Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04045/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
On 30 January 2019	**On 11 February 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

TAJIK BORHAN
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Khan instructed by Parker Rhodes Hickmotts Solicitors.
For the Respondent: Mr Diwnycz – Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Barber promulgated 8 May 2018 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant, a citizen of Afghanistan, claimed to have been born in the year 2000. The appellant claimed asylum in 2015 following his being encountered in the back of a lorry. An age assessment was undertaken by Leicestershire County Council on 29 June 2015 in which the appellant was found to be an adult.

3. The Judge notes that taking the claimed year of birth as 2000, at the date of the screening interview the appellant would have been 15 years of age and a minor throughout. The Judge notes a further age assessment was carried out by Leicestershire County Council on 12 May 2016 which the Judge finds to be Merton compliant. The Judge's conclusion is that he does not accept the appellant is as young as he claims for the reasons set out in the decision under challenge; including noting the appellant giving his oral evidence where he was questioned closely about his age by the Presenting Officer. In relation to age, at [21] the Judge finds:

> "21. Taking all of the evidence in the round, I found as fact that the Appellant at the date of the hearing before me was an adult and I considered his evidence in that light. This means that none of the additional safeguards or factors appropriate to the assessment of children in relation to a claim to asylum and in relation to their evidence at the hearing is relevant. I accept Ms Khan's submission that there should be no bright line between being a child and becoming an adult but on my assessment of the evidence, I think the Appellant has not demonstrated that he is reasonably likely to have been born in 2000 and that in fact he was born in 1995. This would make him 22 or 23 at the date of the hearing and an adult throughout."

4. Having assessed the merits the Judge found the appellant's evidence to be implausible, generally contradictory in a significant way, and wholly unreliable. The Judge did not accept any account of the appellant's life in Afghanistan or events that are said to have occurred other than the fact he is an Afghan national who managed to leave Afghanistan with the assistance of an agent and make his way to the United Kingdom. The Judge does not accept that the appellant has ever had an encounter with the Taliban, finds it likely the appellant still has his family in Afghanistan, and rejected the appellant's account of what happened to him in Afghanistan as lacking credibility [26]. The Judge finds the appellant to be making his case up [27] and was not satisfied that he had established substantial grounds for showing he faced a real risk or even a reasonable degree of likelihood that he will suffer persecution or some other form of ill-treatment if he were to be returned to Afghanistan. Thereafter the Judge considers the issue of humanitarian protection and articles 2, 3 and 8 ECHR, setting out the reasons in the decision for rejecting the appellant's claim to be entitled to a grant of leave on any such basis.

5. The appellant applied for permission to appeal claiming the Judge placed undue weight on the appellant's age which coloured the rest of the decision. Permission to appeal was granted by another judge of the First-Tier Tribunal in the following terms:

> "1. The appellant claiming to have been born in 2000, a national of Afghanistan, applied for permission to appeal, in time, concerning the decision of First-tier Judge P Barber promulgated on 08/05/2018 (the Decision) dismissing the appeal on asylum, humanitarian protection and human rights grounds.
>
> 2. Permission to appeal is granted for the following reasons:
>
> (i) the appellant though previously legally represented at his hearing no longer has legal representation. Although the appellant had the benefit of permission grounds being drafted on his behalf, notwithstanding the grounds furnished appearing thoroughgoing in detail, as they have been drafted by a volunteer at the Doncaster Conservative Club, stated to be a support service for asylum seekers and refugees, the volunteer describing themselves as a retired teacher, there was treated that effectively the grounds were settled in person, and therefore that the Decision had to be read with special care with reference to whether there were any arguably manifest *Robinson* error or errors of law;
>
> (ii) in large part the grounds submitted centred on the part of the Decision dealing with age assessment, which later assessment forms the greater part of the judicial assessment, from the very commencement of the Decision (paras 1 – 21), with findings reached accepting official/county council social workers age assessment of 01/01/1995, in stark contrast to the appellant's claimed age, and with those damaging findings on the issue of age assessment arguably providing a preliminary motor for the damaging findings reached ultimately in the claim for international protection;
>
> (iii) oddly there was an absence in the Decision concerning the basis of the appellant's claim, the reasons for the respondent's refusal, and the history of the appeal itself, latterly of materiality, the appeal have been remitted by the Upper Tribunal Judge C Lane to the First-Tier Tribunal for fresh hearing, in decision promulgated on 02/06/2017, Judge Lane having found errors of law in respect of the standard of proof applied by the original Judge, the balance of probabilities, to the matter of age assessment, when correctly following **Rawofi [2012] UKUT 00197**, the standard was reasonable likelihood, and that there had been perpetrated a procedural unfairness with findings reached on matters of which the appellant and/or their representatives had not had the opportunity to explain finding, that there had been applied "standards of 21st Century Britain to the economy of Afghanistan" (para

4), latterly *inter alia* a matter also found by Upper Tribunal J Perkins when granting permission to appeal on 15/03/17, that the original Judge had *inter alia* "wrongly imposed Western European values in his assessment of the work experience the Appellant might have had in Afghanistan...." (para 2);

(iv) arguably the Judge fell into material error alike in the Decision, though ostensibly adopting **Rawofi** (para 4), there appears disclosed rather the application of the probability standard in the age assessment (para 9);

(v) equally arguably a falling into error, there appeared disclosed in the Judge purporting to apply in the age assessment analysis their own "general knowledge of teenagers and the way they grow" (para 5), which arguably there was correctly identified in the permission grounds it's subjective basis allied with arguably valid concern as to the basis of that knowledge and of which environments and/or parts of the world it related;

(vi) in large part there appears disclosed a Eurocentric and/or developed worldview providing a lens of analysis of an appeal of someone claiming to be a very young person from a country known to be economically challenged and one of the least developed compounded by many years of civil war/conflict, giving rise arguably to a flawed judicial assessment;

(vii) the original Judge fell into error when ignoring the evidence of a Ms B Thurley. The grounds dealing with this part of the Decision of Judge Barber appear of equally arguable force: "*I happened to be a retired teacher-a profession that is often slated by the government, parents, industry and anyone else struggling to understand young people. It seems the judiciary needs to be added to the list. Again I am disappointed that the years of experience and training of Mrs Thurley, Tajik's teacher, has been dismissed as irrelevant....",*

(viii) There appeared arguably overall a lack of objective, adequate reasoning, and application of the correct principles of law in an appeal concerning international protection.

3. Arguable material error (s) of law disclosed."

6. There is no rule 24 reply filed on behalf of the Secretary of State.

Error of law

7. In *Rawofi (age assessment – standard of proof) [2012] UKUT 00197(IAC*) it was held that where age is disputed in the context of an asylum appeal (in contrast to age assessment in judicial review proceedings), the burden is on the appellant and the standard of proof is as laid down in R v Secretary of State for the Home Department Ex parte Sivakumaran [1988] AC 958 and R (Karanakaran) v Secretary of State

for the Home Department [2000] EWCA Civ 11. In the judgement at [13] Lord Justice McFarlane found:

> "13. In our view this court is bound by the decision of the Court of Appeal in the case of Karanakaran and behind that, the decision of the House of Lords in the case of Sivakumaran. The approach taken in asylum cases before the Immigration and Asylum Tribunals is established as the reasonable degree of likelihood and it seems to us that it is just not open to this Tribunal to identify and hive off the topic of age and say that this now should be the subject of a different standard of proof, namely the balance of probabilities."

8. The Judge sets out the correct standard of proof of reasonable likelihood at [4] and neither the grounds nor Ms Khans submissions establish that having done so the Judge failed to apply it. The finding at [9], relied upon in support of the submission that arguable error could have been made, that the appellant was probably older than he claims to be, does not establish that the Judge applied a balance of probabilities test to the evidence.

9. Ms Khan was asked to identify any other aspect of the decision that support the contention the Judge applied the wrong standard. The Tribunal was referred to [3] in which the Judge finds:

> "3. A further age assessment was carried out by Leicestershire County Council on 12 May 2016 ("assessment B"). I'm satisfied that, that report is entirely Merton compliant. It sets out the circumstances of the assessment and arrives at a reasoned and well argued assessment of age. The first paragraph of that report provides an account of the circumstances of assessment A and the way it was carried out. In particular assessment B states that the appellant was interviewed for the purposes of assessment A over two sessions and there is some reasons to find from reading assessment B, that assessment A would also have been a Merton compliant assessment. There is also mention of assessment A (and no indication that it was not a Merton compliant assessment) in the age assessment carried out by Angeline Seymour ("assessment C"). Assessment C also makes mention of the times over which assessment A was carried out which correspond to the times set out in assessment B. Accordingly, whilst I place very little weight on it, assessment A should not be discounted out of hand and whilst I accept a report should follow the guidelines in the Merton judgement to have much in the way of weight, I do not think that I should place no weight on the report. Insofar as it is unnecessary to give it any weight at all, I therefore place it very slightly in the balance against the appellant."

10. Ms Khan submitted that the use of the word "in the balance" by the Judge in the above paragraph indicated the Judge was applying a balance of probabilities test and therefore applying the civil standard not that which should have been applied, that of 'reasonable likelihood'. Such submission has no arguable merit. A balancing exercise is required

whether the civil standard or the reasonable likelihood test applies to ascertain whether the appropriate threshold has been crossed. In [3] the Judge was not necessarily establishing whether the threshold had been crossed or not but explaining why the Judge placed the weight he did upon assessment A. Whether the appropriate standard in a case is on the balance of probabilities, 50-50, or lower standard which may be 70-30, or however it may be phrased, the Judge is still required to balance the evidence. No arguable legal error is made out in the submission. It is also of note that the Judge having decided what weight should be attached to this aspect of the evidence then sets out in the following paragraph, [4], the threshold against which the evidence as a whole is to be assessed. As noted at [21], set out above, the Judge applied the correct standard of reasonable likelihood in assessing the evidence.

11. The Judge is criticised in the grounds for purporting to apply within the age assessment analysis his own general knowledge of teenagers and the way they grow up at [5]. Relevant cases on this point include *Secretary of State for the Home Department v Abdi [1994] Imm AR 402* in which Steyn LJ at page 420 accepted that an Adjudicator was entitled to rely on matters within his own knowledge, provided such matters were disclosed to the parties so as to afford them a fair opportunity to deal with them. That was also the view in *HA and TD v SSHD [2010] CSIH 28*. In *AA(Sudan) [2004] UKIAT 00152* the Adjudicator did not believe the appellant's account that he was tortured after he found out that organs were being removed from patients in the hospital, where he worked, because of his evidence about how those organs were dealt with. The Adjudicator took the view that it was common knowledge that organs needed to be moved within hours rather than the days or weeks the appellant had referred to. The Tribunal found that the Adjudicator was entitled to apply standards of common knowledge on this issue, as that knowledge would be available to any moderately educated person (and was in any event confirmed by subsequent evidence before the Tribunal).

12. In the Court of Session case of *Hasisbi [2007] CSOH 83* the Adjudicator had consulted an atlas after the hearing and reached certain conclusions about the Appellant's journey from Iran to the UK based on the distances involved. Lady Smith held that facts of geography were within judicial knowledge and it could not be said that it was not open to an Adjudicator, by reference to an atlas or otherwise, to rely on the geographical distances involved in a journey. Since in this case, any explanation by the Appellant would inevitably have involved an inconsistency in his evidence, there was nothing which obliged the Adjudicator to put it to the Appellant.

13. More recently, in *AM (fair hearing) Sudan [2015] UKUT 00656 (IAC),* it was held that if a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date.

14. It is necessary to consider [5] in detail in which the Judge writes:

> "Of the two assessments (assessment B and assessment C) my view is that the assessment carried out by Leicestershire Social Services on 12 May 2016 is to be preferred. At page 11 of assessment B, there is mention of the fact that the Appellant, who was purporting to be 15, had gained no "height or torso for nearly a year, if [the Appellant] was 15, it is expected that he would gain a level of height in the year." This is not mentioned in assessment C and I think it is a very salient point. It strikes me, taking into account my general knowledge of teenagers and the way they grow, that it is implausible he would not have grown in nearly a year. This relates well to the section of assessment B at the top of page 3 where there is reference to him being "fully developed" with relevant psychological and clinical signs for that assessment, whereas report C does not properly explain the relevance of some of the physiological features, for example on page 7 of assessment C there is reference to lines on his forehead: "I noted that [the Appellant] had some wrinkles to his forehead, other than that his skin did not look aged." This confirms the Appellant has wrinkles this does not explain the reason why wrinkles were not a mark of his skin being aged. Whereas assessment B deals with the wrinkles as follows: "[the Appellant's] skin was not appearing weathered does have signs of ageing that would not be expected in a child, in that he has lines on his face, which is more characteristic of adults." I thought that assessment B provides a much better consideration of those lines and that was mentioned in assessment C, the lines are not given any relevance."

15. The Judge's comment does not relate to an issue of which the parties had no notice as the issue of age assessment and information contained within the reports was clearly known to both the appellant and respondent's representatives. The question to be considered is not whether the Judge committed a procedural irregularity, which I do not find has been made out, but whether the Judge erred in law in preferring assessment B over assessment C as the determinative age assessment relating to the appellant's actual age. The Judge was required to consider all relevant evidence and clearly did so. I do not find it made out that in preferring assessment B the Judge has been shown to have erred in law in a manner material to the decision to dismiss the appeal.

16. The Judge was clearly aware of the basis of the appellant's claim, reasons for refusal and history of the appeal itself and it is not legal error for the Judge not to have set out in the body of the determination what had gone before. The procedural history of this matter does include decisions by Upper Tribunal Judge Perkins granting permission to appeal on an earlier occasion and the decision of Upper Tribunal Judge C Lane promulgated on 2 June 2017 in which it was found another judge the First-Tier Tribunal had applied the wrong standard of proof to the evidence in a previous decision, such that that decision should be set aside. The Judge in this appeal was considering matters afresh and was required to make his own findings of fact based upon the evidence made available. The Judge clearly considered the evidence with the

required degree of anxious scrutiny and noted the appellant's claim to international protection was based on an alleged real risk on return for the reasons set out at [19] in which the Judge writes "...*His account is that when the Taliban arrived at their house and started shooting his family, he escaped through a window with his younger brother. Regardless of whether he was 6 or 10 at this time, his evidence is that he then went and hid with his younger brother and that they waited for a long time while before he went back (alone) to the house to find that his parents had died at the hands of the Taliban. His evidence is that he then left his brother in hiding and did not go back to him and instead caught a taxi to some other location. He has given no plausible reason why he would do such a thing. In the asylum interview he seems to indicate that he was worried he might get killed if he went back to his brother (although he states that he then went to get a taxi on the road) whereas in the hearing, he told me that he did not go back as he was "in grief and did not know what to do"....*

17. The Judge is also criticised in relation to the evidence given by the appellants teacher. At [20] the Judge writes:

> "20. Finally, one of the Appellant's teachers, Ms Thurley, with 14 years experience of working with 16 – 18-year-olds gave evidence about the Appellant and his assessment of his age. She had previously written a letter at page 31 of the Appellants bundle. However, as experienced as she may be, I placed very little weight on her letter or evidence. The letter and what she told me at the hearing was in no way Merton compliant. She was teaching the Appellant in a large class of students (although at times she said it was small and she did have one-to-one experiences of teaching him) and taught him in the morning for up to a year and when asked about why she formed the impression that his age was adolescence she stated that his "behaviour did not seem different to the other people I work with. Very little eye contact and shy. He would not ask for help and would just sit there." That answer gave me very little assurance that her assessment of his age was based on objective and professional factors which might go anyway to casting doubt on the accuracy of assessment B or in raising any basis for questioning the very considerable inconsistencies in the Appellants evidence about dates and times. Whilst I accept that Ms Thurley was trying to be helpful in writing a letter in support, it makes no difference to my view on his age - or indeed his credibility. I think that Mr Thurley is wrong and that she has misjudged his age."

18. This is not an unwarranted attack by the Judge upon the professionalism of the author of the letter but the Judge weighing the evidence from this source against other evidence that was available to him, and not to Ms Thurley, regarding the appellant's age. The Judge accepts Ms Thurley's experience and interaction with the appellant, but this is only one piece of the 'evidential jigsaw'. The Judge gives adequate reasons in support

of the findings made and no arguable legal error is made out in the weight the Judge chose to give to this evidence.

19. Whilst the Judge granting permission took it upon herself to identify what she considered to be arguable legal errors an examination of the material in some detail does not establish that the Judge made such errors or that any error made is material to the decision of the Judge in relation to the appellant's age sufficient to warrant it be found that the age assessment is infected by material legal error. Pleading such errors by cherry-picking individual words or phrases and attempting to build a case around the same, without considering the decision as a whole, does not assist the appellant.

20. It is not made out the Judge having identified the appellant's age as an adult erred in the assessment of the credibility of the appellant's claim or the assessment of risk on return or human rights aspects.

21. I do not find it made out that the Judge has erred in a manner material to the decision to dismiss the appeal sufficient warrant the Upper Tribunal interfering any further in this matter.

Decision

22. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

23. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed…….
Upper Tribunal Judge Hanson

Dated the 31 January 2019