



IAC-TH-WYL-V1

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

Appeal Number: AA/08914/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 October 2015**

**Decision & Reasons Promulgated
On 4 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APLEYARD

Between

**SM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Smyth, Solicitor

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction has been made in these proceedings and I direct that it continue.
2. The appellant is a citizen of Afghanistan whose date of birth was assessed as 1 June 1996 by Kent Social Services but this was disputed by the appellant who claims that his date of birth is 1 January 1999.
3. He appealed against a decision of the respondent refusing his application for leave to remain on asylum grounds and on humanitarian protection

grounds and under Articles 2, 3 and 8 of the European Convention on Human Rights.

4. His appeal was heard by Judge of the First-tier Tribunal Goodrich at Taylor House on 12 December 2014. She dismissed this.
5. The appellant sought permission to appeal which was granted by Judge of the Upper Tribunal Grubb on 22 May 2015. His reasons for the grant in relation to ground 1 were as follows:-
 - “1. The First-tier Tribunal (Judge Goodrich) dismissed the appellant’s appeal on asylum, humanitarian protection and human rights grounds. The judge did not accept that the appellant would be at risk on return to Afghanistan from the Taliban.
 2. The Grounds argue that the Judge erred in law: (1) in relying on the age assessment to identify inconsistencies in the appellant’s evidence; and (2) in applying the wrong test in assessing whether the appellant would be at risk as an apostate.
 3. Ground 1 is arguable for the following reason. Whilst I doubt whether the Judge placed undue weight on the appellant’s evidence in his age assessment, it does not seem that the inconsistencies were relied upon by the HOPO or put to the appellant by the Judge in evidence. If they were considered to be important factors in assessing the appellant’s account, it was arguably unfair not to do so. Further, as the renewed grounds point out, the Judge’s assessment of the appellant’s claim “at its highest” may not be consistent with AA [2012] UKUT 00016 (IAC) at [16] that relatives of Government “collaborators” may be at risk from the Taliban. I am not persuaded that it is unarguable that any error was, therefore, necessarily immaterial.
 4. Ground 2: the Judge was entitled to conclude for the reasons he gave at para 51 that the appellant had not rejected his faith and so would not be at risk as an apostate.
 5. For these reasons, I grant permission on Ground 1 only.”
6. This appeal first came before me in the Upper Tribunal on 20 August 2015 when I made the following directions:-
 - “1. The appellant to file a witness statement of Counsel who appeared at the First-tier Tribunal hearing, attaching thereto a typed copy of her notes of evidence.
 2. If available the respondent also to file a typed copy of the notes of her representative at the First-tier Tribunal hearing.
 3. The appellant to file a further skeleton argument detailing submissions in relation to the absence of issues being put to the appellant at the First-tier Tribunal hearing where it is said the judge has relied upon such issues in finding against the appellant.
 4. The above to be filed and served no later than fourteen days prior to the application before the Tribunal.”
7. At today’s hearing I had further evidence from the appellant’s representatives including:-

1. Appellant's supplementary skeleton argument.
 2. Conversion of the date "1 Hamal 1391" to the Gregorian calendar.
 3. Witness statement of Rachel Francis (Counsel).
 4. Typed notes of hearing before First-tier Tribunal Judge Goodrich.
8. Mr Smyth's focus within his skeleton argument was on the procedural unfairness arising out of the First-tier Tribunal's reliance upon evidence recorded during the appellant's age assessment, in circumstances where the appellant's discrepancies did not form part of the respondent's case and were not put to the appellant during the course of the hearing. In particular paragraph 42 of the judge's findings.
9. The evidence of Counsel in the First-tier Tribunal hearing was not challenged and it was therefore unnecessary for Miss Francis to be called. Her witness statement is simply to the effect that she represented the appellant at the First-tier Tribunal hearing and attaches to it a typed version of notes she took at that hearing.
10. Mr Kandola accepted that some aspects of the evidence relied upon by Judge Goodrich had not specifically been put to the appellant. However, he asserted there was no onus on her to put each and every point to him and she had not focussed simply on the age assessment and placed undue weight upon it. Hence there was no procedural unfairness and the decision should stand.
11. For all the reasons set out in Mr Smyth's latest skeleton argument I am satisfied that the judge had materially erred and that the appellant was effectively deprived of an opportunity to address various points raised in paragraph 42 of her decision which had a material bearing on the outcome as they were relied upon as apparent discrepancies when finding that the appellant's claim was not credible.
12. Applying the authority of **MM (Unfairness E & R) Sudan [2014] UKUT 105 (IAC)** I am satisfied that the failure of the judge to put matters to the appellant relied upon by her in assessing the credibility of the appellant amounts to a material error of law and as such deprived the appellant of a fair hearing.
13. For these reasons I find that the decision of the First-tier Tribunal contains errors of law and has to be set aside, save for the issue raised and rejected in ground 2, in light of Upper Tribunal Judge Grubb's conclusion that the First-tier Tribunal was entitled to conclude, for the reasons given at paragraph 51 of the decision, that the appellant had not rejected his faith and so would not be at risk as an apostate. In the circumstances it is appropriate for the appeal to be considered *de novo*, subject to the caveat I have just referred to, within the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision set aside subject to the above-mentioned caveat. The appeal is remitted to the First-tier Tribunal, to be dealt with pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b) before any judge aside from Judge Goodrich.

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 27 November 2015.

Deputy Upper Tribunal Judge Appleyard