



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/04124/2016

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Decision & Reasons
Centre Promulgated
On 13th June 2017 On 22nd June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MASTER H K
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bedford (Counsel)
For the Respondent: Mr H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge A M S Green, promulgated on 31st October 2016, following a hearing at Birmingham Sheldon Court on 24th October 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant

subsequently applied for, and was granted permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan, who was born on 1st January 2002. He appealed against the decision of the Respondent dated 14th April 2016, by refusing his application for asylum and refusing his application for humanitarian protection under paragraph 339C of HC 395.

The Appellant's Claim

3. The Appellant's claim is that he was abducted forcefully by the Taliban when he was tending to his goats in the mountains at some distance from his home. He was then taken by the Taliban to an unknown location and held captive for four days and mistreated. A man felt pity for him and helped him to escape. He flagged down a car and told the driver what had happened to him and the driver took him to his village. When the Appellant told his parents they contacted his maternal uncle and arrangements were made for him to leave the country. In the meantime, the Appellant's father was taken away and has not been heard of since.

The Judge's Findings

4. The judge rejected the Appellant's claim for two essential reasons. First, that he failed to claim asylum in several safe third countries through which he travelled, including Hungary before coming to the United Kingdom. The judge held that, "he could and should have claimed asylum earlier and this has damaged his credibility" (paragraph 13). Second, the Appellant chose not to give evidence, and the judge held that, "had he done so, I would have been able to assess his evidence and how it stood up to cross-examination. He was present at the hearing and there was no obvious reason why he did not give evidence". The judge went on to say that, "he is 14 years old and could have testified. Instead he simply chose to say nothing. He did not adopt his witness statement. Under the circumstances, I give his witness statement very little weight. I simply do not believe what he was saying about his abduction or his father's abduction" (paragraph 14). The judge also held that there was no risk of the Appellant being recruited by the Taliban (see paragraph 15). Moreover, if it is asserted that a child cannot contact his family members, then such a claim should be supported by credible evidence of efforts to contact those family members and their inability to meet and care for the child, which had not been done here (see paragraph 16).
5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge was wrong to draw an adverse inference of credibility on the basis that the Appellant, who had been fingerprinted in Hungary, did not claim asylum there, or in any other

country en route. Old established case law states that there is an element of choice that asylum seekers have as to where to claim asylum. Second, the judge wrongly drew an adverse inference of credibility from the Appellant's failure to give evidence. However, since the Appellant was a minor, he had chosen not to give evidence, but that did not mean that his written statements could not be taken into account, and the Appellant was not asked to adopt his witness statement in any event. Thirdly the judge wrongly relied upon the country guidance case of **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163**, because there had been a significant deterioration in the security situation in Afghanistan since that decision was promulgated.

7. On 16th January 2017, the Upper Tribunal granted permission to appeal on the basis that the judge had erred in treating adversely the fact that the Appellant did not give oral evidence (at paragraph 14). Second, the judge had also erred in treating the Appellant's failure to claim asylum en route to the UK as a matter weighing against him in his oral credibility assessment (see paragraph 13).
8. A Rule 24 response was entered on 8th February 2017 to the effect that the Tribunal below had directed itself appropriately, and the failure of the Appellant to claim asylum in another safe country was a matter that the judge could properly take into account, as was the Appellant's failure to give evidence.

Submissions

9. At the hearing before me on 13th June 2017, Mr Bedford, appearing on behalf of the Appellant, made the following submissions. First, the Appellant was a 14 year old when he travelled through Hungary, and he could not be expected to claim asylum as a minor, even if he had been fingerprinted in that country.
10. Second, the failure to claim asylum in a country, which was now accepted as being not one which could properly be categorised as a safe country, could not be taken against the Appellant. In the case of **Ibrahimi [2016] EWHC 2049**, which was promulgated two months prior to the decision of the judge, the High Court, in giving its judgment on 5th August 2016, made it clear that refoulement to Hungary was a breach of the European Convention, because it was unsafe.
11. Third, the Appellant's failure to tender himself for cross-examination was deliberate given that he was a minor but this did not mean that his witness statement could not be taken to account, and it certainly did not mean that an adverse inference could be drawn. However, he had been interviewed twice, and these matters should have been given priority by the judge rather than the Appellant's failure to be orally examined of his witness statement.

12. Fourth, the judge stated that there were material inconsistencies in the evidence but did not identify what these were.
13. Fifth, the case of **JK v Sweden (Application No. 59166/12)** dated 22nd August 2016, makes it clear (at paragraph 91) that all that an applicant has to do is “to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3”. Once this is done, then the government has to dispel any doubts that this would not happen. The Appellant has produced this evidence. He was not certified as manifestly unfounded. That being so, the Grand chamber in **JK** stated (at paragraph 101) that, “credibility established where the applicant has presented a claim which is coherent and plausible, and not contradicting generally known facts”. This was the case here.
14. Finally, the judge had regard to authorities that were irrelevant to the Appellant’s condition. For example reference was made to **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163**, and reference was also made to **PM (Afghanistan) [2007] UKAIT 00089**, but that was a case that involved hard bitten insurgents, rather than a minor child, and the judge’s emphasis upon these cases, eschewed his assessment of the merits of the Appellant’s claim (see paragraphs 16 to 17 of the determination).
15. For her part, Ms Aboni relied upon the Rule 24 response of 8th February 2017. First, she submitted that the failure to claim asylum in another safe country, such as Hungary, was just one factor that the judge found that damaged the Appellant’s credibility, and it was not an error when read in the context of the determination as a whole. Second, that the judge took account of the Appellant’s age, and in the absence of evidence also, or even a claim of mental health issues, which prevented the Appellant from giving evidence, the judge was entitled to conclude that the Appellant should have testified in court. Third, the main basis for the judge’s adverse credibility findings was material inconsistencies in the Appellant’s evidence. The judge considered the evidence in the round with the resulting conclusion that the Appellant had not made out his claim to be at risk on return to Afghanistan. Finally, the judge considered the relevant country guidance and background evidence and concluded that the return of the Appellant was entirely feasible in these circumstances.
16. In reply, Mr Bedford stated that one could not get away from the fact that the judge had concluded (at paragraph 13) that the Appellant’s failure to claim asylum in Hungary, which was not a safe country, was against him. Secondly, the judge should not have had regard to the failure of the Appellant to give evidence as a matter that went against the Appellant.

Error of Law

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, the judge stated that the failure of the Appellant to claim asylum “in several safe third countries including Hungary before coming to the United Kingdom” was something that damaged his credibility (paragraph 13). However, Hungary is not a safe country as stated in **Ibrahimi [2016] EWHC 2049**, such that the Appellant could realistically have claimed asylum in that country. He was, in any event 13 years of age at that time.
18. Second, the judge drew an adverse inference from the Appellant’s failure to give evidence leading him to conclude that he would give his witness statement “very little weight” (paragraph 14). Whereas the judge does refer to the Appellant’s screening interview, outside what was said in the witness statement which the Appellant did not refuse to adopt, his relative substantive asylum interview, stating that there were “material inconsistencies between them” he does not explain in what way.
19. Third, the judge’s reference to authorities, such as **PM (Afghanistan) [2007] UKAIT 00089** and **AK** (see paragraph 16) could not be criticised, in the way suggested by Mr Bedford, because although these cases did not refer to children, what the judge was doing was referring to the principles of adjourned application, when drawing attention to such case law, and he was entitled to so do. Nevertheless, for the reasons that I have given, there was a material error of law in the judge’s determination.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge A M S Green, pursuant to Practice Statement 7.2, for the reasons that I have set out above. The appeal is allowed only to that extent.

An anonymity direction is made.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Juss

21st June 2017