Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06269/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 5th February 2016	**On 23rd February 2016**

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR S S
(Anonymity Order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant Mr Lay (Counsel)
For the Respondent: Ms Fijawala (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Symes promulgated on the 21st September 2015, in which he dismissed the Appellant's appeal on Asylum, Humanitarian Protection and Human Rights grounds.

2. Within the Grounds of Appeal it is argued that the First-tier Tribunal Judge had accepted at [24] that the Appellant's home province of "Kunar was, and remains, a centre of Taliban insurgent activity and that the Appellant's basic account is plausible". It is stated the judge

then correctly cited Immigration Rule paragraph 351 and the correct approach to the credibility of the accounts given by children, given that the Appellant was only aged 13 years old at the time when he left Afghanistan and he gave his first account soon after arriving in the United Kingdom. It is said that he is now aged 19 years old. It is argued, however, that the First-tier Tribunal Judge erred in reaching an adverse view of the Appellant's credibility on the basis of paragraphs [25 to 27] of the determination, in that what were said to be significant discrepancies and the vagueness of the account had not been particularised, nor had the Judge integrated into his analysis the fact that the Appellant was only aged 13 when he underwent his problems in Afghanistan. It is further argued that the Judge was not entitled to state judicial knowledge of the likely actions and motivations of a local village Headman in a rural area of Afghanistan, as a basis for casting doubt upon the provenance and veracity of recently obtained documents, and further in order to cast doubt upon the original account.

3. It is further argued that the First-tier Tribunal Judge's finding at [26] that "I consider it intrinsically unlikely that the Appellant's mother would not have made some arrangements for them to keep in touch" failed to take account of the age of the Appellant at the time, the likelihood of population moving away from Kunar in the 6 years since flight and was based upon a general contention that "Diaspora communities across the world have developed means of contacting one another".

4. Within the third Ground of Appeal it is argued that the First-tier Tribunal Judge failed to have regard to the case of R (Naziri) and Others v Secretary of State for the Home Department [2015] UKUT 437 and that on the 21st August 2015, Lord Justice Clark had put a stay on removal of the Appellants in that case until the outcome of the appeal in the Court of Appeal, on the basis of individuals facing forced removal from "dangerous provinces" and who fell within the (disputed) Memorandum of Understanding between Kabul and London which also included "women, unaccompanied women and children, people with mental illness and/or physical health issues". It is argued the Court of Appeal had granted permission to the Claimants to seek to argue that an Article 15 (C) situation prevailed in a number of provinces such as Kunar.

5. Finally, within the Grounds of Appeal it is argued in respect of the Judge's consideration of Article 8, that in the case of the Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387, the Court of Appeal had not endorsed the Upper Tribunal's approach in the case of AM (Section 117B) Malawi [2015] UKUT 260 (IAC) and that it is argued that AM (Section 117B) Malawi is wrong in law and that the First-tier Tribunal Judge had failed to assign an appropriate weight to the Appellant's private life in the UK and the fact that the Appellant had been a child for 6 years of the 7 years

lawful leave in the UK, at a critical stage in his personal, social and emotional development.

6. Permission to appeal has been granted by First-tier Tribunal Judge Holmes on the ground that "the Appellant's age was not in dispute before the Tribunal and so care was required in the assessment of the weight that could be given to his evidence. Paragraph 25 of the decision suggests that the Judge may have lost sight of both that, and the correct standard of proof. Moreover, it is an arguable error to refer to the existence of significant discrepancies in the evidence without then detailing them. In the circumstances all of the grounds may be argued".

7. In the Respondent's Rule 24 reply, it is argued that the First-tier Tribunal Judge directed himself appropriately and had considered all the evidence and concluded that the Appellant was not the son of a Taliban commander, or that the Afghanistan authorities had any current interest in him. It is argued that this was a finding that was open to the Judge on the totality the evidence. It is argued that the First-tier Tribunal Judge had adequate regard to the Appellant's age in assessing his credibility and the weight that could be given to his evidence, and that the Judge had provided adequate reasons for concluding that there were significant discrepancies in the Appellant's evidence and had detailed such discrepancies between paragraphs [24 and 27] of the determination. It is further argued that irrationality is an elevated threshold and that the Respondent submits that the Judge's conclusions were rational and open to him. It is further argued that the Judge correctly referred to the Country Guidance case of AK (Article 15 (C)) Afghanistan v Secretary of State for the Home Department [2012] UKUT 00163 and that the approach taken by the Upper Tribunal in the case of AM Malawi, said to be clarified in the case of Deelah and Others (Section 117B-ambit) [2015] UKUT 00515, indicated that the adjective 'precarious' in Section 117 B (5) of the 2002 Act does not contemplate only, and is not restricted to, temporary admission to the United Kingdom or a grant of Leave to Remain in a category which permits no expectation of a further grant. It is argued that there were no material errors.

8. In his oral submissions, Mr Lay of Counsel argued that the Judge had not given adequate reasons between [24] and [27], as to why the historic account had not been accepted, and that the Judge had not explained what the discrepancies were, but even if they were discrepancies, why this should be taken to mean that his account should not be accepted, given he was a 13-year-old boy whose basic account was said to have been plausible. He argued that the Judge had not considered whether or not the account was "reasonably likely to be true". He further argued that in considering the Appellant's private life claim under paragraph 276 ADE of the Immigration Rules, the Judge had been wrong in finding that it was intrinsically unlikely that the Appellant's mother would not have found a way of keeping in

contact with him, and that the Judge could not use Judicial Knowledge of that fact. It was further argued that in any event, the First-tier Tribunal Judge had not considered the fact that Kunar was rife with Taliban activity and that there would therefore be very significant obstacles to the Appellant returning to Kunar, given he had never lived as an adult and in circumstances where the Appellant himself had become westernised during his time in the UK.

9. Mr Lay recognised that the Naziri issue had not been put to the Judge, but further argued that the Judge has not detailed which "human rights reports" he had actually referred to and taken into account at [31] of the Judgement.

10. Finally, Mr Lay argued that AM Malawi was wrong in setting out that anyone with limited leave should be deemed to be precarious and that leave granted in circumstances such as the Appellant's to a 13-year-old boy should not be deemed to be precarious. He argued the case of Deelah had "reined back in" the case of AM Malawi.

11. Ms Fijawala on behalf of the Respondent relied upon the Respondent's Rule 24 response dated the 29th October 2015. She argued that the Judge had properly directed himself in having referred to paragraph 351, did not need to refer to the fact that the Appellant was a child when he came throughout the determination. She argued the Judge was entitled to find that the account was vague and that there had been discrepancies. She argued that what was contained within paragraph [7B] did reflect the contents of the 2009 Refusal Notice. She argued that in respect of [27] the Judge had not imposed his own views but had made findings in accordance with the country background information and was entitled to find that the village Headman, had he truly informed on a Taliban commander and their family members would not have given that information freely to a person he hardly knew, in the person the Appellant's friend Omar.

12. Ms Fijawala further argued that the Judge was entitled to take account of diaspora contact and that people can now maintain contact throughout the world and that the Appellant's mother did have a 6 day window in order to put a means of communication in place. She argued that there was no material error and that there were no significant obstacles to the Appellant returning back to Afghanistan for the purpose of paragraph 276 ADE. She further argued that the Judge had not made any findings in respect of the "Human Rights reports" that he had looked at and the Judge had properly made findings based upon the Country Guidance case of AK. She further argued that there was no material error in any event as the Appellant could safely internally relocate.

13. Ms Fijawala further argued that the case of SS (Congo) was considering family life in respect of spouses and not the circumstances of children and did not cover circumstances in which

private life should be considered precarious. She argued that AM Malawi remained good law.

My Findings on Error of Law and Materiality

14. I do find that First-tier Tribunal Judge Symes has erred in law at [25] in his finding that "there have been significant discrepancies such as those itemised in the refusal letter even within its narrow parameters". Although the First-tier Tribunal Judge went on to detail a further discrepancy that had materialised during the giving of evidence regarding different explanations as to where the documents said to be from Afghanistan were posted, in respect of the other significant discrepancies he refers to at [25] these are not explained within the determination or set out within [25], to explain, in a manner that the Appellant can understand, the basis upon which he has lost. The reasoning in this regard is inadequate. The Judge cannot simply rely upon the refusal letter without actually considering the evidence in the case. Although the First-tier Tribunal Judge had set out at [7B] that the Appellant's claim originally had been refused in September 2009 on the basis that "there were inconsistencies in his account, for example that in his statement he had said that he and his mother had not told his father of the objections to joining the Taliban but at interview he had said that both he and his mother had told him; and he had said that he did not want to join the Taliban because they harm people but had also said he was unaware of the detail of their activities", this was reference simply to the contents of the refusal letter in 2009, and is unclear from the reasoning at [25] whether it was said to be these matters that the First-tier Tribunal Judge was taking account of or others. In this regard, the explanation that at [7(B)] that there was purporting a discrepancy between the Appellant not wanting to join the Taliban because they harm people but also being unaware of the detail of their activities, in my judgement, does not amount to a discrepancy, and if the Judge was purporting to rely upon the same as a discrepancy, he was wrong to do so without further explanation. The fact that he may not have known the details of their activities is not inconsistent or discrepant with a statement that he was aware that they harmed people.

15. Further, the summary at [7(B)] of the September 2009 refusal letter in which it is said that "in his statement he said that he and his mother had not told his father of his objections to join the Taliban, but at interview he said that both he and his mother had told him", is again not particularised or explained in light of the actual evidence before the First-tier Tribunal Judge. The 2009 refusal letter is not in itself evidence of what the Appellant had said, that evidence comes from his interviews or any statements. That evidence has not been analysed by the Judge.

16. To the extent that the First-Tier Tribunal Judge sought to summarise the September 2009 refusal letter's reasoning at paragraph 7(B) and

that it is said that "in his statement he had said that he and his mother had not told his father of his objections to joining the Taliban, but at interview he had said that both he and his mother had told him", if this is purporting to be a summary of paragraphs 28 and 29 of the refusal dated the 28th September 2009, and it does not accurately record in summary, the contents of those paragraphs. At [28] of the 2009 refusal, the answers given by the Appellant in interview from question 28 onwards was set out, but then in [29], it was stated that the Appellant in his witness statement had said that his mother was also too afraid to tell his father that the Appellant did not want to join the Taliban, but that when asked at interview "did your mother tell him she didn't want you to join the Taliban?", he answered "as I refused, the same way my mother told him that she didn't want me to join". This is not therefore an inconsistency, given that in the witness statement that it was said that the Appellant's mother was too afraid to tell the Appellant's father that the Appellant did not want to join, but in interview he was saying that his mother had said that she did not want him to join. These are very different matters, and to the extent that the First-tier Tribunal Judge has sought to summarise that at [7(B)] as reading "in his statement he had said that he and his mother had not told his father of his objections to join the Taliban, but at interview he had said that both he and his mother had told him", this is not an accurate reflection of what is recorded within the 2009 refusal letter, nor the answers given by the Appellant in interview. The Judge in this regard has therefore clearly failed to take account of and misinterpreted material evidence. However, if in fact these are not the alleged discrepancies relied upon by the Judge at [25], then he has failed to adequately explain his findings in this regard.

17. Next, at [26] the First-tier Judge found that "I consider it intrinsically unlikely that the Appellant's mother would not have made some arrangements for them to keep in touch. This is not a case where he fled the family home without notice, and she clearly sought to secure his welfare, and had a 6 day window before he left to put those arrangements in place. Whatever the local availability of power sources, diaspora communities across the world have developed means of contacting one another and it is fundamentally implausible that this would not have been done here. The Home Office are unable to make effective family-tracing enquiries in Afghanistan, and I treat their inability to do so as a neutral fact in this appeal."

18. I find that it is not open for the First-tier Tribunal Judge to simply find that "diaspora communities across the world have developed means of contacting one another and is fundamentally implausible that this would not have been done here." Irrespective as to whether or not there is a 6 day window, without any analysis as to the means of postal or telephone communication, whether by means of landline or mobile, between the Barabt village in the Kunar province where the Appellant lived and the UK, I do not consider that it is a matter of sufficiently common knowledge that communication can be

maintained for the Judge to rely uon “judicial knowledge” in his regard. The Judge has to look at the actual individual locations, and the security state of the Kunar province, given that it is said to be an area of Taliban insurgency, in order to determine the likelihood of being able to maintain contact, and also as to whether or not in light of the security situation, his relatives may had moved. The Judge has failed to do so. The bold assertion that "diaspora communities across the world have developed means of contacting one another" is inadequately reasoned and is insufficient as a reason for her finding that the Appellant is in contact with his mother, and using this as a reason for disbelieving the Appellant's core account.

19. I do find that given credibility has to be considered holistically, taken into account all of the relevant facts, evidence and findings, that the Judge’s errors in respect of the evidence in this regard, are material errors, such as to mean that the decision of First-tier Tribunal Judge Symes should be set aside and the matter remitted back to the First-tier Tribunal for a hearing de novo on the evidence.

20. In respect of the other arguments I do consider that it was open to the Judge and he has entitled to find that the village Headman, had he truly informed on a Taliban commander and their family members would not have given that information freely to a person he hardly knew, in the person the Appellant's friend Omar. The reasoning in respect of this issue is adequate and sufficient.

21. In respect of the submission made by Mr Lay that the Judge failed to have regard to the case of R (Naziri and Others) v Secretary of State for the Home Department [2015] UKUT 437, given that the complaint in this regard is that Lord Justice Clarke, on the appeal from the Upper Tribunal to the Court of Appeal, granted asylum removal of the appellants until the outcome of their appeal before the Court of Appeal, given that First-tier Tribunal Judge Symes was not referred to this case, and in any event, the Court of Appeal has yet to publish its final decision on the appeal, such that at present, the case of AK (Article 15 C) Afghanistan CG [2012] UKUT 163 (IAC) remains presently good law, there was no error on part of the First-tier Tribunal Judge referring to the Country Guidance as it was as at the date of his decision.

22. Further, I do not consider that the Court of Appeal in the case of Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387 at paragraphs 36 and 37 was seeking to define "precariousness" for purpose of Section 117B of the Nationality, Immigration and Asylum Act 2002, as amended. The Court of Appeal in those paragraphs, was simply trying to distinguish between the circumstances of a case involving someone outside of the United Kingdom who applies to come here to take up or resume family life established in ordinary and legitimate circumstances from some time in the past, and someone who from the United Kingdom who marries

a foreign national and establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come to the UK. This is very different to the consideration by the Upper Tribunal in the case of AM (Section 117 B) Malawi v Secretary of State for the Home Department [2015] UKUT 26 which was simply seeking to determine how "precarious" should be interpreted for the purpose of that section of the Act, as amended. I do not consider that First-tier Tribunal Judge Symes was wrong in therefore relying upon the Upper Tribunal case of AM (Section 117 B) Malawi [2015] UKUT 26.

23. However, for the reasons set out above, I do find that the First-tier Tribunal Judge's analysis of the evidence in his findings in respect of credibility are vitiated by material errors of law, such that the decision of First-tier Tribunal Judge Symes is set aside, and the case is remitted back to the First-tier Tribunal to be heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge Symes.

Notice of Decision

The decision of First-tier Tribunal Judge Symes is set aside, the same containing material errors of law. The case is remitted back to the First-tier Tribunal to be heard before any First-tier Tribunal Judge other than First-tier Tribunal Judge Symes;

The First-tier Tribunal having made an anonymity order in this case, given the age of the Appellant, I do maintain the anonymity order that was previously made. 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 to both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed Dated 6th February 2016

RF McGinty
Deputy Judge of the Upper Tribunal McGinty