IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07585/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2016	**On 13 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR ASADULLAH ORIAKHAIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Smith, Counsel instructed by Irving & Co Solicitors
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

DECISION ON ERROR OF LAW

Details of Appeal

1. The appellant is a citizen of Afghanistan born on [ ] 1996 and is now 20 years old. (The date of his birth is not in issue; this was the date arrived at following an age assessment carried out by Social Services in 2008). Although the appellant's nationality was at issue the First-tier Tribunal found that the appellant is an Afghan national.

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2. The appellant came to the United Kingdom as an unaccompanied minor arriving on 2 December 2008 and claiming asylum on 30 December 2008. The respondent refused the appellant's asylum claim initially on 15 June 2009 and also refused his claim for humanitarian protection. However the appellant was granted discretionary leave until 14 June 2012 when he reached 17½ years. The appellant submitted an application for further leave to remain in the United Kingdom on 16 June 2012. This was refused on 15 September 2014.

3. The appellant appealed and his appeal came before the First-tier Tribunal, Judge Farmer, on 29 September 2015. In a decision promulgated on 5 October 2015 Judge Farmer dismissed the appellant's appeal on all grounds.

4. The appellant appeals with permission to the Upper Tribunal. The hearing came before me.

Ground 1:

5. The appellant's first ground of appeal, in summary, was that it was not open to the First-tier Tribunal to find that the appellant had contact with his mother and would be able to go back to her given the foster carer's evidence and evidence from two social workers that they did not believe the appellant was in touch with his mother and given that it was the Red Cross who were trying to trace the appellant's family. It was the appellant's argument that the comments in **EU (Afghanistan) & Others v Secretary of State for the Home Department [2013]** about a likely lack of co-operation from the family were not relevant. It was submitted that it was not correct to assume that because the court claim was not believed that the appellant should not be believed in relation to contact with the family.

6. Judge Farmer at paragraph [22] did not accept that the appellant had provided a broadly consistent account and found that the appellant had failed to give any real detail on the matters on which he relied, to an extent which damaged his credibility. Judge Farmer found that in the appellant's oral evidence he was unable to recall, for example, any detail in relation to the gun the appellant claimed to have been trained on.

7. In relation to the specific issue of the appellant claiming to have lost touch with his family the judge noted at [23] that this happened after his uncle disappeared or was shot. The appellant had confirmed that prior to this he was in touch with his mother who was responsible for sending his Tazkera to him and that she also had her own mobile phone and her own telephone number. The appellant told the First-tier Tribunal that he did not know where his mother and brother are and that he had also told this to Mr Warner, the appellant's former foster parents who gave evidence before the First-tier Tribunal. The First-tier Tribunal Judge accepted at [23] that Mr Warner had never witnessed the appellant being in touch with his mother. However, the judge was of the view that this did not mean that the appellant was not in touch with his family.

8. Significantly, the judge found that the appellant "was able to have significant contact with his mother such that she could send him his Tazkera and explain to him more about his background. I do not accept that he would have suddenly lost touch with her".

9. The appellant's representative criticised the judge's subsequent findings that Sir Stanley Burton's comments in the case of **EU (Afghanistan) v Secretary of State for the Home Department [2013] EWCA Civ 32** at [10] were relevant. It was noted that where a family had incurred considerable costs in paying for an appellant to leave Afghanistan, it would be unlikely that they would be happy to co-operate with an agent of the Secretary of State for the return of a person to Afghanistan. However I am not satisfied that the judge made any error of law in referring to this comment.

10. The judge went on to make her own findings that it was clear that the appellant's family had spent a considerable amount in paying an agent to bring the appellant to the United Kingdom and in assisting him in getting documents to ensure that he can stay here and "in those circumstances it is clear that they would be likely to be unwilling to co-operate in being contacted to consider arrangements for the return for the appellant".

11. I accept that **EU** is a "duty to trace case" and that the focus of Sir Stanley Burnton's comments were on how a family might react, uncooperatively, if tracing enquiries were made of them by an agent of the Secretary of State. I further accept that **EU** does not comment on a scenario where a young person has been to the Red Cross, such as is the case in the appellant's situation, or how a family would react if approached by the Red Cross or where a person has provided contact numbers and has a number of witnesses stating that he has lost contact. In quoting from this case it is evident however that Judge Farmer was aware of the differences between this case and the appellant's. I am not satisfied that the judge made any error in finding as she did that it was clear that the appellant's family had spent a considerable amount of money in paying for the appellant to come to the United Kingdom and in assisting him in getting documents to ensure that he could stay here. There was no error in her subsequent finding that in those circumstances they would likely be unwilling to cooperate in being contacted to consider arrangements for the return of the appellant.

12. The judge did not base her decision on **EU** but rather came to her own conclusions. This included the judge's consideration of the fact that the appellant's mother had her own mobile phone and her own telephone number and that the appellant's mother had been in a position to send documents to the appellant and to provide him with information in relation to his account. I am satisfied therefore that any arguable error in relying on the comments made in **EU** is not material as I am satisfied that the judge's findings in relation to not accepting that the appellant would have suddenly lost contact with his mother can stand without this comment. Although it was drawn to the Tribunal's attention that the judge did not specifically refer in her determination to the comments of the social workers which included that

the appellant made references to not being in contact with his family, the judge clearly set out the material before her.

13. For example, although Ms Smith indicated that the judge made no reference to the Red Cross information, I note that at [8(ii)] the judge indicated that she had sight of Red Cross documents. I am satisfied that the judge was aware of all the circumstances that the appellant cited in relation to his claimed lack of contact with his family and considered this in the round. I am not satisfied that there was any error of law in her consideration of this issue.

14. It is clear from [21], [23], [24] and [25] of the judge's decision that she had regard to all the evidence before her including from the appellant's foster parent but remained not satisfied that the appellant had lost contact. The judge provided adequate reasons for this decision. It was a decision which she was entitled to reach. I am not satisfied that any error is disclosed.

Ground 2:

15. The appellant's second ground related to the conclusions of the First-tier Tribunal regarding the alleged blood feud. The appellant contended that these were not tenable as they did not take into consideration relevant expert evidence from Dr Giustozzi and the country of origin materials which supported the credibility of the development of a risk from the feud.

16. Judge Farmer at [30] considered the evidence in relation to the claimed blood feud and gave clear reasons for rejecting this evidence. In so doing the judge considered the appellant's account and also considered the expert evidence of Dr Giustozzi. The judge referred to the detailed report from Dr Giustozzi which confirmed that a blood feud can exist over years and if so motivated then the appellant's cousins can use their position within the Taliban to reach the appellant. The judge considered this evidence in the round including in the balance her general findings on the appellant's credibility. It was open to the judge to find as she did that the fact that the blood feud was considered plausible by Dr Giustozzi does not make it a credible account on the circumstances of this particular case.

17. Although Ms Smith indicated that the judge in error attributed a comment by Dr Giustozzi to Ms Smith, namely that whilst his father remained alive he was a protector as he himself was a Taliban member, it was clear that the judge took full consideration of Dr Giustozzi's account and would have been aware that this comment originated from him. The fact that the judge recorded that this was also made in submissions by Ms Smith does not constitute an error. Ms Smith's arguments on this point represent no more than a disagreement with the judge's findings.

18. Ms Smith also contended that the judge failed to have regard to relevant background country information, in particular in relation to the fact that women and children would not generally be the subject of a blood feud and that this might explain why the appellant was not targeted even in the months after his father died and before the

appellant left. I have considered the judge's findings in their entirety. In not accepting the blood feud the judge did not accept the appellant's general credibility and also noted that the appellant was unable to provide further details in relation to his father being shot, he claims, by his cousins. The judge gave clear reasons for disbelieving the appellant's evidence. Whilst it may well be that the background information indicates that blood feuds are normally pursued against adult males, the judge was entitled to take into account the fact that neither the appellant, or his remaining family experienced any problems in relation to the blood feud, or generally. I am not satisfied that the judge made any material error.

Grounds 3 and 4:

19. Ms Smith made submissions in relation to the judge's approach to the appellant's age. However Ms Smith conceded that the First-tier Tribunal Judge did specifically take into account the appellant's age in her decision.

20. The judge at [19] set out in some detail the guidance which was brought to her attention by Ms Smith in relation to assessing the evidence of a child and the general approach in terms of assessing credibility, which she set out at [20]. The judge also reminded herself at [27] that it is hard for children to remember dates.

21. Ms Smith took issue with the judge's finding at [27] in finding that the appellant had been inconsistent in stating whether his father had been killed three or five years previously.

22. I am satisfied that the judge correctly directed herself and was obviously fully aware of the relevant guidance and the approach to children's evidence. The judge was still entitled to find that the appellant was not credible in this regard and gave adequate reasons for doing so, including indicating again at [29] that she was bearing in mind the appellant's age at the time of answering the questions.

23. Ms Smith sought to impugn the judge's approach to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act. Whilst Ms Smith accepted that any error would not have been material (as the judge clearly stated at [39]) that the appellant was an unaccompanied minor and this factor "should not weigh too heavily against his claim for asylum in the UK") she suggested that this was indicative of the appellant's approach in failing to properly take into account that the appellant was a child. I do not accept this is the case. The entirety of the decision makes it clear that the judge was fully aware of the appellant's age including his very young age when he first left Afghanistan and when the claimed events occurred. She reminded herself throughout the Decision and Reasons of the appellant's young age and gave clear reasons for not accepting his evidence.

24. In addition, as Ms Smith indicates, any error that the judge has said to have made at [36] and [37] in relation to her consideration of Section 8 is not material given that the judge went on to find that the appellant was under the control of an agent and this should not weigh too heavily against him. In any event I am not satisfied that the judge did fetter her discretion in relation to her consideration of Section 8 as the

judge clearly stated at [37] that her Section 8 consideration was "not of itself determinative of the appeal".

25. In relation to ground 3, Ms Smith submitted that the judge unduly focused on, and drew adverse inferences against the appellant in relation to, his description of a gun.

26. The judge addressed this issue at [22] and [29] of the Decision and Reasons. The judge indicated that the appellant's account was not just of one visit by the Taliban but 'repeated attempts to recruit him'. The judge clearly accepted that the appellant would not be expected to know the make and model of a gun but found that the appellant's evidence that the gun was black with something in the middle was not consistent with his account of being shown how to use a gun.

27. In so doing the judge was taking into account all the evidence, including the appellant's own statements; at paragraph 6 of the appellant's 27 November 2014 witness statement the appellant indicated that there was one man of the Taliban who spent a lot of time with me and 'he showed me his gun and showed me how to use it'.

28. As noted above the judge repeatedly took into consideration the appellant's age but gave adequate reasons for reaching the decision that she did that the appellant's account and the lack of any further information in relation to the gun was not credible. No error has been identified in this ground.

29. In any event even if I am wrong in the above, the judge at [33] and [34] made alternative findings considering the appellant's claim at its highest and was satisfied that the appellant's appeal even if credible would still fall to be dismissed in line with **AK (Afghanistan) [2012] UKUT 163**. The judge made this decision in line with the relevant country guidance case law and the relevant background country information and was satisfied that it would not be unreasonable or unduly harsh to expect the appellant to internally relocate to Kabul. Although Ms Smith indicated this could not be the case, for example if it was accepted that the appellant did not have family, the judge made clear alternative findings which would have taken this alternative into consideration. In addition the appellant was an adult at the time of the First-tier Tribunal hearing and would be returning as such and it is clear that the judge had this in mind in reaching her alternative findings.

Ground 5

30. Although Ms Smith submitted considerable additional written arguments in relation to ground 5 and Article 8 and the respondent's asylum policy, I indicated at the commencement of the hearing that paragraph 80 of the respondent's Reasons for Refusal Letter dated 15 September 2014 specifically addresses the issue of the Immigration Directorate Instructions, Chapter 8, paragraph 2.3, which sets out transitional provisions for those applying for further leave to remain in the United Kingdom. The respondent took into consideration that those who were granted leave under the Discretionary Leave policy before 9 July 2012 will continue to be

considered under the Discretionary Leave policy through to settlement provided they continue to qualify for leave and their circumstances had not changed.

31. However, the respondent continued at paragraph 80 of the Reasons for Refusal Letter to indicate that although the appellant was granted leave under the Discretionary Leave policy and consideration was given to whether he continued to qualify for leave, the respondent considered that the appellant no longer continued to qualify as his circumstances had changed, namely that he was now an adult at the time of the decision.

32. Although the First-tier Tribunal Judge did not specifically set out this policy the Decision and Reasons clearly had in mind the decision of the respondent dismissing the appellant's Article 8 claim and this would have included the respondent's consideration of the Discretionary Leave policy.

33. There can be no error in the judge's detailed approach to Article 8.

Conclusion

34. I am not satisfied that any error of law is disclosed in the First-tier Tribunal Judge's decision. The decision of First-tier Tribunal Judge Farmer shall stand.

35. The appeal by the appellant is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hutchinson