**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/06019/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 30 July 2015** | **On 11 September 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR JAN AGHA KHOMERKHEL**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the appellant: Mr T Lay of Counsel
For the respondent: Ms I Isherwood, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is the Secretary of State for the Home Department and the respondent is a citizen of Afghanistan born on 1 January 1999. However, for convenience, I refer below to Mr Agha as the appellant and to the Secretary of State as the respondent, which are the designations they had before the proceedings at the First-tier Tribunal.

2. The Secretary of State appeals with permission to the Upper Tribunal against the determination of First-tier Tribunal Judge C Newberry promulgated on 10 January 2015, allowing the appellant's appeal pursuant to the Refugee Convention against the decision of the Secretary of State made on 8 August 2014, in which the Secretary of State refused the

appellant's claim for asylum and humanitarian protection in the United Kingdom.

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

3. First-tier Tribunal Judge C. Newberry gave the following reasons for allowing the appellant's appeal pursuant to Article 3.

    i. [20] It is common ground that the appellant is a minor, the assessed date of birth being as 1 January 1999 and that he is from Afghanistan. It is also accepted that in Afghanistan he was uneducated and illiterate. It is also accepted that the appellant lived with his parents and family in Nanghar province in a village called Safar in the Esarak District.

    ii. [21] One of the most important questions in the case is whether the appellant's father was a Talib and a member of the Taliban. The appellant maintains that he was. He says he remembers his father carrying a rifle. His father would travel early in the morning to a local Taliban base, returned late at night. Nangarhar province is a known Taliban stronghold and has been for a considerable time… It does make in my judgement, plausible that a male adult and a Pashtun living there, could be a member of the Taliban. The appellant's written statement dated 4/9/13 indicates that the appellant's father had already introduced his brother to the Taliban and the Taliban base. The appellant's brother had told him that his brother had gone to jihad "in the mountains to fight the Americans".

    iii. [23] The respondent maintains that the appellant has "adduced no evidence to confirm your father's role as a Taliban and it is not accepted that your father is a member of the Taliban". The respondent considered the appellant's account of his father's role in the Taliban was a "vague account".

    iv. [24] In my view it is not realistic to expect a Taliban operative to give any meaningful information about his activities or rank in the Taliban. What a minor does not know cannot be extorted by torture.

    v. [27] The respondent maintains that the appellant's description of his two-day stay at the camp was vague because he did not know the distance travelled from his home, he could not remember the time taken to get there, he was unable to name the camp and he did not know the names of the people who trained him.

    vi. [28] Child recruits may have a variety of reactions to military training and the level of encouragement to capture a young mind may vary. Initial tolerance may be a better policy. The descriptions of what happened at the camp do not seem to me to be vague or inconsistent. Similarly an uneducated child in remote

of Kurdistan might not be familiar with kilometres and the conversion of time taken to distance travelled.

vii. [31] At paragraph 28 of the refusal letter reference is made to the UNANA Mission Report which confirms the widespread practice of child recruitment by the Taliban. It also refers to children being "tricked". The respondent accepts at paragraph 20 that child recruitment happens.

viii. [32] In my view, is the son of a Taliban operative, the risk of forced recruitment is a real possibility. At paragraph 30 of the refusal letter the respondent makes the point that the appellant will not be removed until he is an adult, and that being so he would no longer be a child and therefore forced recruitment of a child could not occur. The reason behind this concession is that it is not safe to return the appellant to Afghanistan. Further there is little, if any, basis for inferring with certainty inherent in this paragraph that it will be safe when he is an adult.

ix. [39] At paragraph 39 of the refusal letter the respondent summarises its case. The respondent accepts the appellant's identity, age and nationality, but rejects that his father is a member of the Taliban, that his father tried to recruit him into the Taliban, that his father took him to the camp for two days, that the appellant is at risk of recruitment, that the child is unattached or an orphan, that the appellant failed to take advantage of a reasonable opportunity to claim asylum whilst in the safe country.

x. [40] For the reasons indicated above, (primarily the expert report) in my view there is a real likelihood that the appellant's father was a member of the Taliban. Given that, seeking to recruit his sons is consistent with those beliefs. Child recruitment is far from perfection and in my view was the objective of taking the appellant and indeed his brother to the base. It is not the appellant's case that he is an orphan or unattached. On the appellant's evidence both parents are alive and in relation to his father, is the fear that on return his that he would be killed, seriously harmed and/or forcibly recruited to the Taliban, either by his father, the Taliban or both. In my view this is a real possibility.

xi. [42] The only evidence of enforcement appears to be the reference in the refusal letter at paragraph 47 of the Afghanistan Independent Human Rights Commission where reliance was placed on records of what was recorded in 2010. There is no evidence of what "resolution" of human rights violations actually were. Of equal concern is there is no evidence that since 2010 of what this Commission has done since then and no explanation by the respondent why the absence of records for four or five years should mean this body is still effectively functioning. There is much evidence of Taliban in forced recruitment of children, but

no evidence of any prosecutions for it. Mr Zadeh in his report paints a different picture.

xii. [43] The withdrawal of funding in 2012 is not consistent with the respondent's contention that the rule of law is effectively protecting the population of Afghanistan. In my view the appellant cannot expect with any degree of certainty that if returned who would be afforded meaningful protection.

xiii. The Judge analysed the expert report and concluded at paragraph 47 that since the appellant would have to relocate to a Pashtun area, he will inevitably come to the attention of the Taliban who inhabit such areas. Notwithstanding being in such areas, the likelihood of gaining employment is remote because of the absence of his own family.

xiv. [48] In addition to the significant problems, the expert deals with the issue of employment in his report. He draws attention to the difficulties inherent in seeking and or obtaining accommodation for the appellant.

xv. [15] I have concluded that the appellant's father was a Taliban and a member of the Taliban. I do not find that looking at the evidence in the round of a minor that his accounts was vague and that his credibility should be impugned.

xvi. The appeal was allowed on the appellant's asylum claim.

**Grounds of appeal**

4. The respondent in her grounds of appeal stated the following which I summarise. The Judge stated at paragraph 51 of the determination that in light of the expert's report, relocation to Kabul would be unreasonable and expose the appellant to a considerable danger of serious harm. The panel in **AK (article 15 (c) Afghanistan CG [2012] UKUT 163 (IAC)** issued the following guidance; (iv) whilst when assessing a claim in the context of article 15 (c) in which the respondent asserts that Kabul City would be a viable internal relocation alternative, it is necessary to take into account (both in assessing "safety" and "reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many Internally Displaced Persons (IDP's) living there, these considerations will not in general make return to Kabul unsafe or unreasonable. The Judge has failed to give adequate reasons for finding that it would be unreasonable or dangerous for this appellant to relocate to Kabul.

5. The appellant relies upon the report of Mr Zadeh upon which the Judge has afforded decisive weight. His report is unduly vague and failed to adequately engage with the particular facts of the appellant's case. It is not sufficiently clear from the report that the assertions it contains are supported by reliable evidence. With respect, the respondent is unjustifiably subjective and appears to exaggerate the risks to the appellant. One example is "the type of pressure that master Khomerkhel's

father exerted on both brothers can be very highly plausible in Kandahar province. Especially against the Pashtuns, this type of behaviour is common." The expert report gives a firm view on the frequency of intra-family Taliban recruitment, without reference to facts or figures. The evidential value of this view is nil. The other generalisation is that "Pashtun young men like the appellant belong to a category of Afghan population who are at serious risk due to the ethnicity". This appears to be a sweeping generalisation, made without reference to reliable evidence. Other examples were given in the grounds of appeal.

6. It is contended that the examples listed, illustrate the inappropriate approach taken by the expert in the report as a whole. The global reading of the expert's report, no weight can properly be attached to it, save where it may be supported by reliable independent evidence. The Judge has failed to approach the report from adequately critical or impartial perspective. The majority of the determination appears to consist of no more than the mechanical repetition of the report, and wholesale acquiescence in this conclusions without due scrutiny. The Judge thereby materially misdirected himself in law, by accepting the assertions of the expert at face value without conducting any adequate independent assessment of its reliability. He has also failed to consider whether this expert is considered to be an appropriate person to give evidence on the matters stated. The Judge has further erred by failing to direct himself as to the country guidance case of **AK**. He has not given adequate reasons for departing from the country guidance case.

7. The Judge has failed to consider the evidence in assessing credibility. The Judge's cumulative assessment of credibility is vitiated by his failure to have any regard to a material inconsistency in the appellant's evidence. This material inconsistency was highlighted in the refusal letter at paragraph 18 which stated "upon arriving in the UK and undergoing Home Office checks, it was found that you were fingerprinted by the Greek authorities on 17 May 2013. During your screening interview, you stated that you had been fingerprinted. When it was put to you that the Home Office were aware that you were stopped on the 17 May 2013, you claimed "no it's not mine". During your written statement, you confirmed that you had been fingerprinted, held and detained by the Greek authorities for 20 days. Your inability to remain consistent has damaged your credibility".

**The hearing**

8. At the hearing both parties agreed that there is an error of law in the determination. Mr Hodson submitted that he is not in a position to put up many contravening arguments because the Judge has veered off to a path which was never argued. He further added that it would be untenable for him to say that the Judge's reasoning is adequate. He said that the nationality issue of the appellant was not addressed and that the Judge failed to make crucial findings or engage with the evidence.

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

9. I am the view that the Judge materially fell into error in his assessment of the appellant's appeal. The Judge failed to properly take into account the country guidance case of **AK** but instead placed undue reliance and weight on the expert report without giving full and cogent reasons for his departure. In **AK** it was stated that when assessing a claim in the context of article 15 (c) in which the respondent asserts that Kabul City would be a viable internal relocation alternative, it is necessary to take into account (both in assessing "safety" and "reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many Internally Displaced Persons (IDP's) living there, these considerations will not in general make return to Kabul unsafe or unreasonable. The Judge's almost sole reliance on the expert report for his decision brought him into material error.

10. The Judge failed to take into account the credibility of the appellant as raised by the respondent in her reasons for refusal letter at paragraph 18 where the appellant was inconsistent about whether he had been fingerprinted by the Greek authorities on 17 May 2013. The Judge's failure to take into account this inconsistency as it reflects on the appellant's credibility, brought him into material error.

11. I am satisfied that there is a material error in the determination of First-tier Tribunal Judge, in that he did not give adequate reasons for his findings on many issues in the appeal. Mr Hodson very sensibly did not submit otherwise.

12. Consequential to my finding that there is a material error of law, I set aside the determination of the first-tier Tribunal Judge preserving none of the findings.

13. Both parties agreed in such an event, the appeal ought to be sent back to the First-tier Tribunal so that findings of fact can be made. I agreed that this was the proper course of action to take in this appeal in accordance with section 7. 2 (b) (i) the Senior President's Practice Statement of 25 September 2012 as I was of the view that the appeal requires judicial fact-finding and should to be considered by the First-tier Tribunal.

14. The re-making of the decision on appeal will be undertaken by a First-tier Judge in the First-tier Tribunal other than by First-tier Tribunal Judge Newbury on a date to be notified.

**Decision**

15. The appeal by the Secretary of State is allowed and the determination of First-tier Tribunal Judge is set aside. The case is remitted to the First-tier Tribunal for re-determination.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal Judge

Date 30th day of July 2015