



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09437/2016

THE IMMIGRATION ACTS

Heard at Field House
Heard on 5 September 2018

Decision & Reasons Promulgated
On 17 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MOHAMMADULLAH ZAZAI
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Kirk of Counsel

For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Afghanistan, born on 1 January 2000. He appeals against a decision of Judge of the First-tier Tribunal Davey sitting at Taylor House on 26 July 2017 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 16 August 2016. That decision was to refuse the Appellant's application for international protection and to reject the Appellant's claims in relation to private life and Article 8 of the European Convention on Human Rights. The

Appellant arrived in the United Kingdom on 17 November 2015 and claimed asylum on 25th of March 2016.

The Appellant's Case

2. Before coming to the United Kingdom, the Appellant had lived in a village in Baghlan province north of Kabul in Afghanistan with his father, mother and other family members. On an unspecified date a near neighbour, a married woman called [L] who was about 20 years of age, called the Appellant into her house to help her move something around. [L] demanded that the Appellant should have sexual intercourse with her and threatened him that if he refused to do so she would make trouble for him. Either during those events or after they were over a female cousin of [L] entered the house discovered the Appellant in a state of undress having intercourse with [L] and demanded to know what had been happening.
3. The Appellant escaped, recovered his clothing and dressed notwithstanding the denunciations of the cousin and threats to call relatives who were said to be connected to the Taliban. The Appellant went home and explained matters to his parents. His father reported the matter to the police but they were unable to protect the Appellant who was released from the police station on payment of a bribe and taken directly to Kabul by taxi. He thereafter left the country.

The Decision at First Instance

4. The Judge had a number of concerns about the credibility of the Appellant's claim noting that the centrepiece of the Appellant's claim was addressed by a country expert report from Mr T Foxley dated 3 October 2016. Mr Foxley described the Appellant's claimed account of events as plausible. The Judge commented at [19] "In that sense he [Mr Foxley] was right to do so since it could have happened, but I have to assess the real likelihood of it having happened and the real likelihood of risk associated with it having happened bearing in mind the low standard of proof and the level of evidence that one can reasonably expect from a child. It was not said that the Appellant's recollection of events is mistaken or dimmed because of his age or an inability to recollect the events. On the contrary the clarity with which he has given his evidence and made those statements to his representatives tends to suggest he does ... recollect those claimed events. I do not find myself in the position where there are inconsistencies of any material nature in the account which might be associated with his age."
5. If the events had occurred the Judge found that the Appellant would face a real risk of harm from the Taliban or religious extremists because of the claimed adultery. There was no other evidence other than the Appellant's own account in support of the claim. [L] had been stoned to death, the Appellant knowing this because of something told to him by his father. At [22] the Judge indicated why he rejected the Appellant's claim. The Appellant had never spoken to [L] until the day of the events. He had not been conducting an affair with her and there was no sequence of relations

between the two which might have been a setting for him entering her home. Given the strictness of Sharia law there was something unreliable in the idea that a woman would hail a child and force him in her home to have sexual intercourse with her.

6. At [23] and following the Judge elaborated on his reasons why he found the Appellant's account unacceptable. He described the account as "far-fetched and unlikely even applying the low standard of proof." The claimed fear on return had no basis in fact. The Appellant had family in Afghanistan who would be able to meet him upon return. The Judge did not accept the claim that the Appellant had lost contact with his family. This was an unsupported assertion being used to bolster the claim. The likelihood was that the Appellant's family were still in their village where they lived and much as the Appellant's father had taken a taxi to bring the Appellant to Kabul, he could come to Kabul to collect the Appellant on return. If the Appellant were returned he could be met and collected by family members in Afghanistan. Where there was a family home network to return to the Appellant would not face the risks associated with life in Kabul for a young adult, [26].
7. The evidence that the Appellant had lost contact with an uncle in Italy was not accepted. There was no risk in the home area or risk from the Taliban. There was nothing about the Appellant that caused the Appellant to be picked out. There was no active involvement of the Taliban in the Appellant's life's style or his family's life. The Judge referred to the skeleton argument submitted to him "which at length seeks to parade a number of concerns, primarily driven by the assumption that the Appellant did commit the adulterous act as it would be judged to be and that he has no protection to which he could return". The risk of indiscriminate violence was not one that came into play. The Appellant had been given an account by third person, but that account was of poor quality. The Appellant had pursued the account consistently but that did not establish its reliability. The Judge dismissed the appeal.

The Onward Appeal

8. The Appellant applied for permission to appeal arguing that the Judge had failed to consider submissions made in evidence as to the claimed bases of risk. The Appellant would be at risk from indiscriminate violence as he would be perceived by fighting forces in Baghlan province to be a young male of fighting age. The case had been argued on Article 15 (c) grounds notwithstanding the Judges remark to the contrary.
9. The second ground was that the Judge had erred in assessing the veracity of the Appellant's account. The expert Mr Foxley had explained that the Appellant's account was plausible, but the Judge gave no explanation or reasons for nonetheless finding it to be implausible. The Judge had found numerous aspects of the Appellant's account to be unlikely indicating that he had been assessing the claim on the ordinary civil standard of proof rather than on the lower standard applicable in protection claims. The Judge's assessment of the Appellant's account of what had happened with [L] contravened guidance and authority on the assessment of the evidence of minors. The Judge should have given greater weight to objective

evidence of risk than to the quality of the Appellant's evidence. The Judge had had no regard to a psychotherapist's report explaining the Appellant's mental health problems and vulnerability.

10. The Judge had failed to have regard to the argument that an Afghan child would have extreme difficulty in relaying an account of sexual abuse that occurred when he was aged 15. The assessment that the Appellant had been given an account by a third person had no factual basis. That demonstrated the Judge had failed to comply with the high standards of procedural fairness. The Appellant would be at risk if returned to Kabul because he would arrive there as an unaccompanied child and he would not be met by family members. The Judge had made an unreasoned finding that there would be reception arrangements for the Appellant when the Respondent had accepted that there were none.
11. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Frankish on 22 November 2017. In refusing permission to appeal he noted that the Judge had paid careful attention to the Appellant's vulnerability as a juvenile at [15] and that regard had been had by the Judge to generalised risk at [18] and [19]. The use by the Judge of the word "unlikely" at [23] indicated a conclusion as to the evidence falling far short of the threshold of reasonable likelihood. The correct standard was immediately reiterated thereafter at [25] with reference to the correct case law. The Judge had rejected risk in the home area or from the Taliban or the claimed loss of contact with the family, these being conclusions open to the Judge.
12. The Appellant renewed his application for permission to appeal to the Upper Tribunal on grounds substantially similar to the previous grounds adding that Judge Frankish had not addressed or engaged with the criticisms of the First-tier Tribunal's decision in the previous grounds. The renewed application came before Upper Tribunal Judge Bruce on 8 May 2018. Giving brief reasons for her decision to grant permission to appeal she wrote: "The grounds were drafted before the Upper Tribunal published the decision in **AS (safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC)**; Counsel will need to review his ground (i) in light of that country guidance. I am nevertheless prepared to grant permission in this case dismissed on plausibility grounds, on the basis that ground (ii) is arguable."

The Hearing Before Me

13. In consequence of the grant of permission to appeal the matter came before me to determine in the first place whether there was a material error of law in the determination. If there was then the determination would be set aside and I would give directions for the rehearing of the appeal. If there was no material error of law then the decision of the First-tier would stand.
14. In oral submissions counsel acknowledged that Judge Bruce had invited a review of the first ground of appeal (generalised risk in Afghanistan). The Respondent had accepted that the Appellant would have no family if returned to Kabul and therefore

granted leave to the Appellant as an unaccompanied minor. The Appellant would be at risk regardless of whether his account of being involved with [L] was believed. The argument as to indiscriminate violence had not been considered at all. It had been made in detail and supported by Mr Foxley. The Judge had not considered the risk that the Appellant would be perceived as westernised. The case of AS only arguably applied in relation to the argument put forward regarding westernisation. Paragraph 187 of AS [which I cite at paragraph 35 below] did not shut out the argument because it did not form part of the guidance. It would be open still to accept the argument in a particular case depending on the evidence.

15. The risk to the Appellant was in his home area. An analysis of whether it was reasonable to relocate to Kabul was not carried out. The Appellant would have been entitled to humanitarian protection regardless of what was said in AS. The Judge accepted that the Appellant's account of the incident with [L] was consistent but instead of finding him credible he found that the account was not plausible. The Appellant's account was plausible because events such as that did occur. People were killed as a result of adulterous behaviour. The only way a vulnerable minor could establish the truth was by relaying the account with consistency.
16. I queried with counsel whether the argument that Mr Foxley had said the Appellant's account was plausible related to the detail that [L] had forced herself on the Appellant. Counsel replied that Mr Foxley had said that the overall account was plausible and that examples of adulterous behaviour were frequently reported. It was however not apparent from those examples whether they occurred within a relationship or a one off sexual encounter. Counsel accepted that he should not overly nit-pick when looking at a determination to see if there was a material error of law contained therein but the frequent references to "likelihood" created an ambiguity as to the standard of proof applied by the Judge.
17. Of particular importance was the argument that the Judge had contravened guidance on the assessment of the evidence of minors. The Judge had very scant regard to Mr Foxley's evidence rejecting it without explanation or reasons. The Judge failed to have regard to the Appellant's age. He had paid no regard to the psychotherapist's report. There was no appreciation that it would be difficult for the Appellant to explain his account to a series of strange adults. The Judge had criticised the Appellant's account for not giving sufficient detail.
18. I queried with counsel whether consideration had been given to the commissioning of an expert's report by an appropriate psychologist or other trained person who would have been able to speak to the Appellant about the trauma he claimed to have suffered. This was in the light of the fact that the Appellant had been disbelieved once before in the First-tier by Judge Lingam, as well as subsequently by Judge Davey. It meant he faced having to give his account twice. Counsel (who had appeared for the Appellant throughout, replied that the guidance was very clear. The Appellant could not be expected to provide that level of detail. The Appellant had given a clear context of the way that events had occurred. The only extra detail would

have been the mechanics of the sexual act. The Judge was concerned that the Appellant had been given the account by a third person. Even if disbelieved the Appellant would be at risk upon return to Kabul. The Appellant could not be expected to provide evidence other than that he had attempted to trace his family without success.

19. In response the Presenting Officer stated that the Judge had addressed the risk of indiscriminate violence and found there was no risk from the Taliban in the Appellant's home area. He had rejected the Appellant's claim to be westernised. That finding was buttressed by paragraph 187 of AS which referred to perceived westernisation. The Judge had reminded himself of the relevant guidance on the treatment of evidence from child witnesses and had reminded himself of the lower standard of proof. The references to the unlikelihood of the account did not indicate that he was applying too high a standard, see for example [25] of the determination where the Judge had said that the account was far-fetched even applying the low standard of proof.
20. The Judge's assessment of credibility was in line with authorities. There was a structured approach to that assessment. One of the issues was the inherent implausibility of the account. It could not be believed to have happened. It was unlikely that to directly address Mr Foxley's report would have given a different outcome. The Appellant had never spoken to the lady before and they were not conducting an affair. The Judge was aware that the evidence of a minor should be approached with care see [15].
21. In conclusion counsel argued that it could not be disputed the Judge had failed to consider the risk of violence in the Appellant's home area. The Judge had not referred to the expert evidence. The guidance had to be shown to have been properly applied it was not enough to say that the Judge made reference to it.

Findings

22. There were in essence two challenges to the Appellant's account in this case. The first was that the Appellant's account of committing an adulterous act with a stranger and being found by the stranger's cousin was inherently implausible such that it could not be believed that it had happened and could not therefore be the cause of any risk to the Appellant upon return. If the Appellant could not be believed as to his reasons why he had left Afghanistan, he could not necessarily be believed when he said that he had no family and that there was no one to meet him on return.
23. The second challenge was to the Appellant's contention that whether or not he was believed in his account of the adultery with [L], he would still be at risk upon return as a young adult (he is now 18 but was 17 at the date of hearing) because of general country conditions in Afghanistan and his lack of support network.

24. The Appellant's argument is that in arriving at the Judge's conclusions the Judge failed to apply established guidance on the treatment of the evidence of minors. The Judge was well aware of the Practice Direction on child and vulnerable adults and sensitive witnesses and the Joint Presidential Guidance Note No. 2 of 2010 referring to them at [15]. He also cited two relevant cases on the appropriate weight to be given to the Appellant's status as a child. He referred to Mr Foxley's report acknowledging that Mr Foxley had stated the Appellant's claim of events was plausible. At [25] the Judge noted that because of the Appellant's age the cross-examination did not particularly and assertively question the Appellant's account of what happened.
25. It is an incorrect criticism of this determination to say that the Judge merely paid lip service to the guidance on the treatment of the evidence of those under the age of 18. What the Judge had to do was to consider whether the Appellant's account was such that if believed he would be at risk upon return. The Judge did not believe the account. The description by Mr Foxley that the Appellant's account was plausible did not mean that the account therefore had to be accepted. The Appellant appears to put his argument on the basis that once the country expert indicated that adultery occurred in Afghanistan with serious adverse consequences for those engaged in that activity, his claim that he was involved should be accepted. That was not the function of the expert. It was for the Judge to assess the credibility of the Appellant's account and whether the risk to adulterers applied to this Appellant.
26. That the Appellant's account might have happened did not mean that it had happened as the Judge pointed out. The problem was that the account was inherently implausible. The Judge was entitled to form his own view on plausibility regardless of what the expert Mr Foxley had said. In any event Mr Foxley's remarks were directed more to the prevalence of ill-treatment following allegations of adultery rather than the plausibility of this "far-fetched account", as the Judge put it, of being forced to have sex, that the Appellant was putting forward in this case.
27. The Judge had considerable doubts that an unaccompanied married woman [L] would invite the Appellant into her home on the claimed pretext, let alone force sexual intercourse upon him who was effectively a stranger with no previous relationship or intimation of the desire for sexual activity. Furthermore, the Appellant's account that he could not escape was not believable since it was not said that [L]'s physique was such as to prevent the Appellant leaving the home after the claim discovery.
28. It was for the Judge to assess the account that was being given to him by the Appellant making due allowance for the Appellant's age. The Appellant was not overly cross examined because of his age. The Appellant's description of the incident was very basic and there was barely any real description of the events or how [L] was able to force herself upon the Appellant. The Appellant's response to that criticism made by the Judge is to say that he could not reasonably be expected to give such details. However, the forced nature of the sexual act was the core of the case. It would not have been proper for the Appellant to have been cross examined during the Tribunal hearing about such matters as the Judge fully accepted. Nevertheless, it was

reasonably open to the Appellant's representatives, given that they had instructed a psychotherapist, for the Appellant to be questioned in a sensitive manner by an appropriately qualified person in order to elucidate this part of the account. The issue of the lack of detail went to the core of whether this was a credible account or was or was a fiction. These were matters which were open to the Judge to consider.

29. The Judge was at pains during the course of his determination to emphasise that the standard of proof was the lower standard not the civil standard of the balance of probabilities. I agree with counsel that one should not nit-pick a determination to see whether there is some technical point that can be argued. Nevertheless I regret to say that part at least of the argument put forward by the Appellant in this case is indeed an exercise in nit-picking the determination. I do not accept that there is any validity in the argument that the Judge has applied the wrong standard of proof as Judge Frankish pointed out in refusing permission to appeal. I have referred above to examples where the Judge specifically self-directed on the correct standard of proof, see paragraphs 4 and 6 herein.
30. It is interesting to note that this matter was previously heard by Judge of the First-tier Tribunal Lingam sitting at Taylor House on 10 October 2016. Judge Lingam also rejected the credibility of the Appellant's account and permission to appeal was not granted by the First-tier Tribunal to challenge the adverse credibility assessment. At the error of law stage which followed that earlier grant, Deputy Upper Tribunal Judge Shaerf noted that Judge Lingam may have found the Appellant's account not to be credible but nevertheless still had to consider the Appellant's position on return for example as an unaccompanied minor, that is the generalised risk argument.
31. It is not in my view surprising that the Appellant who continues to assert his claim that he was caught in the act of adultery with a married woman could not be believed about this account. The onward grounds of appeal and submissions are merely a lengthy disagreement with conclusions which were open to Judge Davey. The criticism of the Judge's comment that the Appellant had been given the account by someone else is misplaced. The Judge rejected the Appellant's account. As it was open to him to do that it meant that either the Appellant himself had fabricated the account or that someone else had given him the account. No doubt bearing in mind the Appellant's age at the date the Appellant arrived in the United Kingdom the Judge does not make a criticism of the Appellant that the Appellant thought up the account. It follows from that that someone else gave the Appellant this account. To suggest that there was no evidential basis for the Judge's comment is without foundation.
32. The other argument in this case put forward by the Appellant is that he is nevertheless at risk upon return because of general country conditions. Judge Davey did not consider that the Appellant would be at risk in his home area. He rejected the claim that the Taliban would have any adverse interest in the Appellant and that too was a finding open to the Judge on the evidence. If the Appellant's account that [L]'s family had Taliban connections was disbelieved there was no reason why the Taliban would

have an adverse interest. The argument that the Appellant would be at risk in his home area because he was of an age when he could be recruited was similarly not accepted by the Judge. As Judge Bruce pointed out such an argument should in any event be reviewed in the light of the most recent country guidance case on Afghanistan, AS.

33. The Appellant would be returned to Kabul and the issue would then be whether the Appellant would be safe in Kabul or whether he would be at risk there. The Appellant cannot make out a proper case that he would be at risk in Kabul as the Judge pointed out. The Appellant does not have a profile that would lead him to the adverse attention of either the authorities or the Taliban. Further the Judge found that the Appellant did have family members in Afghanistan whom he could contact. The Appellant would thus not be returned to Afghanistan as a lone male without support.
34. That the Respondent was unable to confirm at the time the Appellant made his claim that there were insufficient grounds for believing reception arrangements existed does not mean that the Judge was therefore bound to find that the Appellant had no family in Afghanistan or any family that could meet him. The two issues were quite separate. The Judge was entitled to form his own view of what awaited the Appellant upon return to Afghanistan. Since the Appellant had shown himself not to be a credible witness the Judge had to consider matters in the round to see whether the Appellant would have some form of support network. The Judge was impressed by the evidence that the Appellant had been driven to Kabul in a taxi arranged by the Appellant's father. The Judge's view was that there was no reason why the father could not make arrangements for the Appellant upon return. That was a conclusion open to the Judge on the evidence.
35. The Appellant's claim to have been westernised in the relatively short time he has been in this country cannot be supported in the light of the country guidance of AS. I found the Appellant's argument put forward by counsel on this point to be somewhat confused. The head note to the case of AS is not the guidance itself. The guidance is contained in the body of the determination, specifically at paragraph 187 where the Upper Tribunal say: "We do not find a person on return to Kabul, or more widely to Afghanistan, to be at risk on the basis of 'Westernisation'. There is simply a lack of any cogent or consistent evidence of incidents of such harm on which it could be concluded that there was a real risk to a person who has spent time in the west being targeted for that reason, either because of appearance, perceived or actual attitudes of such a person." That clearly sets out the position and disposes of the argument of a risk from westernisation, there is not the room for doubt suggested by counsel.
36. It could not be a criticism of the Judge that he failed to mention country guidance which had not been issued at the date he heard the appeal. However, that country guidance has now been issued and it is plain as Judge Bruce strongly hinted that the Appellant's claim of fear upon return to Afghanistan from general conditions in that

country has no foundation. The Appellant could not be believed in his account, he would not be at risk upon return to Kabul as a healthy young man and he had family to support him upon return. The Judge was well aware of the Appellant's age when the Appellant gave his evidence. The report of the expert Mr Foxley only took matters so far. The Judge was quite correct to find that the risk of indiscriminate violence was not one that came into play in the case.

37. As the Judge pointed out at [19] it was not said that the Appellant's recollection of events was mistaken or deemed because of his age or an inability to recollect the events. That was not the Appellant's case in the First-tier. It is difficult to see what further steps the Judge could have taken to ensure access to justice by the Appellant. If it is the argument that because the Appellant was a vulnerable witness therefore he must be believed, that would clearly usurp the function of the Tribunal. The criticism that the Judge paid no heed to the psychiatric evidence is also without foundation. At [30] the Judge specifically considered the Appellant's difficulties here and the need for help.
38. The Judge had to form his own independent view of the evidence based on a holistic assessment of that evidence. This Judge did that and arrived at conclusions which were open to him. For all their length the challenges to the determination are no more than a disagreement with it and an attempt to relitigate the matter. There was no material error of law in the determination and I dismissed the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing. The Appellant who is now an adult and has not been found to be in need of international protection has not given any valid reason why his case should be anonymized

Signed this 7 September 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 7 September 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge