



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/05613/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 January 2016

Determination Promulgated  
On 11 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

S S

~~(ANONYMITY ORDER NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: Ms H Head of Counsel

For the respondent: Mr D Clarke, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department and the respondent is a citizen of citizen of Afghanistan born on 20 September 1994. However, for convenience, I refer below to SS as “the appellant” and to the Secretary of State as “the respondent”, which are the designations they had before the First-tier Tribunal.
2. The Secretary of State appeals with permission to the Upper Tribunal against the determination of First-tier Tribunal Judge McDonald promulgated on 25 September 2015, allowing the appellant’s appeal against the decision of the respondent made on

17 March 2015, in which the respondent refused the appellant's claim for asylum and humanitarian protection in the United Kingdom.

3. First-tier Tribunal Judge Astle in granting permission to appeal stated that the grounds are arguable in that the judge made inconsistent findings regarding the appellant's contact with his family in Afghanistan and failed to consider that the appellant would be returned to Afghanistan with his adult brother and not alone.
4. Thus the appeal came before me

### **The First-tier Tribunal's findings**

5. The First-tier Tribunal Judge made the following findings which I set out in summary. The appellant's case is that he arrived at Heathrow airport on 22 February 2013 with a false passport issued by an agent when he was almost 13 years old. He is now in the care of the London Borough of Hillingdon Social Services and lives with his foster parents. He does not live with his brother who is also in the United Kingdom.
6. The appellant's case at its highest and without taking into account the challenges made by the respondent, is that his father was a member of the Taliban and was killed in 2005, when he was about five or six years old which is. Following his father's death, he was bullied on one occasion at school, as a result of his father's involvement with the Taliban. Shortly before the appellant's departed from the United Kingdom in 2013, his mother was approached by the Taliban seeking to recruit the appellant as a child soldier or suicide bomber.
7. The appellant states that he has lost contact with his family in Afghanistan. The Secretary of State does not accept that the appellant's father is dead, that there was Taliban involvement and that the appellant has lost contact with his family. The appellant's brother, JS has had two appeals heard before the First-tier Tribunal. On 7 April 2011 First-tier Tribunal Judge Khan rejected the appellant's brother's claim that he was an orphan. He equally rejected that the location of the appellant's family was unknown. He also rejected that their father had died. Judge Khan dismissed the appellant's brother's claim for asylum. On 2 December 2014 First-tier Tribunal Judge Higgins also rejected the appellant's brother's claim for asylum, specifically he rejected the contentions made by the appellant, (who was a witness at his brother's trial) and his brother at that hearing that the two of them were not in contact with their family.
8. So far as the appeal is under the Immigration Rules is concerned the Judge allowed the appeal. There is no doubt that the appellant was a minor when he arrived in the United Kingdom and was a minor with the respondent's decision was made. There is no evidence within the decision that the Secretary of State has considered the Immigration Rules which commence at paragraph 350 adding particular rules 352ZC, 352ZD and 352ZE. I find that the appellant was an unaccompanied asylum seeking child under the age of 17½ when he arrived at Heathrow. The appellant has applied for asylum and has been refused refugee leave and humanitarian protection.

There is no evidence to show that adequate reception arrangements in Afghanistan exist to which the appellant would be returned if leave was not granted. The appellant is separated from both his parents. The appellant's brother may be an adult but he does not have in law or by custom the responsibility to care for his brother. His brother is stated to be born on 20 September 1994 and would have been 18 when the appellant arrived at Heathrow. The appellant is in the care of the London Borough of Hillingdon and living with foster parents and his brother does not have responsibility for him. I find that leave should be granted under paragraph 352ZE until the appellant is 17½ years old. It is for the appellant to satisfy me that he has an Article 8 private and/or family in this country which will be interfered with by the decision under appeal.

9. As for the claim for asylum and humanitarian protection are concerned, the Judge dismissed those claims for the following reasons. He stated, "I am not persuaded that the appellant's father died in the circumstances claimed. There are a number of inconsistencies concerning this. The matter has been already considered twice before Tribunal Judge Khan and Tribunal Judge Higgins. Although those appeals concerned the appellant's brother, this appellant gave evidence before Judge Higgins. The fact was substantially the same. I do not accept that the appellant and his brother have lost contact with their family. Like the two previous Tribunal Judges I do not find it plausible that the appellant would leave Afghanistan without some means of keeping in touch. The evidence given by this appellant before Tribunal Judge Higgins, would appear to be inconsistent with what is being said by him before me. In particular, the appellant had his brother's telephone number when he arrived at Heathrow. The appellant said in evidence that his mother had a mobile phone that was given to her the day before the appellant left for the United Kingdom. The appellant said that his mother did not have a SIM card for the phone. I find that implausible. The most likely reason that the mother was given the phone was to keep in touch with her son. The appellant's brother's telephone number was not known to the family before the appellant left for the United Kingdom as the appellant took it with him. His brother is therefore capable of being contacted either by his mother or his uncle. In any event, the two other witnesses who gave evidence in addition to the appellant's brother from the same village all have mobile phones and clearly have the ability to keep in touch with each other. I do not find it plausible that the appellant would not contact his mother in Afghanistan either directly or indirectly or other village members or his uncle. The appellant has a maternal uncle in Afghanistan with whom contact can be made".
10. The appellant refers to a visit that his mother received from the Taliban seeking to recruit the appellant as a soldier or suicide bomber. The exact date of that visit is challenged, however, as the answers to questions 79 to 84 of the Asylum interview show the appellant and his mother's response to that visit was to relocate to Jalalabad where they did not have any further problems with the Taliban. This shows that the appellant was able to relocate within Afghanistan and even if he had a well-founded fear of persecution, which I do not accept, paragraph 339O of the Immigration Rules would apply. The appellant does not have a well-founded fear of persecution and his asylum appeal is dismissed.

11. As for humanitarian protection since I have allowed the appeal under the Immigration Rules I do not consider that it is necessary for me to decide this issue since it will not arise unless or until the appellant is required to return to Afghanistan. This may occur when, or if, he makes a further application for leave to remain following the expiry of his leave to remain at the age of 17 and of and it should be considered at that time in the light of the appellant's personal circumstances and the situation in Afghanistan which then exist. As far as Article 8 is concerned this is also an aspect that would be considered if the appellant's leave when he attains the age of 17½ is not extended and a further application for leave to remain is made.
12. The decision is that the appeal is allowed under the Immigration Rules but is dismissed on asylum grounds and humanitarian protection grounds and on human rights grounds.

### **The respondent's grounds of appeal**

13. The respondent's grounds of appeal state the following. The Judge has allowed the appeal under the Immigration Rules but dismissed the appeal on asylum, humanitarian protection and human rights grounds. For the avoidance of doubt the respondent is seeking only to appeal the decision to allow the appeal under the Immigration Rules.
14. The Judge has made inconsistent findings in respect of the appellant's contact with his family and has materially misdirected himself in law by failing to consider that the appellant would be returned with his adult brother.
15. At paragraph 66, the Judge finds that the appellant is separated from his parents. However, at paragraph 84, the Judge finds that the appellant is in contact with his mother in Afghanistan. Whilst the appellant may be physically separated from his mother, the Judge has failed to consider the two findings that the appellant is in contact with his family in Afghanistan. Therefore, the appellant is clearly not isolated from his family and their whereabouts are clearly known to him.
16. The fact that the appellant does not currently reside with his brother could not lead to a finding that the appellant would be "unaccompanied" on his return to Afghanistan. As was clearly evident from the refusal letter, the appellant's older brother had been given a period of discretionary leave whilst the appellant's appeal was ongoing. The appellant's brother gave evidence at the appeal and there was clear evidence of regular contact between the brothers. By definition the appellant is not and would not be an unaccompanied asylum seeker as he would be returning to Afghanistan with his brother, who is an adult, and would be returning to Afghanistan to reside with this mother and uncle, who the Judge found at paragraph 82-85 that the appellant is still in contact with.

### **The appellant's response to the respondent's grounds of appeal**

17. The respondent's actions in relation to the appellant's case have been legally flawed and unfair. Having accepted the appellant's age in February 2013, the respondent failed to grant the appellant discretionary leave as required by law. The respondent further delayed in making a decision for another 15 months and then continued to refuse to grant this child appellant appropriate leave. At the appellant's appeal on 30 June 2014, the respondent withdrew her decision after considering their failure to grant discretionary leave. Perversely, the respondent again failed to grant discretionary leave and continued to delay for a further nine months before refusing the appellants again in an identical Reasons for Refusal Letter. The appellant's appeal was allowed by Judge McDonald on account of the respondent's failure to grant discretionary leave.
18. The determination of Judge McDonald does not contain any material errors of law. The Judge clearly applied the law correctly and it is the respondent that did not. Despite the appellant's minority, the respondent failed to grant him discretionary leave in accordance with her own policy in relation to unaccompanied asylum seeking children and in accordance with paragraph 352ZC of the Immigration Rules.
19. The respondent further failed to act in accordance with the law and failed to take seriously her duty under s55. The respondent relies on one point in submitting that the Judge misdirected himself by incorrectly finding that the appellant is an unaccompanied asylum seeker. The respondent asserts that the appellant would be returned with his brother. The respondent's grounds are clearly without merit. The appellant's brother at the date of the hearing had leave to remain in the United Kingdom and therefore was not returnable. In any event the respondent knows the definition of an unaccompanied asylum seeking child is confirmed as being "a person who is under 18 years of age when the asylum application is submitted; is applying for asylum in their own right; and is separated from both parents and is not being cared for by an adult who in law by custom has responsibility to do so". At paragraph 66 the Judge found that the appellant is separated from both his parents. The appellant's brother may be an adult but he does not have in law or custom the responsibility to care for his brother... The appellant is in the care of the London Borough of Hillingdon and living with foster parents. His brother does not have responsibility for him.
20. Paragraph 352ZE of the Immigration Rules confirms that "limited leave to remain should be granted to an unaccompanied asylum seeking child for a period of 30 months (or until the child is 17½ years of age whichever is shorter,) provided specified requirements are met." The requirements are that the applicant is an unaccompanied asylum seeking child is under the age of 17½ years throughout the duration of leave to be granted in this capacity; the applicant must have applied for asylum and been refused refugee leave and humanitarian protection; there are no adequate reception arrangements in the country to which they would be returned if leave to remain was not granted;

21. The appellant was clearly entitled to a grant of discretionary leave in accordance with the Immigration Rules. The respondent's bizarre attempt to offload their statutory duty to this child by suggesting that he would be returned with his brother is entirely unsustainable. The appellant's brother has a current outstanding application with the Home Office and therefore the Home Office cannot remove him with the appellant.

### **The hearing**

22. I heard submissions from both parties as to whether there is an error of law in the determination of the first-tier Tribunal Judge. Mr Clarke on behalf of the respondent submitted that the Judge's finding that there are no reception facilities in Afghanistan is inconsistent with other findings that the appellant's mother and uncle are living in Afghanistan. The Robinson obvious point which is not the grounds of appeal is that first-tier Tribunal Judge Khan in his determination the appellant's brother's appeal in 2011 found that he was in contact with his mother. The appellant therefore will not be an unaccompanied asylum seeking child. The appellant's brother who is an adult has responsibility for the appellant by custom. The public policy guidance states that unaccompanied children are united other family members. It is no requirement that the appellant must have lived with his brother for him to have responsibility to travel with him Afghanistan.
23. Miss Heather on behalf of the appellant relied on in her reply to the grounds of appeal. She said that the appellant's brother has a pending appeal and therefore is not movable from this country. The appellant does not live with his brother and therefore the brother does not have responsibility for the appellant. The appellant's brother's leave expired in March 2015 and he has made a further application. I must make a finding that the appellant is an unaccompanied minor at this time as his brother cannot be removed with him.
24. Mr Clarke replied that the Reasons for Refusal letter deals with this point about the appellant's brother leave to remain. The appellant and his brother's applications are linked and therefore the appellant will only be removed when his brother is removed. All Mr Clarke suggested that the appellant be granted leave to coincide with that of his brother.

### **Findings as to whether there is an error of law**

25. The Judge fell into material error of law in the determination when he made inconsistent findings as to the main issue in this appeal which is whether the appellant is in contact with his mother and uncle in Afghanistan. At the beginning of the determination the Judge found that the appellant satisfies the Immigration Rules because he was a minor when he entered the United Kingdom and was an unaccompanied asylum seeking child under the age of 17½. He stated "there is no evidence to show that adequate reception arrangements in Afghanistan exist to which the appellant would be returned if leave was not granted". The Judge found that the appellant is separated from both his parents. However, at paragraph 82 the Judge found "further, I do not accept that the appellant and his brother have lost

contact with their family. Like the two previous Tribunal Judges, I do not find it plausible that the appellant would leave Afghanistan without some means of keeping in touch." At paragraph 83 the Judge states that the appellant was inconsistent before Judge Higgins with the evidence that he gave before him at the hearing. At paragraph 84 the Judge found that the appellant's mother was given a mobile phone to keep in contact with the appellant. He also found that the appellant has an uncle who is contactable in Afghanistan.

26. Whether or not the appellant is in contact with his mother and uncle in Afghanistan, was pivotal to the appellant's success or failure in the appeal pursuant to the Immigration Rules. Three different Tribunal Judges have found that the appellant's mother and uncle are living in Afghanistan and the appellant and his brother (whose appeal for asylum and humanitarian protection has also been dismissed on two separate occasions) are in contact with them. The Judge having found that the appellant's mother and uncle can be contacted in Afghanistan, materially erred in law in allowing the appeal pursuant to the Immigration Rules.
27. Furthermore, the Judge found that the appellant's account was not credible and did not accept that he is at risk from the Taliban. The Judge also found that even if he was, when the mother relocated with it Afghanistan, she had no further problem from the Taliban and the appellant could have relocated with her. This should have demonstrated to the Judge that the appellant has been sent to this country by his mother and uncle as an economic refugee and he was not fleeing from persecution in Afghanistan. A parent who has sent the appellant to the United Kingdom would be aware that there is every chance that they may fail in their plan of sending their child to the United Kingdom as an economic refugee and if not find credible, he will be returned to his home country and ultimately to them.
28. This insistence on discretionary leave to the appellant until he is 17½ years old is just that, it is discretionary and not mandatory. It is only to be given where there are no reception facilities on return to Afghanistan for the minor child and who are not in contact with their parents. In this appeal, the appellant's mother and uncle have sent the appellant to the United Kingdom for economic reasons and no doubt are following his progress through the system. The appellant's brother's asylum and humanitarian claim has also been dismissed in two separate appeals by two different Judges. Therefore, Three Tribunal Judges have now found that the appellant's mother and uncle are in Afghanistan who are in contact with the appellant and who will take over responsibility for him on his return.
29. It is clear that the respondent intends to remove the appellant with his brother who is an adult. Their appeals had been linked for that purpose. I find that the appellant's brother is responsible for the appellant by custom even though he may not live with his brother and lives with foster parents. Therefore, there can be no possible reason for why the appellant should not be removed to Afghanistan with his brother who is an adult. The appellant has his mother and uncle in Afghanistan on his return who will meet them and therefore he will be reunited with them. Therefore, the appellant

would not be an unaccompanied asylum seeker but would be returned with his adult brother where there are adequate reception arrangements for him.

30. Consequential to my finding that there is a material error of law in the determination, I set aside the determination of Judge McDonald in respect of the Immigration Rules. There was no cross-appeal by the appellant in respect of his asylum and humanitarian protection claim.
31. I re-make the decision. I find that the appellant has not been granted refugee status on humanitarian protection in this country. I find that there are adequate reception arrangements in Afghanistan for the appellant. I find that the appellant will be returned at the same time as his brother who is an adult and is responsible for him by custom. There was no cultural evidence before me to say that brothers in Afghanistan do not have responsibility for each other by custom. On the contrary, I find that the culture from which the appellant comes has a very close family network. I find that the appellant does not meet the requirements of the Immigration Rules and the respondent's decision is properly made.

### **Decision**

I find that there is an error of law in the First-tier Tribunal's determination and I re-make the decision and dismiss the appellant's appeal.

Signed by

A Deputy Judge of the Upper Tribunal Judge  
Mrs S Chana

Dated this 7<sup>th</sup> day of February 2016