Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08529/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 June 2017	**On 04 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MR T M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Gillespie promulgated on 3 April 2017 in which he dismissed the Appellant's protection appeal following a refusal to grant asylum on 29 July 2016.

2. The Appellant is a minor born on 6 April 2001. He is a citizen of Afghanistan. He presented to Stoke Newington police as a child asylum seeker on 10 December 2015. On 19 January 2016 an initial health assessment was conducted and a screening interview took place on 29 January 2016. An SEF was completed on 17 February 2016 and a substantive asylum interview was held on 15 June 2016.

3. The Appellant's application for asylum was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 29 July 2016, but nonetheless the Appellant was granted discretionary leave to remain as an unaccompanied minor. He appealed to the IAC against the refusal of asylum. His appeal was dismissed for reasons set out in the Decision of Judge Gillespie. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Andrew on 12 May 2017. In such circumstances the appeal was duly listed and called on before me today.

4. There was no attendance by or on behalf of the Appellant. A telephone message had been received indicating that there was to be no attendance but very little further information was contained. I caused further enquiries to be made and in consequence a fax has now been received by the Tribunal from the Appellant's foster carer which is in these terms: *"The above Appellant has a hearing today 27/6/17 but he has no legal aid as his solicitor has refused to proceed the case. Hence can we please adjourn the hearing until we can have a solicitor present."*

5. Mr Avery for the Respondent resisted the application for an adjournment.

6. I have reached the conclusion that the appeal should not be adjourned today. I do so bearing in mind that there was no express reason offered for the failure of the Appellant to attend in person today - whether that be in the company of his foster carer or a social worker or otherwise. Moreover, no details have been presented with regard to relevant dates as regards the withdrawal of legal support, and therefore it is not possible to discern to what extent the Appellant has been diligent in seeking further representation; accordingly I am not satisfied that he has been denied a proper opportunity of securing further legal representation. Moreover, as Mr Avery observes, in circumstances where his current advisers have declined to extend further services under the legal assistance, or legal aid, scheme it is not readily ascertainable on what basis he would be able to secure and fund further representation. Certainly nothing has been said on the Appellant's behalf as to what steps or measures or what prospects there might be in this regard.

7. I also take into account that the Appellant has had the benefit of legal advice hitherto including in the drafting of grounds of appeal.

8. I emphasise that I have in my consideration of all of these matters borne in mind the Appellant's status as a minor.

9. However, in my judgment no good reason for non-attendance today has been shown and no good reason for granting an adjournment has been

shown. In those circumstances I am of the view that it is appropriate to proceed with the appeal in the Appellant's absence.

10. In this regard Mr Avery on behalf of the Secretary of State resisted the Appellant's appeal, arguing that the Appellant's grounds of appeal that had succeeded in securing permission to appeal in substance essentially amounted to a disagreement with the findings and conclusion of the First-tier Tribunal and did not identify an error of law.

11. I turn then to a consideration of the challenge set out in the grounds of appeal under five discrete grounds.

12. The first ground of appeal is that the Judge *"failed to take into account at all or properly that the Appellant is a child"* and it is argued that *"this is pervasive throughout the determination"*, see grounds of appeal at paragraph 3.

13. It is argued that in rehearsing the applicable law at paragraphs 8 to 12 of the decision the Judge failed to make any reference to the Appellant's age. It is also said that the Appellant's age is not referenced until paragraph 15 of the First-tier Tribunal's decision at which point, if anything, his age is referenced in a manner seemingly adverse to the plausibility of the Appellant's account. Criticism is also made in respect of the second reference to the Appellant's age at paragraph 18.

14. In the premises it seems to me unattractive on the one hand to argue that the Judge failed to take into account the Appellant's age, but in so doing then to cite two examples where the Judge plainly did have regard to the Appellant's age. The grounds cannot have it both ways.

15. Be that as it may, I make the following observations.

    (1) At paragraph 1 the Judge cites the Appellant's date of birth.

    (2) At paragraph 3 he refers to the fact that the Appellant is *"a minor"*.

    (3) In this regard also the Judge observed that the Appellant did not give evidence on the advice of Counsel by reason of being a minor and that this was legitimate and justifiable. This suggests both that the Judge was alert to the fact that the Appellant was a child and also alert to the appropriateness of adopting different procedural considerations compared with the appeal of an adult.

    (4) Also at paragraph 3 the Judge refers to the Appellant's *"allegations of fact"* being contained in the screening and asylum interviews, the

Appellant's witness statement and the testimony of the Appellant's social worker. Necessarily all of these documents refer to the Appellant's age.

(5) It may also be noted that the preceding includes a reference to the Appellant's social worker, who attended and gave evidence at the hearing before the First-tier Tribunal. The fact that the Appellant is in the care of a foster carer under the supervision of a social worker is also referenced at paragraph 6 of the First-tier Tribunal's decision.

(6) At paragraph 7 the Judge refers to the grant of leave to the Appellant as *"an unaccompanied minor"*.

(7) See similarly paragraph 21 where reference is made to the Respondent's acknowledgement that the Appellant is an *"unaccompanied child"*. Indeed, the substantial focus of the *"secondary ground of protection advanced by"* counsel before the First-tier Tribunal set out across paragraphs 21 to 28 and covering some three pages of the twelve page decision is exactly focused on the circumstance of returning a minor to Afghanistan.

(8) At paragraph 14 the Judge refers to the Appellant's counsel's submission *"that any perceived deficiencies in the evidence of the Appellant are to be considered in the light of the Appellant's age and vulnerability as a witness"*. This is followed at paragraph 15 by the Judge stating: *"I acknowledge the force and correctness in principle of"* such an argument.

(9) At paragraph 18, having just referred in the final sentence of paragraph 17 to aspects of the Appellant's narrative having *"every appearance of a colourable and fictitious account"* the Judge states: *"This appearance is in no way diminished by consideration of the Appellant's age both at the time of the events and at the time of interview."* It seems to me that this phrase, underscored by the Judge's express acknowledgement of the correctness in principle of the need to consider the Appellant's evidence in light of his age and vulnerability, makes it absolutely plain that the Judge was both alert to the requirement to make due allowance for the Appellant's minority and also indeed had express regard to the Appellant's minority in evaluating his testimony. (I note that a further criticism is made in respect of this passage at paragraph 18, which I address below.)

16. In all such circumstances, in my judgment, it is wholly unsustainable to suggest that the Judge did not take into account that the Appellant was a child. Indeed, contrary to the submission contained in the grounds it is in fact *"pervasive throughout the determination"* that the Judge was well aware that the Appellant was a child. Moreover, it is also clear that the Judge expressly acknowledged the need to make due allowance in light of the Appellant's age and vulnerability.

17. I have noted above that a further criticism is made in respect of the Judge's observation that the appearance of a colourable and fictitious account is not diminished by consideration of the Appellant's age. The grounds argue in this regard that *"the Judge has fallen into the classic error of considering that a factor does not displace negative findings rather than taking the factor into account before making the findings"*, see grounds at paragraph 8.

18. I disagree that the passages relied upon are illustrative of such an error. I note the following:

    (1) At paragraph 12 the Judge observes that the evaluation of the Appellant's case is to be *"undertaken as a single exercise"*, which is a clear echo of the 'single composite question' endorsed in **Karanakaran [2000] EWCA Civ 11**.

    (2) At paragraph 13 the Judge says: *"I have taken into account all the available evidence in the round"* before going on to say this: *"The order in which I address the factors is not indicative of any relative amount of weight attached to them but is adopted purely for convenience of exposition."*

    (3) Similarly, at paragraph 15 the Judge refers to his *"anxious scrutiny of the evidence as a whole"* before offering that his conclusion as to the falseness of the Appellant's account was *"for the cumulative effect of the various reasons adumbrated below"*.

19. In such circumstances, and indeed reading the decision as a whole, in my judgment, it is clear that at paragraphs 17 and 18 the Judge is setting out in a linear fashion - as the format of a written determination inevitably demands - matters that he has taken into consideration 'in the round'.

20. Ground 2 argues that the Judge *"has applied an incorrect standard of proof"*, see grounds at paragraph 10. Whilst in this context it is acknowledged on behalf of the Appellant that the Judge included an appropriate self-direction as to onus and standard of proof, it is submitted by reference to a number of examples that he in fact applied a different standard of proof.

21. No criticism is made of the Judge's self-direction at paragraph 12, which, as I have already observed, accurately echoes the single composite question identified by Lord Justice Simon Brown, as he then was, in **Ravichandran** and endorsed by Lord Justice Sedley in **Karanakaran [2000] EWCA Civ 11**, see paragraph 19 of Lord Justice Sedley's judgment.

22. Further to this the Judge correctly identifies at paragraph 13 that he is required to take into account all the available evidence 'in the round', and that it is his task to attach such weight as he considers appropriate to the disparate elements that combine in the single composite question.

23. It is against this background that I turn to a consideration of the examples that, it is said, indicate a misapplication of the standard of proof. These examples are cited at paragraph 12 of the grounds. Firstly it is said that the Judge uses the following phrases at paragraph 15 which are illustrative of a misapplication of standard of proof: *"Greater improbability", "seriously improbable"*, and *"so exceedingly unlikely"*.

24. Paragraph 15 of the Judge's decision so far as is relevant is in these terms:

> *"I consider the account by the Appellant of his alleged exposure to harm to be false. Assuming the truth, as conceded by the Respondent, of the claim as to the Appellant's father's business and of the threat to his family arising therefrom there is all the greater improbability in the proposition that the Appellant would defy safety and his father's injunction to slip away from his bodyguards and go alone into the city. This is by no means a fatal aspect of the case but it is a feature of the Appellant's account that gives rise to legitimate query and cause for concern. That cause for concern is all the greater in respect of the alleged second occasion of kidnap. It is seriously improbable that, having once survived unscathed the extremely frightening experience alleged, the Appellant would knowingly expose himself to similar risk a second time. It seems to me so exceedingly unlikely that the Appellant, a teenager with the capacity to understand the consequences of his action, informed as this capacity was by his own experiences, would place himself at such risk, that very serious doubt must arise as to whether the claim is true."*

25. In my judgment the use of the comparator term 'greater' in 'greater improbability' is indeed in context indicative of no more than a comparison. This is not an illustration of an application of standard of proof. The phrases 'seriously improbable' and 'exceedingly unlikely' are terms essentially comparable with the standard of 'reasonable likelihood'. To say something is seriously improbable or is exceedingly unlikely is in effect to say that it is not reasonably likely.

26. As the Judge observes, his analysis at paragraph 15 leads him to consider that *"very serious doubt"* arises as to the veracity of the Appellant's account, a factor he takes forward into his overall consideration. So we see, for example, in the following paragraph the Judge identifying *"other very significant reasons to doubt the truth of the claim"*. Not one of these

matters is in and of itself said to be a conclusion of the claim but represent in the Judge's evaluation adverse signifiers in the overall assessment. This is an entirely appropriate methodology, and essentially consistent with the approach identified in **Karanakaran**.

27. The grounds also argue that the Judge in using the phrase *"is so lacking in credibility that it cannot possibly be true"* at paragraph 18 of the decision again indicates a misapplication of the standard of proof. However, it seems to me that this phrase actually equates to something even more emphatic than 'not reasonably likely true', and I cannot see that it is either illustrative of an error of approach or that it could be said to be in any way a material error in the overall consideration.

28. It is also pleaded that at paragraph 17 the words *"his account is irreconcilable with a release for a ransom"* is indicative of a misunderstanding or misapplication of the standard of proof. In my judgment this is not in substance an illustration of the application of the standard of proof. Instead, to characterise matters as irreconcilable is merely to observe that one element does not match or fit with another element. Even if there were more to this point, in isolation it would not provide a reliable indicator that the Judge had otherwise wrongly applied the standard of proof. Moreover, in context it would clearly be an immaterial error because, as may be seen from the immediately preceding sentences in paragraph 16, it relates to a matter - release consequent upon payment of a ransom - not actually alleged by the Appellant but rather raised as a suggestion in the Skeleton Argument.

29. With all due respect to the drafter of the grounds of appeal, the practice of scanning a decision to alight upon particular words or phrases that in isolation may not congruently accord with the phrase 'reasonable likelihood' is not to be encouraged, particularly in circumstances where it is otherwise acknowledged that the Judge has unimpeachably directed himself as to the burden and the standard of proof. In such circumstances it will only be in the rarest of cases that the use of such language will be any sort of reliable indicator of a misunderstanding of the standard of proof to which a Judge has expressly directed him or herself.

30. Ground 3 argues that the Judge *"has effectively gone behind the agreed facts in the case rendering the determination unfair"*. This submission arises in the context of the apparent concession made in the RFRL based on an application of the principle of the benefit of the doubt with reference to paragraph 339L of the Immigration Rules, to the Appellant's assertion that his father had been involved in a business providing security services to the Americans: see paragraphs 17-21 and 32-34 of the RFRL.

31. The grounds of appeal direct attention to the following passages in the First-tier Tribunal Judge's decision. At paragraph 14, *"I consider myself bound by the decision of the Respondent to accept that the Appellant's father may have operated a business such as claimed"* and at paragraph 15, *"assuming the truth, as conceded by the Respondent, of the claim as to the Appellant's father's business"*. It is argued that such language gives the impression that the First-tier Tribunal Judge in fact disbelieved the Appellant in this regard. Why else, it is asked rhetorically, would he have to observe that he considered himself bound or why else, it is again asked rhetorically, does he have to assume the truth of the matter?

32. For my part I consider the suggestion the Judge has gone behind agreed facts quite simply to be nonsense. It is manifestly the case that the Judge has proceeded on the basis of an acceptance of those facts and uses language to that effect, *"I consider myself bound"*. It could not be clearer. There could only possibly be any substance to this challenge if it was possible to attach *mala fides* to the words utilised by the Judge. The grounds do not go so far as to make any such suggestion.

33. Similarly, at paragraph 15 in commencing *"assuming the truth"* the Judge is proceeding to analyse matters in a manner entirely consistent with the concession as to the Appellant's father's business.

34. Even if it were otherwise it seems to me that there would be nothing objectionable in a Judge expressing reservations in respect of a concession but nonetheless proceeding on the basis of the concession. Of course theoretically it is not incumbent upon the Judge to accept a concession providing if minded not to do so due notice is given to the parties so they may modify their presentation of the case accordingly. It should also be noted that where – as here – a Judge forms an adverse view as to an appellant's credibility, the foundation for any concession made by the Respondent will likely be undermined; in such circumstances there would be nothing amiss in a judge expressing reservations in respect of a concession even if prepared to accept it.

35. Approximate analogy in this context may be drawn with a magistrate who excludes damaging evidence on grounds of inadmissibility and goes on to evaluate a case on the basis of the admissible evidence. He or she puts out of mind any doubts or reservations that might arise from or be engendered by the inadmissible evidence, and determines the cases on the basis of that which is admissible. Here, irrespective of any personal view as to the concession, the Judge expressly states that he proceeds on the basis of its acceptance.

36. Ground 4 argues that the Judge's findings *"or at least some of them"* are not *"evidence-based"*. In this regard in particular focus is made on the Judge's evaluation of the Appellant's conduct in twice moving around free

of the bodyguards that his father had provided to him and the fact that on each of those occasions the Appellant found himself, on his case, the victim of adverse actions by members of the Taliban. In my judgment this ground amounts to no more than a disagreement with the Judge's findings and the outcome of the appeal.

37. Moreover, it seems to me that it is a disagreement, in itself flawed in its reasoning. If, as he did, the Judge takes the view that the second arrest is *"extremely improbable"* then necessarily this undermines the credibility of the Appellant's evidence generally - including in respect of his claim as to the first arrest. It seems to me that this is the substance of the Judge's analysis at paragraphs 15 and 20 of the decision. I have cited paragraph 15 above, and so here merely emphasise this: "*It is seriously improbable that, having once survived unscathed the extremely frightening experience alleged, the Appellant would knowingly expose himself to similar risk a second time. It seems to me so exceedingly unlikely that the Appellant, a teenager with the capacity to understand the consequences of his action, informed as this capacity was by his own experiences, would place himself at such risk, that very serious doubt must arise as to whether the claim is true*". The notion that it was *"so exceedingly unlikely"* that the Appellant would have wandered off again without his bodyguard, informed as to his own experiences of the consequences of such conduct, appropriately and unimpeachably undermines the credibility of the first claimed incident, and suitably informs the conclusion at paragraph 20:

> *"In conclusion, I hold it so far removed from the conduct that might be expected of a young person in the Appellant's claimed position that he would so defy instruction and imperil himself as to venture abroad without his bodyguard that I do not accept that such occurred even once, let alone twice. I hold it so contrary to what one might understand of the practice of the Taliban and the background evidence that the Appellant would be released relatively unharmed twice in circumstances suggesting that the Taliban might have feared that they missed their mark or in other unexplained circumstances that it could not have happened. I therefore agree with and endorse the findings of the Respondent as to the lack of truthfulness of the claim of past exposure to persecution or other harm."*

38. Ground 5 raises a challenge to the 'secondary argument' advanced on behalf of the Appellant, which was to the effect that even if his personal narrative was rejected there was still a risk of persecution to him if he were to be returned to Afghanistan as an unaccompanied minor without access to the support of family or an adult. The Judge concluded that the Appellant had not satisfied him in this regard.

39. Whilst it may be that there is scope for some criticism of the Judge with regard to the clarity of identifying the absence of cooperation of the

Appellant with regard to tracing, bearing in mind, for example, that the Appellant appeared to have given full details of his family during the interviewing process, it seems to me that ultimately this matter is adequately covered by the substantial adverse credibility assessment that has been made in respect of the Appellant's case.

40. In particular, in this regard the following may be noted from paragraph 25:

> *"The Appellant has made no attempt to give any details by which his family might be contacted. It seems to me inconceivable that if he has a married adult cousin in the United Kingdom the Appellant would be sent unaccompanied to the United Kingdom without some degree of arrangement with the family in the United Kingdom and without some means of communicating with the family in Afghanistan."*

In this regard it is to be noted from the interview record at questions 37 and 120 and the screening interview at paragraph 3.4 that it was all along the plan that the Appellant should come to the United Kingdom to stay with his cousin. It is reasonable to infer from this, as the Judge has done, that there was some communication between the family members in Afghanistan and the UK prior to the Appellant's arrival, and nothing has been demonstrated to explain or show that that communication has broken down or is no longer possible.

41. Similarly, it seems to me entirely sustainable for the Judge to conclude in these terms at paragraph 28: *"At the very least the Appellant has failed to lead satisfactory evidence to prove to the lower standard that he would on return to Afghanistan be unable to contact his parents and would be a young person alone."*

42. In all those circumstances I find no error of law on the part of the First-tier Tribunal. It follows that the decision of the First-tier Tribunal stands.

43. Before leaving this case, I make two observations. I emphasise that these matters have not informed my analysis of the 'error of law' arguments, but I raise them lest this case sees some further life – perhaps either in the context of this appeal or when the Appellant comes to apply for further leave to remain towards the end of the period of his discretionary leave - such that there may be some future occasion when the factual merits of the case are reconsidered.

44. The first matter is this. It is to be noted from the initial health assessment conducted on 7 January 2016 (Annex E of the Respondent's bundle) that shortly after his claimed arrival in the United Kingdom the Appellant underwent an assessment in which amongst other things he gave his medical history as including the following: *"Reports being abducted and beaten 2–3 years ago. His left arm was fractured and he had surgery to*

put in a metal plate which was later removed. He does not have any loss of power or altered sensation in the affected arm." 'Two to three years' prior to the Appellant's arrival in the United Kingdom would mean that the Appellant would have been 11 or 12 years old at the time of the break of his arm.

45. This circumstance, which does not seem to have been alighted upon either by the Respondent or in turn by the First-tier Tribunal Judge, is not readily reconcilable with the chronology of the Appellant's narrative in support of his asylum claim. In his asylum claim he has asserted that his arm was broken during the course of the second abduction by the Taliban and that it was one or two months later that the decision was made for him to leave the United Kingdom. The RFRL and indeed the case before the First-tier Tribunal appeared to proceed on the premise that the Appellant left Afghanistan approximately two months after this second detention and therefore approximately, on his account, two months after breaking his arm.

46. It may well need to be considered in due course what possible explanation there might be for such an apparent discrepancy. It might be thought, for example, that a person arriving so shortly after a serious injury – as the narrative claim would seem to have it - would be able to present at an initial health assessment, an arm still suffering from the postsurgical effects of having a metal plate either inserted or later removed. If it be the case that one possible explanation is that the abduction and assault did indeed take place two to three years prior to the arrival in the United Kingdom this would then point in the direction of the Appellant having been able to remain in Afghanistan for a substantial period of time without any further incident. Either way, as I say, this matter appears problematic in an understanding of the Appellant's claim and is yet to be addressed.

47. The second matter that it seems to me may need further consideration is this. It is the Appellant's case that his father's company collapsed and was no longer operating. If that be the case it rather begs the question of why there would be any continuing risk to the Appellant in circumstances where the father's conduct has ceased to be such as would make him the subject of adverse interest on the part of the Taliban.

48. Be that as it may, these matters are not for determination today and are only raised as potential issues that may require consideration in due course.

49. For the reasons already given the appeal today is dismissed.

Notice of Decision

50. The Decision of the First-tier Tribunal contained no errors of law and stands. The Appellant's appeal remains dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The above represents a corrected transcript of reason give ex tempore at the conclusion of the hearing.

Signed: Date: **4 July 2017**

Deputy Upper Tribunal Judge I A Lewis