Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/01442/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 8 February 2016 **On 29 April 2016**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MH
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bundock, Counsel instructed by Lawrence Lupin Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

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 his 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.

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1. I was not addressed by either party on the issue of anonymity, but considering the issues raised, I have made a direction for anonymity. The appellant is a citizen of Afghanistan. His claim is that his date of birth is 23 March 1998. The respondent's position is that his date of birth is 23 March 1996. The applicant made an application to vary his leave to remain in the UK on 22 March 2013 to be recognised as a refugee under the 1951 Convention.

2. The application that was made on 23 March 2013 was refused on 8 January 2015. The appellant made an application to appeal against that decision and his appeal was dismissed by Judge of the First-tier Tribunal MacKenzie ("the second judge") following a hearing on 9 October 2015 in a decision that was promulgated on 2 November 2015. Permission was granted by Judge of the First-tier Tribunal Baker in a decision of 30 December 2015.

3. The appellant's appeal had been dismissed by Immigration Judge Kopieczek ("the first judge") following a hearing on 10 February 2011. He concluded that the appellant was a minor and took into account the "Merton compliant age assessment" before him and concluded that the appellant and his brother N were not credible and the judge rejected his account.

4. The first judge took into account the documentary evidence that the appellant submitted, namely a birth certificate, a vaccination card and identity card and concluded that they were not reliable. Whilst he accepted that the appellant's brother N was a commander for Hizb-e-Islami, he concluded that this would not establish that the appellant is at risk on return or that there was a general risk of indiscriminate violence pursuant to Section 15(c) of Council Directive 2004/83/EC ("the Qualification Directive")

5. The matter came before the second judge on 9 October 2015 and he heard evidence from the appellant and N and reached the same conclusions as the first judge. In relation to the age assessment produced by the respondent the second judge considered a number of challenges to this that were made by the appellant's representative.

6. The second the judge took into consideration a report from Dr Giustozzi relating to investigations that Dr Giustozzi instructed in respect of the vaccination card. A copy of the vaccination card was produced at the hearing before the first, but the second judge had a report from Dr Giustozzi which was not before the first judge. This report was produced to establish that the vaccination card was in fact genuine.

7. The second judge made the following findings:

"51. Taking all the relevant evidence before me in the round I find, to the low standard of proof that the Respondent has established that the Appellant was born in 1996 and not 1998 as he claims. I did not accept the Appellant's oral evidence that he did not understand the nature of the interview by the social workers. He indicated that he was spoken to first of all by two females and they were using hand gestures from which he understood they were making enquiries about age. The Appellant stated that he had not been provided with any access to an interpreter either before or during the age assessment process. Looking at the Age Assessment report it is, I find, a clear inference that an interpreter was provided given the detailed information that it recorded. I also do not accept the submission on behalf of the Appellant that the assessment was unfair because the Appellant did not have a responsible adult present. It is narrated in the report that the Appellant smiled when asked by a social worker if he was ok. The Appellant, in any event, accepted in his evidence that his recollection of these events were unclear given the passage of time.

52. I note that the assessment makes reference to the Appellant wearing 'teenage' clothing. Taken in isolation this observation cannot be relied upon as pointing the Appellant being a teenager given that he was not asked about what he was wearing. However, this was only one of a number of factors which the authors of the report had regard to in forming their assessment. It is correct that the assessment made reference to physical features, including the Appellant having 'wispy/light upper lip and side facial hair' and 'small spots on the epidermis to both cheeks and nose and an oily complexion as would be expected in an adolescent'. It was also noted that the Appellant's voice indicated that of a 'pubescence/not fully 'broken' male voice'. While I accept that physical appearance alone can be unreliable indicator of a child's age (NA v London Borough of Croydon [2009] EWHC 2357 (Admin), paragraph [27]) it is again clear that this was again only one of a number of factors referred to in the assessment.

53. I have taken into account the fact that the age assessment was carried out a very short period after the Appellant had arrived in the United Kingdom and it is recorded that he was 'extremely tired'. I also acknowledge that it is not clear from the assessment that the Appellant was given an opportunity to comment on the age attributed to him. I do not, however, find that to be fatal to the overall conclusions reached by the authors of the report (Merton, paragraph 56). Had the age range identified been put to the Appellant then, as the Presenting Officer submitted, this would not have altered the conclusions reached, he having given a clearly stated age that the local authority did not agree with. This can be contrasted with the situation where there might been a misunderstanding reached by

the interviewing local authority officers and, to ensure fairness, the subject should be given an opportunity to comment the provisional view reached.

55. I do not attach weight to the Report of Dr Giustozzi, which was of course evidence that was not First-tier Tribunal Judge Kopieczek, in terms of supporting the claim that the Appellant's date of birth is 23 March 1998. While Dr Giustozzi's expert credentials are fully documented in his Report the research upon which his conclusion that the copy vaccination card relates to the Appellant and that his date of birth is in 1998 was carried out by a third party, a Dr Andarabi. No statement is produced from Dr Andarabi or the Ministry of Public Health official referred to in paragraph 6 of the Report.

56. More importantly however, the enquiries were focussed on a copy of the vaccination card. I did not find N's evidence that he was sent faxed copies of the Appellant's documents by his uncle in Afghanistan but when he asked for the originals to be sent he was 'unable to get through to him' to be credible (statement, paragraph 27). This statement was, I found, contradicted by N's oral evidence that he remained in contact with his uncle. I do not accept the evidence in the statement from the Appellant's cousin, [ND] (the maternal uncle's son) that the night after the Appellant left Afghanistan his family had to leave their home because they had helped him flee Afghanistan. The explanation offered by this witness in paragraph 15 of his statement about the circumstances in which he re-established contact with [N] in 2015, I find, lacks credibility.

57. I do not, taking the evidence before me in the round and applying the low standard of proof, attach any weight to the identification documents produced as supporting the Appellant's claim that he was born in 1998. I note that the document claimed to be the Appellant's identification document from Afghanistan is dated 28 July 2010. At the end of the asylum interview [N], who was present at the responsible adult, provided information that because the original document that his mother's cousin had was in poor condition a replacement was obtained from the registry office. It is, I find, significant that the original – albeit claimed to be in poor condition – has never been produced. It was not explained in the evidence why the original was not sent by fax or in the post to [N]. I did not find [N] evidence about the Appellant's documents to be credible.

58. In considering the Appellant's age I have taken into account the evidence that when first detained by the police the Appellant gave his age as 12 years (custody records, Appellant's bundle, tab B, page 44). Furthermore, the Age Assessment concludes that the Appellant 'may be older' than his stated age, 'possibly up to 14 years of age'. I also note that when the Screening

Interview was carried out on 18 June 2010 it is recorded for the Appellant's date of birth, '... given as 23/03/98 by brother'. In terms of the Appellant's age I also note, as did Judge Kopieczek, that the chronology given of him being kidnapped when he was 4 or 5 years old and then having been kept on the farm for about 8 years sits more comfortably with him being the age he claims.

59. I have given consideration to all these factors, to which I have applied the low standard of proof. However, taking matters in the round and not finding the Appellant or his brother [N] to be credible witnesses regarding his age, I am not persuaded that the finding of Judge Kopieczek that the Appellant's date of birth is 23 March 1996 is one that I should depart from."

8. The second judge went on to consider the appellant's claim for asylum and directed himself in accordance with the principles set out in Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702. He found that the expert evidence did not alter his views in relation to the assessment of the evidence and that it lacked credibility. He concluded that the appellant would not be at risk on return to Afghanistan on account of his brother's political activities and he went on to conclude that:

"I do not attach weight to the evidence of Dr Giustozzi in his report dated 9 May 2015 regarding the risk to the Appellant on his return to Afghanistan. The points he advances in paragraph 18 are, I find, based on a degree of speculation – for example his observation that '... MH's background *might* emerge later ...'"

9. The judge went on to conclude that if the appellant did not want to return to his home area he could internally locate, taking into account RQ (Afghan National Army - Hizb-i-Islami - Risk) Afghanistan CG [2008] UKAIT 00013 and PM and Others (Kabul - Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089. The judge concluded at paragraph 74:

"I agree with Judge Kopieczek that the Appellant has not demonstrated that there are substantial grounds for believing that he would face a real risk of suffering serious harm as defined in paragraph 339C (HC 395) if returned to Afghanistan. He would not, I find, be at personal risk from the Taliban or anyone else in his home area."

10. The judge went on to dismiss the appeal under Article 8 concluding that the appellant's relationship with his brothers and wider family members in the UK did not amount to family life that could engage Article 8 with reference to Kugathas v SSHD [2003] EWCA Civ 31.

The Grounds of Appeal and Oral Submissions

11. The grounds of appeal are insufficiently particularised and are silent on the determination of the first judge and the implications of this as regards Devaseelan. Mr Bundock assisted me and made clear oral submissions. Before the second judge there was evidence that was not before the first judge, in particular the report of Dr Giustozzi, which was capable of corroborating the appellant's substantive asylum claim, and his evidence relating to his age.

Error of Law

12. In relation to Article 15(c) the appellant also submitted evidence from Dr Lisa Schuster of 26 March 2015 and Professor Susan Clayton of 23 March 2015. This evidence was capable of supporting the appellant's claim to be at risk from violence in his home area and Afghanistan generally. There was a skeleton argument before the First-tier Tribunal and reference is made in that to the evidence of Dr Giustozzi in relation to the appellant's individual circumstances and his claim for asylum and relocation to Kabul. The second judge's starting point was the determination of the first judge and his findings therein, in particular the findings in relation to the appellant's credibility

13. First, the second judge applied the wrong standard and burden of proof in relation to the age assessment (see paragraph 51). Second, I conclude that the second judge's findings in relation to Dr Giustozzi's report are insufficiently reasoned. The report was capable of corroborating the appellant's evidence that the vaccination card was genuine and therefore capable of corroborating the appellant's evidence relating to his date of birth.

14. The second judge attached no weight to the evidence of Dr Giustozzi because there was no statement produced from Dr Andarabi or the Ministry of Public Health Official referred to by Dr Giustozzi in the report. Whilst there were other reasons given by the second judge for not accepting the appellant's evidence in relation to his age and the weight to attach to Dr Giustozzi's evidence was a matter for him, his conclusion (to attach no weight to it) was not adequately reasoned and he applied a too high standard of proof by requiring a statement from Dr Andarabi or the Ministry of Public Health.

15. In relation to the assessment of risk the judge erred in failing to take into account the evidence that was before him relating to the situation as it was in 2015 at the time of the hearing. He considered risk relying on the first judge's findings, but whether the appellant was at risk on return to Afghanistan should have been considered assessing the position at the date of the hearing before the second judge. The second judge did not adequately engaged with the evidence of the experts relating to risk which was relied upon by the appellant in order to establish risk under 15(c) of the Qualification Directive.

16. The second judge considered Article 8 and the decision that the relationship between the appellant and his family here is insufficiently reasoned and I refer specifically to paragraph 82. The evidence was that the appellant had been here since the age of 12, (on his account and aged 14 on the respondent's account), and that he had since then resided with his brother and his brother's wife who had assumed the role of parents.

Notice of Decision

17. The First-tier Tribunal made material errors. I set aside the decision in its entirety. Both parties agreed that the matter should be remitted to the First-tier Tribunal and reheard afresh.

Signed Joanna McWilliam Date 25.02.16

Upper Tribunal Judge McWilliam