Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04308/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2017	**On 13 February 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

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(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Briddock of Counsel instructed by J D Spicer Zeb Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is an Afghan national born on [ ] 2003. He claimed to have arrived here on 21 October 2016 in the back of a lorry and claimed asylum three days later. This was refused on 21

April 2017 although discretionary leave was granted until 21 October 2019 due to the inadequacy of reception facilities in Afghanistan.

2. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Randall on 5 June 2017 (not determined on the papers as the determination records). The judge heard evidence from the appellant's uncle. The appellant himself did not give oral evidence; presumably because he was 14 at the date of the hearing. In a determination promulgated on 27 June 2017, the judge dismissed the appeal. Whilst he made several favourable findings, he concluded that the witness had not been credible, that the appellant had not lost contact with his family in Afghanistan, that he had not attended a madrassa which is where most forced recruitment of children by the Taliban was focused, that the evidence did not suggest there was a particular practice to recruit children to replace fathers who had ceased fighting and that there was no risk of forced recruitment to the appellant.

3. Permission to appeal was refused by First-tier Tribunal Judge Brunnen on 24 July 2017 but granted on renewal by Upper Tribunal Judge Plimmer on 20 September 2017. Although she focused on the complaint that the judge had applied the wrong standard of proof when he referred to the account as being "*not convincing*", "*unlikely*" and "*not fanciful*", she gave permission for all grounds to be argued. The appeal then came before me on 23 November 2017.

The hearing

4. The appellant and his uncle attended the hearing and I heard submissions from Mr Briddock, who had also represented the appellant at the First-tier Tribunal, and Ms Isherwood for the respondent.

5. Mr Briddock accepted that the determination was very detailed and carefully drafted but submitted that did not mean it was without errors. He submitted that the very detail of the determination may have led the judge into error as he had begun to speculate. The first complaint was that the judge failed to give proper reasons for his negative findings. The appellant had been under 14 at the date of the hearing and even younger when he left Afghanistan. The respondent had raised several credibility issues arising from the account but the judge found that the vast majority of those had not been made out. The only point of the respondent's case which he considered to have merit was the omission of the Taliban to look for the appellant at places other than his family home (at 12.9). However, he then went on to rely on matters that had not formed part of the respondent's case.

6. The judge's assessment of the appellant's uncle's evidence was contained at paragraph 12.16. He found the uncle to be lacking in credibility because there had been no prior reference to the appellant having been at a madrassa but he gave no reasons why he thought this was a matter that should have been mentioned. He also considered that as the uncle's sisters had met him in Kabul, the appellant would also be found and that his mother would then be told of his return. The judge speculated at 12.17 when he concluded that the uncle would not have known about the appellant's journey before he arrived in Calais; he gave no reason for this expectation. Mr Briddock submitted that once the respondent's case had been largely rejected, the judge gave peripheral and inadequate reasons for dismissing the appeal.

7. The second criticism of the determination was that although the judge had directed himself as to the correct standard of proof at regular intervals in the determination, he had in fact failed to apply it. His reference to the account not being "*convincing*" (at 12.16) was undoubtedly wrong as were his references to "*very unlikely*" and "*relatively unlikely but not fanciful*". One could therefore not be sure that the correct standard had been applied.

8. The third criticism, which fell away if the previous grounds were rejected, was that the judge's conclusion as to forced recruitment was flawed. The judge rejected the claim that the appellant would be at risk of forced recruitment but the EASO report suggested that there was forced child recruitment and the judge had applied too narrow a yardstick when he found there was no evidence to show a practice of recruitment of children to replace fathers. The judge had also rejected the claim because he found that the appellant's two brothers had not been recruited but one had a bad leg as a result of polio and the other was just 9 years old. The judge had made errors in his determination and the decision should be re-made.

9. In response, Ms Isherwood submitted that there were no errors of law. She argued that the grounds had disregarded the substantive finding at 12,17 that the appellant had been on his way to the UK when his mother had met up with the uncle in November 2015 yet nothing had been mentioned of his journey. Furthermore, the appellant's father had been missing at that time and that had not been mentioned either. The judge found that the appellant had been sent to the UK for a better life and had not been satisfied that he had lost contact with his family. There was nothing to suggest that the judge relied on new issues and he was well aware of the appellant's youth as this was referred to several times. It had been open for the judge to find that the uncle's evidence lacked credibility and that the appellant had not been at a madrassa.

10. With respect to the second ground, Ms Isherwood submitted that the judge had reminded himself of the lower standard and the

appellant's age throughout the determination. Although he used the word "*convincing*", this did not mean that a higher standard had been applied. He had also shown that he was aware of the EASO report which he had referred to. When the determination was read as a whole, no error of law was apparent.

11. Mr Briddock replied. He submitted that when the uncle had met the appellant's mother, the appellant had still been at home. It was his cousin who was on his way to Europe. The judge had gone into incredible forensic detail about the journey of a 13 year old. He also made contradictory findings when he said there was no evidence of when the appellant's cousin left Afghanistan, despite finding at 12.17 that he had left in November 2015. He rejected the claim on the basis that it was not credible but he had made adverse credibility findings on the uncle's evidence before considering all the evidence before him. With respect to the madrassa point, the respondent had given no reasons for why she maintained that it had been open to the judge to make that finding. There was no reason given for why this fact should have been previously mentioned. Mr Briddock submitted that just because the judge had got the law right in some areas, it did not follow that he did so on all issues. There were at least two examples of having used the wrong standard. On the third point, although the judge had considered the report, he made assumptions about the evidence contained therein. Mr Briddock sought a *de novo* hearing on all issues.

12. That completed the submissions. At the conclusion of the hearing, I reserved my decision.

Discussion and Findings

13. I have taken account of all the evidence before me as a whole and have given careful consideration to the grounds and the submissions made by the parties.

14. With respect to the argument about the standard of proof, I accept that although the judge properly self-directs himself several times during the course of the determination, the terminology he uses does not reassure me that he has consistently applied the lower standard. It may be that the use of the words highlighted in the grounds were not given their true meaning but I cannot be sure and the appellant, a vulnerable child, should be able to rest assured that the lower standard has been applied throughout the assessment of his case. This error is a material one as the outcome may have been different had the lower standard been applied. On that basis alone the determination cannot stand. There is no need in these circumstances to consider the other two grounds but I do so for the sake of completeness.

15. The judge is criticized for narrowing down the issue of forced child recruitment into a category of those recruited to replace fathers. I accept he did so and that focusing on such a narrow category meant that he did not properly assess the evidence on the forced recruitment of children *per se*. Nor did he have regard to the reasons why the appellant's brothers may not have been a target (although the appellant's evidence and Mr Briddock's submissions only dealt with two out of three brothers). His approach to the evidence was, therefore, flawed.

16. The remaining criticism of the determination pertains to the judge's credibility assessment of the appellant's uncle. It is unclear from the determination whether the uncle is a paternal or maternal uncle as although he is described as a paternal uncle (at 9.1), the judge appears to suggest elsewhere that he is the appellant's mother brother. I note that the judge gave three main reasons for rejecting his evidence. The first was that there had not been previous reference to the appellant being in a madrassa. I assume this point was significant because recruitment of children appears to take place from madrassas. Mr Briddock argued there was no reason given as to why this should have been previously mentioned and he submitted that a madrassa was a school. At interview, the appellant gave evidence that he attended school. Whilst he may have meant a madrassa, this point would have been immaterial had it not been for the uncle's evidence at the hearing that the appellant had attended school *and* a madrassa (9.6). It was no doubt in this context that the judge found that there should have been previous reference to it and that is a fair point.

17. The second point centred round the claimed inability of the appellant to make contact with family on return. On this too, I find the criticisms are unjustified. The judge noted that there were regular comings and goings of people between the appellant's village and Kabul and that in the same way as the uncle had made contact with family members, so could the appellant. That is a reasoned assumption. Ms Isherwood's submission that there was no mention to the uncle of his missing brother-in-law at the time of his meeting with the appellant's mother is another point against the evidence of the appellant's uncle and, indeed, of the appellant's own claim.

18. The third point raised was the uncle's lack of knowledge about the present whereabouts of the appellant's cousin. No reasons are given for why the judge held this against the witness and, in any event, this was a finding on which the lower standard of proof does not appear to have been applied.

19. The contents of paragraph 12.17 upon which Ms Isherwood placed reliance are rather confusing. Different cousins are referred

to and it is difficult to be clear about who these are. Here again, however, the lower standard of proof was not applied.

20. So, whilst I accept that some of the criticisms against the evidence of the uncle are justified, others are not. However, given the incorrect application of the standard of proof when the assessment of this evidence was undertaken, none of the findings can stand.

21. It follows that the determination, having been found to contain errors of law, is set aside, Mr Briddock sought a *de novo* hearing on all issues and Ms Isherwood did not raise objections to that course of action were errors of law to be found.

Decision

22. The determination of the First-tier Tribunal contains errors of law and is set aside. The decision shall be re-made afresh by another judge of that Tribunal at a date to be notified.

Anonymity

23. I continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge
Date: 28 November 2017