



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01260/2018

THE IMMIGRATION ACTS

Heard at Field House
On 14 May 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Applicant

and

IK (a minor)

Respondent

Representation:

For the Secretary of State: Ms A. Fijiwala, Home Office Presenting Officer

For IK: Mr M. Moriaty, Counsel, instructed by Luqqmani
& Partners, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge Bart-Stewart promulgated on 9 March 2018 in which she allowed the appeal of IK against the decision of the Secretary of State made on 9 January 2018 refusing to grant asylum and humanitarian protection. For the sake of continuity, I shall refer to IK as the appellant as he was before the First-tier Tribunal.
2. The appellant is a citizen of Afghanistan who was born on 25 October 2000. He will be 18 years old on 25 October 2018. At all material times he was a minor.

3. In her determination the judge considered the appellant's claim that he was at risk in the village in which his family lived in Qarghai District of Laghman Province. The appellant had claimed his father was murdered as he was a general during the time of the administration of the Taraki government.
4. The judge rejected the appellant's account that his father was killed as a result of his activities 20 years before. It had been asserted that this was a blood feud but, if it had been, it would have been concluded by his father's death. The judge also rejected an associated claim involving the death of his brother or that the appellant himself had been attacked by an individual in Germany who came from his home area. She rejected the claim that the appellant was at any risk from his father's enemies in his home area. Even if it were so, he could have stayed with his uncle in Kabul.
5. The appellant gave evidence that he had a maternal uncle and three aunts living in Kabul. The judge found that the appellant also has his mother and brother there. The appellant submitted a letter from the British Red Cross dated 5 January 2018 offering the appellant an appointment on 18 January 2018, about a month before the hearing. The judge concluded with reference to the location of his uncle in Kabul:

This suggests that the family tracing request was made recently. [It] does not mean that the family cannot be traced however I accept his evidence he has not been to their home and it is unlikely he could easily find them were he to return now.

6. In paragraph 52 of the determination, the judge recorded that the appellant left Afghanistan in 2014 when he was aged 14. There was no challenge to his evidence that he had not had contact with his family since he left his home country. His evidence was that his mother went to live with his uncle whose address he did not know and that he was dropped off on her way there when he commenced his journey to the United Kingdom. In these circumstances, he did not find out where his uncle lived.
7. The judge also recorded the contents of material from Dr Nathan, a Child and Adolescent Psychiatrist who stated that the appellant had been under his care at the Child and Adolescent Mental Health Service for almost 2 years. The appellant was described as having had little education.
8. The First-tier Tribunal Judge did not accept that the appellant had a well-founded fear of persecution by reason of imputed political opinion. However, she concluded that it would be unsafe to return the appellant to Afghanistan as to do so would place him at real risk of

serious harm. Accordingly she allowed the appeal on the basis that the appellant was entitled to humanitarian protection.

9. It should be noted that the Secretary of State's decision of 9 January 2018 granted the appellant discretionary leave because she accepted that the appellant was an unaccompanied asylum seeking child.
10. As a result of the grant of leave, the appellant is to be treated as a child who will not be removed now. Accordingly, he has no claim that the decision violated his human rights. This consideration takes into account the fact that he has been granted leave. Conversely, the asylum claim and its associated claim for humanitarian protection is made on the hypothetical basis that he is to be returned *now*. So much is clear from the decision by the Tribunal in *AA (Unattended Children) Afghanistan* CG [2012] UK UT00016 (IAC). The reasoning behind the decision is that the background evidence demonstrated that unattached children returning to Afghanistan, depending upon the individual circumstances and the location to which they are to be returned, may be exposed to risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Indeed, irrespective of the risk of specific harm from violence, it is difficult to see how a child who on the basis of the hypothesis that he is unaccompanied and alone would not face harm unless he were to be returned to a country where he would immediately be received into some form of local authority care.
11. I make no comment on why humanitarian protection does not take into account the fact that discretionary leave has been granted and has taken away the need for further protection. I restrict my consideration to the fact that the case law has not approached humanitarian protection in this way.
12. The First-tier Tribunal Judge made findings that, when the matter came before her, the appellant had had no contact with his family since he left home and, notwithstanding the presence of a number of relatives in Kabul, including his mother and a brother, they had not been traced. Accordingly, on the hypothetical basis that he would be returned now, he must be entitled to humanitarian protection. As a child, the United Kingdom authorities could not properly return him without adequate reception facilities being available and the respondent was recorded by the judge in paragraph 48 of the determination as having no plan to return the appellant to Afghanistan as she accepted there was no evidence of reception facilities being available to the appellant.
13. On the basis of these findings of fact, which are not challenged by the Secretary of State in the grounds of appeal, there can be no answer to

the claim that a child would face harm. Such an outcome arises regardless of whether his family were wealthy or that there are medical facilities available in Afghanistan to treat those with mental health difficulties, the matters raised by the Secretary of State in the grounds of appeal. Those were not the issues.

14. As far as I can see, the grant of discretionary leave whilst the appellant is a minor is, in essence, the same as a grant of humanitarian protection. I was not told the basis upon which the Secretary of State has a duty in law to provide a specific period of protection and, if she does so, that may be a matter of her own choice. If the reason that the appellant is entitled to humanitarian protection is because he is a minor, then on his ceasing to be a minor the entitlement to humanitarian protection would logically be at an end. For these reasons, I am unable to see why the Secretary of State is averse to granting humanitarian protection on the basis that the appellant would suffer serious harm when she has herself granted the appellant discretionary leave on the basis that he is an unaccompanied minor and would suffer harm, presumably serious harm, were that discretionary leave not to have been granted.
15. I emphasise that this is not an invitation to the Secretary of State to remove the appellant on the day he reaches 18. There are no bright lines between a child aged 17 and 11 months and an adult aged 18 and a week. However, it will be at that stage that the real decisions have to be made. If, of course, the Secretary of State is bound by a policy that anyone receiving humanitarian protection must be granted a period of at least three or four years, that is the consequence of the respondent's own policies. Such a policy would not necessarily reflect the fact that the recipient does not require humanitarian protection for such a long period.
16. The First-tier Tribunal Judge was entitled to consider the appellant's situation as it stood at the date of the hearing; indeed, she was required to do so. I am not satisfied her decision was wrong in law.

DECISION

- (i) The First-tier Tribunal Judge made no error of law in her decision.
- (ii) The appeal of the Secretary of State against that decision is dismissed.
- (iii) The determination of the First-tier Tribunal shall stand.

ANDREW JORDAN

DEPUTY UPPER TRIBUNAL JUDGE