



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

Appeal Number: AA/03567/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 September 2015**

**Decision & Reasons Promulgated  
On 14 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**AS**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation**

For the Appellant: Ms A. Fijiwala, Senior Home Office Presenting Officer

For the Respondent: Ms A. Mackenzie, Counsel instructed by Sutovic & Hartigan

**DECISION AND REASONS**

1. In this decision I will refer to the appellant as “the Secretary of State” and to the respondent as “the claimant”.
2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal promulgated on 7th April 2015 allowing the claimant’s appeal against the decision of the Secretary of State, dated 30 March 2013, to refuse his application for asylum and humanitarian protection.

3. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the claimant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

### The Claimant

4. The claimant is a citizen of Afghanistan who arrived in the UK on 5 December 2011 and immediately claimed asylum.
5. The claimant claims his date of birth is 4 September 1997.
6. On 16 December 2011 an age assessment was carried out by Croydon Social Services which found the claimant to be 16 years old and on 3 May 2012 Croydon Social Services carried out another age assessment which concluded the claimant's date of birth was 4 September 1995.
7. On 3 February 2012 an age assessment was carried out by Dr Birch, who found the claimant to be 14 or 15 at that date.
8. The Secretary of State refused the claimant's application. Her reasons are set out in a refusal letter dated 30 March 2013 (hereinafter "the Refusal Letter"). In sum, the application was refused because the Secretary of State did not find the claimant's account of being kidnapped and tortured by the Taliban to be credible; she found that he had family in Afghanistan who could offer him support and protection upon return; and she found that in any event he could relocate internally.
9. One of the key issues considered in the Refusal Letter was the claimant's age. The Refusal Letter states that according to the assessments by Croydon Social Services the claimant was 17 years and 207 days old but based on Dr Birch's assessment he would be only 15 or 16 years of age. There is a lengthy discussion of negative judicial treatment of Dr Birch's methodology and approach and the Refusal Letter concludes that Dr Birch's assessment cannot be used as a reliable indicator of the claimant's age. The claimant is found to be 17 years and 6 months old and therefore not able to qualify for Discretionary Leave as an asylum seeking child.
10. In the meantime, the claimant brought judicial review proceedings in relation to the assessment of his age by Croydon Social Services. In a decision promulgated on 18 November 2013, Upper Tribunal Judge Latta found the claimant to not be a reliable witness about his age, to be older than he claimed "by a reasonably significant margin" and to have a probable date of birth of 4 September 1995.

### The First-Tier Tribunal Decision

11. The appellant appealed the Secretary of State's decision to refuse asylum or humanitarian protection and his appeal was heard by First-tier Tribunal Judge Cooper ("the judge") on 3 February 2015.
12. The judge was satisfied that the claimant's account of his treatment in and escape from Afghanistan was credible and consistent with objective evidence. She was also satisfied that the claimant had provided medical evidence pertaining to his mental health that showed there to be a risk of his mental health deteriorating further if he was required to return to Afghanistan. The judge accepted that the claimant did not know the whereabouts of his family and found that there would not be sufficient of protection for the claimant as an unattached child returning to Afghanistan.
13. The judge gave detailed consideration to the issue of the claimant's age (paragraphs [34] - [56] of the decision) and found, on balance, that his date of birth was 4 September 1997. The judge commented that this finding was of importance in considering any discrepancies or inconsistencies in the claimant's evidence and the question of sufficient of protection on return.
14. In considering the issue of the claimant's age, the judge made the following findings and observations:
  - a. She was not bound by the decision in the Upper Tribunal which found the claimant's probable date of birth to be 4 September 1995 as there was a different (and lower) standard of proof in asylum appeals and she had taken into account evidence that was not before the Upper Tribunal. She stated at paragraph [53] that the Upper Tribunal's findings were the starting point but she could depart from them if there are good reasons.
  - b. At paragraph [44] she commented that the claimant had not relied on Dr Birch's assessment but as it was evidence before her she was entitled to give it consideration. She went on to discuss the report and compare it to those of the social workers before concluding, at paragraph [54], that "on balance I prefer and give more weight to the report of Dr Birch than to the two social services assessments given their inconsistencies, lack of precision and vague unreasoned assessments."
  - c. She found the Taskira, stating the claimant's age as 12 in October 2009, to be valid. This finding was made in light of a report by Dr Giustozzi which concerned its veracity. The judge noted that this report, to which she 'gave weight', was not available to the Upper Tribunal.

- d. The judge also gave weight to the evidence of the claimant's GP and his solicitor's statement which she said confirmed the claimant had continued to grow since arriving in the UK.
  - e. She concluded that based on the evidence in the round, and at the lower standard of proof, she was satisfied the claimant's date of birth was 4 September 1997.
15. The Secretary of State's grounds of appeal submit that:
- a. The judge failed to inform the parties that reliance would be placed upon Dr Birch's age assessment, the claimant having said he would not be relying on it. Before the judge took into account evidence explicitly not relied upon by the claimant she should have put the parties on notice and asked for submissions on the same.
  - b. The judge's comment, at paragraph [37], that London Borough of Croydon may have an interest in the claimant being older than his claimed age, indicates a lack of impartiality.
  - c. There was a failure to take proper account of the judicial review findings, and in particular the credibility findings therein with regard both to the social workers (to whom the Upper Tribunal gave considerable weight) and the claimant (whose evidence was not considered credible or reliable).
  - d. With regard to the Taskira, there was a failure to follow the approach in **Tanveer Ahmed** ([2002] UKIAT 00439) that documentary evidence along with provenance needs to be weighed in light of all the evidence and does not carry with it a presumption of authenticity. There must be an appraisal in light of the evidence about its nature, provenance, timing and background evidence and in light of all the other evidence in the case especially from the claimant.

### Submissions

16. Ms Fijiwala, on behalf of the Secretary of State, argued that placing reliance on Dr Birch's report without first allowing the Secretary of State an opportunity to make submissions in respect of it was procedurally unfair and amounted to an error of law. She argued that the error was material because it was clear the judge had relied on the report in reaching her view on the claimant's age and that the appellant's age was critical to the judge's overall findings.
17. Ms Fijiwala also submitted that the judge had not given proper consideration to the Upper Tribunal's decision about the claimant's age in the recent judicial review proceedings. The Upper Tribunal made clear findings with respect to the two social workers who carried out the age assessments. Having heard them give oral evidence, Judge Latta stated at paragraph [53] that they were entirely professional in their approach and had not been influenced by the fact they were employed by the local authority. He described them as giving an honest assessment and

attached considerable weight to their opinions. The judge in this appeal, who did not hear oral evidence from the social workers, took a very different view without an adequate explanation as to why she was departing from the considered view of the Upper Tribunal.

18. Mr Mackenzie submitted that even on the Upper Tribunal's view as to the claimant's age, he was a minor when he entered the UK and only 19 at the date of the hearing. Given the factual findings by the judge which have not been challenged including in particular about the claimant's mental health, he was, if not a child, then a vulnerable young adult and as such the judge's analysis regarding sufficiency of protection and risk on relocation pertained whether he was 17 or 19. Accordingly, if there was an error in the judge's approach to assessing the claimant's age, it was not material.
19. Mr Mackenzie argued that the judge's approach to assessing age did not disclose an error of law. Dr Birch's report was in the bundle and the Secretary of State was able to make submissions. In any event, submissions had been made in the Refusal Letter which gave detailed reasons for objecting to Dr Birch's report. Mr Mackenzie argued that the Secretary of State had not explained what further objections, not already in the Refusal Letter, she had to Dr Birch's report and it is clear the judge had had regard to the criticisms set out in the Refusal Letter. Any further submissions in respect of the report would therefore not have been material. He also submitted that if the judge had erred in his approach to Dr Birch's evidence that would not have been material as there was ample other evidence upon which the judge relied in reaching her conclusion about the claimant's age.
20. With respect to the judicial review proceedings, Mr Mackenzie argued that the judge had directed herself accurately to the law and was entitled to reach a different conclusion to the Upper Tribunal in light of the different evidence before her and different burden of proof.

### Consideration

21. For the reasons set out below, I find there to be a material error of law such the appeal should be remitted to the First-tier Tribunal for hearing afresh in its entirety.
22. The judge was entitled, despite the claimant's decision to not rely on Dr Birch's report, as recorded at paragraphs [36] and [44] of her decision, to have regard to and take account of Dr Birch's report but if she decided to do so it was incumbent upon her to forewarn the parties in order to give them the opportunity to make submissions with respect to the report. In the absence of being so advised it was reasonable of the Secretary of State to assume it was not necessary to make any submissions in relation to the report given that the claimant had said he was not relying on it. Failure to so advise the parties was an error that affected the procedural fairness of the appeal. This was particularly the case because Dr Birch's

report formed an important part of the judge's assessment and she attached to it considerable weight. At paragraph [54] she stated that she preferred and gave more weight to it than the other reports before her. Moreover, the judge was aware that the Secretary of State had serious reservations about the report that were grounded in judicial criticism of the methodology used by the author in earlier cases. The judge recognised this and commented that Dr Birch had not used certain methodologies that were the subject of the criticism and had adhered to the guidelines issued by the Royal College of Paediatricians. However, she reached this view without giving the Secretary of State an opportunity to make submissions or develop arguments about the report.

23. Mr Mackenzie argued that even if the judge erred in her approach to Dr Birch's evidence, the error was not material because the other evidence about the claimant's age was sufficient to justify her findings. I do not agree. The judge made clear that her finding on the claimant's age was based on all the circumstances "in the round." Whilst the judge could, arguably, have reached the same view without relying on Dr Birch's report - indeed, that appears to be what the claimant was asking her to do as he explicitly chose to not rely on the report - that is not what she did and it is clear that she placed considerable reliance on the report. Indeed, it is apparent from the decision that the weight she gave to Dr Birch's report was a determinative factor in reaching her finding about the claimant's age.
24. Having found that the judge erred in relying on Dr Birch's report without first giving the Secretary of State an opportunity to make submissions about it and that this error was material to the finding about the claimant's age, the next issue is whether the finding that the claimant was born in September 1997 rather than September 1995 was material to the overall question of whether the claimant should be granted asylum. The judge devoted a considerable part of her decision to assessing the claimant's age and then made her findings as to risk on return, sufficient of protection and internal relocation on the basis of the claimant being a child. Arguably it may have been open to the judge to find that even if she was mistaken about the claimant's age there was in any event a sufficient basis to find he satisfied the requirements to be granted asylum. However, that was not the approach the judge took and instead her decision makes clear that her findings in respect of asylum are bound up with her findings as to the claimant's age. Accordingly, I find that there has been a material error of law such that the judge's decision should be set aside.
25. I have considered whether the factual findings unrelated to the claimant's age can be preserved. However, the issue of the claimant's age cannot be disentangled and separated from the rest of the findings and therefore my conclusion is that the appeal should be remitted for a *de novo* rehearing in the First-tier Tribunal.

## **NOTICE OF DECISION**

**The decision of the First-tier Tribunal contains a material error of law such that it should be set aside in its entirety and the appeal heard afresh.**

**The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than Judge R Cooper.**

**Anonymity order made**

Signed

Deputy Upper Tribunal Judge Sheridan

Dated