



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

Appeal Number: AA/06544/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 20 October 2017**

**Decision & Reasons Promulgated
On 12 January 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR ABDUL ZAHIR IBRAHIMKHEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Solomon, Counsel

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan, born in 1992. He arrived in the UK in 2008 and claimed asylum. Because of his age he was taken into the care of Kent Social Services.
2. Although it appears that the earlier application for asylum was treated as withdrawn on 20 October 2008, the applicant made another application for asylum or the previous one was reactivated. In any event, a decision was made on 26 March 2015 to refuse the asylum and human rights claim. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Bart-Stewart at a hearing on 15 March 2017 which resulted in the appeal being dismissed on all grounds.

3. I should also say that following an earlier appeal a different First-tier Judge also dismissed the appeal, but her decision was set aside for error of law and the matter remitted to the First-tier Tribunal which resulted in the decision which is now challenged before me.

The grounds and submissions

4. I summarise the grounds and submissions. The grounds contend that the Ftj failed to apply the correct standard of proof, with her reasoning indicating that she had applied too high a standard of proof. Linked to this is the contention that the Ftj was wrong to require corroboration of the appellant's account.
5. In relation to the corroboration point, the Ftj had said at [46] that there was no supporting evidence of the appellant's claim that his uncles were Taliban commanders. In addition, there was in fact supporting evidence from the witnesses who either gave oral evidence or provided a statement in support of the appeal. Furthermore, the Ftj was wrong to say that the appellant gave no reason as to why his father did not support the Taliban, the appellant having dealt with that at [4] of his witness statement.
6. Similarly, in relation to the appellant's claim that his father and brothers had been killed, the Ftj was again wrong to say that there was no supporting evidence of it; there was, from the witnesses already referred to.
7. At [50] the Ftj said that she considered it "surprising" that the appellant did not say during his port interview that he had two uncles who are Taliban commanders and who were looking to kill him. In this respect the Ftj had not had sufficient regard to the fact that the appellant was interviewed as a minor, and apparently in the absence of a responsible adult.
8. Further, relatives had given evidence but the Ftj had not given adequate reasons for not accepting their evidence.
9. It is argued in the grounds that the Ftj's evaluation of the expert evidence was materially flawed. At [52] she had said that the appellant's claim that his family is in a blood feud is inconsistent with what is generally considered to be a blood feud. However, the expert's report of Dr Antonio Giustozzi at [8] was that kin conflict of that sort, between uncles, nephews and even brothers, was a typical feature of the Afghan countryside. Further aspects of the expert's report are referred to and in respect of which it is said that the Ftj's decision failed to have regard.
10. Although the Ftj concluded that the appellant has close extended family in Kabul, the appellant's evidence was that his grandfather had disappeared and his cousin's evidence was that family members and friends were too scared to help find other members of the appellant's family.

11. Those errors, it is argued, vitiate the Ftj's assessment of Article 8. Furthermore, the conclusion that the respondent's delay had not been to the appellant's disadvantage was an erroneous conclusion in the sense that prejudice is not part of the assessment in considering proportionality. In addition, the result of the delay has been that the appellant has been prejudiced since he has lost out on a grant of discretionary leave to remain as an unaccompanied asylum-seeking child.
12. In submissions Mr Solomon adopted the grounds of appeal. In terms of the standard of proof, it was submitted that there is no reference in the Ftj's decision to the lower standard of proof.
13. In relation to what the Ftj said about the lack of corroboration, that was a significant feature of the Ftj's decision. She did not go on to consider whether it would be reasonable in the circumstances to expect supporting evidence to be provided. For example, in relation to death certificates there is no evidence that they are routinely provided. In addition, the Ftj appears to have supposed that each Taliban commander would be known to an expert. I was referred to the evidence of the witnesses called in support of the appeal to the effect that they supported the appellant's account of the appellant's uncles being Taliban commanders. Although it is true that at [51] the Ftj did make findings about the evidence of the appellant's relatives, those findings were inadequate, it was submitted.
14. In reliance on the grounds of appeal at [4], it was submitted that inherent implausibility is a "wholly inappropriate factor" to rely on in asylum cases. In support of that proposition the decision in *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 was relied on.
15. In the skeleton argument that was before the Ftj, submissions were advanced in relation to the appellant's port interview. The Ftj's brief reference to his age when he was interviewed at that time was insufficient. *YL (Rely on SEF) China* [2004] UKIAT 00145, in particular at [19] was cited in support of the suggestion that the Ftj's assessment of the appellant's account at the time of the screening interview was inadequate.
16. Mr Clarke submitted that in relation to the standard of proof, the fact that the Ftj accepted that the appellant had not absconded, and that there was no 'section 8' point that could be taken against him, could not be said to be determinative of the appeal, as the grounds appear to suggest. She was otherwise entitled to find that the appellant's account was not credible.
17. In terms of the 'corroboration' point, it was submitted that what underpins the case law in this regard is the fact that corroboration is not required where a person is fleeing the country and would not have the time to obtain corroborative evidence, but that must be seen in context where someone is in the UK. At [46] the FTJ dealt with two issues, namely whether the appellant's uncles were Taliban commanders and whether his father and brothers were killed. Although the appellant relied on expert

evidence from someone who claims to have links to the Taliban, that expert did not provide evidence to indicate that he knew that those uncles were Taliban commanders. The FtJ was entitled to ask why the appellant's uncles would need to concoct a land dispute given that the people in the area supported the Taliban.

18. Furthermore, the appellant has close family in Afghanistan and one of the witnesses was a frequent visitor. Despite that, evidence in relation to the points raised by the FtJ had not been provided. It is not a case of there being no family contact with Afghanistan. Therefore, the FtJ was entitled to draw a reasonable inference from the absence of evidence, bearing in mind that the appellant had been in the UK for nine years. The FtJ pointed out at [46] in the last sentence that not even the death certificates of his father and brothers had been provided. That is evidence that could reasonably have been provided, given that he has family there and a family member who makes trips back to Afghanistan.
19. Although the expert evidence was that those in the patrilineal line could be at risk by means of a blood feud, the two witnesses who gave evidence have not had any problems. The second witness to give evidence visited Afghanistan frequently, staying in Kabul, which the FtJ said was only 15 to 30 minutes' drive away from the appellant's home area.
20. Although it was true to say, as the grounds at [3] suggest, that the FtJ was wrong to say that the appellant had given no reasons as to why his father did not support the Taliban, bearing in mind [4] of the appellant's witness statement, it is difficult to see how that was material.
21. The grounds' reliance on *HK* in terms of corroboration are wrong, when the decision as a whole is considered.
22. It was further submitted that the FtJ at [51] had given good reasons as to why she was not satisfied about the reasons for the appellant's aunt not having attended the hearing. This is particularly so, given the gravity of the nature of the appeal. It was open to the FtJ significantly to reduce the weight attached to that witness's evidence. The witness could have come to the hearing after dropping her children off at school, as the FtJ said.
23. The FtJ was entitled to find that it was not credible that the appellant's mother would have been able to make the arrangements for the appellant's departure so quickly, going to their home area and then immediately arranging the flight. Furthermore, it was difficult to see why the uncles would not go to the grandfather's house and kill the remainder of the family, if that is what they wanted to do.
24. As regards the port interview, it is true that the matter was dealt with in the appellant's skeleton argument that was before the FtJ. However, she took into account that the appellant was a child at the time of the interview.

25. In relation to the evidence from the appellant's relatives, it was relevant to the asylum claim that the appellant's cousin, Naimatullah Rahmatullah, gave inconsistent evidence about how long he had stayed in Kabul before leaving the country (in respect of which the complaint in the grounds is that the FtJ had failed to explain why this was relevant). His evidence was that he had moved to Kabul because of the situation in Mayden, but that evidence was inconsistent. It was difficult to see why the FtJ was not entitled to draw an adverse inference from that inconsistency.
26. The FtJ was entitled to draw an adverse inference from the fact that the witnesses are paternal relatives and had not been troubled by the blood feud. One of them had been to Kabul many times without experiencing any problems.
27. As regards the complaint about the FtJ's conclusion that the witness statements used very similar language, and the finding that "heads were put together", Mr Clarke conceded that he could not in fact see what point the FtJ was making in this respect on the basis of the witness statements he has seen. However, in the light of the findings made otherwise, that is not a matter that could have affected the outcome.
28. Mr Clarke's submissions in relation to the FtJ's findings with reference to the expert evidence can be summed up as a submission that the FtJ was entitled to make the findings that she did on the basis of the expert evidence, which she fully took into account.
29. Likewise, in terms of sufficiency of protection and internal relocation, given her conclusion that the appellant does not have the profile or risk that he claimed, he would not be at risk on return and would in any event be able to live in Kabul.
30. In reply, Mr Solomon submitted that the relatives that gave evidence explained the enquiries that they had made of the appellant's family in Afghanistan. Although their evidence suggests that they are able to travel without risk, that is not enough to discount the risk to the appellant in the context of a claim which asserts risk to him and not beyond close family members.
31. In relation to the expert evidence, Dr Giustozzi is a well-respected expert who evaluated the claim in the context of the background evidence, and concluded that the appellant would be at risk.

Assessment and conclusions

32. There are three respects in which I consider that the grounds of appeal in relation to the FtJ's decision have merit. The first is in terms of the FtJ having considered it adverse to the appellant's credibility that in the initial port interview he did not say that he had two uncles who are Taliban commanders who were looking to kill him. At [50] the FtJ said that the fact that there was a phone interpreter is not an explanation for the lack of

detail, nor was his contention that he was expecting a more detailed interview. She pointed out that his uncles had been Taliban commanders looking to kill him as the sole reason for his departure and it was significant that it was not mentioned.

33. However, not only does the Ftj's decision fail to take into account the detailed submissions advanced in the skeleton argument in relation to that initial interview, I for my part cannot see that the appellant's initial account is so greatly inconsistent as suggested, when seen in context. The appellant said that he had a problem in Afghanistan over a land dispute whereby "my uncle" killed his father and brother and that he escaped to his maternal uncle in Kabul. He said that if he went back his uncle would kill him. That, it seems to me, is the rough gist of his claim; risk from a relative, and his father and a brother were killed. It does not of course refer to two uncles, and does not refer to them being Taliban commanders. It similarly does not say that two of his brothers were killed. However, those omissions must be seen in the context of the appellant's age when he arrived, the fact that he had undergone what was probably an arduous journey, arriving in the back of a lorry, and that interpretation was done over the telephone. In all those respects it is not difficult to conclude that there may have been room for error, either in what was said, what was translated, or what was written down.
34. In the circumstances, I do not consider that the Ftj was entitled to find that what the appellant said in that interview was adverse to his credibility because of inconsistency.
35. The second matter in respect of which I am satisfied that the grounds have merit concerns the Ftj having said at [46] that the appellant gave no explicit reason as to why his father did not support the Taliban. In his witness statement at [4] the appellant did give a reason, namely that he blamed the Taliban for the internal conflict and deaths of innocent people. The Ftj did not take that into account, it would appear.
36. The third respect in which I consider that the grounds have merit concerns what the Ftj said at [51] in the last sentence, namely that the witness statements of the appellant's relatives use very similar language, with the Ftj finding that "heads were put together". Mr Clarke acknowledged that the conclusion that there was similarity in the witness statements indicating that there was collusion amongst them, is not borne out by consideration of the witness statements. I agree with that concession. The Ftj did not explain why she came to that view, and it is not a conclusion that appears to be reflected in any of the witness statements.
37. However, whereas those issues may in another case be a sufficient basis from which to conclude that the Ftj's decision should be set aside for error of law in terms of the assessment of credibility, I do not consider that those errors have that effect in this case. That is because even without the Ftj having erroneously taken those matters into account in assessing the appellant's credibility, she would inevitably have come to the same

conclusion as to the appellant's lack of credibility. This is evident when one considers her reasoning overall.

38. It would have been better had the FtJ given an express self-direction as to the appropriate standard of proof, but it is not an error of law for her not to have done so, provided it is apparent from the decision that she did apply the correct standard. There is nothing to indicate the application of anything other than the correct standard of proof and it is to be noted that at [52] the FtJ said that the appellant did not have a well-founded fear of persecution when he left Afghanistan and that "neither was there a real risk of serious harm".
39. The point advanced in relation to corroboration has no merit. In the course of his submissions Mr Solomon's enthusiasm for the argument waned somewhat, once the decision in *HK* was considered overall. The grounds contend that inherent implausibility is a "wholly inappropriate" factor to rely on in asylum cases, for which *HK* is cited as authority. The phrase "wholly inappropriate" appears at [29] of *HK* where it is said as follows:

"Inherent improbability, which *may* be helpful in many domestic cases, *can* be a dangerous, even wholly inappropriate, factor to rely on in *some* asylum cases" [my emphasis].
40. The decision then explains the reasons for that view. However, at [30] the Court accepted that the rejection of an account on grounds of implausibility is permissible "on reasonably drawn inferences and not simply on conjecture or speculation". The quotation is from *Awala v Secretary of State for the Home Department* [2005] CSOH 73.
41. Thus, where the FtJ referred, for example at [46] and [47], to matters being not plausible, she was entitled to take that lack of plausibility into account in circumstances where that conclusion was based on reasonably drawn inferences, rather than conjecture or speculation.
42. The point about a lack of "supporting evidence" which is advanced on behalf of the appellant argues that supporting evidence in relation to certain matters, for example the killing of the appellant's father and his two brothers, was to be found in the witness statements of the relatives who gave evidence. It seems to me however, that where the FtJ was referring to a lack of supporting evidence she had in mind evidence other than the written or oral evidence of the appellant's relatives in the UK. Thus, at [46], she said that there was no supporting evidence that his father and brothers were killed, stating that the appellant had been in the UK for nine years and that that was more than sufficient time to have produced at least their death certificates. In the same paragraph, she said that although the appellant's paternal uncles were claiming to be Taliban commanders, there was no supporting evidence of that claim, not even from the appellant's expert (Dr Giustozzi) who says he has links with Taliban cadres. She further stated that Dr Giustozzi does not suggest that he even raised their name with these contacts or carried out any research.

43. Whilst I cannot see in Dr Giustozzi's report any explicit reference at least, to his having contacts with Taliban cadres, it is evident that Dr Giustozzi has contacts in Afghanistan, and extensive contacts at that. The FtJ made the valid point that there was no evidence from him to support the claim of the appellant's uncles being Taliban commanders. In this context I also note that the evidence set out by the FtJ at [22] from Zahidullah Sadat was to the effect that the uncles were Taliban commanders in charge of factions heavily involved in recruiting new Taliban members and assassinations, and that everyone within Mayden Wardak appeared to know that they were behind the killings of the appellant's father and brothers. At [40] she referred to the fact that the names of the two uncles who are said to be Taliban commanders, are given in the appellant's witness statement.
44. The point the FtJ was making was clearly that it was reasonable to expect that some documentary or expert evidence to support the basis of the appellant's claim could have been provided in the years since the appellant had been in the UK. It is not as if the appellant has had to rely on his own researches or resources for that purpose, given the evidence of his relatives travelling back to Afghanistan and having apparently made some enquiries themselves. Indeed, in this context I note that the evidence of Zahidullah Sadat in his second statement, referred to by the FtJ at [23] was that he had contacted the Afghan Red Crescent Society and National Red Crescent in Kabul. It is not apparent that there was any evidence to support that aspect of his evidence.
45. I do not accept that the FtJ had failed to give adequate reasons for not accepting the evidence of the appellant's relatives. Naimatullah Rahmatullah said initially that he had lived in Kabul all his life, then said that he lived in Mayden and then moved to Kabul, stating that he grew up in Mayden and lived in Kabul for one year before coming to the UK [29]. The FtJ said that his evidence was inconsistent in terms of how long he had stayed in Kabul before leaving the country. The FtJ also said that "The cousin" which I presume is a reference to the first witness, Zahidullah Sadat, is able frequently to visit Afghanistan, staying in Kabul, only 15 to 30 minutes' drive from the home area, without having experienced any difficulty. At [57] she said that both of the appellant's witnesses agreed that they felt safe in Kabul.
46. Although on behalf of the appellant it was said that it was not they who were at potential risk but the appellant, on the question of whether the FtJ gave reasons for rejecting the evidence of the witnesses I am satisfied that she did. It is also to be borne in mind that in relation to the general credibility of the claim, at [49] the FtJ rejected the contention that it was mere coincidence that the appellant happened to come across someone who was able indirectly to connect him with his relatives in the UK, her conclusion being that they were in fact expecting the appellant.
47. In relation to the appellant's aunt who neither attended the hearing of the first appeal in 2015 nor before the FtJ, the FtJ was entitled to conclude that

there was no credible reason for her failing to attend the hearing, since she could have dropped off her children at school and then come to the hearing, as the FtJ said at [51]. Thus, what she says in her witness statement in support of the appellant's account was justifiably rejected.

48. In terms of the lack of risk to the appellant's UK relatives as compared to the claimed risk to the appellant, the claim being that neither of them would be at risk on their visits to Afghanistan, it is to be noted that Zahidullah Sadat's evidence was that when he tried to make enquiries of the appellant's family in Afghanistan, when he returned there in March 2016, he referred to first cousins having been threatened, and family members and friends being too scared to help. That is hardly consistent with the contention that he was not at risk on return, still less so when he said to have been making enquiries on the appellant's behalf.
49. So far as the expert evidence is concerned, the FtJ took into account that evidence and made her assessment of it. The expert evidence can, by turns, support the appellant's account or undermine it. Thus, what is said about risk to family members supports the appellant's claim, but also suggests that relatives, such as those in the UK, would potentially be at risk.
50. I consider that the FtJ was entitled to conclude that it was speculative of Dr Giustozzi to say that the appellant's uncles could easily frame the appellant as a government collaborator. Apart from anything else, that is no part of the appellant's claim, and whilst it may be on the expert evidence a theoretical possibility, it is nevertheless a speculative possibility on the facts of this case.
51. At [47] the FtJ said that "I do not find implausible that his mother would have taken the risk to return to the area where her husband and children had just been killed". There was some discussion at the hearing before me in relation to whether the FtJ meant to say that the appellant's mother returning to the area was plausible or implausible. In fact, when one considers the whole of the paragraph, it is evident that she concluded that it was *implausible*. She referred to a question put to the appellant in cross-examination about whether it would have been safe for a woman to have travelled alone. The FtJ was entitled to conclude that that aspect of the appellant's account was not credible. Likewise, in terms of there having been no evidence that the uncles said to be Taliban commanders went to the appellant's grandfather's house in Kabul to look for the appellant (or indeed his other brother).
52. Similarly, the FtJ was entitled to conclude that it was not credible that the appellant's mother would have been able to make the arrangements for the appellant's departure so quickly. It appears from the evidence that the appellant gave [19], that on the day that his father and brothers are said to have been killed, his mother left Kabul to go to the home area, came back the next morning and the appellant left when she returned. The evaluation of that aspect of the claim was a matter for the FtJ.

53. The Ftj resolved two matters in the appellant's favour, namely the contention that he had absconded from social services (and had thus not pursued the asylum claim), and the 'section 8' point in terms of the appellant not having claimed asylum en route to the UK when he had travelled through 'safe' countries. She undertook a careful analysis of the evidence in relation to the appellant having left Kent Social Services without informing the authorities, but in particular as to subsequent events including the involvement of the appellant's then solicitors. In relation to the section 8 point, she referred to his age when he left Afghanistan, his being under the direction of adults and his not being expected to be able to understand the concept of safe countries.
54. I mention those two potentially significant issues resolved in favour of the appellant to illustrate my view that the Ftj's consideration of the issues was a balanced one. Furthermore, it is evident from her detailed summary of the evidence, and the appellant's account, as well as the expert evidence, that she had a clear appreciation of the basis of the appellant's claim and the factual issues that needed to be resolved.
55. Much of the argument on behalf of the appellant amounts in reality simply to a disagreement with the Ftj's assessment of the evidence. The weight to be attached to the expert evidence, and indeed the evidence of the other witnesses, was a matter for her. She was not bound to accept the evidence of Dr Giustozzi, and for my part I would observe that Dr Giustozzi's report is based on an acceptance of the appellant's account as credible. Furthermore, his conclusion that the appellant would be at risk on return is a conclusion that strays beyond the remit of an expert, he having stated in the concluding paragraph that the appellant would be at great risk from his uncles.
56. Whilst I have identified errors in the Ftj's decision, it is not the case that every error in assessing credibility leads to a conclusion that the assessment of credibility is vitiated for error of law, and such is not the case here.
57. Having concluded that the appellant would not be at risk on return, and that he has family members there who would be able to support him, as well as the other matters that she referred to at [57] of her decision, there is no error in her conclusion that he would be able to live safely in Kabul where, she found, he has close extended family and having rejected the contention that his family's whereabouts was unknown.
58. Equally, it follows that in the light of her conclusions the Ftj was entitled to find that the appellant's return would not amount to a disproportionate breach of his Article 8 rights.
59. She noted the delay on the part of the Home Office, but contrary to what is asserted in the grounds the appellant cannot derive any advantage from his not having been granted discretionary leave to remain as a minor. Even if the appellant had been granted discretionary leave to remain, that

would only have been until shortly before his 18th birthday. He is now aged 25 years of age. At the expiry of his discretionary leave he would in any event have been required to return to Afghanistan, in circumstances where he has no basis of stay in terms of any protection ground.

60. Accordingly, the FtJ's decision to dismiss the appeal on all grounds must stand.

Decision

61. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal on all grounds therefore stands.

Upper Tribunal Judge Kopieczek

11/01/18