Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05294/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 June 2013	

Before

UPPER TRIBUNAL JUDGE LATTER

Between

AS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Knorr, instructed by Wilsons, Solicitors
For the Respondent: Ms M Tanner, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing an appeal by the appellant following a hearing on 7 March 2013 against the respondent's decision made on 9 May 2012 refusing to vary his leave to remain following the refusal of his claim on asylum and human rights

grounds. Permission to appeal was granted by the First-tier Tribunal in a decision issued on 25 April 2013.

Background

2. The appellant is a citizen of Afghanistan born in 1994. He arrived in the UK on 17 January 2010 and subsequently claimed asylum. His application was refused on 20 May 2010. The respondent did not accept that the appellant was born in 1994 but assessed his year of birth as 1992.

3. The appellant appealed against that decision and his appeal was heard before IJ Gordon on 7 July 2010. Although she found that he was born in 1994, she did not accept that he would be at real risk of serious harm on return to Afghanistan and his appeal was dismissed. Permission to appeal was refused by both the First-tier and the Upper Tribunal. However, in the light of the findings about his age, he was granted discretionary leave until 18 February 2012. On 16 February 2012 he made an application for further leave to remain, in substance repeating the basis of his previous claim. His appeal was dismissed by the First-tier Tribunal but this decision was set aside by the Upper Tribunal and remitted for rehearing. It was reheard on 7 March 2013 by Judge Buckwell and dismissed on all grounds.

The Hearing Before the First-tier Tribunal

4. The judge summarised the basis of the appellant's claim in [5]. He said that he had a well-founded fear of persecution if he returned to Afghanistan as his father had been a commander with Jamiat-e-Islami when the Taliban governed the country. His father was a wealthy man and had had contracts with the previous government, but lost them when the Taliban came to power. Nevertheless, he was still perceived to be wealthy and attracted the attention of criminal gangs including kidnappers. The appellant claimed that he was kidnapped and released only when his father made a payment of US$93,000. He also claimed that his father and family members had encountered problems with rival commanders and in particular one identified as Commander Hamidullah who belonged to Hezb-e-Islami. The animosity between them led to the appellant's father deciding to send him to Europe to save his life. In submissions made in support of his application, it was said that the whereabouts of his father were not known but other family members were in Pakistan and a paternal uncle had been captured by Hezb-e-Islami.

5. A witness statement dated 16 February 2012 from the appellant was also submitted in support of the application. He said that his family were of Tajik ethnicity and where they lived it was common for people from their ethnic group to be involved with the Jamiat-e-Islami. Those who were Pashtuns were more likely to be affiliated to Hezb-e-Islami or the Taliban. His father had been a commander with the Mujahidin, which had taken over the capital city Kabul when the government supported by Russia had collapsed. His father had secured valuable contracts from the new

government and although the appellant was young at the time, he was aware that his father had engaged armed protection for family members. Following the fall of the Taliban and President Karzai coming to power and international forces being in the country, his father had set up new businesses. Although his father's wealth had been reduced during the Taliban regime, the family were still perceived as wealthy and the rivalry with Commander Hamidullah remained. His son had been killed and it was perceived that the appellant's father was involved in the death.

6. In July 2008 the appellant and family members set out to visit a shrine in Herat but their vehicle was stopped by a group of men who were masked and armed. The appellant was kidnapped and driven away. He was kept in a dark basement. He was punched and detained for 43 days. He gave the captors his father's telephone number which they said they already held. Every day he was threatened with death and asked about the activities of his father and about his land and wealth. He was released when US$93,000 was paid. He said that even after his release, those who kidnapped him continued to pursue the family demanding more funds. For this reason they left Kabul and the appellant was put in the hands of an agent so that his travel to Europe could be arranged. The family first moved to Iran and then to Pakistan. His father had lost contact with his mother on the journey to Iran and he had heard his father had been killed but he was not sure. His mother and siblings resided in Pakistan. He believed that his life would be in danger if he was returned to Kabul due to perceptions about his father's wealth.

7. His application was supported with a number of enclosures identified by the judge in [14]. These included not only background evidence about the situation in Afghanistan but letters relating to the appellant including a document addressed to him seeking an execution due to the killing of Commander Hamidullah's son and stating that the appellant's uncle was in their captivity. The letter was said to be from Hezb-e-Islami and issued in Parwan province on 24 September 2011. There was also a letter said to be from the police command in Kabul stating that in response to a request for security for the appellant, there would not be sufficient resources to respond and a letter in the name of the Taliban addressed to his father demanding that the appellant be sent to join them and threatening the family with punishment including a threat to blow up their house. A correction was also made to his previous statement to the effect that the money paid for his release was $90,000 not $93,000.

8. The judge set out in [16] – [20] the substance of the respondent's decision in the decision letter of 9 May 2012. It was the respondent's view that the credibility assessment of Judge Gordon remained authoritative and that the account given by the appellant was neither plausible nor credible. She noted that documents sent by the appellant's uncle residing in Pakistan had come from Afghanistan but without any explanation as to how they had come into his custody. The relevant envelopes had not been provided. The letter from Hezb-e-Islami purported to be from their legal

department but there was no evidence that this armed organisation had such a department. It was noted that Commander Hamidullah's son was said to have been killed on 10 September 2008 but in his most recent witness statement the appellant had said that he had been killed earlier than that which is why he had stopped attending school and was subsequently kidnapped in July 2008. The respondent also commented that a membership card for the appellant's father in relation to Jamiat-e-Islami giving a registration date of 26 July 1992 was in remarkable condition given its claimed age and described the appellant's father as a worker rather than as a commander.

9. The judge heard oral evidence from the appellant and his brother. He also had a psychiatric report prepared by Dr Katona, a bundle of case law and a small number of further documents identified in [25]. The appellant gave oral evidence in substance confirming his account. His brother gave evidence confirming and adopting his witness statement. It was submitted on behalf of the appellant that the issue of credibility needed to be looked at afresh as at the hearing before Judge Gordon the appellant had been a minor and no medical evidence was available. There was also an expert report by Mr Peter Marsden whereas Judge Gordon had had no more than minimal evidence before her about circumstances in Afghanistan. It was argued that the appellant's family had had bodyguards and there were many armed groups in Afghanistan. The report from Mr Marsden confirmed that there were animosities and hostilities between individuals. The appellant's mental health difficulties as set out in Dr Katona's report should be taken into account. It was argued that the appellant and his family had received threats and that the family had left Pakistan in consequence. On behalf of the respondent it was argued that the appellant's evidence was unreliable and evasive and it was simply not credible that he would not have had any adverse experiences prior to the claimed kidnapping.

The Judge's Findings and Reasons

10. The judge set out his findings and conclusions in [49] – [69]. He said that he was not at all impressed by the quality of the evidence given by the appellant [60]. He did not rely on the appellant's demeanour but said that it was clear from his summary of the evidence that the appellant had been able in response to certain questions to give relatively clear answers but when questioned in cross-examination in particular, he was often vague. On other questions he was able to give much clearer answers. The judge cited by way of example the appellant being able to explain, when previously he had said his captors may have been the Taliban or otherwise he did not know who they were, that he stated this in his reply because he had meant that he did not know the individuals concerned and was therefore not sure who they were. He was also able to say the family had experienced problems from the Taliban. However, having claimed that he was held for many days, when he was asked about speaking to those who held him captive, he accepted that he had done so but when asked for

more detail, his reply was that he had not been in a good situation. He had been asked whether he had ever asked his father who his captors had been but had said he was unable to recall asking his father that. The judge found that to be extraordinary.

11. The judge commented that the content of the appellant's oral evidence was in stark contrast with the apparent detail of his witness statements which had been adopted at hearings both before this and previous Tribunals [61]. He gave little weight to the record of the screening interview. He commented that the appellant was asked questions about Commander Hamidullah but he was unable to say how far away he lived from the appellant's family home. Generally, the appellant had been unable to recall any detail of significance in response to the questions posed to him. He noted that in re-examination the appellant did appear to be able to give longer and more detailed replies to questions put to him and was able to talk about documents held by his father, his last contact with family members, telephone warnings to his father, warning letters, the restrictions which the family had placed on his own travel and the more recent information that his father had been killed [63].

12. The judge found that the evidence given by the appellant's brother did not advance his cause to any significant degree in terms of establishing his credibility. Having been given the opportunity to explain what difficulties his father and the family had experienced in Afghanistan, his brief answer was to say that his father had been a contractor for the former Northern Alliance government [65].

13. The judge summarised his findings as follows:

> "68. The Tribunal finds here that the appellant has not set out a truthful account. It is believed that he wished to come to this country in order to find a better life. The Tribunal does not believe the account of the appellant. It is not accepted that he was previously targeted, that he was abducted, that his father paid any sum to release him from kidnap or that any other threats had been made against him. The Tribunal does not give weight to the documentation provided in view of the general adverse credibility findings and does not accept on the basis of his claimed account that the appellant is at risk on return to Afghanistan."

14. The judge then went on to find that the appellant was not an individual who had a current and well-founded fear of persecution for a Geneva Convention reason in any part of Afghanistan or that he would face any real risk of treatment contrary to article 3 of the ECHR and that in addition he would not face circumstances which would engage the 2006 Regulations. The appeal was accordingly dismissed.

The Grounds and Submissions

15. In the grounds it is alleged that the judge committed three errors: firstly, he erred in law in his assessment of the appellant's oral evidence;

secondly, he failed to take into account relevant evidence and to assess the evidence in the round and thirdly, he failed to give reasons for dismissing the humanitarian protection appeal, to apply country guidance, to consider all relevant considerations or to make findings on the whereabouts of the appellant's family.

16. Ms Knorr dealt initially with the second and third grounds, crystallising them into two points. The judge had failed to deal with the article 15c argument on humanitarian protection and had also failed to make any findings on where the appellant's family were. The judge had accepted that the appellant was vulnerable and suffered from post-traumatic stress disorder but there had been no assessment of his individual circumstances in the context of a return to Kabul. There had been evidence in two statements from his uncle but the judge had not dealt with them. He had made no findings on the whereabouts of the appellant's family and it followed, so she submitted, that there had been no proper basis on which to simply dismiss the humanitarian protection appeal.

17. The first ground was dealt with in more detail and the grounds of appeal at [2] – [18] set out a detailed challenge to the judge's findings on credibility. It is argued that the judge ultimately rejected the appeal on the basis the appellant was unable to give full answers to all questions when giving oral evidence and that the judge relied on the following factors to find that the appellant was not credible: having been held captive for many days and accepting that he had been spoken to his captors, when he was asked for more details about what had been said, he had simply replied that he had not been in a good situation [60]. The judge had regarded it as extraordinary that the appellant was unable to recall whether he had asked his father about who his kidnappers had been and had been unable to say how far away Hamidullah had lived from the appellant's family home.

18. The grounds then argue that it was irrational to conclude from these factors and the other criticisms made of the appellant's evidence identified in [4] of the grounds that his evidence was not credible. Although the judge had taken into account Dr Katona's report, he had failed expressly to acknowledge that the appellant had been diagnosed with a significant learning disability or to take this into account when assessing the oral evidence. The grounds raise issues about what inferences should be drawn from the appellant's evidence and argue that some of the judge's conclusions were unreasonable and to this extent he took irrelevant considerations into account. The appellant had given extensive evidence about matters which had not been challenged or tested orally and the judge had failed to take into account the fact that Mr Marsden had confirmed the plausibility of a number of aspects of the appellant's evidence.

19. It was submitted in particular that the uncle's evidence should have been taken into account because of its importance and dealt with specifically.

The judge also erred, so it is argued, in the way he dealt with the documentary evidence by not giving weight to the documents in the light of his general adverse credibility findings and by not looking at the evidence in the round. The judge had said that he gave little weight to the asylum interview but it is argued that he had failed to take into account the question of whether the appellant's evidence had been consistent and had also failed to factor in to his assessment of the appellant's evidence the fact that he was an exceptionally vulnerable young man.

20. Ms Tanner submitted that the judge's assessment of the evidence was exemplary and that the grounds amounted to no more than a sustained disagreement with his findings of fact which were properly open to him. The judge had been right to take as his starting point the previous determination by Judge Gordon. He had then considered the additional evidence from Mr Marsden and Dr Katona. He reviewed the evidence in the round and was entitled to comment in the light of the detailed evidence given in the witness statement that the appellant's evidence in cross-examination had been vague. It had been open to the judge to comment in [62] that generally the appellant was unable to recall any detail of significance in response to the questions posed to him. She accepted that the judge had not dealt in terms with the humanitarian protection appeal but in the light of his findings of fact there was no basis on which that appeal could succeed. It was clear that the core of the appellant's account was rejected and that the judge did not believe his evidence about his family.

Assessment of the Issues

21. The issue for me at this stage of the appeal is whether the First-tier Tribunal erred in law such that its decision should be set aside. I shall deal firstly with the challenge to the judge's findings of fact. Such a challenge can only succeed if his findings were not properly open to him on the evidence or can be categorised as unreasonable or irrational. They may also be erroneous in law if relevant matters were left out of account when his evidence was assessed.

22. The initial challenge in the grounds is that there was no adequate basis for rejecting the appellant's evidence in that the judge was not entitled to find that he lacked credibility on the basis of the replies that he gave about what had been said to those who held him captive, the fact he did not recall whether he had asked his father who his kidnappers were and had been unable to say how far away from Commander Hamidullah the family had lived. It is also argued in the grounds that the appellant's evidence in cross-examination that he was not sure how much ransom had been paid for his release and his comment that he could not explain why he could not recall matters as they had happened a long time ago, the fact that he was unable to be more clear about who his kidnappers were and in particular whether they were from the Taliban, whether he had ever seen the person who had threatened to kill him and whether people at his

school had told him someone was looking for him did not provide an adequate basis from which to draw an adverse finding on credibility. It was also argued that the judge had failed to take proper account of Dr Katona's report and failed to look at matters in the round.

23. These grounds do not satisfy me that the appellant is able to meet the high threshold of showing that the judge's findings of fact were not properly open to him. The judge made it clear that when assessing the evidence he took into account all the documentation whether or not specifically referred to and that when considering the veracity of documentation he was guided by the Tribunal decision in Tanveer Ahmed [49]. He referred again to considering the evidence in the round when commenting in [50] that it was for him to conclude whether Judge Gordon's findings should stand or whether consideration of evidence in the round should lead to a different view on credibility. He referred to the reports submitted in evidence. The report of Mr Marsden is covered in [51] – [53]. He was clearly aware from this report that Mr Marsden had expressed the view that the appellant would be particularly vulnerable [51] and that if his father had died then he would not be able to benefit from his previous protection or influence his father might otherwise have [53]. The psychiatric report from Dr Katona was considered in [54].

24. The judge was entitled to comment in [57] that the assessments and professional opinions expressed including assessments of plausibility on the appellant's account did not of themselves provide an absolute assurance that the account he gave of his claimed experiences in Afghanistan and his fear of future risk on return were necessarily truthful. The use of the word "absolute" must be read in context and when the determination is read as a whole, there is no reason to believe the judge did not accept the appellant's evidence simply because the reports did not provide an absolute assurance of credibility, an impossible standard if read literally, not least because the judge balanced what he said about the expert reports by acknowledging that the standard of proof was still relatively low but the burden was on the appellant.

25. The judge also commented in [58] that, when considering Judge Gordon's decision, it was also appropriate to take into account that the appellant at that hearing had been unrepresented and that for any individual, let alone a vulnerable individual, facing a Tribunal hearing with or without the support of a social worker was a significant and very challenging scenario. He also repeated that he took into account the views and the conclusions in the report of Mr Marsden.

26. There is nothing to support a contention that the judge did not take the reports into account and give proper weight to them in the context of the evidence as a whole. He went on to make findings on the appellant's credibility. This was an issue of fact for him to assess. He did not find the appellant to be an impressive witness and I am satisfied that he gave adequate and sustainable reasons for this conclusion. He was entitled to

comment on the vagueness of the appellant's answers in cross-examination in contrast to the detail in his witness statement. It was argued by Ms Knorr that it was wrong to contrast cross-examination with examination-in-chief when very little further evidence had been given and in any event the appellant had given clearer evidence in re-examination.

27. However, the point the judge was entitled to make was that generally the appellant was unable to recall details of significance when questioned: [62]. The grounds identify details in the evidence and set out arguments about the inferences which could or should properly be drawn from the evidence but in substance, these are arguments about issues of fact and the inferences to be drawn from primary fact. They do not satisfy me that the judge erred in law in the view he took of the credibility of the appellant's evidence.

28. The judge dealt with the evidence of the appellant's brother in [65]. He explained why he took the view that it did not to any significant degree help establish the appellant's credibility. It is argued that the judge should have made specific findings on the evidence from the appellant's uncle but the judge was clearly aware of that evidence [23]. The appellant had been asked about his family in re-examination and these answers are recorded in [33]. There is no reason to believe that the uncle's evidence was left out of account and I am not satisfied that the judge erred in law by not dealing specifically with that evidence.

29. The judge is also criticised for the way he dealt with the documentary evidence where in [68] he says that he did not give weight to it in view of his general adverse credibility findings. If the judge had left the documentary evidence out of account when making his credibility findings, he would have fallen into error but I am not satisfied that this was the case. As I have already indicated, the judge said on a number of occasions that he took all the evidence into account and there is no reason to believe that he did not do so. I am not satisfied that he fell into the error of compartmentalising the evidence when making his findings of fact. In summary, the challenges in the grounds to the judge's findings of fact do not satisfy me that he erred in law in this respect.

30. It is argued that the judge erred by failing to give specific consideration to the humanitarian protection appeal under article 15(c). It is correct that he did not deal specifically with this issue and made no reference to it in [70]–[71] even though this appeal is referred to as being dismissed in [73]. However, I am not satisfied that the humanitarian protection appeal had any prospect of success in the light of the judge's findings of fact. It is clear that he did not find the appellant's evidence to be credible and he did not believe his evidence about events in Afghanistan including his evidence about where his family members were. When the determination is read as a whole, it is clear that the judge did not believe the appellant's evidence about his family circumstances and was not satisfied that he was without family members in Afghanistan to whom he could look for support.

31. The appellant failed to show that he would be at real risk of persecution on return to Afghanistan and applying the country guidance at [243] of AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 he would be unable to bring himself within the provisions of article 15(c) in relation to a return to Kabul. The evidence about his vulnerability arising from the report of Dr Katona would only give rise to an arguable claim if he was able to show that he would be without family support. The appellant was therefore unable to show either that he would be at risk from generalised violence under article 15(c) or that there were particular features relating to his circumstances which would bring him within article 3 or article 15(b). Any error in failing to deal specifically with humanitarian protection is not in these circumstances an error capable of affecting the outcome of the appeal.

Decision

32. The First-tier Tribunal did not err in law and its decision stands.

33. No application has been made to vary or discharge the anonymity order made by the First-tier Tribunal and accordingly that direction remains in force.

Signed Date: 9 July 2013

Upper Tribunal Judge Latter