Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07803/2016**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 24th August 2017	**On 01st September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MR M. S.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood of Counsel
For the Respondent: Mr S Staunton, the Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Hembrough promulgated on 9th March 2017 in which he dismissed the Appellant's asylum appeal. At the Upper Tribunal appeal hearing before me the Appellant has been represented by Mr Haywood of Counsel and the Secretary of State has been represented by Mr Staunton, the Home Office Presenting Officer.

2. Within the first ground of the Grounds of Appeal it is argued that the judge erred in his analysis of the Appellant's claim regarding whether or not his brother had stored or hidden weapons and ammunition belonging to the Taliban at the family home and whether the Taliban thought that he had done so.

3. In the second Ground of Appeal it is argued that the judge erred in his analysis as to whether or not the Appellant would be subject to forced recruitment by the Taliban and that the judge had not adequately considered the expert report from Jared Zadeh, who considered that the Appellant's claim was plausible.

4. It was further argued within the Grounds of Appeal that written submissions were submitted in the skeleton argument at the hearing before the First-tier Judge on the basis that the Appellant's status as a returnee and as someone who would be seen as being westernised would put him at risk, and that the Appellant would be at risk from the Afghan Authorities as a returnee originating from a Taliban area of control whose brother was a member of the Taliban and who had been killed as a result. It is said the judge had not adequately engaged with those arguments.

5. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 5th July 2017 in which she said the grounds argue there had been no finding as to the minor Appellant's account of his brother having held weapons for the Taliban, but contrary to Ground 1 that account was found by the judge at paragraph 39 not to be credible, but she found the reasons given were arguably inadequate. She also found that the points made at paragraph 15 regarding the flawed analysis of the background material and expert evidence as to forced recruitment were arguable in light of the relatively brief reasoning at paragraphs 43 and 44 of the judge's decision. She therefore found that the grounds did disclose an arguable material error of law and granted permission to appeal on all grounds.

6. The Rule 24 reply from the Respondent is dated 25th July 2017. It is argued that the First-tier Tribunal Judge directed himself appropriately in his finding regarding the weapons, based upon a proper evaluation of the evidence and that was a finding open to the judge. It is argued that the decision did not disclose any error of law and it is argued that findings regarding forced recruitment were likewise sound.

7. I have also fully heard and taken account of the submissions of both legal representatives today.

8. The judge when making his findings did accept some of the Appellant's account. He accepted that the Appellant's brother had been recruited by the Taliban and undergone training at a madrassa in Pakistan, and also accepted the brother was killed in an airstrike in or around August 2012 as claimed, at paragraph 37 of the decision.

9. The judge went on to find that the Appellant claimed that after his brother's death the Taliban had threatened to recruit him forcibly and the evidence was that the brother had lived away from home at a madrassa in Pakistan for some years, returning home infrequently, and that following his recruitment by the Taliban he lived with his cohorts in the local area only returning home every two to three

months and that he had been killed in active service and regarded as a martyr and was a loyal and trusted member of the Taliban and senior members of the local Taliban attended the funeral.

10. The judge at paragraph 39 of his judgment went on to find that against that background he could not find it credible that the Taliban would form the view that the brother had somehow hidden weapons and ammunition at the family home, nor had the appellant explained what motives of purpose he could possibly have for doing so. That therefore led the judge to reject the account that the Taliban had come to the family home seeking return of weapons and ammunitions and to reject the account that as the weapons were not returned, that led to the Taliban to try to recruit the Appellant or that the failure to return such weapons, put the appellant. However it has been properly conceded by Mr Staunton on behalf of the Secretary of State the judge in fact appears to have somewhat misunderstood the Appellant's account in that regard.

11. The account set out by the judge at paragraph 9 of his judgment was that about one or two months after the airstrike when his brother was killed, members of the Taliban had come to the Appellant's home on two occasions demanding the return of weapons and ammunition that has been given to the brother, and that neither the Appellant nor his mother had any knowledge of the same. The Appellant said they were told if the weapons and ammunitions were not returned the Appellant would have to join the Taliban and therefore arrangements were therefore made to send the Appellant out of the country using the services of an agent.

12. As Mr Staunton properly concedes the judge appears to have taken that as being an account that the brother hid weapons and ammunitions at the family home. That however was not the basis of the evidence that was given. The basis of the evidence that was given was that weapons and ammunition were thought by the Taliban to have been stored at the family home that had been given to the brother. It was not an account that the brother had deliberately hidden weapons from the Taliban, just that weapons or ammunition were believed by the Taliban to have been stored there and that the Appellant's brother having been killed in an airstrike, the Taliban wanted it's weapons or ammunition back. I do therefore find that the judge has sadly got the basis of the Appellant's claim in that regard wrong and therefore I find that the judge has analysed the case regarding the threats made by the Taliban on the wrong basis.

13. Although that is in effect an error of fact I do accept that in the circumstances of this case that is an error of law given that the error is as to a material fact which can be established by uncontentious evidence for which the Appellant or his representatives were not responsible, but clearly it is material to the judge's consideration as to the credibility of the Appellant's account regarding the threats which were said to have been made by the Taliban, and therefore unfairness has resulted from that Although it is argued by Mr Staunton that it is not material, I cannot say that the judge would necessarily have reached the same conclusion regarding the threats made by the Taliban or risk of forced recruitment had the judge properly analysed that aspect of the Appellant's account, in circumstances where the judge had accepted other parts

of the Appellant's account, including the fact that his brother had been recruited by the Taliban. I do therefore find that it is a material error of law.

14. In respect of the risk of forced recruitment, although the judge has considered the issue of forced recruitment between paragraphs 40 and 45 inclusive of the judgment, the point that is made by Mr Haywood on behalf of the Appellant is that what was argued before the First-tier Tribunal as set out within the Appellant's skeleton argument was not only the threats by the Taliban to recruit family members if the weapons and/or ammunition were not returned, but what was further argued within the skeleton argument at paragraph 14 of the skeleton argument was a submission that when fighters die or are wounded, such as the Appellant's brother, they have to be replaced by family members, for example a brother, son or nephew and this is a system of 'call ups' often relied upon by the Taliban, which was said to stem from the Country of Origin Information Report.

15. It was also argued within the skeleton argument that the expert Mr Jared Zadeh had considered the Appellant's account of his being sought to be recruited by the Taliban to be plausible and it was further argued within the skeleton argument that individuals perceived as having become westernised stood a risk of being tortured or killed on the grounds that they had become foreigners or were spies for a western country.

16. Although the First-tier Tribunal Judge has actually considered some of the background evidence and considered that forced recruitment of children by the Taliban was rare and regarded as exceptional and that they use more subtle coercive strategies rather than forced recruitment and that in areas such as Kapisa province where the Appellant came from the Taliban had a large presence and enjoyed popular support so there was no need for them to forcibly recruit members to make up dwindling numbers as they are not short of recruits, the judge actually has not considered the arguments raised by the Appellant as to whether or not the Appellant would be subject to a 'call up' to replace the brother who had been killed. Nor has the judge dealt with the question as to whether or not the Appellant would be regarded as having become westernised, having by that stage been out of the country for some three years and thereby be at risk upon return.

17. I should point out for completeness that although Mr Staunton relied upon the finding at paragraph 58 as to whether or not the Appellant had become so westernised that he would not be able to integrate upon return and the judge's finding that he had not become so westernised that he would be unable to integrate upon return, the judge by that stage had already made his findings regarding the claims for asylum and the humanitarian protection and the claims under Article 2 and 3 which he dismissed at paragraph 57. At paragraph 58 the Judge was looking at the westernisation argument simply in terms of the Appellant's private life under paragraph 276ADE. The judge has not made any specific findings regarding the westernisation of the Appellant regarding his risk upon return as argued within the skeleton argument and therefore did not deal with that issue when considering the risk on return element.

18. Regrettably therefore when making his findings in respect of forced recruitment the judge also has not adequately dealt with the arguments actually raised by the Appellant or the evidence that was relied upon by the Appellant regarding the risk of him being called up as a result of the death of his brother and a result of him being seen as being westernised.

19. I therefore do consider that the failure to actually deal with the arguments raised by the Appellant also sadly in this case does also amount to a material error of law and I cannot say that the decision reached by the judge would have been the same irrespective had those errors not been made.

20. The judge when considering the question of internal relocation the judge found that it was not unreasonable for the family to provide support for him in Kabul, given the fact that he had family living in an adjacent province. However in that regard there was no specific findings that the Appellant actually had any relatives living within that city itself and in that regard I consider that the judge has not adequately explained his findings at paragraph 53 that it would not be unreasonable to expect family members to arrange support for the Appellant in Kabul simply on the basis that they lived in the adjacent province. This is not a case where it had been said that he could go and live with family members in Kabul who could provide accommodation free of charge or that they could help him obtain employment in Kabul. I do not consider that the judge has really adequately or sufficiently explained why he found that the Appellant could return to Kabul without undue hardship and internally relocate there, simply on the basis of having relatives in a neighbouring province.

21. Although not a Ground of Appeal I also raised concerns about paragraph 44 of the judgment wherein the judge when considering the question about forced recruitment found that the starting point for the Taliban "*as set out in its code of conduct is a prohibition on the recruitment of children. However I am satisfied the provision is breached on a regular basis*". Although I asked both legal representatives as to where that particular finding has come from, neither were able to point me to any evidence before the First-tier Tribunal Judge of a code of conduct for the Taliban which generally prohibited the recruitment of children. Although the background evidence he referred to indicated that often the recruitment of children was seen as a rarity or exceptional, the background evidence he referred to did not refer to a code of conduct which prohibited the recruitment of children. If the judge was aware of such a code of conduct, he has not adequately explained where that evidence was to be found.

22. Regrettably therefore I do find that the decision of First-tier Tribunal Judge Hembrough does contain material errors of law and I therefore set aside the decision of First-tier Tribunal Judge Hembrough.

23. Given the nature of the errors made I do not consider that the case can simply be re-decided and reheard by the Upper Tribunal on a narrow point and I find that there would be a substantial amount of fact-finding required again in respect of the Appellant's risk upon return. I therefore do find that given the amount of fact-finding required that it is appropriate for the case to be remitted back to the First-tier

Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Hembrough.

24. The First-tier Tribunal did order anonymity and it seems appropriate given the nature of this case that the anonymity direction be maintained and I therefore do order anonymity.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court otherwise directs, the Appellant is thereby 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.

Signed Date 31st August 2017

RFMcGinty

Deputy Upper Tribunal Judge McGinty