Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10169/2016**

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision and Reasons Promulgated**
On 13th July 2017	**On 08th August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR S K D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paul Draycott (Counsel)
For the Respondent: Mr David Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Butler, promulgated on 4th January 2017, following a hearing at Birmingham on 24th November 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan, who was born on 13th January 2001. At the date of the hearing he is a minor aged 14 years. He appealed against the

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decision of the Respondent dated 22nd September 2015 on the basis that his removal would not be contrary to the UK's obligations under the Refugee Convention and he would not suffer treatment contrary to Articles 2 and 3 of the Human Rights Convention.

The Appellant's Claim

3. The Appellant's claim is that he was born and raised in Ramat village in Ghazni province. He lived there with his parents, his brother, and his sister. The children did not attend school. His father was asked to join the Taliban but refused to do so. The family home was bombed and there were casualties. He was taken in by a neighbour. The neighbour arranged for an agent to take him out of the country. The Appellant left Afghanistan in September 2015, travelling for six months, before arriving in the jungle in Calais before entering the UK concealed in a lorry.

The Judge's Findings

4. The judge had evidence before him from an expert, Mr Tim Foxley. However, he held that,

> "I attach little weight to it, particularly since he did not attend to give evidence and justify some of his comments. I further note that he did not meet the Appellant but has based his conclusions on statements by the Appellant to which he has then applied his expert knowledge" (paragraph 34).

5. Second, the judge then had regard to the Appellant's own evidence. Here, the judge held that the Appellant's evidence was not to be believed that he was targeted with a bomb by the Taliban because, "he was not at home, did not see anything, no one else saw anything and he only assumed it was the work of the Taliban" (paragraph 31). Moreover, the Appellant's account of how he came to leave Afghanistan was also not credible (paragraph 32).

6. Third, the judge then considered the possibility of the Appellant's return to Ghazni. He noted the expert's report, that of Mr Foxley, that the dangers of the Appellant travelling from Kabul to Ghazni, were such that he might be exposed to roadside attacks, tribal disputes, and other military activities. However, the judge's conclusion was that, "the journey from Kabul to provinces is not as hazardous as he makes out" (paragraph 37).

7. Finally, in relation to Article 8, no exceptional circumstances had been shown and the Appellant could return back to his family there because the account of his family being killed was not accepted by the judge.

Grounds of Application

8. The grounds of application state that the judge materially erred in law in the following respects. First, his assessment of the evidence of the Appellant was erroneous, given that he failed to properly recognise that the Appellant was a minor.

He left Afghanistan at the age of 14. He was even today aged only 16 and still a minor. Second, he had wrongly disregarded the findings of the expert report of Mr Tim Foxley. Thirdly, he had misdirected himself as to the risk to the Appellant from the Taliban. Fourth, in finding that the Appellant would have the benefit of support from his family on his return, the judge failed to acknowledge that the Respondent had accepted that there were no adequate reception facilities for the Appellant to return. Finally, the manner in which the judge addressed the ability of the Appellant to travel from Kabul to Ghazni was also materially wrong.

9. On 27th March 2017, permission to appeal was granted by the Upper Tribunal.

Submissions

10. At the hearing before me on 13th July 2017, Mr Draycott, appearing on behalf of the Appellant, made two fundamental submissions.

11. First, that the judge was wrong to reject outright the evidence of a renowned expert, Mr Tim Foxley, on the basis that he had not attended the hearing to give evidence (bearing in mind that legal aid funding for such an exercise was scarce). This is because it was well established, as long ago as the case of **Kilic v SSHD [2002] UKIAT 02714**, that,

> "It may be that experts who give oral evidence should carry more weight than those who give only written evidence. However, be it written, oral or both, their evidence is entitled to be treated with respect due to persons who possess relevant expertise" (see paragraph 6).

12. Second, in relation to the evidence of the Appellant, a great deal of time was spent by the judge focusing on the fact that the Appellant, a child of 14 at the time, was unable to give detailed answers in relation to the world around him. Not only was this a child who had not gone to school, as his other siblings had not, but it overlooked the fact that it had been well established in the case of **AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)** that an unattended child is by its very nature, at risk of return to Afghanistan. Related to this is the issue as to where the judge thought the Appellant would return. The focus of the judge was a return to Ghazni province.

13. However, the Home Office has long maintained the position that returns are to Kabul. It is here that Mr Tim Foxley's report becomes relevant because he makes it clear that travel from Kabul to Ghazni is fraught with hazards, such as to be well-nigh impracticable. It was wrong for the judge to consider the Appellant's return to Ghazni, which is not the design of the Secretary of State for the Home Department.

14. For his part, Mr Mills submitted that, although he would have to accept that there were errors in the manner in which the judge had made her decision, nevertheless, it was not strictly correct to say that the expert report of Mr Tim Foxley had been rejected simply because the expert did not attend. This is because after paragraph 34, there is a detailed consideration of the report of Mr Foxley at paragraphs 35 to 38,

before the judge concludes that she can attach "little weight" to the report (paragraph 39).

15. Second, notwithstanding what the expert said, it was still the case that an Appellant child, even as a minor, had to discharge the burden of proof by putting forward a credible claim. This principle arose directly from the case of **ZH (Afghanistan) [2009] EWCA Civ 470** (see paragraphs 9 to 10). Here, the Court of Appeal had said, in the judgment of Sullivan LJ, that,

> "The mere fact that a child applicant for asylum falls within the policy of the Secretary of State is not in my judgment of itself sufficient to discharge the burden on the child applicant to demonstrate that he is at real risk, or there is a serious possibility that he would be persecuted if returned" (paragraph 10).

16. In reply, Mr Draycott submitted that the case of **ZH (Afghanistan)** was not the operative and determinative legal authority for the purposes of a claim such as the present one. That was a 2009 decision by the Court of Appeal, but since then everything had changed after the decision in 2012 of **AA (unattended children) Afghanistan**, and it was invidious now to rely upon the 2009 decision, because the 2012 decision for the first time gave proper consideration to the plight of "unattended children" and subsequent to that, it had been accepted in **AK (Afghanistan) [2012] UKUT** that that country guidance remained good law.

17. Second, the judge had erred in law in not considering the feasibility of return to Kabul, because that is the place to which returnees are sent. It is not the case that a judge has to consider return to Ghazni province, because that is not in contention as far as the Secretary of State's return policy is concerned.

18. Third, the Secretary of State actually conceded that there are no reception conditions of a satisfactory nature that can be provided, and yet there is nowhere in the judge's determination a reference to this important concession.

19. Finally, a rejection of a child's asylum appeal on the basis that he is unable to question answers in relation to bombing by the Taliban, when he was not even there at the house, is simply wrong in itself.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

21. First, even though the judge does proceed to give detailed consideration to the expert's report of Mr Tim Foxley (at paragraphs 35 to 38), it nevertheless remains the case, that this is prefaced at the outset, with the observation that, "I have considered Mr Foxley's report in detail. I attach little weight to it, particularly since he did not attend to give evidence … …" (paragraph 34).

22. Second, the judge does not consider the viability of return to Kabul, but instead considers a return to Ghazni province, in rural Afghanistan, and this is a wrong focus, with respect to how a returns policy is put into effect by the United Kingdom government.

23. Finally, there is no consideration of the concession made with respect to reception conditions. The country guidance case of **AA (unattended children) Afghanistan CG [2012] UKUT 0016** also needs to be given proper consideration.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to a judge other than Judge Butler, under practice statement 7.2(a) because the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity to put their case. This appeal is allowed to that extent.

25. I allow the appeal.

26. An anonymity direction is made.

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 their 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.

Signed Dated

Deputy Upper Tribunal Judge Juss 8th August 2017