Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11660/2019 (P)**

THE IMMIGRATION ACTS

Decided Under Rule 34 (P)	**Decision & Reasons Promulgated**
On 2 September 2020	**On 7 September 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

S H
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)
For the appellant: Mr P Draycott of Counsel instructed by Hoole and Co. Solicitors
For the respondent: Ms H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by First-tier Tribunal Judge Haria on 17 April 2020 against the determination of First-tier Tribunal Judge Davidge, promulgated on 30 January 2020 following a hearing at Newport on 23 January 2020.

2. The appellant is an Afghan national born on 20 January 1995. He entered the UK illegally in July 2018 and claimed asylum. As he had travelled through several European countries where he had claimed to have spent lengthy periods of time and had been finger printed in Slovenia and Italy, his removal to Italy was arranged in February 2019 but he refused to board the flight. The application was then considered by the UK authorities and refused on 4 October 2019. The appellant's claim is that he fled Afghanistan aged 13 because his father and brother had been shot and the Taliban forcibly tried to recruit him. Judge Davidge heard oral evidence from the appellant and a witness. She found that the evidence failed to establish to the lower standard that he was at risk in his home area. She found that he had family there to whom he could return and, alternatively, that he could safely return to Kabul if he preferred to do so. Accordingly, she dismissed the appeal.

3. The appellant's grounds and application to challenge the decision were submitted six weeks late. Time was extended on the basis that the appellant's solicitors had only notified him of the decision after the time limit to challenge it had expired although it may be seen from the Tribunal file that the appellant had also been sent a copy of the determination by the Tribunal.

4. The grounds argue that the judge unlawfully speculated and/or showed apparent bias. There is criticism of her finding that all unaccompanied asylum seeking children are economic migrants, it being argued that there was no evidence to show that this was the case. It is further maintained that the judge reached her finding on purported evidence which neither party had relied on and had not been disclosed by the judge at the hearing so that she entered into the arena and acted in a biased manner.

5. The second ground is that the judge failed to determine whether the appellant was a vulnerable witness on the basis that he had sustained a head injury in Afghanistan and that he was depressed.

6. Thirdly, it is argued that the judge dismissed the appeal without carrying out any assessment of the appellant's risk profile on return. Additionally, it is argued that she failed to consider whether his home area was in a state of internal armed conflict for the purposes of article 15(c).

7. The fourth ground is that the judge did not properly consider the issue of return to Kabul and undertook no proper assessment of whether it would be safe for him to go there.

8. A large number of cases are relied on to support the grounds.

<u>Covid-19 crisis</u>

9. Normally, the matter would have been listed for hearing after the grant of permission, but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen. Instead, directions were sent to the parties on 26 June 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

10. The Tribunal has received written submissions from both parties. I now proceed to consider the matter.

11. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

12. I have had careful regard to the submissions made and to all the evidence before me before deciding how to proceed. The respondent raises no objection to the matter being considered on the papers but the appellant seeks a remote hearing to present his arguments as he maintains that the appeal "*raises complicated issues*" and there is an allegation that the determination is "*procedurally unfair*" and biased. It is submitted that no bespoke directions have been issued by the Tribunal to deal with the allegations of procedural unfairness. It is maintained that as the application for permission to appeal raised an issue of procedural unfairness, it is inappropriate to determine the matter on the papers. It is maintained that the Upper Tribunal must have regard to the views of the parties when deciding whether to dispense with a hearing and that the procedure rules provide the appellant with an entitlement to attend a hearing. It is maintained that if the matter is, nevertheless, to be considered on the papers, then the respondent should be directed to lodge "*a comprehensive response to each of the appellant's grounds of appeal*" rather than "*the customarily terse reply which is normally lodged*" and that the appellant thereafter be given the opportunity to reply.

13. I am not persuaded that the issues to be decided are complicated as is claimed; indeed, they appear to me to be straightforward. There are detailed arguments for the appellant on file, both in the grounds

for permission and in the submissions made in compliance with the Upper Tribunal's directions. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. The respondent has already been directed to provide her submissions on the matter and it is not for the Tribunal to dictate the form that the submissions should take. I note further that the appellant already has been given the opportunity to respond to the Secretary of State's submissions (by way of the directions issued on 26 June) and has not availed himself of that opportunity even though those submissions were received on 14 July 2020 and were served on the appellant's representatives the same day. There is provision in the rules for the Tribunal to determine an appeal on the papers and in this case I cannot see any basis on which the appellant would be disadvantaged by the lack of an oral hearing. I have regard to the importance of the matter to him and consider that a speedy determination of this matter is in his best interests. I am satisfied that I am able to fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

14. The appellant's submissions are dated 10 July 2020. They only deal with the proposed disposal of the error of law issue and future case management and make no submissions on the determination of Judge Davidge other than the contention that this is a more complex case than normal and involves allegations as to whether there was evidence before the judge to support the finding that Afghan Unaccompanied Asylum Seeking Children (UASC) are economic migrants and/or that this amounted to bias. Details are summarized at paragraph 12 above.

15. The respondent's submissions are dated 14 July 2020 and were served on the Tribunal and the appellant's representatives the same day.

16. The respondent opposes the appellant's appeal and submits that the judge directed herself appropriately. It is submitted that there was no indication that any application was made to treat the appellant as a vulnerable witness but that the judge nevertheless ensured that the appellant understood the interpreter, reassured him that if there were any problems he should say so, and recorded that there were no apparent difficulties of understanding during the course of the hearing. It is submitted that in considering the appellant's claim, the judge reminded herself of the appellant's age at the time of the claimed incidents and when he left Afghanistan and also reminded herself of the passage of time since the claimed incidents. It is submitted that she gave adequate reasons for finding that the difficulties in his account could not be explained as age-related. The respondent submits that the judge gave adequate consideration to the background evidence and the oral and documentary evidence relied upon. She gave adequate reasons for finding there were

discrepancies and inconsistencies in his account and that there were late additions to it in an attempt to address issues raised in the decision letter. It is submitted that the judge gave adequate reasons for finding that the evidence of the witness did not assist the case and for concluding that the documentary evidence was not reliable. It is submitted that the determination is well reasoned and that the conclusion that the appellant would not be at risk in his home area and could safely return there or, alternatively, that he could safely return to Kabul where he would have the assistance of his village chief was open to the judge to reach. The respondent maintains that the appellant's grounds of appeal amount to mere disagreement with the conclusions of the judge and that the determination discloses no material errors of law.

17. The Upper Tribunal's directions provided the appellant with an opportunity to respond to the respondent's submissions but he has not done so. The submissions are, indeed, detailed and address the appellant's grounds of appeal and are far from the "*terse reply*" which Mr Draycott expected. I am satisfied that the submissions were properly served on the appellant's representatives and of course that the appellant and his representatives are in receipt of the earlier directions as they have been referred to in Mr Draycott's arguments.

Discussion and Conclusions

18. I have considered all the evidence, the grounds for permission, the First-tier Tribunal's determination and the submissions made by the parties.

19. The appellant's grounds are not prepared by the same representative who acted for him at the hearing. That is not necessarily a problem but in this case it is, as Mr Draycott criticizes the judge for failing to address matters that were never argued before her. It may be that he would have chosen to do so had he represented the appellant but he did not and cannot now complain about matters which did not form part of the appellant's appeal.

20. I can see nothing in the skeleton argument or in the Record of Proceedings to even remotely suggest that there was any application to treat the appellant as a vulnerable witness, nor were there any submissions made which suggested that being hit on the head 12 years ago or being depressed would have any impact upon his ability to give evidence (at 40). The appellant's reply to the IAC Notice of Hearing which has a specific section on vulnerabilities (at s.9) asks for any details of vulnerability but the appellant through his representatives replied in the negative in December 2019. The appellant was aged 24 at the date of the hearing as the judge noted (at 2) and the judge was satisfied there were no problems in comprehension during the course of the proceedings (at 10). Despite the appellant's failure to comply with directions, the judge was

amenable to evidence being admitted at the hearing both in the form of documents and a witness for whom no statement of evidence had been provided (at 9). She assured the appellant of her independence and took steps to reassure him as to his rights to comfort breaks and so on (at 10). She permitted the appellant's witness statement to be read to him in full, with the help of the interpreter, a task that should have been undertaken by his representatives prior to the hearing (at 11). She also reminded herself of the appellant's young age at the time the claimed incidents occurred (at 15 and 43). I am satisfied that in the absence of any request for the appellant to be considered as vulnerable, and given the lack of any medical evidence to suggest that he might be, the judge did not err in failing to address this point.

21. The grounds begin by setting out matters alleged to be "*common ground*" (at 1). These differ from the undisputed facts set out in the determination (at 16). There were issues in fact about the appellant's village identified by the judge (at 32). Further, the respondent only accepted that the appellant was Afghani and did not accept that he had established which part he was from (determination: at 4, decision letter: at 24). Additionally, the judge noted that the first reliable evidence of the appellant being outside Afghanistan was when he was in Slovenia aged 17 (at 41). It was, however, accepted that the appellant was a child at the time of the claimed incidents in Afghanistan. I do not read the extract from the decision letter cited at paragraph 2 of the grounds as a concession by the respondent that the appellant had health issues. What the respondent says there is that she does not accept that there is evidence to warrant a grant of discretionary leave on health grounds. In any event, these matters were not determinative and do not form part of the appellant's grounds.

22. Dealing with the main complaint of the determination which in the subsequent written submissions are described as procedural unfairness, I turn to what the judge said at the impugned paragraph 18 of her determination: "*In summary, the country information I was taken to during the hearing tended to show that the Taliban used child soldiers, but that forcible recruitment is unlikely, the practice being to recruit older children from Taliban aligned madrassahs by enthusing them to follow willingly. Unaccompanied children leaving Afghanistan are often in their late teens, as economic migrants funded by their relatives. The cost of travel is significant, related to the length and destination of the journey, Europe being considerably more expensive than Iran or Turkey. I have brought forward my consideration of the country information into my assessment of the appellant's credibility in the round*".

23. The first point to make is that this is a summary of the country information before the judge; it is not a 'finding' as the grounds allege. Secondly, at no point did the judge 'find', as is argued in paragraph 9 of the grounds, that "*all*" UASCs are economic migrants. Nothing in paragraph 18 supports that contention which is, therefore,

a complete misrepresentation of what the judge said. This misrepresentation has then been dressed up as procedural unfairness and bias which is wholly inappropriate. Had the author of the grounds taken the time and trouble to look through the documentary evidence that was provided to the judge by the parties and was not, as the grounds contend, evidence that "*neither party had relied on*" and had "*not been disclosed*" by the judge to the parties (at 11), he would have seen that the judge's summary was fair and accurate.

24. The EASO Country of Origin Information Report of February 2018 was submitted at the hearing (at 9) and includes a section on UASCs. The following sections support the judge's summary: "*To send an underage family member to Europe is an important network decision; it involves splitting up the family, a hazardous journey and it is hoped a large boost to family finances*". "*The hope is that the minor will be able to find a job and help support the family financially. A source pointed out that the sum of EUR30 to 50 per month can make a big difference to a family in the Afghan countryside*" (section 2.1 p. 17). "*In an Afghan context an illegal journey to the West costs a considerable amount of money. In 2016 the GDP per inhabitant was USD 561. The average income in Afghanistan is USD 80-120 per month....Sources from January/February 2017 indicate that the journey to Turkey costs about USD 3000...while a journey with a visa to Germany costs at least USD 20,000*" (2.1 at p. 18). "*Not all young Afghan migrants are passive subjects of family decisions. According to research conducted by the Afghanistan Analysts Network (AAN), interviewing households with one or more members that migrated in 2015, in the majority of the cases they surveyed, it was a migrant themselves that had initiated the conversation on migration. These young migrants had to convince their families to let them go and justified their wish to migrate by pointing at lack of economic and educational opportunities in Afghanistan*" (at p.17).

25. The judge's summary of the Taliban's recruitment process is taken from the LandInfo report in the appellant's bundle (at 11, 15, 23-25).

26. The judge has summarized the country evidence adduced by the parties. She was required to have regard to it, there was no necessity to disclose it to the parties as it came from them, and she was obliged to consider the claim in the context of that evidence. To do so demonstrates no bias; indeed, had she not done so she would have transgressed her duty. It is difficult to see how her consideration of the evidence adduced by the parties themselves can be presented by the appellant's Counsel as procedural unfairness and bias. There is no merit whatsoever in the complaints made and no error in the judge's approach to the evidence. The allegations made are devoid of substance and are made without any support at all. As such, they should never have formed the basis of a grant of permission by the First-tier Tribunal. I would further add that the judge's approach, for example, to the section 8 arguments made by the respondent further shows her open mindedness as she did not hold against the appellant

his failure to claim asylum in France, Greece or Italy (among all the other countries he passed through) despite having spent years in them (at 41). Had she been biased, this could easily have been used as a further basis for a negative credibility assessment.

27. The grounds also complain that the judge did not consider the appellant's risk profile on return. It is not specified what this profile is considered to be but the judge rejected the claim of forcible recruitment for wholly sustainable reasons. No other basis for persecution was put forward.

28. It is maintained that the judge did not consider whether the appellant's home area was in a state of armed internal conflict. This was not an argument made to the judge by the appellant's Counsel at the hearing. It was not raised as part of the evidence, nor argued in submissions or in the skeleton argument and no country evidence to support such a contention was brought to the attention of the judge. Had it been considered that there was a risk to the appellant on this basis, then one can be confident that Counsel would have raised it as part of the appellant's appeal. The judge cannot now be criticized for failing to consider a matter which was not argued for the appellant.

29. The final complaint is that the appellant's ability to relocate safely to Kabul was not properly considered. This was, it has to be said, briefly addressed at paragraph 44, however, the brevity of the consideration is not a material error because the judge had already found that the appellant could safely return to his home village where he still had family. Her concluding findings confirm that "*the question of internal relocation to avoid a risk in the home area does not arise*".

30. For all the above reasons, the judge was entitled to conclude that the appellant would not be at risk of return to his home area. No challenge has been made to her findings that there were numerous difficulties with his account, with the evidence of the witness, with the late submission of documents and the difficulties with them, and the mention of matters that had never been previously referred to either in the asylum interview or the appellant's witness statement.

31. No article 8 claim has been pursued.

Decision

32. The decision of the First-tier Tribunal does not contain an error of law and it is upheld. The appeal is dismissed.

Anonymity

33. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I continue the anonymity order made by the First-tier Tribunal to protect the identity of the appellant.

34. Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings of any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed

R. Kekić
Upper Tribunal Judge

Date: 2 September 2020