



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL
APPEAL NUMBER: PA/00150/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 11 February 2019

Decision and Reasons Promulgated
On: 25 February 2019

Before
Deputy Upper Tribunal Judge Mailer

Between
MR JAWAD [H]

ANONYMITY DIRECTION NOT MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms E Mitchell, counsel, instructed by Sutovic & Hartigan

For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Afghanistan, born on 1 July 1999. He appeals with permission against the decision of the First-tier Tribunal Judge promulgated on 14 November 2018, dismissing his appeal against the respondent's decision to refuse his application for international protection.
2. He found that the appellant's account of having been abducted, driven to the mountains and then after five days required to dig a hole in a mountain with other boys, was false and manufactured solely for the purpose of seeking to procure his desired outcome, that is his continued residence in the UK. He set out his reasons

for that finding at [42(iii)]. He dismissed his asylum, humanitarian protection and human rights claims.

3. In granting permission to appeal on 10 December 2018, First-tier Tribunal Judge Lambert found that the First-tier Tribunal Judge has arguably fundamentally misunderstood the nature of the appellant's case, thereby attributing inconsistency to his account where there was none, so that the claimed error, if made out, is clearly material to the overall outcome.
4. At the commencement of the hearing, Ms Mitchell, who did not represent the appellant before the First-tier Tribunal, produced a statement from Ms Zoe McCallum, who was the counsel who represented the appellant before the First-tier Tribunal. Ms Pal did not object to the production of this statement.
5. In her statement, McCallum asserts that the appellant's case has consistently been that he was abducted by Daesh and not the Taliban. The only point on which his understanding of events has altered since arrival in the UK relates to the letter left with the Mullah of his local mosque shortly before he was abducted by Daesh.
6. She stated that in the appellant's first witness statement dated 16 November 2015, his evidence was that his father showed him the letter, when he was still a child, and that he understood that it was from Daesh, his subsequent abductors.
7. In his substantive interview conducted on 12 July 2017, some 20 months later, the appellant affirmed his understanding that the letter was from Daesh – Q 54. He was asked why he feared that he was at risk from Daesh and the Taliban. He responded that both are the same: "I do not know deep into the politics what is the difference between the two" (Q 122).
8. She stated that a copy of the letter was provided to the country expert, Dr Giustozzi for verification through his researcher, Mr Saleem Safi. In his verification report dated 22 January 2018, also before the Tribunal, the letter was identified as emanating from the Taliban and not Daesh. The report of Dr Giustozzi was read to the appellant, who produced a further witness statement dated 21 February 2018. The witness statement recorded that the appellant accepted that he may have confused the Taliban stamp with the black flag of Daesh. It is also reiterated that it was only since the appellant arrived in the UK that he had learned more about the differences between Daesh and the Taliban.
9. In adopting the appellant's grounds of appeal Ms Mitchell submitted that there was a fundamental error made by the Tribunal regarding the nature of the appellant's case. His judgment was predicated on a fundamental misunderstanding of his case as put by the appellant in his evidence and by counsel in her written and oral submissions.
10. The Tribunal approached the appeal on the basis that the appellant, having previously recounted how he was forcibly recruited by Daesh, was now claiming that he had in fact been abducted by the Taliban [42(iii)(a)]. However, Ms Mitchell

submitted that the appellant in fact had made no such claim. His consistent evidence was that he was abducted by Daesh whose members he identified largely on the way they dressed.

11. That was the way the case was argued by counsel. Her skeleton argument presented relied expressly on the appellant's having been taken by Daesh and used for forced labour. Ms Mitchell also referred to the current witness statement of Ms McCallum, where she has confirmed that this was the basis upon which the appellant's case was argued at the time.
12. Ms Mitchell referred to Ms Mitchell's skeleton argument produced before the First-tier Tribunal and which was before the Judge. The skeleton argument set out his case, namely, that he was abducted by Daesh but that he accepted that the threat letter was from the Taliban - paragraphs 5-7 and 24-27.
13. Ms Mitchell submitted that the only point on which the appellant's understanding of events has altered since his arrival in the UK related to the letter left with the Mullah of his local mosque shortly before his abduction. He had initially understood the letter to come from Daesh, consistent with the identity of his subsequent abductors, and with what he thought he had recognised as Daesh emblems on the letter itself. This was also referred to in the skeleton at paragraph 23 and the witness statement, at paragraph 1-2.
14. However, when a copy of the letter was provided to the country expert it was identified as emanating from the Taliban, as referred to in the skeleton of Ms McCallum at paragraphs 19-21. The appellant explained that his knowledge of the differences between the groups was limited, that he had seen the letter only briefly and that he had likely confused the Taliban stamp with the Daesh flag as stated in the skeleton at paragraph 23.
15. Ms Mitchell submitted that despite all of this, the Tribunal proceeded on the basis that the appellant's entire account of his forcible recruitment had shifted. It described his case in respect of Daesh as having "substantially evaporated" [42(iii) (a-b)].
16. She submitted that the adverse credibility findings were therefore based in a significant respect on the idea that the appellant had altered his case so as to "dovetail" it with the documentary evidence of the Taliban judgment [42(iii)(a)]. The assessment of the appellant's evidence in respect of the letter itself was thus made against this background.
17. Ms Mitchell also contended that Tribunal erred in his approach to the appellant's credibility. In that respect, she submitted that the Tribunal acknowledged that the appellant was a minor at the relevant time which was relevant in the assessment of his credibility. Accordingly, the Judge should have had regard to the relevant paragraphs of the joint Presidential Guidance Note No. 2, and the decision in AM (Afghanistan) [2017] EWCA Civ 1132.

18. Furthermore, cases involving children may call for a liberal application of the benefit of the doubt – UNHCR Guidelines on Child Asylum Cases.
19. She submitted that the First-tier Judge did not in fact evaluate the appellant's credibility in accordance with those principles. He adopted a stringent approach which in several respects failed to take into account the totality of the appellant's own evidence. The Tribunal drew an adverse credibility inference from his evidence that, when he was abducted, he was driven for 30 minutes into the mountains and that when he escaped he arrived home after running for 20 minutes and walking for an hour. The Tribunal found this account to be "beyond credence" [12] and [42(d)].
20. Ms Mitchell submitted that a child's estimates of time are unlikely to be especially accurate, particularly in cultures that do not attach particular significance to time keeping and in the context of a stressful or traumatic unfolding event. However, no allowance was made for that. Nor did the Tribunal take account of the totality of his evidence, in which he explained that the poor roads contributed to the initial pace of travel and that the vehicle had been stuck in mud for part of the journey time.
21. In addition, she submitted that the Tribunal drew adverse inferences from his inability to explain the decisions and actions of adults around him, such as why his father told the police that he was at his aunt's house and why his father directed him to return to the family home to say goodbye to his mother despite the danger involved before fleeing the country.
22. The appellant cannot be expected to have known or understood how the police received information relating to groups such as Daesh or why his father made the decisions that he did. To infer that there was no adequate explanation and that his account was unlikely to be true, was inconsistent with the principles relating to the giving of evidence by a child.
23. She contended that the Tribunal entirely failed to have regard to his age and hence to the likelihood that he would do as an agent had directed, even when the agent was not physically present. Nor did the Tribunal take account of his evidence that he was particularly afraid of the agent, having been beaten on the journey and threatened with physical violence in the event of disobedience, as was set out in the skeleton at paragraph 9.
24. In addition, the Tribunal criticised the appellant for accepting that he had been mistaken as to the provenance of the letter his family received before his abduction. However, as already noted, the appellant had initially described the letter as coming from Daesh, having seen the words "Emirati e Islami" and what he believed was the Daesh flag. However, he accepted, consistent with the country expert, that he is likely to have been mistaken in this regard and that the emblems were in fact those of the Taliban.
25. The Judge also wrongly concluded that the appellant stated for the first time in cross examination that he became aware of the differences between Daesh and the

Taliban via his solicitors whereas his evidence was that his solicitors showed him their different flags.

26. Nor did the Judge recognise the consistency of his overall evidence in relation to the document. This included his explanation at interview that he did not know “deep into the politics what is the difference between Daesh and the Taliban.” His case accordingly should not have been approached on the basis that there was a very firm and clear case which became substantially different. Instead, it should have been assessed on the basis that this was a young person's best and understandably flawed attempt to recall and make sense of past events.
27. The refusal to accept that the appellant had not appreciated the ‘evidentiary value’ of the letter as well as another sent by the police until prompted by his solicitors to seek evidence in support of his claim, was underpinned by assumptions as to the appellant's knowledge and understanding which found no supporting objective or expert evidence but were instead predicated on the Tribunal's own understanding of what a child or young person would know and understand. This was impermissibly shaped by the Tribunal's own socio-cultural context and was not a safe guide to the assessment of credibility.
28. The examples thus cumulatively illustrate an approach to credibility which is inconsistent with the application of the principles relating to an assessment and appreciation of a child's evidence. It was characterised by a relatively high degree of scepticism and rigidity, resulting in a failure properly to take account of the likely impact of the appellant's age on his knowledge, understanding and recollection. There were, she submitted, repeated failures to evaluate his evidence in its full context.
29. There were also a number of issues which formed the basis of the Tribunal's adverse credibility findings which were not put to the appellant in cross examination or raised by the Tribunal to give the appellant or his counsel the opportunity to respond.
30. This included the apparent differences between the original letter from the Taliban and the photocopy used for verification by Dr Giustozzi [19]. No opportunity was given to take instructions on the point in order to clarify the matter.
31. There was also an issue relating to the control exercised over the appellant by his agent whilst in Hungary. If that had been put, the Tribunal would have been referred to his repeatedly expressed fear of the agent. The finding that since the appellant had been fingerprinted by the authorities in Hungary, he must have been able to exercise free choice and hence to seek protection, was not substantiated by the evidence. The failure to afford the appellant an opportunity to respond to such points was relevant to the overall conclusions.
32. Ms Mitchell submitted that the majority of the psychological evidence from Dr Heke was essentially based upon what she was told by the appellant and that for the reasons already given, the Tribunal had rejected this account, and did not

properly take into account that evidence. The Tribunal rejected the possibility that the appellant's recollection might be affected by PTSD on the basis that the diagnosis assumed that the appellant's account was not self-serving [39]. He failed to take into account passages in which Dr Heke explained her reasons in more detail and the Judge treated himself, without providing reasons, as better placed than Dr Heke to assess the potential feigning of symptoms of mental illness.

33. Accordingly, the Tribunal rejected Dr Heke's evidence based on its own prior conclusions regarding the appellant's credibility, contrary to the proper approach set out in Mibanga v SSHD [2005] EWCA Civ 367 at [20-26].
34. Ms Pal submitted that there has been no material error of law. The First-tier Tribunal Judge has given a thorough and detailed assessment. He was aware of the sequence of events relevant to his decision. This is evident from [24].
35. No explanation was given for the difference in the photocopy of the letter sent to the appellant which had five more lines of writing and a scribbled signature.
36. He was highly critical of the "verification evidence" relating to that letter [26]. Further, when the appellant was cross examined, he claimed for the first time that his solicitor had informed him that Daesh is a different organisation to the Taliban.
37. The Tribunal moreover referred to the fact that the appellant had previously been able to assert on several occasions in his evidence that he had been kidnapped by Daesh [28].
38. She submitted that when assessing the appellant's evidence, the Judge considered whether the fundamental change in the appellant's case and his age and other factors relevant to younger witnesses should be taken into account. Although they might explain an inability to recall precise details or, on occasion, show a degree of confusion or forgetfulness, he did not accept that they have any material bearing on whether there is a very firm and clear case being put forward initially which later becomes substantially different, as in this case: [42(iii)(b)].
39. She submitted that the Tribunal did not proceed on a mistaken basis.
40. In reply, Ms Mitchell submitted that the reliance by Ms Pal on paragraph [42(iii)(b)] confirms the error. The Tribunal did not properly understand the nature of the change.

Assessment

41. I have also had regard to the grant of permission by First-tier Tribunal Judge Lambert. He noted that there may be some questions as to how counsel did present the case at the hearing.
42. Following the grant of permission Ms McCallum has now presented a detailed statement regarding the way the appellant's case was presented. There was no objection to its production. There has been no challenge to its accuracy.

43. The Tribunal considered that the appellant previously recounted that he was forcibly recruited by Daesh but subsequently claimed that he had in fact been abducted by the Taliban.
44. In Ms McCallum's witness statement (confirmed by her skeleton argument produced before the First-tier Tribunal), it does not appear that he made such claim. His consistent evidence was that he was abducted by Daesh and he identified his captors by the way they were dressed. This is in fact recorded by the Tribunal at [11-15] and [28]. His claim to have a well founded fear of the Taliban as well as Daesh arose not from his abduction but from the receipt of the letter which was identified as emanating from the Taliban.
45. A copy of the letter was handed to the country expert, Dr Antonio Giustozzi. It was identified as coming from the Taliban. This was also referred to in counsel's skeleton argument. The appellant claimed that his knowledge of the differences between the groups was limited and that he had only seen the letter briefly. He stated that he had probably confused the Taliban's stamp with the Daesh flag.
46. Although it has been submitted by Ms Pal that a proper chronology of events was given, and that the findings are sustainable, the Tribunal did ultimately proceed on the basis that the appellant's entire account of his forcible recruitment had shifted, resulting in the finding that the appellant had altered his case so as to "dovetail" it with the documentary evidence of Taliban involvement. His evidence relating to the letter was itself assessed against this background. The assessment of the appellant's credibility was based on an erroneous understanding of his evidence and his case.
47. In addition, although having regard to the need to take into account his age when assessing his evidence, there is some force in the submission that the Judge adopted a stringent approach which are inconsistent with the principles reflected in the Joint Presidential Guidance note No 2 of 2010 and the UNHCR guidelines on Child Asylum Claims. The inconsistencies identified by the Judge were not properly assessed in accordance with these principles.
48. I accordingly find that the decision of the First-tier Tribunal Judge involved the making of an error on a point of law. I set aside the decision. Both parties agreed that if I came to that conclusion, the appeal should be remitted to the First-tier Tribunal for a fresh decision to be made. I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made is extensive. In the circumstances it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. It is set aside.

The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Signed

Date 21 February 2019

Deputy Upper Tribunal Judge Mailer