Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00270/2014

THE IMMIGRATION ACTS

Heard at Birmingham Centre City Tower	**Determination Promulgated**
On 22 October 2015	**On 04 January 2016**

Before

UPPER TRIBUNAL JUDGE PITT

Between

NK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bedford, instructed by Sultan Lloyd Solictors
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This appeal is against the decision dated 16 September 2014 of First-tier Tribunal Judge Pirotta which refused the appellant's asylum and human rights appeal.

3. The appellant is a national of Afghanistan. He was born in 1994.

Background

4. In order to address the grounds of appeal, it is necessary to set out the somewhat complicated details of previous litigation of this matter. Unless I have specifically indicated otherwise, the references in brackets below are to the page numbers in the appellant's admirably well-prepared bundle submitted under a cover letter dated 18 September 2015.

First Decision

5. The appellant claimed asylum on 23 November 2010 after entering the UK illegally.

6. A decision refusing his asylum claim was made on 3 March 2011 (page 5 of the respondent's bundle submitted on 17 September 2015 (RB)). The decision was accompanied by a reasons for refusal letter (RFL) dated 22 February 2011 (643-676).

7. In another letter also dated 3 March 2011, the appellant was granted discretionary leave to remain (DLR) on the basis of his age (3-4 RB). This letter and those referred to in the previous paragraph stated that the respondent's view was that he was born on 1 January 1994.

8. The appellant was also issued with an Immigration Status Document (ISD) showing a grant of DLR from 21 February 2011 to 1 July 2011 (6-7 RB). That period of leave is consistent with the respondent's view that the appellant was born on 1 January 1994, granting him DLR until 6 months before his 18th birthday.

9. The ISD, however, stated his age to be both 1 January 2011 (7 RB) and 8 October 1994 (6 RB), however. This would appear to be because, contrary to the indications above, the Social Services age assessment, not disputed by the respondent, had found the appellant to have been born on 8 October 1994. Somehow, the 8 October 1994 date of birth made it onto the ISD when it had not been included in the other documents issued in March 2011.

10. The calculation of DLR based on the incorrect 1 January 1994 was important for the appellant as it meant that he had been granted leave for only 7 months and no "asylum upgrade" right of appeal arose under s.83 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

11. Following the grant of DLR and issuing of the ISD, the appellant's legal representatives wrote to the respondent pointing out the error as to the date of birth and calculation of DLR. The respondent accepted that the correct date of birth was 8 October 1994 and that this also meant that the grant of DLR had been calculated incorrectly. On 7 July 2011, therefore, the respondent issued another ISD showing a grant of DLR from 21 February 2011 to 8 April 2012 (765-767).

Second Decision

12. After further prompting from the appellant's legal representatives, the respondent also accepted that as the grant of DLR was now over 12 months, it attracted a right of appeal on "asylum upgrade" grounds under s.83 of the 2002 Act.

13. On 1 September 2011, therefore, the respondent issued a second immigration decision refusing asylum as of 21 February 2011, confirming the grant of DLR until 8 April 2012 and indicating that a right of appeal arose (775-779).

14. The appellant exercised that right of appeal. In a determination promulgated on 31 October 2011 (807-813) First-tier Tribunal Judge Graham made no findings of fact on the appellant's asylum claim or disputed age, however. Instead, she remitted the matter to the respondent to make a new decision in line with the "best interests" duty under s.55 of the UK Borders, Citizenship and Immigration Act 2009.

15. The appellant appealed to the Upper Tribunal maintaining that remittal to the respondent on the basis of that the decision was not in accordance with the law was not within the Tribunal's jurisdiction on an "asylum upgrade" appeal under s.83. The appellant was granted permission to appeal by Upper Tribunal Judge Spencer (848-849) on 19 December 2011.

Third Decision

16. It was at this point, even though the appeal against Judge Graham's decision to remit the appeal was outstanding before the Upper Tribunal, that on 4 January 2012 the respondent issued another immigration decision (857-859), again refusing the appellant's asylum claim. A supplementary RFL dated 3 January 2012 (853-855) issued at the same time purports to comply with the s.55 duty so this third immigration decision appears to have been issued in order to comply with the terms of the remittal of Judge Graham.

17. The immigration decision of 4 January 2012 also indicated that the asylum claim was refused as of 21 February 2011 but confirmed that DLR was granted. A further ISD confirmed the grant of DLR from 21 February 2011 to 8 April 2012 (861).

18. The issuing of this third immigration decision led to the litigation proceeding in two directions. As above, the appellant already had an outstanding appeal arising from the second immigration decision and was awaiting an error of law decision from the Upper Tribunal on whether Judge Graham had jurisdiction to remit to the respondent.

19. The appellant, faced with a further refusal, also lodged an appeal against the third immigration decision of 4 January 2012. That appeal appears to have been accepted by the First-tier Tribunal. So the appellant then also had an appeal in the First-tier Tribunal against the third decision.

20. The decision of 4 January 2012 was sent to the Upper Tribunal as well as to the appellant. Even though permission to appeal had clearly been applied for and granted to the appellant (848-849), the 4 January 2012 letter appears to have led the Upper Tribunal to conclude that it was the respondent who had challenged Judge Graham and that new immigration decision was a concession by the respondent that she no longer opposed First-tier Tribunal Judge Graham's remittal decision as she had acted upon it.

21. A direction (891-895) was sent out by the Upper Tribunal on 25 January 2012 stating, incorrectly, that the Secretary of State was the appellant and that NK was the respondent. It went on to indicate that as the immigration decision of 4 January 2012 gave effect to the terms of remittal decision of Judge Graham, unless one of the parties objected, the appeal to the Upper Tribunal would be dismissed and the decision of First-Tier Tribunal Judge Graham upheld. Any objection was to be made by 10 February 2012.

22. The appellant, quite rightly, and in clear terms, did object (897). Another error occurred, however, as the objection was not put before Upper Tribunal Judge Spencer by the deadline of 10 February 2012. So, following on from the proposal in his direction, Upper Tribunal Judge Spencer dismissed the appeal against Judge Graham's decision in a determination dated 13 February 2012 (909-913).

23. The appellant finally managed to get matters back onto a proper footing by sending a further letter on 17 February 2012 pointing out that the Upper Tribunal judge had proceeded on a mistaken basis (915). That letter was put before Upper Tribunal Judge Spencer who proposed in a direction dated 21 March 2012 (921-925) that his decision of 13 February 2012 should be set aside.

24. In a decision dated 4 May 2012 (929-935) Upper Tribunal Judge Spencer proceeded to set aside his decision of 13 February 2012. That left the appellant's appeal to the Upper Tribunal against Judge Graham's decision as it had been prior to the respondent's third decision of 4 January 2012, awaiting an error of law decision.

25. The respondent wrote on 29 May 2012 to the Upper Tribunal (939) indicating that she did not oppose the appellant's challenge to the decision of Judge

Graham and was content for the matter to be remitted to the First-tier Tribunal for the asylum appeal to be heard again, substantively.

26. The respondent was by then also astute to the anomaly of having issued the third decision letter of 4 January 2012. In her letter dated 29 May 2012 the respondent also indicated that the third immigration decision dated 4 January 2012, issued incorrectly in response to the remittal by Judge Graham, was withdrawn. I mention only in passing that the appellant's First-tier Tribunal appeal against that decision appears to have fallen away somehow, as it should have done, but I could not ascertain quite how that happened from the documents before me.

27. The respondent's letter of 29 May 2012 specifically referred to ongoing reliance on the RFL of 22 February 2011 together with the supplementary RFL dated 3 January 2012. I flag that up here as the question of whether the appellant had proper knowledge of the reasons given in the 22 February 2011 RFL at the time of the decision under challenge before me formed one aspect of the grounds of appeal.

28. The result of the respondent's 29 May 2012 letter was that as she did not object to the appeal against the decision of Judge Graham and there was consent to the appeal being remade by the First-tier Tribunal, the appeal was remitted and listed for hearing in the First-tier Tribunal on 21 September 2012 (953).

29. That left matters with appellant maintaining an appeal to the First-tier Tribunal against the second immigration decision of 1 September 2011 and the respondent's case being as set out in the RFLs dated 22 February 2011 and 3 January 2012.

30. That state of affairs did not last for long. On 20 September 2012, the day before the case was listed for hearing, the respondent wrote to the First-tier Tribunal (957). The letter stated that it was intended to withdraw "the immigration decision".

31. I set out the letter of 20 September 2012 in full as it is relevant to the first ground of challenge before me. It stated (including the original emphasis):

> "A substantive appeal hearing is due to take place at Sheldon Court on 21 September in respect of the above-named appellant.
>
> In light of the findings made in the recently promulgated case of **KA (Afghanistan) & Ors v Secretary of State for the Home Department [2012] EWCA Civ 1014** the Respondent has decided to withdraw the original immigration decision on this case. We will arrange for the claim to be reconsidered and for a new decision to be made in the near future.
>
> **I would therefore respectfully ask that the substantive hearing listed for 21 September 2012 be vacated**.
>
> I have also sent a fax to the representatives today to inform them of this decision.

> I apologise for the late notification of this withdrawal. If you have any questions about this please let me know."

32. The First Tribunal accepted the 20 September 2012 letter as notice of withdrawal of the second immigration decision issued on 1 September 2011. That must be so as that was the only extant decision which generated a right of appeal over which the Tribunal had any jurisdiction.

33. The respondent accepted in the 20 September 2012 letter that it remained for her to make a new decision on the appellant's asylum claim made on 23 November 2010.

34. It is difficult not to have sympathy for the appellant in light of what must have been the somewhat dizzying and dispiriting progress of his asylum claim and appeal. That is additionally so as he was still, as of September 2012, even on the respondent's assessment of his age, a minor.

The Fourth Decision

35. Meanwhile, a very attentive reader will have noted that by the time that the respondent withdrew her asylum refusal decision on 20 September 2012, the DLR granted from 21 February 2011 to 8 April 2012 (see 11] above) had come to an end.

36. Given the matters set out above, it did not seem to me that much, if any, criticism could attract to the appellant or his legal advisers for not seeking to extend in time. The appellant can be presumed to have had section 3C "roll over" leave until 20 September 2012 and the representatives did not take long to pick up on the lapse of his DLR, raising this with the respondent in a letter of 22 November 2012 (959-1055).

37. The letter of 22 November 2012 (959-1055) set out an application for leave to remain on asylum, humanitarian protection and human rights grounds "further to his grant of Discretionary Leave to Remain which has expired". The respondent queried this in further correspondence (1057), making a reference, albeit in somewhat confused terms, to the earlier appeal having been withdrawn leaving a decision on the November 2010 asylum claim outstanding. In a letter dated 21 February 2013 (1063) the appellant continued to maintain that he wished to protect his legal position by making an application for an extension of his DLR.

38. The respondent responded in a letter dated 14 March 2013 (1065), stating:

> "I will register your client's HPDL application. Your client will receive a decision in due course which will consider his application, taking into account any information provided with his HPDL form, as well as the reasons for the appeal being withdrawn. I cannot provide a timescale for the decision."

39. A fourth immigration decision was eventually issued 9 months later on 23 December 2013.

40. The decision is headed "REFUSAL TO VARY LEAVE TO ENTER OR REMAIN AND DECISION TO REMOVE" and goes on to refer to a "DECISION TO REFUSE TO REMAIN (sic)" (1095). The cover letter (1071) refers to a "DETERMINATION OF APPLICATION FOR FURTHER LEAVE" and (1095-1099).

41. The decision indicates the respondent did not accept that the appellant had made out an asylum, humanitarian protection or human rights claim. The accompanying RFL dated 23 December 2013 states at paragraph 1 that "On 22 November 2012 you made an application for further leave to remain in the United Kingdom" and "The purpose of this review of your case is to determine whether you qualify for further leave to remain".

42. The appellant exercised his right of appeal against the decision of 23 December 2013. It was dismissed by First-tier Tribunal Freer in a decision dated 15 February 2014. That decision was set aside for error of law by Deputy Upper Tribunal Judge Juss in a determination promulgated on 10 June 2014. Fortunately, there was agreement that the substance of those decisions does not relate directly to the challenge before me, and I do not need to go into them further here.

43. Deputy Upper Tribunal Judge Juss remitted the appeal to be re-made by First-tier Tribunal. It was heard by Judge Pirotta on 10 September 2014. It is the challenge to her determination dated 16 September 2014 that is before me.

Error of Law Decision

44. The grounds of appeal before me are dated 26 September 2014. They argue in the body of the first paragraph on the first page that First-tier Tribunal Judge Pirotta erred in failing to take into account that the appellant:

> "... has been denied a determination of his initial asylum application. What is more, A has been denied an effective remedy within the meaning of article 39 of Direction 2005/85, namely an independent decision by the Tribunal with compulsory jurisdiction over the merits of his asylum application of 23 November 2010."

45. I accept that in her letter dated 20 September 2012 the respondent withdrew a decision on the appellant's asylum claim made on 23 November 2010.

46. The wording of the immigration decision and RFL dated 23 December 2013 set out at [40] and [41] above refers only to a decision on the application to vary or extend leave. It does not, superficially, appear to be a decision on the asylum claim made in November 2010.

47. It remains the case that I did not find this ground to be made out. Notwithstanding the complicated history and wording of the documents issued by the respondent on 23 December 2013, the reason for this is relatively simple.

48. The appellant's application for further leave to remain dated 22 November 2012 (959-977) stated on the second page under the heading "Asylum Claim":

> "Our client continues to fear persecution in Afghanistan for the reasons he has already given in his initial asylum claim."

Nothing in the further leave to remain application suggests that a claim on any other basis was being or had been made. The applicant was relying on the same asylum claim in the 2010 and 2012 applications.

49. In my judgement, the immigration decision dated 23 December 2013 refuses that asylum claim. It refuses the asylum claim made on 22 November 2012 in terms. It was the appellant's case that the asylum claim made on 22 November 2012 was the same as that made in November 2010. The decision and RFL of 23 December 2013 therefore acted, certainly in substance, as a refusal of the appellant's asylum claim.

50. A purist might argue that an immigration decision worded as a refusal of leave rather than a refusal of a variation or extension of leave was required in order to address the claim made in November 2010. Even if that point were accepted, it is not material here as it unarguable that the appellant has had access to "an effective remedy" against the refusal of his substantive asylum claim made in November 2010. The proceedings before me are a part of that remedy, an appeal on the merits to the Immigration and Asylum Chamber.

51. Paragraphs 1 and 2 of the grounds state:

> "1. erroneously, the learned Judge permitted [the respondent] to rely on the reasons for refusal letter of 22 February 2011 to maintain [the respondent's] assessment of [the appellant's] age when the same had been withdrawn, which was unfair because [the appellant] relied on the otherwise unchallenged age assessments of Dr Birch, which he would have supported with a further independent assessment of his age if the same had been challenged;
>
> 2. the point is material also because the learned Judge relied on the material in the refusal letter of 22 February 2011 and the Social services age assessments to make an adverse credibility finding against [the appellant] at §43 to 50 of her determination"

52. As I understood it, the argument here starts with the premise that if the first, second and third immigration decisions were superseded or withdrawn, then the accompanying RFLs also fell away and neither the respondent nor the First-tier Tribunal were entitled to take any points from those RFLs in this appeal which arose from an entirely different decision.

53. I did not accept that argument. The 22 February 2011 RFL was referred to in terms at paragraph 11 of the RFL dated 23 December 2013 and was included in the materials relied upon by the respondent in her appeal bundle. The respondent clearly intended to rely upon it, the appellant knew that. The First-tier Tribunal would have been remiss if it had not taken it into account.

54. In addition, the appellant's age assessment report from Dr Birch and the Social Services assessments were also included in the material relied upon by the respondent in the appeal before the First-tier Tribunal. The appellant also knew that those documents were live as well, therefore.

55. If more were needed, the appellant addressed these points made against him in the 22 February 2011 RFL in his witness statement dated (309-327) prepared for his appeal in the First-tier Tribunal against the decision dated 23 December 2013 and before Judge Pirotta.

56. The appellant points out, correctly, in my view, in the witness statement at [3] that the RFL dated 23 December 2011 was lacking by way of reasoning but accepts that:

> "The only thing that I can do is provide the Court with the responses that I made to the original asylum claim, which I assume that the SSHD continues to rely upon in refusing me leave to remain in the UK. Although the decision has been withdrawn by the Home Office I have no other explanation as to why my asylum claim has been refused."

57. He then goes on to address expressly the respondent's case as set out in the 22 February 2011 RFL If that was how the appellant approached the case before the First-tier Tribunal, Judge Pirotta was entitled to proceed on the same basis.

58. As above, there are certainly shortcomings in the reasoning of the 23 December 2013 RFL. At paragraphs 13 and 20-24, the RFL of 23 December seriously misstates the history of the case, suggesting that the Tribunal had made substantive adverse findings in the previous appeal when none were ever made and there remained no substantive Tribunal decision at all where the appeal was withdrawn on 20 September 2012. At paragraph 22 there is an inaccurate citation of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 and wholly inaccurate and misleading purported quotation from [39] of that case, not relevant in any event where there were no previous substantive findings to act as a starting point in this appeal.

59. Notwithstanding those matters, it is not arguable that the letter of 23 December 2013 gave the appellant any expectation that his claimed age or asylum claim were accepted. It clearly indicated that they were not even if the reasoning was defective. His witness statement shows that he prepared for the appeal on the basis that his claim was not accepted and that he was aware of the respondent's view as to why that was so.

60. It is therefore my conclusion that First-tier Tribunal Judge Pirotta was entitled to take the respondent's case to be that set out in the RFLs dated 22 February 2011 and 23 December 2013. That was how the appellant had approached the appeal. She was equally entitled to rely on the age assessment documents, not, in fact, commented on in the RFLs but clearly in evidence and relied upon by the parties who had good notice of the other side's case.

61. Paragraphs 7 and 8 of the grounds are somewhat similar, arguing that Judge Pirotta erred in failing to find material detriment where the appellant did not have an appeal at the time that he was a minor and the asylum system had operated against him unfairly.

62. The history of the appellant's asylum claim does not make happy reading as I indicate at [34] above but this is not sufficient to support the assertion of material detriment in the grounds. Why would the appellant have been in a materially better position if his appeal had proceeded whilst he was a minor? Setting aside the errors on the part of those responsible for progressing his claim, there is no right to a decision and an appeal whilst an appellant remains a minor. It is commonplace for a claim by a minor to proceed to appeal only after the individual has attained majority. The material before me doe not show that the appellant can benefit substantively either in his protection claim or his Article 8 ECHR claim from the maladministration detailed above. The grounds, therefore, do not show error in Judge Pirotta's approach at [51] and [64] or in her Article 8 ECHR assessment

63. The ground at paragraph 3 maintains that the First-tier Tribunal made a material error of fact in recording at [52]–[57] that the appellant had failed to provide tracing information to the Red Cross for a maternal uncle in Afghanistan.

64. Judge Pirotta records at [52] that

> "He did not advise the Red Cross that he had maternal uncles in Afghanistan, much less any paternal uncles. He said in evidence that he did not want them to be found as he was only interested in meeting up with his brother."

65. At [53] she records:

> "The Appellant agreed he deliberately chose not to reveal that he had relatives in Afghanistan, because he did not want to be returned there."

66. If this ground is arguing that the appellant did not say these things but said, as in the grounds, that he gave information to the Red Cross about his uncles but was only concerned to trace his brother, it cannot succeed where it fails to provide any kind of record of proceedings showing the supposedly correct version of his evidence. No request was made for Judge Pirotta's record of proceedings in order to support this ground. There is no statement from the appellant clarifying what he said.

67. Further, the statements of the appellant recorded by Judge Pirotta bat [52] and [53] are consistent with a Red Cross letter dated 3 January 2014 (1101) referred only to the appellant making a tracing enquiry for his brother. They are consistent with the information in the appellant's family tracing questionnaire dated 3 February 2012 (901-903) which provided details only of his brother.

68. It has not been shown, therefore, that Judge Pirotta erred in finding that the appellant had not provided details of his maternal uncles to the Red Cross and the argument at paragraph 3 of the grounds has no merit.

69. The ground at paragraph 4 maintains that the First-tier Tribunal made a material error of fact in stating at the appellant withheld tracing information about his maternal uncles from the respondent. This was stated to be an error as the appellant had provided their names and the names of their village in his first witness statement dated 12 January 2011 (573-579).

70. It is correct that the witness statement at [10] and [11] gives names for two maternal uncles and the names of the village in which they lived. However, this submission loses force where it ignores the omission of the uncles' details from the family tracing questionnaire dated 3 February 2012 (901-903), the document specifically issued in order to assist in tracing and the lack of any reference to the maternal uncles in the Red Cross letter (1101).

71. Further, the comment objected to here would appear to be at [54] where Judge Pirotta states "He did not disclose adequate information to the Home Office" and that the information given was "sketchy". It did not appear to me that this could be properly characterised as a "fundamental mistake of fact" given that the limited details at [10] and [1] in the witness statement were all that was provided on the appellant's uncles.

72. It is my conclusion that it has not been shown that Judge Pirotta's conclusion and negative inference arising from the failure to give proper disclosure of details of the appellant's uncles was erroneous. This ground 4 is not made out.

73. The ground at paragraph 5 maintains that the First-tier Tribunal failed to consider the country evidence from the time that the appellant left Afghanistan which indicated a high level of Taliban activity in his home area, consistent with his asylum claim. Mr Bedford took me to country evidence relating to Kunduz province, however, which he maintained Judge Pirotta had overlooked but this ground has to fail where the appellant's case is that he is from Baghlan province. He states this in his witness statements of 12 January 2011 (573-579), 6 October 2011 which at [10] specifically contrasts his position as someone from Baghlan with someone from Kunduz, (69-82), the same point being made at [12] of the undated statement at 309-328 of his bundle.

74. I should perhaps also point out that I had some difficulty with this submission where Mr Bedford took me to one sentence in the body of a UNCHR report and some footnotes to that report which was contained in a 1252 page bundle. There

was no skeleton argument or list of essential reading from the hearing before Judge Pirotta to show that she had been taken to this or other specific country evidence. Where it comprised only one sentence in the body of text and otherwise consisted of foot notes it was not my view that it was likely that it could have been shown an error of law occurred in overlooking this material even had it related to the correct province.

75. The same reasons must significantly undermine the arguments at paragraph 6 of the grounds which seeks to rely on the UNHCR report in combination with an attack on Judge Pirotta's approach to assessing the evidence of someone who was a minor at the time of the claimed events in Afghanistan.

76. At [38] Judge Pirotta specifically indicated that she took into account the appellant's age and relative inexperience in giving evidence when he first applied for asylum and how his age "would prevent his understanding of relevant facts then and now." That self-direction is more than sufficient to show that she took a correct approach in her assessment of the evidence of someone who was a minor at the time of the events he was recounting and was still so when he claimed asylum in the UK. Nothing in the determination offends the principles set out at [38]-[42] of AA (unattended children) (Afghanistan) CG [2012] UKUT 00016 (IAC). Ground 6 has no merit.

77. For all of these reasons, I do not find that the grounds show an error of law in the determination of First-tier Tribunal Judge Pirotta.

Decision

78. The decision of the First-tier Tribunal does not contain an error on a point of law and shall stand.

Signed

Upper Tribunal Judge Pitt Date 18 December 2015