of documentary evidence.

8. The Tribunal recognised that family tracing had been unsuccessful, but noting that the burden of proof lay on the Appellant, found his failure to personally contact the Red Cross or similar organisation weighed against him. The case that he was an unaccompanied minor was not made out and the appeal was dismissed on the grounds that he could return to his family in Kabul.

The Challenge

9. It is submitted on behalf of the Appellant that the decision of the First-tier Tribunal is flawed for the following material errors of law:
- i) Making comments implying a “general negative bias” such that the Appellant would reasonably conclude that the Tribunal embarked on its credibility findings from the premise that the Appellant was an economic migrant.
 - ii) Failing to give reasons. The determination finds evidence to be implausible and inconsistent without giving intelligible reasons why;
 - iii) Requiring corroboration where it is trite asylum law that refugees should not be required to prove their cases by producing documentary evidence;
 - iv) Making unreasonable findings. The evidence was that family tracing had failed and that the Appellant had lost contact with his family in Kabul. There was no evidential basis for the conclusion that he could return to live with them.

The Response

10. The appeal was opposed by the Respondent.
11. Mr Mills agreed that the comments at paragraph 35 were unnecessary, unfortunate and should not have been made. He agreed that an appellant reading that paragraph might well think that the judge had made his mind up before he had considered the evidence, but Mr Mills submitted that *this* Appellant could be reassured, by reading the rest of the determination, that the Tribunal had conducted a balanced and fair assessment of the case.
12. The Respondent submitted that the findings made by the First-tier Tribunal were open to it on the evidence, and that adequate reasons had been given. It was not unlawful for the Tribunal to describe something as ‘implausible’ where such reasons were given.
13. As to the ‘family tracing’ point Mr Mills urged the Tribunal to exercise caution in drawing conclusions from the grant of DL. The Secretary of State for the Home Department had not been able to trace the Appellant’s family, but that was because she did not have the facilities in Afghanistan to be able to effectively conduct these enquiries: see paragraph 63 of the ‘reasons for refusal’ letter. It did not amount to a definitive finding that the Appellant was out of touch

with his family. The finding that he was in contact had to be read in line with the overall negative credibility finding.

Discussion and Findings

14. The parties before me were in agreement that paragraph 35 of the First-tier Tribunal's determination should not have been included in the decision. Is it, as Mr Mills suggests, a paragraph that can simply be disregarded, or is it as Mr Howard submits, a piece of reasoning which reveals a "general negative bias" on the part of the Tribunal? I have no hesitation in accepting it to be the latter. The only inference that can be drawn from that paragraph is that the Tribunal has formed the view that "it is not uncommon" to find that the Afghan children who make their way to this country are economic migrants, and that the Appellant, with his "familiar" account, is one of their number. Mr Mills agreed that any appellant would read the paragraph that way, and could reasonably conclude that the Tribunal had already made up its mind. I am not satisfied that upon reading the rest of the decision the Appellant's concerns about this matter would be assuaged. It was no part of the Tribunal's task to compare this account to others it had heard. Nor was there any evidential basis for the suggestion that it is common for parents in Afghanistan to hand over their children to agents simply so that they have a chance of a "better life". The corollary of that assumption was that these children do not have protection needs, a curious notion considering that Afghanistan is a country which has been in the grip of civil war and violent extremism for the best part of four decades. It continues to be one of the biggest refugee-producing countries in the world. It is of course possible that this, or any appellant, is not in fact a refugee, but the starting point for that enquiry should have been the evidence.
15. I am satisfied that paragraph 35 of the determination has given rise to a perception that the Appellant has had an unfair hearing and for that reason alone this is a matter that must be remitted to be heard afresh in the First-tier Tribunal.
16. I should add that there is at least one other clear error in the determination. At paragraph 39 the Tribunal weighs against the Appellant the fact that he has been unable to provide any corroboration of his account. It is a well-established principle of asylum law that refugees should not be expected to produce documentary corroboration of their claims. The origins of this principle are to be found in paragraph 196 of the UNHCR Handbook²:

² HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents....

In this case it is not clear what corroboration the Tribunal wanted. Presumably it was not looking for call-up papers from the Taliban. I am not satisfied that any of the possible evidence that the Appellant could have got would fall into the class of material discussed in TK (Burundi) v Secretary of State for the Home Department [2009] EWCA Civ 40: it would not have been straightforward for the Appellant to obtain any documentary corroboration. The evidence that this child, who has traversed 4000 miles in the back of lorries, walking through forests and scrambling over mountains, had lost a phone number is dismissed without reasons as “convenient”. Confusingly the Tribunal also appears to weigh against him the fact that he has not sought to maintain contact with the very uncle whom he claims to fear.

17. It follows that I need not address the remaining grounds in any detail, save to say that there did not seem to me to be anything inherently implausible in this account. The Tribunal appeared to regard the Appellant’s mother’s decision to send him away to be at odds with the evidence about the position of women in Afghanistan generally. All I say about that is that the Tribunal has arguably here failed to take into account that families, and individuals, are rarely a monolithic representation of the society from which they come. Just as ‘conservative’ fathers may wish their daughters to be educated, so might a Taliban brother have the decency to respect his sister’s wishes. The case put is that the Appellant’s mother feared that her brother would cease to do so after she had died. I find nothing incredible in that.

Decisions

18. The determination of the First-tier Tribunal contains an error of law and it is set aside.
19. The matter is remitted to be heard afresh in the First-tier Tribunal.
20. There is an order for anonymity.

Upper Tribunal Judge Bruce
30th

June 2017