



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06751/2017

THE IMMIGRATION ACTS

Heard at Field House
On 16th April 2018

Decision & Reasons Promulgated
On 16th May 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

A K S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Brown, instructed by Elder Rahimi Solicitors

For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan. He appeals against a decision of First-tier Tribunal Judge P-J S White who dismissed his appeal on asylum, humanitarian protection and human rights grounds on 5 October 2017.
2. The Appellant appealed on the grounds that the judge failed to determine whether the age assessment was Merton compliant; he failed to take into account relevant evidence or give reasons for rejecting such evidence; he failed to properly apply guidance policy

documents; and his conclusion at paragraph 34 was irrational. The judge did not accept that the Appellant's father was killed or that the Taliban attempted to recruit the Appellant, but he did accept that his family were able to raise a large sum of money to send him to the UK and that there was a specific intention to reach this country.

3. Permission to appeal was granted by Upper Tribunal Judge Coker on the grounds that it was arguable the judge failed to properly assess the Appellant's age and this had infected his consideration of the evidence as a whole. It was arguable that the judge failed to give adequate reasons for considering that a difference of two years in age could make a difference in the assessment of evidence without reaching conclusions on the nature of the journey and so on. Judge Coker commented that, although no specific findings were made as to whether the assessment was Merton compliant, it was unlikely that such a finding would have any relevant outcome to the findings of the judge.

The Appellant's Immigration History

4. The Appellant claims that he was born on 8 October 2001. It is the Respondent's case that he was born on 1 January 2000 or 1 June 2000. The Appellant claims to have left Afghanistan in September 2015 and entered the UK on 10 December 2015 in the back of a lorry. He was caught by the police at Dover and served with notice as an illegal entrant. He was referred to Kent Social Services and placed in foster care. Social Services completed their age assessment on 23 March 2016. The Appellant claimed asylum. He had a screening interview on 16 March 2016, filed a witness statement on 30 June 2016 and had a substantive asylum interview on 26 April 2017. The claim was refused by the Respondent on 17 June 2017.
5. It is the Appellant's case that he is from a village in Nangarhar Province and is the eldest of his parents' three children. He was born on 8 October 2001 and had a taskera in Afghanistan, but lost it in Iran during his journey. His home area was one where the Taliban are prominent and the government is not really in control. He attended school from the age of eight but stopped aged twelve because his father was elderly and he had to help with chores at home. His father worked for the office which issued taskeras. The Taliban told his father to stop working for the government, but he could not do any other job and needed an income to support his family. He owned some land where they grew vegetables, but this was mainly for their own use.
6. On the eighth day of Ramadan 2015, the family were at home when about five armed Taliban came to the house. The Appellant's father went to the door, there was the sound of gunfire and the family came out to find him dead and the Taliban leaving. The Appellant believes his mother and his maternal uncle, who lives next door, reported this to the police. Such incidents were common and the villagers did not want to make enemies of the Taliban so nothing was done.

7. The Taliban regularly encouraged young people in the area to join them and sometimes killed those who refused. About a month after his father's death members of the Taliban came to the house and asked for the Appellant but his mother had hidden him in a cupboard and said he was not there. They searched the house but did not find him. His mother then told his uncle of the incident and his uncle said it was not safe for him to stay in Afghanistan. They sold some of the family land to pay for his trip. It took about a month to organise and during this time he stayed at his uncle's house and did not go out much. The Taliban came once more during this month but he was in the mountains gathering wood and was told afterwards by his mother that they had visited. His mother and uncle did not report these incidents to the police.
8. The Appellant was unsure when he left Afghanistan but thought his journey took about two months. He travelled with other young boys and an agent through Iran, Turkey, Bulgaria, Serbia and Austria where they were put up in a camp for two days. The police then put them on a bus and said they could go to Germany. In Germany the Appellant was fingerprinted and asked if he wanted to claim asylum but he said he did not. This was because his mother and uncle had told him it would be safer to go to London. The others in the group also wanted to go to the UK and after another two weeks he travelled by train to France and spent twenty days in the jungle before getting in a lorry to the UK. When he left Afghanistan, he had a mobile number for his uncle but he lost his mobile phone in Germany and has had no contact with his family since then.

Relevant Law and Guidance

9. Paragraph 351 of HC 395 states:

"A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 apply to all cases. However, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of their situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand their situation or to have formed a well-founded fear of persecution. Close attention should be given to the welfare of the child at all times."

10. Paragraph 218 of the UNHCR Handbook on Procedures and Criteria for determining refugee status states:

"The problem of 'proof' is great in every refugee status determination. It is compounded in the case of children. For this reason the decision on a child's refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child's story the burden is not on the child to provide proof that the child should be given the benefit of the doubt."

11. The UNHCR protection guidelines on child claims state at paragraph 73:

“Although the burden of proof usually shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children’s claims especially if the child concerned is incapable of fully articulating his/her claim. The examiner needs to make a decision on the basis of well-known circumstances, which may call for a liberal application of the benefit of the doubt. Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.”

12. The Respondent’s relevant policy; Processing children’s asylum claims version 1.1 dated 12 July 2016 states:

“In certain circumstances, the benefit of the doubt will need to be applied more generously when dealing with a child, particularly where a child is unable to provide detail on a particular element of their claim. When considering the evidence of the appellant the Tribunal must have regard to the Joint Presidential Guidance Note No.2 of 2010, “Child, vulnerable adult and sensitive Appellant guidance” which states at paragraph 10.3:

“Assessing Evidence:

Children often do not provide as much detail as adults in recalling experiences and may often manifest their fears differently from adults.”

The judge’s findings

13. Paragraph 26: “That assessment of his age clearly affects the way that his evidence about events in Afghanistan must be approached. His evidence is still to be assessed as that of a child, but a child nearly 2 years older than he claimed to be. The extent to which, as a child, he is entitled to a greater measure of the benefit of the doubt, is less for a 15-year old than for a 13-year old. It also seems to me to have some relevance to the assessment of credibility. His claim to be a particular age, or even to have a specific date of birth, might simply reflect what his relatives had told him and he genuinely believed. The claim to have had a taskera with a date of birth, after first claiming to have no ID documents, and the change to claiming that it showed only his age, are in my judgment of much more concern as to whether he believed what he was saying or not.”
14. Paragraph 27: “Turning to the limited details of his claim, I begin by noting that suggestions that he did not have more details of his father’s role, or that he did not provide corroborative evidence of the killing of his father, do not seem to me to carry weight. He was still a child, so far as the former is concerned, and I do not know what corroborative evidence might realistically be expected, in relation to the latter. I further note that the expert report provided suggests, with cogency and references to sources, that the warning and then killing of a government employee in Nangarhar by the Taliban is entirely plausible given the general situation there.”

15. Paragraph 32: “In the appellant’s account of his escape he suggests that his group was encountered by the police in Austria, and after a couple of days they put them on a bus and told them to go to Germany. That seems a surprising way for the Austrian authorities to behave towards a group of recently arrived young Afghans, whose situation and paperwork (or lack of it) had led to them being placed in a camp. He then says that in Germany he was specifically asked if he wanted to claim asylum, and said he did not. He does not claim that this was under pressure from the agent, which might be expected, but rather because his mother and uncle had advised him to get to London because it would be safe. I struggle to understand why someone in Afghanistan should consider only the United Kingdom to be safe, and I find it surprising that the appellant, fleeing for his life and invited by the authorities in a Western European country to claim the asylum he says he needs should simply turn them down in this way. It seems to me that his account at this point is more consistent with wanting to enter the United Kingdom than with wanting to reach safety.”
16. Paragraph 34: “I have considered all of this evidence with care and in the round. I have reminded myself of the low standard of proof appropriate in an asylum case, and of the fact that the appellant is still not an adult. I am however not satisfied, in the light of the concerns explored above, that the appellant’s account of events in Afghanistan is a credible one. I am not, accordingly satisfied that his father was killed, or that the Taliban attempted to recruit him. I do accept that his family were able to raise a large sum of money to send him to the United Kingdom, and that there was a specific intention to reach this country rather than any other.”

Submissions

17. Ms Brown submitted that the relevant guidance was set out in her skeleton argument and, notwithstanding the dispute in relation to the Appellant’s age, he was a child at the time of the events he described in Afghanistan. She submits that, on the Appellant’s case he was 15 years old, almost 16 years old at the date of hearing but on the Respondent’s case the Appellant was 17½ years old.
18. Ms Brown submitted that there should be no difference in applying the benefit of the doubt to the evidence of a child whether they were aged 13 or 15. The judge erred in his approach at paragraph 26 in failing to give the Appellant the benefit of the doubt and in failing to properly apply the guidance in relation to the assessment of claims of minors. This point was argued before the First-tier Tribunal and was set out in the Appellant’s skeleton argument of 14 August 2017. The Respondent had accepted part of the Appellant’s account and therefore he should have been given the benefit of the doubt. At the date of the events in Afghanistan, on the Respondent’s case, the Appellant was 15 years old. The judge’s finding that the Appellant did not have more details of his father’s role was not sustainable and the judge failed to give the Appellant the benefit of the doubt and give effect to policy and guidance. There was no sliding

scale or different level of applicability according to the age of the child. The judge was assessing events recalled by a 15 year old child.

19. Ms Brown submitted that the judge found the Appellant not to be a credible witness because there were some discrepancies in his account, particularly in his journey to the UK and some discrepancies in relation to his evidence of the sale of land. The judge also found that it was not plausible that the Taliban intended to forcibly recruit the Appellant. The judge's conclusions at paragraph 34 were irrational because having found the Appellant's account of events in Afghanistan to be incredible he then accepted the Appellant's account that his mother and uncle had paid a large sum of money to send him to the UK. The only evidence of this payment was the Appellant's own evidence. It was irrational for the judge to rely on one part of the Appellant's account as credible when finding other parts of his account not credible. He also failed to give adequate reasons for why part of the Appellant's account was accepted. The judge's assessment of the Appellant's credibility was flawed because he failed to apply appropriate guidance.
20. In relation to the age assessment, Ms Brown submitted that the judge failed to make any finding on whether the age assessment report was Merton compliant. It was not Merton compliant for the reasons set out in paragraph 2 of the grounds. The observation that the Appellant could not account for one and a half to two years of his life was irrationally concluded to be a factor undermining the Appellant's claimed age because it was explicable by the Appellant's account that he had provided an estimation. He did not know the date or day whilst in Afghanistan and he had no way of knowing that a year passed unless somebody told him.
21. Secondly, it appeared that the Appellant had not been provided with any opportunity to address the observation that he arrived at the foster placement with a full beard and that he had been shaving regularly. Adverse conclusions should be put to a claimant so that he had the opportunity to deal with them and rectify misunderstandings.
22. Thirdly, physical appearance was a notoriously unreliable basis for the assessment of chronological age and the conclusion that the Appellant's account was vague was not borne out when his account is properly and fairly assessed.
23. Lastly, the age assessment was completed on 23 March 2016, and the Appellant was not provided with a copy until after 21 July 2017 when it was included in the Respondent's appeal bundle. The Appellant was therefore deprived of an opportunity to challenge the assessment by way of judicial review for over sixteen months.
24. The judge had failed to engage with, or address any of the submissions in the Appellant's skeleton argument in relation to whether the report was Merton compliant and therefore had failed to determine a material issue in the appeal. Ms Brown submitted that the judge was not able to rely on the age assessment report because it was not Merton compliant.

25. In summary the judge had failed to properly apply policy and guidance in giving the Appellant the benefit of the doubt. He had made irrational findings on the Appellant's credibility and he had failed to assess whether the age assessment report was Merton compliant. Had he done so he would have found that it was not Merton compliant and therefore he should not have relied on the date given in that age assessment in relation to the Appellant's age.
26. Ms Pal submitted that there was nothing in the decision to suggest that the judge did not take into account the Appellant's evidence and the age assessment report. It was clear from paragraph 27 that the judge had given the Appellant the benefit of the doubt and his decision was in accordance with policy and guidance on the assessment of claims from minors.
27. In relation to the judge's assessment of credibility, the judge was entitled to accept part of the Appellant's evidence and reject other parts. Ms Pal referred to paragraph 32 and submitted that the judge's finding that the Appellant was an economic migrant coming to the UK, and not a genuine asylum seeker, was supported by his finding that the Appellant had paid a lot of money to come to the UK. The judge had given adequate reasons for accepting part of the Appellant's account even though he rejected the core of the Appellant's claim. The judge took into account the Appellant's failure to claim asylum, having had two previous opportunities to do so and his acceptance that the Appellant had paid \$10,000 to get himself out of Afghanistan was open to him on the evidence.
28. In response, Ms Brown submitted that the judge's findings at paragraph 27 did not really deal with guidance and policy. The only evidence that the Appellant had paid \$10,000 was from the Appellant himself and the judge had found him not to be credible. The judge's findings at paragraph 32 that the Appellant had not claimed asylum in a European country was affected by the judge's misdirection in relation to giving the Appellant the benefit of doubt.

Discussion and Conclusion

29. I shall deal with the grounds of appeal as set out in the written application for permission to appeal, namely:
 - (i) whether the failure to determine whether the age assessment was Merton compliant;
 - (ii) the failure to provide reasons for rejecting evidence;
 - (iii) the failure to apply policy and guidance in relation to the benefit of the doubt;
 - (iv) the irrational conclusion in relation to the Appellant's credibility at paragraph 34.
30. I am not persuaded by Ms Brown's submission that the age assessment was not Merton compliant. It is apparent from reading that assessment and from reading the judge's decision that matters which were adverse to the Appellant were put to him during the age assessment and he was given the opportunity to comment on what was said. Therefore, adverse provisional conclusions were put to the Appellant and he had an

opportunity to deal with them and rectify any misunderstandings. The judge stated at paragraph 21: "The report indicates that the appellant was given the opportunity to comment on the assessor's concerns and provisional views, but his responses did not persuade them to accept his claimed age. The overall conclusion was that he was 16 by the time of the assessment."

31. Further, at paragraph 22, the judge dealt with the Appellant's physical appearance and was well aware of placing too much weight on impressions formed from demeanour or physical appearance. The age assessment report was not deficient in that respect. The age assessors took into account the Appellant's physical appearance as part of the overall assessment and the Appellant's own evidence of his knowledge of his age. Any failure to allow him to comment on his foster carer's observation that he had a full beard when he arrived was not material. The judge took into account the fact that the Appellant was still a child at the date of hearing and was at the date of the age assessment.
32. The matters referred to at paragraph 2 of the grounds of appeal did not establish that the age assessment was not Merton compliant. In any event, the judge took these matters into account and gave adequate reasons, at paragraphs 17 to 25, for why he was relying on the age assessment report. The judge took into account the age assessment and the Appellant's own evidence in coming to his conclusion at paragraph 25 that the Appellant was 15 at the date of the events he described in Afghanistan, 16 at the time of his interviews and 17 at the hearing. The judge's failure to specifically state whether the age assessment was Merton compliant was not material to the overall decision because it is apparent from the judge's findings that he considered this issue.
33. Ms Brown's main point in argument was that the judge failed to give the Appellant the full benefit of the doubt in accordance with policy and guidance set out at paragraphs 9 to 12 above. I am not persuaded by this submission for the following reasons. It is clear from paragraph 27 of the judge's decision that he gave the Appellant the benefit of the doubt and he did not expect the Appellant to be able to give more details of his father's role or to provide corroboration of his father's death. The judge's findings at paragraphs 26 to 33 show that he was assessing the Appellant's evidence in the light of the expert report, the age assessment and the evidence as a whole, and he gave the Appellant the benefit of doubt having recognised that he was a child at the time the events occurred. The judge has not applied a sliding scale or a different level of assessment even though he acknowledged, at paragraph 26, the maturity of a 15 year old compared to that of a 13 year old.
34. The statement that the extent to which as a child he is entitled he is entitled to a greater measure of the benefit of doubt is less for a 15 year old than for a 13 year old was not a material error of law because it is apparent from the subsequent paragraphs of the decision that the judge gave the Appellant the benefit of the doubt and made findings which were favourable to the Appellant at paragraphs 27 and 30. The judge has not cherry picked adverse points on which to reject the Appellant's credibility, but has

assessed the Appellant's evidence and demonstrated the weight he has attached to that evidence, making both adverse and favourable findings. The judge took into account the Appellant's evidence as to his age and gave adequate reasons for why he did not accept it.

35. The reasons given, in relation to the Appellant's journey to the UK, were adequate to support the judge's finding that he accepted that the Appellant paid a large sum of money to come to the UK. There was no lack of reasoning in relation to why the judge did not accept the Appellant's account that his father was killed by the Taliban or that the Taliban attempted to recruit him. The judge found that the Appellant's account was not supported by the expert report and the actions of the Taliban, described by the Appellant, were inconsistent with forced recruitment. The judge gave the Appellant the benefit of the doubt in relation to the chronology and timing of when his father was killed. He clearly took into account all the evidence and assessed it in the round. His conclusions at paragraph 34 were open to him on the evidence before him.
36. Accordingly, I find that the judge was entitled to rely on the age assessment report and any failure to specifically state whether it was Merton complaint was not material. The judge's findings on credibility were open to him on the evidence before him and he gave adequate reasons for why he accepted part of the Appellant's account. The judge was well aware that the Appellant was a child at the time the events occurred and he gave the Appellant the benefit of the doubt in his assessment of credibility, making both adverse and favourable findings in respect of the Appellant's account. There was no error of law in the decision and the judge's findings were consistent with policy and guidance.
37. Accordingly, I find that there was no material error of law in the judge's decision and I dismiss the Appellant's appeal.

Notice of Decision

Appeal 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 her or any member of her 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.

J Frances

Signed

Date: 14 May 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

J Frances

Signed

Date: 14 May 2018

Upper Tribunal Judge Frances