



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02290/2017

THE IMMIGRATION ACTS

Heard at Bradford
On 23 July 2018

Decision & Reasons Promulgated
On 26th July 2018

Before

Deputy Upper Tribunal Judge Pickup

Between

[H M]

~~[No anonymity direction made]~~

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms C Warren, instructed by Duncan Lewis & Co Solicitors

For the respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Bradshaw promulgated 16.8.17, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 16.2.17, to refuse his claim for international protection but allowing him leave to remain as a minor until he becomes an adult.
2. Judge Bradshaw found the appellant's account not credible and his claimed fear of Taliban recruitment not made out.

3. First-tier Tribunal Judge O'Garro refused permission to appeal on 3.11.17. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Storey granted permission to appeal on 6.2.18, stating, "Despite finding that the appellant was a minor who may be suffering from mental health difficulties the judge made no discernible allowances for his vulnerabilities when assessing whether his account was credible in light of several inconsistencies. The judge's treatment of the expert evidence is also problematic, especially in relation to that expert's conclusions on the issue of forced recruitment."

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.
5. The appellant's case was that he had been told that his father died fighting for the Taliban. Some years later, at age 13 in 2015, Taliban members took him from home to a training camp where he received some instruction on guns and bombs. The following day, his uncle secured his release by payment of an unknown sum of money. Two or three days later, he left Afghanistan. Taliban members have since been to his home asking about him. The respondent did not accept his claim of Taliban recruitment or adverse interest.
6. In relation to mental health, the appellant claimed that he suffers nightmares, feels withdrawn, has been self-harming, and has been referred for counselling. The judge was alive to this issue and at [25] details how he adjusted the hearing process accordingly. The judge also took into account the appellant's young age and lack of education when considering credibility in light of the inconsistencies in the account. At [50] the judge appears to have accepted (may well be) that the appellant was suffering from mental health problems but noted that he had produced no medical evidence to support the claim, not even his alleged referral for counselling. The judge considered alternative reasons for his alleged mental health problems, including the long and arduous journey from Afghanistan to the UK. The judge also noted at [26] that the appellant was evidently able to fully participate in the proceedings and at [43] that his evidence was quite clear and specific.
7. The appellant's representative did not address mental health issues in his submissions at the close of the evidence and there is no ground of appeal specifically addressing that issue. It is barely mentioned at all and Ms Warren struggled to try and bring it within one of the other grounds. Ms Warren relies on AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) in which the Upper Tribunal held that permission should be granted on a ground that was not advanced by an applicant for permission, only if it is one that the judge is satisfied has a strong prospect of success for either party or, possibly, one that relates to an issue of general importance.
8. Permission having been granted, and the issue being relevant, I accept that it is a ground that can be advanced at the Upper Tribunal appeal hearing.

9. Whilst Judge Bradshaw properly took the mental health issue into account in the conduct of the proceedings, it does not appear that it was a factor taken into account in the assessment of credibility, along with the appellant's youth, which was specifically mentioned at [51] as having been considered in the credibility assessment.
10. In relation to the treatment of the expert evidence of Mr Foxley, the judge noted and summarised the unchallenged evidence in relation to grooming and recruitment of children by the Taliban. At [30] the judge observed that the report was very lengthy and detailed and commented that it was long on generalities but short of specifics relating to the appellant and his home area of Nangahar. However, the judge noted that even the expert found the appellant's account of attempted recruitment vague. Despite the lack of clarity and detail, which the expert ascribed to the appellant age, and despite a lack of hard data regarding forced recruitment, the expert found the appellant's account "convincing". The judge went on to observe that the expert erred in referring to the appellant as someone without much in the way of a family network. Later in the decision, the judge addressed the submission that the appellant would be at risk on grounds of perceived westernisation and non-Islamic behaviour arising out of his schooling in the UK.
11. The difficulty, as Mr Diwnycz conceded was that there was no conclusion to the judge's assessment of the expert evidence and it is not clear that it was taken into account at all the credibility assessment. Mr Diwnycz submitted that in the circumstances of youth and the accepted mental health issues, the judge should perhaps have relied more on the background and expert evidence rather than only on discrepancies in the appellant's account. It is conceded by the respondent that the First-tier Tribunal failed to adequately grapple with the evidence as a whole, in the round, and that there is an insufficiency of reasoning in the decision.
12. For example, at [41] the judge concluded that the submission of risk based on westernisation was "speculative at best," based on his schooling in the UK. However, there was no reasoning to support this conclusion and no reference to the evidence adduced to support this contention, including UNCHR and the two reports referred to at [11] and [12] of the grounds.
13. Similarly, the grounds and Ms Warren's submissions assert that the judge erred at [46] in stating that evidence is required to show that forcible recruitment is a real risk for the particular child concerned and not a mere possibility. It is not clear that the judge has taken into account any general risk of children in Nangahar Province being recruited to the Taliban, although the judge earlier addressed the inadequacies of evidence in this regard both from the expert and from the appellant.
14. I am satisfied that there was an inadequacy of reasoning in the decision read as a whole and a failure to demonstrate that relevant considerations had been taken into account in assessment of credibility. In all the circumstances, for the reasons summarised above, I am satisfied that there were material errors of law in the making of the decision of the First-tier Tribunal which could have affected the outcome of the appeal.

Remittal

15. It was not possible to proceed immediately to rehear the appeal, there being no interpreter and the parties not in a position to address the evidence.
16. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
17. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

19. The appeal is remitted to the First-tier Tribunal sitting at Bradford;
20. The ELH is 3 hours. An interpreter in Pashto will be required;
21. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Bradshaw and Judge O'Garro;
22. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
23. The First-tier Tribunal may give such further or alternative directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

I make no fee award.

Reasons: No fee is payable.



Signed

Deputy Upper Tribunal Judge Pickup

Dated