



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13643/2017

THE IMMIGRATION ACTS

Heard at: Bradford
On 18th July 2019

Decision & Reasons Promulgated
On 31st July 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MK
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Majid, Legal Justice Solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan whose year of birth is 2001¹. He appeals with permission the decision of the First-tier Tribunal (Judge B Cox) to dismiss his protection and human rights appeal.

¹ At the hearing, the Appellant's 'appropriate adult' a Mr [K], informed the Tribunal that as far as Sheffield Social Services are concerned, the Appellant was born in 2000. The Tribunal file has the Appellant's date

Anonymity Order

2. This case concerns a claim for international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

3. The basis of the Appellant’s protection and human rights claims was that he faced a well-founded fear of persecution in Afghanistan for reasons of his membership of a particular social group (children/young person) and imputed political opinion (refusal to join the Taliban interpreted as political opposition/father being in the Afghan Army).
4. The Respondent had rejected the claim for want of credibility. He had not accepted the Appellant’s account and had given several reasons why.
5. On appeal the First-tier Tribunal had heard oral evidence from the Appellant. The determination records the uncontested country background material showing that the Appellant’s home area of Nangarhar province had, at the relevant time, been under Taliban control. It further records the evidence that persons perceived to be opposed to the Taliban in these areas face human rights abuses including terrorist attack. Against this background the Tribunal found the Appellant’s account to be plausible. The Tribunal noted that the Appellant had been only 14 at the material time so some lack of detail and confusion in his recollection were to be expected. The determination then proceeds to consider, and discount with reasons, the credibility concerns raised in the Respondent’s ‘reasons for refusal’ letter. The Tribunal drew no adverse inference from the fact that the Appellant had not claimed asylum *en route* to the United Kingdom, since he was only a child at the time and under the control of agents at all times. Nor did it attach any weight to the fact that he had claimed to be 14 on arrival whereas social services had assessed him to be 15. So far so good: all of the findings in the determination til this point had been in the Appellant’s favour.

of birth recorded as January 2001. Mr Diwnycz informed me that this is also the date of birth on the Respondent’s file.

6. At paragraph 46 the Tribunal identifies one issue in the evidence that caused it concern. That was the identity of the uncle who had assisted the Appellant and his mother after the Appellant's father had gone missing:

"46. At the outset of the hearing, I intended to clarify one issue that troubled me. The Appellant had stated that his uncle lived in Kabul, but he had also stated that his uncle had come to the house to help find his father, after his father had gone with the Taliban. The Appellant confirmed that they lived some distance from Kabul and I then asked who his mother had called, when his father had not answered his phone and the Appellant stated that she had called his maternal uncle, [AK]. He then mentioned a [LG]. At this point, the Appellant's solicitor offered to help. The Appellant confirmed that [LG] lived in the UK and that [AK] lived in Kabul. The Appellant then stated that his father had two brothers living in the village. He added "they are connected to the Taliban and one of them is disabled, Ismail".

47. The Appellant also reiterated that his mother had phoned [AK] and added "he did not come the same night, but he came later ... after my father's body was found". The Appellant's solicitor noted that the Appellant had previously stated that "my uncle and others tried to find out where my father was" (paragraph 7 of the asylum statement) and asked whether that is right? The Appellant replied I don't remember properly what I said we have an uncle in the village. I am referring to Ismail.

48. However, the Appellant had previously stated in the asylum statement "then my mother called my uncle and he also came to find out where my father was my uncle is called [AK]" (paragraph 6). In my view, the Appellant has clearly stated that the uncle who came to find his father was his maternal uncle which is at odds with the oral evidence. The Appellant's solicitor acknowledged that the Appellant has now given a different account, but noted that the Appellant had previously given a consistent account and that over three years had passed. I appreciate that the Appellant's consistent accounts had been given at closer proximity to the alleged events and that he became upset during his age assessment when providing information about his father.

49. Nevertheless, it is my view that if the Appellant's father had disappeared, then the Appellant ought to have been able to consistently identify the uncle who turned up that night to help find his father, even if he is a minor and a vulnerable witness. In my view it is the type of detail that would remain constant. Especially as the Appellant also stated that that night he learned for the first time from his mother and his uncle that his father had been with the Afghan army. I also do not believe that a child would forget or confuse which uncle had helped when one of them is disabled. In my view, the appellant realised that if his maternal uncle had been in Kabul, as he had originally stated, he would not have been able to get to the home village that night and that is why he changed his account.

50. In any event, the Appellant's failure to give a consistent account of the uncle that helped that my leads me to seriously doubt that the Taliban took the Appellant's father, or had an adverse interest in the Appellant's

father. In turn this leads me to have serious reservations about the Appellant's claim that his father was in the Afghan army".

7. The appeal was thereby dismissed.

Error of Law

8. The Appellant lodged grounds of appeal himself. He said that he had not understood what he was being asked and that the Judge had not asked him any questions. Permission was granted by First-tier Tribunal Judge Scott Baker who considered it arguable that the determination was insufficiently/inadequately reasoned.
9. At a hearing before me in September 2018 the parties were in agreement that the passages I have cited above were insufficiently clear. The Respondent invited me to proceed to a continuance hearing in order to remake the decision myself. The basis of the Respondent's concession was that it is difficult to discern from the Tribunal's reasoning what the discrepancy in the evidence actually was. It would appear that the Appellant had consistently said that the uncle who helped was [AK], his maternal uncle who lives in Kabul. He is said to have "mentioned" [LG], and then to have clarified that this uncle lives in the United Kingdom. He also refers to his father's brother Ismail, a disabled man who lives in the village, but it is far from clear from the evidence recorded that the Appellant at any point asserted that it was this man who came to assist after being called to do so by the Appellant's mother. I have had regard to the 'record of proceedings' and to the typed note very helpfully taken by the judge. The Appellant was asked "which uncle did your mother call when no answer from father" to which he said "maternal uncle - [AK]". There then follows a series of questions about [LG] and Ismail. The Appellant's is recorded as saying "I think I got confused. I did not understand the question. I was being asked for both". Whilst there was certainly some confusion at this point in the evidence, nowhere can I see it asserted that it was anyone other than [AK] who came the family's assistance that night. As Mr Diwnycz for the Respondent very fairly agreed, where all of the other matters in issue were resolved in the Appellant's favour, and having regard to the Appellant's age, it would be appropriate to give the Appellant an opportunity to clarify.
10. I would add this. At paragraph 50 of the determination (set out above) the Tribunal uses a curious formulation that is arguably inconsistent with the appropriate application of the burden and standard of proof. The determination there reads: "the Appellant's failure to give a consistent account of the uncle that helped that night leads me to seriously doubt that the Taliban took the Appellant's father...in turn this leads me to have serious reservations about the Appellant's claim that his father was in the Afghan army". The Tribunal can have serious doubts or reservations that an account is true, but still find that the burden of proof has been discharged to the lower standard of proof.

11. For those reasons the determination of the First-tier Tribunal was set aside.

The Re-Made Decision

12. That initial hearing in September 2018 was adjourned because the Appellant was unrepresented. He asked for some time to find a solicitor and in view of his age I considered it appropriate to do so. It is a matter of some regret that the case did not get re-listed until now. The parties have my apologies for that delay. The time was however well spent, since the Appellant managed to instruct Legal Justice, who in turn instructed Mr Tim Foxley MBE to prepare an expert report. The Respondent accepts that Mr Foxley is qualified to give the opinion that he does, and that his report should be afforded considerable weight.
13. At the outset of the hearing I agreed with the parties that my starting point had to be whether the Appellant would face a real risk of harm in Nangarhar today.
14. Nangarhar is a province in the east of Afghanistan, bordering the Federally Administered Tribal Areas of Pakistan. It had been agreed before the First-tier Tribunal that it was under Taliban control at the time that the Appellant left in early 2015. The area had long association with the Taliban and al-Qaeda, being home to the Haqqani network, 'Tora Bora' mountain complex and an easy staging post for fighters crossing backwards and forward from Pakistan. It was this evidence that led the First-tier Tribunal to find the overall account to be plausible. The report of Mr Foxley indicates that the picture was in fact even more complex. 'Islamic State of Khorasan Province' (ISKP) had by then begun to emerge in Nangarhar as a major fighting force. They used the province to stage strikes into Kabul. There were reports of the ISIS black flag being hoisted in some areas, and their preachers taking over key mosques. They attracted disillusioned Talibs as well as fighters retreating from the Middle East.
15. The strength of ISKP has markedly increased since the Appellant's departure. Today Nangarhar is "strongly contested in a three-way conflict between the government, the Taliban and Islamic State". It suffers from extensive Islamic militant activity. Mr Foxley quotes with approval the assessment of the highly respected Afghanistan Research and Evaluation Unit (AREU):

"Nangarhar - a province that historically has been one of the major entry points for the capture of Kabul - is in complete disarray. It lies in chaos, riven by a process of political fragmentation that has increased in both pace and severity...there seems little to currently bind the province together given the faltering economy, a reduction in aid flows and the continued disassembling of the political alliances that maintained stability...without US military support, and with little direction from Kabul, the Afghan National Defence Security Forces (ANDSF) appear

reluctant to leave the sanctuary of their fortified bases...These centrifugal forces are apparent in the province, as it becomes a setting for multiple armed groups and their activities, which are hostile to the government and each other, including Islami Emirati, Daesh, and Lashkar-e-Islami. A dramatic uptick in levels of violence over the last twenty-four months is evident, in which the rural population has been subject to acts of extreme brutality – even in the context of the country’s three decade long conflict”.

16. At the date that he completed his report, April 2019, Mr Foxley considered civilians in Nangarhar to be at “high risk” of being caught in the middle of the intense three-way fight gripping the province. More generally Mr Foxley points to evidence that in 2018 Afghanistan was the deadliest conflict in the world, with an estimated 41,000 fatalities over the 12 months: I note that at over 112 deaths per day this is more than Syria and Yemen combined. Mr Foxley also expressed some pessimism about whether the “talks about talks” ongoing between the Americans and the Taliban were likely to lead anywhere.
17. Against this background the Respondent accepted that as a young man of fighting age the Appellant had demonstrated that he faced a real risk of harm in Nangarhar today, regardless of whether his ‘historical claim’, or some of it, was true. This was a realistic concession in view of the wholesale acceptance of Mr Foxley’s evidence. Given the heightened hostilities in the province I find it to be reasonably likely that a young man, absent for four years, returning to the area would attract the attention of one or more militant groups, who would target him for recruitment, or possibly regard him with suspicion. At the date of my decision Mr Foxley’s report is already three months old. I note for the sake of completeness that recent media reports have not demonstrated any improvement on the ground. For instance, just a few days before the hearing a story was run confirming that the conflict is ongoing, and that at least one of the parties – the Taliban – are prepared to use children as weapons: on the 12th July a 13 year old Taliban suicide bomber carried out an attack on a wedding, wounding 40 and killing at least 5². As an 18 year old the Appellant would be a prime target for recruitment, which if he refused he would be marked out as an ‘enemy’. I find that the Appellant would today face a real risk of serious harm in his home province for reasons of his (imputed) political opinion.
18. I now must decide whether he could reasonably be expected to relocate to Kabul. I begin by considering the Appellant’s personal characteristics.
19. The Appellant is today a young man who has spent the past four years living in the United Kingdom. He is, as far as the Home Office is concerned, 18 years old. He speaks fluent Pushto and reasonable English. He has demonstrated some level of resilience in that as a young boy he survived a hazardous journey

² See for instance: <https://www.independent.co.uk/news/world/asia/afghanistan-attack-suicide-bomb-child-nangarhar-death-toll-isis-taliban-a9001716.html>

that took him from the village he had not hitherto left, in the boot of a car across the Hindu Kush to the city of Peshawar, and from there by means of various transport across two continents. He spent months fending for himself in the Calais 'jungle'. The flip side of that is that the Appellant has, by his own account, been left deeply traumatised by that experience. The court file contains a number of letters from the Appellant's student mentor/tutor at Sheffield College expressing his concern about the Appellant's high levels of stress. Having had the opportunity to see the Appellant give evidence he struck me as a shy, and quite anxious, teenager.

20. The Appellant told me that he has started learning to be a plumber. He has passed his 'level 1' exams which means that he knows how to cut and join a pipe, and has some rudimentary understanding of systems. He reckoned that he would be able to unblock a sink, but did caution that this was a 'more professional' task that his current level 2 standard would officially permit him to undertake. So far all of his training has been workshop based. He has not actually undertaken any paid employment as a plumber. He is a Sunni Muslim and as such does not run the risk of harm as a member of a minority faith.
21. To those facts I apply the country guidance in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC). Although that decision is now seven years old, it has been expressly endorsed, and marked as continuing country guidance, in both AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC) and AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC). AA in turn endorsed the guidance given in HK and Others (minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan CG [2010] UKUT 378 (IAC). I further had regard to what is said about age in KA (Afghanistan) & Ors v Secretary of State for the Home Department [2012] EWCA Civ 1014, namely that there should be no "bright line" between minority and majority and that a young person who faced a risk the day before his 18th birthday will likely face it the day after. Per Lord Justice Maurice Kay [at §18]:

"Given that the kinds of risk in issue include the forced recruitment or the sexual exploitation of vulnerable young males, persecution is not respectful of birthdays - apparent or assumed age is more important than chronological age".
22. The parties agree that the sum of these authorities, as they relate to the proposed return of a young person is as follows. An individual who does not have male relatives in the city to whom he can turn for support will be vulnerable to risks of indiscriminate violence, sexual violence and trafficking. In respect of the latter that arises from a situation of destitution. Gangs running begging/criminal rackets recruit street children with a promise of shelter and food, and then trap them in a situation of exploitation and violence.
23. This Appellant, although tall, appeared to me to be very obviously a teenager. He has never been to Kabul. If he has no protection there, no family network to

call upon, I am quite satisfied that it would not be reasonable to expect him to try and make a life for himself in Kabul. He would face the risks identified in the authorities: I find it hard to see that his rudimentary plumbing skills and English language ability would make any discernible difference to his situation.

24. The question then arises: would the Appellant actually find himself alone in Kabul?
25. It has been the Appellant's consistent evidence that, as far as he is aware, his maternal uncle [AK] has some kind of job with the government and he is based in Kabul. He said in both his asylum interviews and age assessment that he had told his uncle that he did not want to leave Afghanistan, and that he wanted to stay with him in Kabul, but his uncle had told him that this was not possible and that it was as dangerous there. The Appellant repeated this account before me. He said that he was under the impression that his uncle had a 'sensitive' role but he did not know what it was. He knows that his uncle did get married but it was not to a relative and he did not know the lady. She does not live in the village with his family. It has further been the Appellant's consistent evidence that he last spoke with his family in Afghanistan by phone when he was in the camp in Calais. He had had a mobile telephone when he left Afghanistan with key numbers stored on it but this had been lost when he tried to board a moving lorry. His other possessions, including written numbers, were lost when the French authorities moved in to clear the Jungle and his tent was set on fire. The one number he could recall is now dead- when he tries to call it is like the phone is switched off. He has tried the Red Cross but they have been able to assist him.
26. Taking into account the generally positive credibility findings made by the First-tier Tribunal, the consistency in the Appellant's accounts and my own positive impression of him as a witness, I find, applying the lower standard of proof, that the Appellant has told the truth about his lack of contact with his family, and the fact that he has an uncle whom he calls [AK] and whom he believes to work in Kabul.
27. I have no reason to doubt that [AK] would help the Appellant if he turned up on his doorstep, given the assistance that he has already offered to him. I must however consider the likelihood of the Appellant actually locating [AK]. Kabul has a population of some 4.6 million people. He has no idea where he lives, or where he works. The situation may have changed in the past four years - [AK] may have moved jobs, left Kabul or even Afghanistan. He could be dead for all the Appellant knows. It is not even clear that '[AK]' would be the name that the man is officially known by, given the practice in Pathan families of honorific titles for elder family members. 'Khan' is one such typical honorific, as is 'Gul': I note that the Appellant refers to his other maternal uncle - believed to be in London - as 'Lal Gul', a name that translates as 'red flower'. If the Appellant is correct and [AK] works in a 'sensitive' role it would seem unlikely that his

presence in any given department would be confirmed to a young man from Nangarhar making enquires. Having considered all of that I am satisfied that it is reasonably likely that the Appellant will not be able to find his uncle. It follows that the appeal must be allowed.

Decisions

28. The determination of the First-tier Tribunal is set aside for error of law.
29. The decision in the appeal is remade: the appeal is allowed.
30. There is an order for anonymity.

Upper Tribunal Judge Bruce
21st July 2019