



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/05905/2016

**THE IMMIGRATION ACTS**

**Heard at Birmingham Civil Justice Centre  
On 12 November 2018**

**Decision & Reasons  
Promulgated  
On 15 January 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**Q J  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Howard of Fountain Solicitors

For the Respondent: Ms Aboni, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Hussain promulgated on 12 December 2017 dismissing the protection appeal of the Appellant.
2. The Appellant is a citizen of Afghanistan who further to an age assessment has been accorded the date of birth 1 August 2001. He claims to have left Afghanistan in April 2015 - which, on the basis of the age assessment, would have been at the age of 13 years and 8 months. He travelled from

Afghanistan transiting Europe before arriving in the UK concealed in a lorry on 21 August 2015. He claimed asylum.

3. The Appellant's application for asylum was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 20 May 2016. The Appellant was nonetheless granted discretionary leave to remain pursuant to the Respondent's policy in respect of unaccompanied minor asylum seekers. Be that as it may, he challenged the decision to refuse his claim on protection grounds.
4. The Appellant's appeal to the IAC was heard in the first instance on 24 November 2016 and dismissed for reasons set out in a decision of First-tier Tribunal Judge Butler promulgated on 4 January 2017. However, following challenge the Upper Tribunal - in a decision of Upper Tribunal Judge Bruce promulgated on 3 July 2017 - set aside the decision of Judge Butler and directed that the decision in the appeal be re-made before the First-tier Tribunal. Accordingly the Appellant's appeal was heard again before First-tier Tribunal Judge Hussain on 4 December 2017. Judge Hussain dismissed the Appellant's appeal for reasons set out in his decision promulgated on 12 December 2017.
5. The Appellant claims that his uncle is a member of the Taliban and was planning forcibly to recruit him. It is the Appellant's case that his father had died when he was an infant, and that his mother had thereafter resided with her brother and her brother's wife, that is to say the Appellant's maternal uncle and aunt. The Appellant claims he was not initially aware his uncle was involved in the Taliban; this became apparent to him after his mother had overheard some discussion as to the intention to recruit the Appellant. This precipitated the Appellant's mother and his aunt to make arrangements for him to leave Afghanistan. Jewellery and other valuable items were sold and the services of an agent engaged. It was in such circumstances that the Appellant departed Afghanistan to make his way in due course to the United Kingdom. The Appellant claims to have had no direct contact with his mother since coming to the United Kingdom, but nonetheless fears that if returned he will be at risk from his maternal uncle who will either force him to join the Taliban or kill him if he would seek to defy him.
6. The First-tier Tribunal Judge did not accept the credibility of the Appellant's account in respect of the core element of his claim. Moreover, the Judge considered that the Appellant had family to return to in Afghanistan and so should not be considered as a returning minor with no support.

7. The Appellant again challenged the decision of the First-tier Tribunal by way of an application for permission to appeal to the Upper Tribunal. Permission was granted by First-tier Tribunal Judge Saffer on 9 January 2018. The grant of permission to appeal in material part is in these terms:

*“It is arguable that in finding that the Appellant had deliberately not given the Respondent sufficient information to find his family the Judge materially erred as he was only 13 years and 8 months old when he left Afghanistan. It took him four months to get here and it was not until sometime later (over a year it appears) that he provided the information he knew. This arguable error may have impacted on the rest of the adverse findings. All grounds may be argued although to me this seems the strongest”.*

8. For completeness I note that there are three separate grounds identified in the application for permission to appeal. The first relates to the so-called ‘tracing’ issue which Judge Saffer considered particularly attractive. The second ground of appeal is not relied upon before me by Mr Howard; in my judgment, Mr Howard is sensible not to rely upon that ground as it seems to me that it is entirely misconceived. In the circumstances I say no more about it. The third ground of appeal relates to the circumstances that the Appellant might face as a minor returning to Afghanistan, but as Mr Howard acknowledges, that ground is essentially contingent upon the first ground of appeal. Accordingly, the principal focus of the challenge is in relation to the Judge’s comments and observations and findings with regard to the issue of tracing.
9. In the premises I share the reservation and concern expressed by Upper Tribunal Judge Bruce when considering the challenge to the previous decision in these proceedings. Judge Bruce makes this observation at paragraph 16 of her decision: *“Confusingly the Tribunal also appears to weigh against him the fact that he has not sought to maintain contact with the very uncle whom he claims to fear”*. The question of tracing the Appellant’s family necessarily means seeking to trace either his mother or the uncle with whom he and his mother had resided since the time of the Appellant’s father’s death. That is, in effect, to invite the Appellant to make contact with the very person from whom he claims to fear persecution. In such circumstances it is difficult to see why any failure to make any such contact, or to pursue contact or tracing with any vigour, should result in any adverse inference being drawn as to overall credibility. Be that as it may, that does not appear to have been a point expressly argued before the First-tier Tribunal Judge - notwithstanding it having found its way into the observations of Judge Bruce. Nor is it expressly a point that has been articulated in the grounds of challenge before me. Nonetheless, it is difficult to see that it does not give rise to at least some reservation in respect of the overall approach to this case. Further, given that it was a matter of express comment by the Upper

Tribunal it is difficult to see how this could have been a point to which the First-tier Tribunal Judge was not alert - (cf. '**Robinson** obvious').

10. The First-tier Tribunal Judge made observations on the issue of tracing at paragraphs 12, 27 and 30 of his decision.
11. Paragraph 12 appears under the heading 'Background Facts' - before a direction on the standard of proof, before the section of the Decision headed 'Assessment of Credibility', and before the specific findings in respect of whether or not the Appellant's uncle was involved with the Taliban. It is in these terms:

*"It is relevant to mention at this stage that at the date of the previous hearing, the Appellant had made no attempt to contact his family through the tracing service provided by the Red Cross although he had rectified this by the time of the hearing before me. The Red Cross have not traced his family. I am satisfied that this was because the information that he provided did not enable either the Red Cross or the Secretary of State to trace his family and that the reason for this was because he did not want his family to be found. I base this on the fact that his family is from Kabul district and there is no credible evidence that families from Kabul are being displaced or have been displaced. This means that if the Appellant had provided sufficiently accurate details of his family it would have been possible to trace them. Subject to the findings I make on his asylum claim this gives rise to an adverse inference against him in terms of whether he would be returning as a lone child".*

12. At paragraph 27 under the heading 'Does the appellant have a family to return to?', the Judge says this in part:

*"Given my findings, I draw an adverse inference from the Appellant's failure to contact his family or provide sufficient information for the Red Cross or the Secretary of State to find them to facilitate family reunion."*

13. At paragraph 30 the Judge makes reference to the Appellant's uncle having a telephone.

*"There is evidence that his uncle has a telephone. For the same reasons I have mentioned about his friend's telephone number, I do not find it credible that he will not know of his uncle's number. If he provides this and full details of where the family lived contact can be made with them either through family tracing by the Secretary of State or the Red Cross. They should still be where the Appellant left*

*them as there is no reason for them to have left or been displaced and there is little or no evidence that any harm has befallen them. I do not consider therefore that the Appellant would be returning as an orphan or as a lone child to Afghanistan. He has family who would be there to assist and take care of him”.*

14. It seems to me necessarily paragraph 30 is written in prospective terms, that is to say it suggests that the Appellant could now seek to make contact with his family via his uncle given that the Judge has in fact found that there is no risk from the uncle. It is difficult to see how what is set out at paragraph 30 could provide supporting reasoning for the Judge’s conclusions in respect of the Appellant’s claim to be at risk from his uncle. Accordingly, I do not identify any substantive reasoning in paragraph 30 that supports the Judge’s overall conclusions that are the subject of challenge. In such circumstances it is paragraphs 12 and 27 that require to be considered in more detail.
15. However, it is appropriate to observe at this stage that the positioning of the analysis at paragraphs 12 and 30 of the Judge’s decision indicate that the Judge approached the Appellant’s conduct in respect of ‘tracing’ as a discreet issue from his narrative account of the claimed events in Afghanistan that led to his departure. In my judgement it was inappropriate to separate these matters out and not to treat them as part of an ‘in the round’ evaluation of credibility. (See further below in particular in respect of paragraph 12.)
16. By way of contextual background it is to be noted that the Appellant provided significant personal details at his screening interview. It may be seen from Annex A of the Respondent’s bundle before the First-tier Tribunal that the Appellant provided his full name, his father’s full name, his mother’s full name, the name of the school that he had attended and its address, and the address of the family home where he had lived with his mother, uncle and aunt. Similarly, the Appellant provided such information in the Statement of Evidence Form that appears at Annex C of the Respondent’s bundle, where again he provides his address, the address of his school and the name of his mother and what he believed were her whereabouts. Also see yet further the witness statement at Annex B.
17. Further, at the substantive asylum interview the Appellant answered questions with regard to his address and family, and in response specifically to question 13 *“If possible would you be happy for the Home Office to try to make contact with your mum or aunt in Afghanistan”* the Appellant answered *“Yes”*.

18. Accordingly it appears that the Appellant provided information that might assist in the process of tracing during his formal contacts with the Respondent and indicated a willingness for the Respondent to use whatever resources were available to seek to contact his mother.
19. The Respondent considered these matters in the RFRL under the heading 'Family Tracing' at paragraphs 63 *et seq.* At paragraph 63 the decision maker sets out a table with regard to tracing setting with 'Action' and 'Results' columns. What is clear from the table is that it is not currently, and has not been since a statement issued on 27 November 2012, the policy of the British Embassy in Kabul to undertake tracing of families of unaccompanied asylum seeking children. Otherwise, the Secretary of State's methods of assisting in tracing appear to be: to search the UK immigration databases - this was done with no matches being found; to search overseas databases - similarly done with no matches; to attempt to trace through relatives that might exist in other European countries - it is noted there that no information was submitted that the Appellant had any relatives in any other European countries; and to attempt to make direct contact with family members in the country of return. No contact details have been provided beyond those I have indicated on the face of the screening interview and the Statement of Evidence Form. There were no UK based relatives through whom to make any such enquiries and again, so far as searching or tracing in the field by local facilitators, it was again noted that the Home Office does not currently have any arrangements or contracts in Afghanistan to allow such measures or checks to be taken.
20. At paragraph 64 of the RFRL the steps taken by the Respondent are summarised in these terms:

*"The following steps have been taken in order to obtain sufficient information from you to enable the Secretary of State to endeavour to trace your family: you been asked questions regarding your family in your screening interview, your SEF and your substantive interview."*
21. At paragraph 66 the Respondent notes *"The particular circumstances of the case meant that only cursory steps were available to the Secretary of State to endeavour to trace your family..."*. Nonetheless the Respondent considered such steps were adequate to meet the duty in respect of tracing: see paragraph 67.
22. There is no suggestion in the RFRL that the Appellant did not cooperate or provide adequate information to permit tracing. The ineffectiveness of the steps taken seem for the main part to be a consequence of the Respondent's policy and resources.

23. Nonetheless, at paragraph 68 of the RFRL the Secretary of State's decision-maker commented that it was not accepted as credible that the Appellant and his family were content to allow him to leave Afghanistan without being able to maintain communication with them. Inevitably the credibility or otherwise of such a circumstance is intertwined with the overall credibility of the Appellant's asylum claim. (As much appears to be implicitly recognised at paragraph 66 of the RFRL wherein it is stated that "*The results of the family tracing have been considered in the round with all other evidence available*".)
24. The Secretary of State has not taken issue in the RFRL with the specific information provided by the Appellant but has not followed up that information because of the Home Office's and the British Embassy's limited facilities so to do. Bearing in mind the age of the Appellant at the time of his arrival in the United Kingdom it is perhaps difficult to see what further information it was expected that the Appellant might have provided to the Secretary of State in respect of the whereabouts of his mother, given the Secretary of State's very limited facilities for chasing matters up.
25. Although not articulated by the Respondent, perhaps the most that could be said was that the Appellant did not provide a telephone number for his mother. However, the Appellant stated at interview that his mother and aunt did not have telephones (question 70). The Respondent did not expressly dispute this in the RFRL: the observation at paragraph 68 is not expressly to the effect that telephone contact would have been ensured. I note that the lack of a telephone number for his mother would not have inevitably prevented tracing by other methods had the policy and/or resource considerations been different.
26. As I say, the Respondent does not raise the absence of a telephone number for the Appellant's mother as an adverse issue in respect of tracing. And neither does the First-tier Tribunal Judge. Rather the Judge identifies that there "*is evidence that his uncle has a telephone*". For the reasons already given, it was inappropriate to rely upon the failure to provide a telephone number for his would-be persecutor as an adverse feature in respect of tracing, and thereby also in respect of any 'in the round' assessment of overall credibility.
27. As regards the Appellant's contact with the Red Cross, there was nothing in the supporting evidence on this point and nothing in the Appellant's witness statement. As such, it appears to have been a matter that

emerged during the course of the oral evidence, (albeit it the First-tier Tribunal Judge does not make that adequately clear in the decision).

28. Whilst at paragraph 12 the Judge records that the Red Cross had been contacted and had failed to trace the Appellant's family, he makes no reference to what information the Appellant may or may not have provided to the Red Cross. The Judge does not expressly identify what might be considered inadequate in the information provided, and does not otherwise identify what information the Appellant should reasonably have been expected to provide.
29. It seems to me that in such circumstances it is unclear on what premise the Judge has seen fit to draw an adverse inference. The Judge characterises the information provided to the Red Cross as necessarily having not been "*sufficiently accurate*". It does not seem to be suggested thereby that the Appellant provided deliberately false information upon his arrival in the UK or subsequently, but perhaps that he provided insufficient information. If the Judge had intended to say that the Appellant had provided false information, he does not make that clear. If the Judge did intend to say that the information was insufficient, he has not specified the nature of that insufficiency.
30. More particularly, in context it seems that the Judge's conclusion in respect of the adequacy of the information provided to the Red Cross is founded on the fact that the Red Cross was unsuccessful in its attempts to trace. In my judgement that is inadequate reasoning: the failure of the Red Cross to trace the family cannot be determinatively indicative of a failure to provide adequate information.
31. Moreover, I am greatly troubled by the positioning in the decision of the Judge's observation in respect of tracing through the Red Cross.
32. Of course in an 'in the round' assessment of credibility it is inevitable that a decision-maker will set out matters in a written decision in a linear fashion. However, I do not think that in the particular circumstances of this case that that provides an explanation for the manner in which the Judge has approached this issue. It seems to me clear enough that the Judge has looked at the tracing point as a discreet and distinct matter, and indeed has done so even before he has come onto the overall credibility assessment of the core elements of the Appellant's claim. In my judgement this is manifest from the final sentence at paragraph 12 - "*subject to the findings I make on his asylum claim ...*" The Judge is thereby indicating that he has taken a view as to the support that might be available to the Appellant through his family in Afghanistan, and



subject to anything he might now find in respect of the asylum claim it means he will be able to return to the bosom of his family. I remind myself again that this is the very family that includes the person from whom he claims to fear persecution. I am driven to the conclusion that the Judge did not consider the tracing issue 'in the round' but determined it adversely as a discreet point even before he has got onto the main body of the decision. Accordingly, the Judge commenced considering the substance of the Appellant's claim having already made an adverse assessment on a peripheral matter. That was inappropriate and is sufficient for me to be satisfied that this amounts to a material error of law.

33. So far as the Judge's assessment of the core element of the Appellant's account is concerned, the key paragraph is paragraph 22 of the decision. The Judge's reasoning therein is essentially that the Appellant is not to be believed in his account because his mother and aunt were able to act and operate in their attempts to raise funds and secure the escape of the Appellant in a manner that was inconsistent with the Judge's expectations of how a Taliban member would allow the womenfolk around him to behave. In substance this was to apply a test of plausibility. The Judge has in effect evaluated that if the uncle was a Taliban member it was implausible that the Appellant's mother and aunt would have been able to have the confidence to act as they did, or the freedom to act as they did, and indeed, that it was implausible that they would have been left alone at home whilst the Appellant's uncle disappeared for two or three days at a time; accordingly the fact that they had acted as claimed rendered it implausible that the Appellant's uncle was a Taliban member.
34. Considerable caution is necessary in evaluating credibility on the basis of plausibility, and on the basis of expected behaviours: the unlikely happens; people do not always behave rationally or in accordance with expectations or societal norms. I am not satisfied that the Judge has demonstrated that he exercised due caution in this regard. Indeed, it seems that a similar approach in the decision of Judge Butler in the first appeal attracted the adverse comments and observations of Judge Bruce:

*"The Tribunal appeared to regard the Appellant's mother's decision to send him away to be at odds with the evidence about the position of women in Afghanistan generally. All I say about that is that the Tribunal has arguably here failed to take into account that families and individuals are rarely a monolithic representation of the society from which they come. Just as conservative fathers may wish their daughters to be educated so might a Taliban brother have the decency to respect his sister's wishes. The case put is that the Appellant's mother feared that her brother would cease to do so after she had died. I find nothing incredible in that" (paragraph 17).*

35. In all the circumstances it seems to me that the reasoning of Judge Hussain in respect of the tracing element - and in particular the conclusion that the Appellant must have provided inaccurate or insufficiently accurate details to the Red Cross is established by the fact that the Red Cross were unsuccessful in tracing the family - to be flawed. Moreover, the decision is flawed in its structure in that a credibility conclusion in this regard is made, and put, ahead of the evaluation of the overall credibility of the claim. Further, when focusing upon the core element of the claim the Judge has not applied the appropriate **Karanakaran** standard, but has unduly relied on plausibility and expectation without giving any weight to the possibility that something different may have been the case in the circumstances of this particular family. For all these reasons I find the decision is flawed for material error of law and must be set aside.
36. It was common ground between the representatives before me that because the flawed nature of the decision of the First-tier Tribunal went to the heart of the credibility of the claim, the case should again be remitted to the First-tier Tribunal. I do not seek to go behind that joint position of the parties: as the First-tier Tribunal Judge indicated ultimately this case turns on the credibility of the Appellant's own account (there being no supporting evidence by way of personal documents relied upon) and this requires to be re-assessed with a fresh hearing.
37. Accordingly, the matter is remitted to the First-tier Tribunal for the decision in the appeal to be re-made with all issues at large before any Judge other than Judge Hussain or Judge Butler. Standard directions will suffice.

### **Notice of Decision**

38. The decision of the First-tier Tribunal contained a material error of law and is set aside.
39. The decision in the appeal is to be re-made before the First-tier Tribunal by any Judge other than Judge Hussain or Judge Butler with all issues at large.

### **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.

Signed:

Date: 3 January 2019

**Deputy Upper Tribunal Judge I A Lewis**