Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08130/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th January 2020	**On 21st January 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

HZ
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Fazli, pupil barrister at Sohaib Fatimi Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Courtney promulgated on 3 October 2019 in which the Appellant's appeal against the decision to refuse his asylum and human rights claim dated 2 August 2019 was dismissed.

2. The Appellant is a national of Afghanistan, born on 26 July 1999, who first arrived in the United Kingdom on 14 June 2013 and claimed asylum that day. His asylum claim was refused but he was granted leave to remain as an unaccompanied asylum seeking child to 15 December 2016. The

Appellant appealed the refusal of his asylum claim, which was dismissed in a decision promulgated on 4 November 2013, in which First-tier Tribunal Judge Afako concluded that the Appellant's claim was not credible and he was not at risk on return to Afghanistan from the Taliban, his family, or as an unaccompanied child.

3. The Appellant made a further application for leave to remain on 5 January 2017, which was refused on 2 October 2017. He then made further submissions on asylum and human rights grounds on 8 January 2019, primarily on the basis that he feared persecution on return to Afghanistan by forcible recruitment to the Taliban and on the basis that he had become westernised and thus had abandoned the values of Islam, contrary to Taliban ideology.

4. The Respondent accepted that the further submissions met the threshold for a fresh claim under paragraph 353 of the Immigration Rules, but refused the application on the basis that the Appellant not be at risk on return to Afghanistan, having previously been found to be not credible and the background country information did not in any event support his claim. Further, the Appellant could internally relocate to Kabul if necessary. The Appellant did not claim to have any family life established in the United Kingdom and in relation to private life, the Respondent did not accept as he met the requirements for a grant of leave to remain under paragraph 276ADE of the Immigration Rules because there were no very significant obstacles to his reintegration in Afghanistan. The Respondent did not consider that there were any exceptional circumstances to warrant a grant of leave to remain and the Appellant did not meet the high threshold for a grant of leave to remain under Articles 3 and/or 8 of the European Convention on Human Rights on medical grounds.

5. Judge Courtney dismissed the appeal in a decision promulgated on 3 October 2019 on all grounds. The decision referred to the findings of First-tier Tribunal Judge Afako in 2013 and recorded the submission on behalf of the Appellant accepting that there was no fresh evidence to displace those earlier findings about risk on return. It was found that the Appellant could safely return to his home area with family support, with no reason to suspect that the Appellant was not or could not be in contact with his family and that he would be returning as an adult who speaks Pashto.

6. As to the risk of forced recruitment by the Taliban, the First-tier Tribunal concluded that this was no more than a mere possibility for the Appellant on the same basis as any member of the population in Afghanistan and there were no particular factors identifying any specific vulnerability to forced recruitment. There was no risk on return because of westernisation. The First-tier Tribunal referred to the very limited medical evidence, which did not contain any diagnosis or urgency for investigation of the Appellant's symptoms and noted that healthcare was available in Afghanistan. The Appellant did not claim to be incapable of working, nor was there any credible evidence that he would be unable to contact and live with his family on return. In all of the circumstances it was not

accepted that there would be very significant obstacles to the Appellant's reintegration into Afghanistan and no compelling circumstances either.

The appeal

7. The Appellant appeals on three grounds. First, that the First-tier Tribunal failed to consider the Appellant's claim to be at risk on return to Afghanistan as an atheist, considering his lack of continuing adherence to Islam only under Article 8 of the European Convention on Human Rights. Secondly, that there were inadequate reasons in the First-tier Tribunal's decision as to the Appellant's medical problems and the findings made contrary to the medical evidence. These adverse findings infecting the assessment of whether there were very significant obstacles to return for the purposes of paragraph 276 ADE of the Immigration Rules. Thirdly, that the First-tier Tribunal fails to make any findings as to whether the Appellant's family members were in the Taliban, relevant to the risk of forced recruitment to the Taliban on return.

8. Permission to appeal was granted on the basis that it was arguable that the First-tier Tribunal should have considered the Appellant's claim to be an atheist; that the First-tier Tribunal failed to give sufficient weight to the medical evidence in the context of the Appellant's ability to re-establish private life in Kabul; and it was arguable that a finding should be made as to whether the Appellant's family included Taliban members.

Findings and reasons

9. At the oral hearing, it became apparent that the grounds of appeal were largely based on matters considered by the Appellant's legal representatives only upon reading the decision of the First-tier Tribunal and were relied upon in the absence of any consideration of the Appellant's claim as put to the First-tier Tribunal or evidence in support of it. Prior to the oral hearing, Mr Fazli had not had sight of the Appellant's skeleton argument for his appeal before the First-tier Tribunal (the Appellant being previously represented by different solicitors and Counsel at the hearing) and it is unclear as to whether there had been any detailed consideration of the Appellant's bundle of evidence before the First-tier Tribunal either.

10. For the reasons given below, all three grounds of appeal were wholly unarguable because in essence they relied upon a claimed failure by the First-tier Tribunal to consider, and/or make findings on matters which were not expressly in evidence or relied upon by the Appellant before it. With the exception of Robinson obvious points (of which there are none in the present appeal), a First-tier Tribunal cannot be criticised for determining matters not relied upon before it and it is not the job of a First-tier Tribunal judge to rummage around the evidence to discern the Appellant's claim on wider grounds than those expressly relied upon, in particular in circumstances where the Appellant was legally represented throughout. There is no even arguable error of law on this basis, the grounds

essentially seek to reargue the Appellant's appeal on a different basis to that which was pursued previously.

11. The first ground of appeal was that the First-tier Tribunal fails to consider whether the Appellant was at risk on return to Afghanistan as an atheist. However, at its highest, there was a statement from the Appellant with his further submissions dated 9 February 2017 that he no longer saw himself as a Muslim. This was not relied upon in the covering letter with the further submissions, which focused primarily on a claimed based on Article 15(c) of the Qualification Directive based on country conditions in Afghanistan and that the Appellant's medical condition made him more vulnerable to such harm.

12. A skeleton argument was prepared for the First-tier tribunal hearing which set out in paragraphs 10 to 14 the Appellant's claim. Paragraph 11 states that the Appellant's fear on return to Afghanistan was of forcible recruitment by the Taliban and/or that he would be subject to serious harm at the hands of the Taliban because he had become westernised and had thus abandoned the practices and values of Islam and his native country. The reason for this is identified in paragraph 12 was imputed political opinion or in the alternative, that the Appellant is a member of a particular social group, a young man who has reached fighting age. There is no reference at all to the Appellant fearing persecution on return as an atheist on the basis of religion. The Respondent's decision letter does not cover that point and therefore it is further noteworthy that there was no application on behalf of the Appellant to rely on this is a new matter, nor any permission for the same given by the Respondent in accordance with section 85(5) of the Nationality, Immigration and Asylum Act 2002.

13. Although Mr Fazli accepted orally that the Appellant did not expressly rely on fear on return to Afghanistan on the basis of atheism, it was suggested that from the single sentence in his written statement which accompanied his further submissions that he no longer considered himself to be Muslim, this was a Robinson obvious point that the First-tier Tribunal should have considered applying anxious scrutiny to an asylum claim. However, the Appellant was legally represented, and at no point before the Respondent or the First-tier Tribunal did he claim to be at risk on return to Afghanistan as an atheist, there was no supporting background evidence of risk on this basis relied upon and it cannot rationally be said on any view that in the circumstances this was a Robinson obvious point that the First-tier Tribunal should have dealt with. There is no arguable error of law in the first ground of challenge, to the contrary, it is unarguable that the First-tier Tribunal erred in law by not considering a ground of asylum not expressly relied upon or evidenced before it.

14. The second ground of appeal focused on the conclusions reached by the First-tier Tribunal on the Appellant's medical condition, specifically that the First-tier Tribunal erred in law in paragraph 28 by finding it "highly surprising" that the Appellant would have attended a boxing club if he had genuinely serious health concerns of the nature claimed. This issue is said

to be relevant to the First-tier Tribunal's consideration of whether the Appellant can internally relocate to Kabul and about whether he would face significant obstacles to reintegration in Afghanistan.

15. In paragraphs 25 to 27 of the decision of the First-tier Tribunal, the evidence in relation to the Appellant's medical issues is set out in some detail, including Counsel's submissions on behalf of the Appellant accepting that there was "minimal medical evidence" and noting that there was no diagnosis or prognosis about the Appellant's condition. On that occasion, Counsel also submitted that it was difficult to evaluate the overall significance of the Appellant's episodes of fainting and merely submitted that the Appellant had not been cured. In paragraph 30 of the decision, the Appellant's written statement, referring to it being unreasonable for him to be expected to live on his own without support in Kabul with a real risk that he could pass out at any time was recorded. However, there was a significant lack of detail in relation to the Appellant's claimed medical condition. It was accepted that he was suffering from headaches and blackouts, but the only independent medical evidence confirmed that these matters were under investigation. There was no evidence from the Appellant, nor those treating him as to how often such episodes occurred, the immediate effects of them, or the general impact of them on the Appellant's daily life, ability to work and integrate.

16. In these circumstances, there was simply nothing before the First-tier Tribunal that could have been considered in any more detail to lead to a positive finding that the Appellant's ability to reintegrate or relocate to Kabul would be impaired or adversely affected by his health. The comment in paragraph 28 about boxing is immaterial to the overall conclusion, as taking the Appellant's claim at its highest, there was simply no evidence beyond that which was considered expressly in the decision which could have even arguably altered the outcome of the appeal.

17. At the oral hearing before me, Mr Fazli suggested either that the First-tier Tribunal should have adjourned the hearing of its own motion to seek further medical evidence from the Appellant about his condition, and/or should have questioned him directly on its impact on his daily living and private life. Those submissions are wholly untenable where the burden is on the Appellant to establish his claim and where the Appellant was legally represented throughout. The conclusions of the First-tier Tribunal were rational, adequately reasoned and open to it on the limited evidence available. For these reasons there is also no error of law on the second ground of appeal.

18. The third and final ground of appeal was that the First-tier Tribunal failed to make an express finding as to whether the Appellant's family were Taliban members, relevant to the risk of forced recruitment to the Taliban on return. This ground of appeal is wholly unarguable for two reasons. First, in 2013, Judge Afako found that the Appellant was not at risk on return from the Taliban his family and the Appellant's claim that his father was murdered by other members of the family who were Taliban members

was not found to be credible. Before the First-tier Tribunal more recently, Counsel for the Appellant expressly confirmed that there was no fresh evidence relied upon which could alter the findings made by the First-tier Tribunal in 2013 and in accordance with the principles in Devaseelan, those findings are the starting point for the latest Tribunal. In circumstances where there are clear findings that the Appellant is not at risk on return from the Taliban or family members contained in the earlier decision, there is no error of law in the later Tribunal not expressly remaking findings on the same issues.

19. Secondly, this is yet a further example of a ground of appeal bearing no relation to the case actually put to the First-tier Tribunal. The Appellant's skeleton argument before the First-tier Tribunal deals with forced recruitment by the Taliban in paragraph 19 by reference only to general background country information. There is no express reliance or suggestion of any particular vulnerabilities of the Appellant in this regard and no further reference here to the Appellant maintaining his claim that members of his family were part of the Taliban and that he would be of any increased risk of forced recruitment for that reason. It is not sufficient, as suggested by Mr Fazli, that in the Appellant's written statement, he maintained his initial claim for asylum including his claimed family circumstances which have not been accepted by the Respondent nor the First-tier Tribunal in 2013 and on which there is no further evidence.

20. In these circumstances, no further or express findings were required of the First-tier Tribunal in relation to whether or not members of the Appellant's family were in the Taliban. This was simply not a live issue before the First-tier Tribunal in relation to forced recruitment, risk on return or otherwise. There is therefore no error of law in the failure to make any such express findings.

21. For the reasons set out above, this is an appeal which should not have been pursued by the Appellant on any of the grounds put forward. Although I accept that permission to appeal was granted on all grounds, this was on the basis of grounds of appeal which were less than frank as to the way that the Appellant's claim had been put before the First-tier Tribunal and as to the full findings of the First-tier Tribunal in 2013, which was accepted there was no fresh evidence to justify departure from.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 16th January 2020

Upper Tribunal Judge Jackson