



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

Appeal Number: AA/07203/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision and Reasons**

**Promulgated**

**On: 18 September 2015**

**On: 21 September 2015**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL KAMARA**

**Between**

**MR FH**

(ANONYMITY DIRECTION MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms L Targett-Parker, counsel instructed by Barnes Harrild & Dyer Solicitors

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

**DECISION AND DIRECTIONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Griffith dated 26 November 2014. Permission to appeal was granted on 11 May 2015.

**Background**

2. The appellant arrived in the United Kingdom clandestinely, aged 14. He applied for asylum on 11 February 2009 on the basis that the

Taliban had attempted to recruit him. The respondent's checks disclosed that the appellant was fingerprinted in Greece in July 2008 and France in January 2009. The appellant's asylum claim was refused on 11 August 2009, however he was granted discretionary leave to remain until 1 July 2012. The appellant applied for further leave to remain on 15 June 2012 but that application was not decided until 20 June 2014, when it was refused.

3. During the course of the hearing before the First-tier Tribunal, the appellant was the only witness. The FTTJ found that the appellant's entire account was a "total fabrication" including his evidence before the Tribunal. Reference was made to a number of discrepancies in his evidence including as to the existence of siblings; the identity of a cousin in the United Kingdom; whether or not his fingerprints were taken and his lack of co-operation with the respondent regarding the tracing of his family. The FTTJ also considered that the appellant could relocate. In relation to Article 8 outside the Rules, the FTTJ considered that the respondent's concerns far outweighed the appellant's right to a private life.

#### Error of law

4. Permission to appeal was granted by Upper Tribunal Judge Finch on the basis that, firstly, it was arguable that the FTTJ failed to give sufficient weight to the appellant's age at the time he arrived in the United Kingdom; that he had been under the control of an agent during his journey here or considered the guidance before her in relation to the assessment of credibility of children in asylum proceedings. Secondly, in relation to the duty to trace, it was said that no consideration had been given by the FTTJ to the decision in JS (Former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00586, in reaching her decision about future risk. Thirdly, it was considered arguable that the appellant's presence in the United Kingdom was not precarious, contrary to what was found by the FTTJ.

#### The hearing

5. Ms Targett-Parker relied on her substantial skeleton argument, which had been submitted on the morning of the hearing and in which she continued to rely upon the three grounds upon which permission was granted. Firstly, she argued that the FTTJ's findings on the appellant's credibility were unsound, with particular reference to the lack of liberal application of the benefit of the doubt in view of his age at the time he arrived in the United Kingdom. Secondly, she submitted that the FTTJ failed to adequately consider the respondent's duty to trace the appellant's family from 2009 until he became an adult. Thirdly, Ms Targett-Parker argued that the FTTJ failed to apply EB (Kosovo) [2008] UKHL 41 in taking into account the appellant's private life established from 2009 until the date of the hearing. I also asked her to address the arguments set out on page 6 of the permission application relating to whether the Secretary of State had acted in accordance

with the previous Discretionary Leave policy. Ms Targett-Parker advised me that she had not drafted the grounds and did not seek to rely on that matter further.

6. Mr Clarke submitted that the FTTJ's decision disclosed no material error of law. He relied on a sentence in the judgment in TN and MA (Afghanistan v SSHD) [2015] UKSC 40 at [73] that being "*There is no presumption of credibility.*" He argued that the FTTJ was mindful of age of appellant at [39] and [40]. He referred to my earlier observation that the respondent's case was that fingerprinting took place before the appellant says he left Afghanistan. He asked me to note that the appellant denied being fingerprinted at the hearing but at the same time he remembered discussing with an agent that he should not discuss fingerprinting. It was difficult to see how the FTTJ could do anything other than view that in a negative light. Mr Clarke asked me to note that the appellant claimed he could not read or write despite evidence to contrary. There were also said to be inconsistencies in relation to the appellant's family in Afghanistan, which also went to the tracing issues. Mr Clarke maintained that the appellant did not consent to the Home Office tracing his family, he conceded that he had not seen correspondence relating to this but stated that it was not disputed that the consent was not given. Further discrepancies related to the identity of the cousin who was in the United Kingdom. He argued that it was open to the FTTJ in considering the appellant's evidence at the hearing along with earlier accounts, to find his claim was a fabrication. Mr Clarke stressed that the inconsistencies and implausible matters were not specific to when the appellant was aged 14. Finally, on this ground, Mr Clarke argued that for the FTTJ to say that the appellant always intended to come to the United Kingdom was not an absurd finding.
7. With regard to the second ground, Mr Clarke relied upon EU (Afghanistan) [2013] EWCA Civ 32 at [6] and [7] and argued that there was now no risk to the appellant on return. He stated that there had been no failure to trace. Referring again to TN and MA at [69] he submitted that a child must be properly consulted about his or her wishes and that the Home Office could not steam ahead and make tracing enquiries without the appellant's consent. Mr Clarke argued that there was no case law to say the Home Office was under a duty to trace for an adult and that the appellant should have raised it in his minority. He said the appellant had clearly obstructed the respondent in giving inconsistent information. There was also no longer a duty under section 55 of the Borders, Immigration and Citizenship Act 1999 now the appellant was an adult. In response to the appellant's argument that there had been a failure by the FTTJ to look at his circumstances on return, Mr Clarke noted [44] where the FTTJ did not accept the appellant's parents were killed; [45] that the asylum claim was a sham and at [50] where the appellant's education, background, family, length of residence, that he was living independently and an absence of vulnerability. The FTTJ found that he could relocate to

Kabul and her findings were in line with the case law.

8. Addressing ground 3, Mr Clarke noted that EB (Kosovo) was heavily relied on, however he considered that the law has moved on in the light of s.117B of the 2002 Act. The FTTJ had no choice in that nothing more than little weight can be given to the appellant's to private life. While the FTTJ was wrong on precariousness, the fact was that the appellant was always in the United Kingdom precariously including when he was on Discretionary Leave. He invited me to dismiss the appeal.
9. In reply, Ms Targett-Parker argued that there was no evidence that after appellant gave information about his family in the screening interview that any action was taken to inform, advise or seek consent from him.
10. With reference to JS at [39], it was argued that full and sufficient information was provided at the first opportunity. With regard to the alleged misleading information, at time of the screening interviews, the appellant believed his parents to be alive in Afghanistan. A cousin informed him otherwise, subsequently. The FTTJ found at [44] and [45] of the decision that his parents were not killed, if this was the case then they are expected to be in Afghanistan and could be traced. In relation to Article 8, the appellant was not living independently but in "sheltered" accommodation with other young people paid for by social services and was not working. In relation to the alleged discrepancy regarding the appellant's siblings, Ms Targett-Parker asked me to record that they had been born after the appellant's departure and therefore there was no inconsistency.
11. Ms Targett-Parker advised me that the appellant was in no position to proceed if an error of law was found because his cousin, who was in Ireland, had confirmed that he was unable to attend on 18 September 2015. Furthermore, no interpreter had been booked for the appellant.
12. At the end of the hearing, I reserved my decision as to whether there had been an error of law.

#### Decision on error of law

13. In reaching my decision, I have taken into consideration the submissions made by both parties as well as relevant case law and the material, which was before the FTTJ.
14. The FTTJ noted the appellant's age at the time of his arrival in the United Kingdom but did not demonstrate that she took this into consideration in relation to the apparent inconsistencies in his account. I consider that she failed to consider the liberal application of the benefit of the doubt afforded to a minor as referred to by the UNHCR in the publication "Refugee Children - Guidelines on Protection and Care 1994." The majority of the matters, which the FTTJ considered to undermine the appellant's credibility relate to

peripheral issues including the timing of his departure from Afghanistan, failure to apply for asylum in Greece or France, failure to tell the truth regarding whether he had been fingerprinted en route to the United Kingdom and that it had always been his intention to come here. However, the appellant was a 13 year old under the control of an agent between his departure from Afghanistan soon after he turned 13 and his arrival in the United Kingdom in January 2009. Furthermore, it was the decision of his father to send him out of Afghanistan. The FTTJ's view that the appellant's entire claim was a fabrication, including the details of his journey, makes no reference to his age or lack of autonomy.

15. While the FTTJ noted the appellant's most recent witness statement, she made no reference to his explanation for having denied being fingerprinted; that being that it was impressed upon him by the agent who brought him to Europe that he must not tell the Home Office about it or he would be removed from the United Kingdom. Therefore it cannot be said that he continued to deny being fingerprinted. In these circumstances, it is perhaps unfair to find that this particular matter undermines the appellant's credibility.
16. The FTTJ accepted at [43], the respondent's submission that the appellant was fingerprinted in Greece before he claimed to have left Afghanistan. However, nowhere in any of the witness statements or interview records has the appellant ever been able to provide even an approximate date as to when he left Afghanistan.
17. The appellant is described as uneducated, from a rural background and unfamiliar with calendars. Given that the appellant states that he turned 13 around the beginning of 2008 and he left shortly after, I find that it could not be said that being fingerprinted in Greece in July 2008, following a 4 month journey, fatally undermines his asylum claim.
18. The FTTJ finds at [42] that the appellant did not mention a cousin previously and comments adversely on his "*sudden appearance*." Yet when the appellant was screened in 2009 he mentioned having multiple relatives in the United Kingdom. This is particularly relevant to the appellant's claim, as it is this cousin who informed the appellant about the death of his family, which the FTTJ did not accept because she considered that this cousin had not been mentioned previously. While the appellant denied having siblings when he arrived, he referred to three during his oral evidence. While the FTTJ considers this a further reason to reject his claim, there is no reference to the appellant being questioned about this discrepancy. I am told that there is a simple explanation for this apparent inconsistency, which the appellant could provide if given the opportunity.
19. The FTTJ took an adverse view of the appellant's credibility at [44] owing to his apparent failure to co-operate with the respondent to

give consent to his family being contacted in Afghanistan. In the grounds, it is accepted that the respondent sent a letter dated 11 February 2014 seeking the appellant's consent to tracing. While it may be that the appellant did not consent, this is not altogether surprising given his evidence, recorded by the FTTJ at [27] that it was around this time that his cousin informed him that his family had died.

20. AA (unattached children) Afghanistan CG [2012] UKUT 00016 (IAC), made reference to the UNHCR document referred to above. I note while the standard of proof is the same for minors as adults, a more liberal approach should be taken with respect to the benefit of the doubt. For the above reasons, I find that the FTTJ's credibility findings were unsafe and amount to a material error of law.
21. I will briefly address Grounds 2 and 3 together. It is not in dispute that the appellant provided the full names and address of his parent in Afghanistan at his screening interview, which took place in 2009. The FTTJ had no regard to the respondent's failure to endeavor to trace the appellant's family while he was a minor and placed undue emphasis on the appellant's lack of consent to tracing in 2014 when he aged 19. Owing to the negative credibility findings, there was no consideration by the FTTJ of relevant case law in relation to this duty in the case of former minors, that is KA (Afghanistan) & Ors [2012] EWCA Civ 1014 and JS (Former accompanied child - durable solution) Afghanistan [2013] UKUT 00586. While the evidence did not demonstrate that the appellant has developed an extensive private life in the United Kingdom, it is relevant that he has been in the United Kingdom for over six years, two of those years while awaiting a decision on his application for further leave to remain. The FTTJ In JS it was held that, in some cases, a durable solution may need to be found in the host state. Therefore owing to the FTTJ's failure to consider the un-discharged duty of the respondent to trace the appellant's family while he was a minor and consider the aforementioned cases, I find that the FTTJ also materially erred in this regard.
22. In these circumstances I am satisfied that there are errors of law such that the decision be set aside to be remade. None of the findings of the FTTJ are to stand.
23. Further directions are to follow.

### **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be re-made.

### **Directions**

- This appeal is remitted to be heard de novo by any First-tier

Tribunal Judge except FTTJ Griffith.

- The appeal should be listed for a hearing at Taylor House.
- An interpreter in the Nepali language is required.
- Time estimate is 3 hours.

Signed

Date: 19 September 2015

Deputy Upper Tribunal Judge Kamara