IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08129/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2015	**On 25 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WJ
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Ms J. Isherwood, Home Office Presenting Officer
For the Respondent: Ms. E. Stuart King of Counsel, instructed by JD Spicer Zeb Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Morgan promulgated on 23 June 2015 in which he allowed WJ's appeal against the Secretary of State's decision to refuse to grant asylum.

2. For the purposes of this decision I shall refer to the Secretary of State as the Respondent and to WJ as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

> "The application properly raises concerns that the IJ had not properly conducted the hearing, whereby he failed to avail himself of the complete arguments presented by the Appellant and the Respondent but short circuited the process to conclude the issues of credibility, well-founded fear of persecution, returnabilty (sic) and proportionality of the decision on the results of the age assessment alone. The Secretary of State was precluded from presenting her case, which was unfair and a significant procedural error."

4. I heard submissions from both representatives following which I reserved my decision.

Submissions

5. Ms Isherwood submitted that the decision involved the making of a material error of law. I was referred to paragraph [9] of the decision. Points had been raised by the Respondent in the reasons for refusal letter. With reference to paragraph [24] of decision, neither representative had had a chance to address the points made. Discrepancies were referred to in paragraph [24]. With reference to the Rule 24 response this did not address the conduct of the hearing.

6. Ms Stuart King relied on the Rule 24 response. Given that the challenge was to the decision made under the case management powers, the Respondent had to identify where she had been put to an actual disadvantage as a result of the case management decision, or to demonstrate that an apparent disadvantage was so clear that justice could not be said to have been done [7]. The Respondent complained that she was prevented from cross-examining the Appellant but the Respondent would only have been able to cross-examine the Appellant if he had been called to give evidence [9]. It was not pleaded in the grounds that the judge reached conclusions not properly open to him or which were inadequately reasoned [13].

7. Regardless of the Appellant's claim, the judge found him to be entitled to refugee status as a result of his age and on the basis of the evidence from the Red Cross that he would be returning to Afghanistan as an unaccompanied minor, see paragraph [28] of the decision, [13]. It was submitted that his findings on risks to children in Afghanistan were not flawed particularly given the fact that he had regard to LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005 and AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC).

8. At the hearing she further submitted that the Respondent had not argued that the judge had not been entitled to reach the findings that he did, but that she wanted an opportunity to cross-examine the Appellant. She submitted that there would be an error of law had the Secretary of State been prohibited from cross-examining the Appellant. However it was not an error of law for the Secretary of State to have been deprived of this as

no request had been made for the Appellant to be produced. From the evidence provided it did not appear that any request had been made. She submitted that this was a procedural case management decision by the judge. On the evidence before him, the judge had reached findings which were open to him. There was no dispute that the findings about the Appellant's age were unsustainable.

9. She submitted that, in consideration of his protection claim, the Appellant was still a minor and would be returned as a lone minor. The documentary evidence from the Red Cross showed that they had failed to find the Appellant's family. He had a protection claim solely on that basis and there had been no challenge to that conclusion.

10. Paragraph [24] of the decision referred to the Appellant's fear of Hizb-E-Islami and the authorities. This paragraph acknowledged the Respondent's challenges to his credibility but found that given his age, and applying the required standard, his account was broadly consistent. No challenge had been made to this finding. The letter from the Red Cross dated 30 March 2015 had been before the First-tier Tribunal.

11. It was submitted that the appeal against the decision was based on speculation that something else might have come out in cross-examination. There was no material error of law. The complaint in the grounds was that it was an unusual way to approach case management, but the grounds failed to identify a material error of law caused by that approach. The Respondent had not demonstrated how the findings of fact made by the judge had been affected. The judge had been entitled to make the decision that he did on the evidence before him. He explained why he had approached the case in the way that he did.

12. In response Ms Isherwood submitted that there had been a procedural error and therefore the findings could not stand. She submitted that the Red Cross continue to search for the Appellant's family. The Respondent did not accept that he was an unaccompanied minor as acknowledged in paragraph [16] of the decision. She stated that age was the starting point but was not the end of the road given that the asylum claim had not been believed.

13. She submitted that the Appellant did not fall under the criteria in LQ and AA in the way stated because the Respondent had not been able to put her case. This affected the findings in paragraph [28] of the decision.

14. Ms Stuart King responded that, even if the judge had erred in not allowing submissions on LQ and AA, the Respondent had not identified how this was a material error of law. She had not identified why the judge had not been entitled to make the findings that he did.

Error of law

15. I have carefully considered the grounds and the decision. At paragraph [9] it states:

> "The representatives both accepted at the start of the hearing that the first matter to be determined was the Appellant's age. If the Appellant was still a minor, as he maintains, both representatives accepted that the position taken by the Respondent in the reasons for refusal letter would be largely unsustainable. This was mainly because the refusal letter is predicated on the Appellant being returned to Afghanistan as an adult."

16. At paragraph [16] the decision states that the Respondent accepted that the Appellant was an unaccompanied minor on his arrival in the United Kingdom. "However the Respondent did not accept that the Appellant was still an unaccompanied minor. The Respondent submitted that as a 19 year old male, with no medical conditions, he would have little trouble relocating to Kabul."

17. Later in the same paragraph it states that the Respondent's representative "helpfully confirmed in submissions that the Respondent's position was that the Appellant would be returned as an adult. She did not seek to persuade me that if the Appellant was still a minor that he would not continue to fall within the Respondent's policy on unaccompanied minors and would not be at risk by virtue of his age".

18. The judge then went on to analyse the age assessment reports. In paragraph [23] he finds that applying the lower standard, the Appellant has made out his age and is a minor.

19. Paragraph [24] states:

> "It was not suggested that if the Appellant was the age maintained that many of the Respondent's challenges to his credibility and his asylum claim fell away. I find for the sake of completeness however that given his age and applying the lower standard I find that although his account was not without any discrepancy it was nevertheless broadly consistent not only within itself but also with the country evidence. In light of this I find that the Appellant's family did flee their home area following attack because of the family's involvement with Hizb-E-Islami and that they remained in hiding in Jalalabad. I find that the Appellant has a subjective fear of both Hizb-E-Islami and the authorities in his home area and that this is well founded given the killing and kidnap of his uncles and the disappearance of his father and brother."

20. The judge found that the Appellant was a minor. In paragraph [24] he acknowledges that there were some discrepancies in his account but finds that the account was "broadly consistent" both internally and with the background evidence. In the light of this finding the judge finds that the Appellant has a well-founded fear both of Hizb-E-Islami and of the authorities.

21. The judge then finds that the Appellant falls within the at risk categories identified in recent country guidance [25]. He finds that the Appellant is an unaccompanied minor [26], and finds that given that he would be

returned as an unaccompanied minor to Kabul where it was accepted that the reception facilities were inadequate, he would be entitled to refugee status.

22. I find that the judge heard submissions on and took into account the reports as to the Appellant's age. The Appellant did not give evidence and was not cross-examined. The Respondent now submits that the failure to allow cross-examination is a procedural error of law which has disadvantaged the Respondent. In the grounds it states that the judge took the wrong approach "since it presupposes that nothing would emerge from cross-examination which would cause him to take a different view".

23. However, the Respondent has not disputed the judge's findings as to the Appellant's age. The judge clearly finds that the Appellant is the age he claims to be and is still a minor. The judge has also found that the Appellant would be unaccompanied on return to Afghanistan. At paragraph [16] of the decision it is noted that the Respondent's representative did not seek to persuade the judge that if the Appellant was still a minor he would not fall within the Respondent's policy on unaccompanied minors.

24. I have considered the evidence which was before the First-tier Tribunal from the Red Cross including the most recent letter which was dated 30 March 2015. This states:

> "We refer to your enquiry of 24 July 2014 and very much regret that enquiries for the sought person and your accompanying relatives have been unsuccessful."

Later in the letter it states:

> "The ICRC were able to speak to Imam Azim, who informed them that the entire enquirer's family moved from the village to an unknown destination some years ago, and he does not have any news of them."

25. The Appellant's bundle contains various letters from the Red Cross including letters arranging appointments for the Appellant as early as October 2013. In the reasons for refusal letter at paragraph 34 the Respondent stated that the Appellant had not provided any evidence to suggest he had made attempts to trace his family via the Red Cross. It is clear from the evidence before the First-tier Tribunal that the Appellant had been in contact with the Red Cross who had been attempting to trace his family. The most recent letter indicated that the Red Cross had not been able to locate any of his family. Given this, the judge's finding that the Appellant would be unaccompanied on return to Afghanistan is a finding which was open to him. Additionally the judge had found, given the Appellant's age and applying the lower standard, that the Appellant's account was broadly consistent and therefore accepted that the Appellant's family had fled their home area following attack because of their involvement with Hizb-E-Islami.

26. Given that the judge found that the Appellant was a minor who would be returning unaccompanied to Afghanistan, a finding for which he gave reasons and, given the evidence before him from the Red Cross, was a finding he was entitled to make, how the Respondent has been disadvantaged by her failure to be able to cross-examine the Appellant is not apparent. The judge is clear that, even if he had not been able to accept that the Appellant's family had been targeted by the authorities, which he finds in paragraph [24], that he would have found he would be entitled to refugee status because of his age and the fact that he would be an unaccompanied minor [28]. It was acknowledged in paragraph [16] that it was not argued on behalf of the Respondent that if the Appellant was still a minor he would not fall within the Respondent's policy on unaccompanied minors.

27. Although the Respondent has identified what she claims to be a procedural error in the conduct of the hearing, she has failed to demonstrate that this is a material error given the findings of the judge who found that the Appellant would be at risk on return to Afghanistan due to being an unaccompanied minor. There has been no challenge in the grounds to the finding that an unaccompanied minor returning to Afghanistan would be at risk on return.

Notice of Decision

The decision does not involve the making of an error on a point of law and I do not set it aside. The decision of the First-tier Tribunal stands.

Signed Date 21 November 2015

Deputy Upper Tribunal Judge Chamberlain