Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03895/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2019	**On 17 October 2019**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

BK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hodson, Elder Rahimi Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born on 10 March 2000. He appeals against a decision of Judge Colvin of the First-tier Tribunal promulgated on 28 June 2019 dismissing his appeal against the respondent's decision dated 29 March 2019 to refuse his asylum claim, but allowing his appeal on humanitarian protection grounds.

2. The basis of the appeal is that Judge Colvin erroneously concluded that the appellant's Counsel, Ms E Griffiths, had conceded that the asylum element of the appellant's case was no longer in issue. That was said to have been

an error and Ms Griffiths, who did not appear before me, has provided a witness statement to that effect.

Factual Background

3. The appellant arrived in the United Kingdom in 2014 as an unaccompanied child. Although his claim for asylum was refused, at the time he was granted leave as an unaccompanied minor valid until September 2017.

4. On 4 April 2016, First-tier Tribunal Judge Andonian dismissed the appellant's appeal against the refusal of the Secretary of State to recognise him as a refugee. On 6 September 2017, the appellant made further submissions which were treated as a fresh claim under paragraph 353 of the Immigration Rules. The fresh claim was refused on 29 March 2019, and it was that refusal decision which was challenged before Judge Colvin.

5. In Judge Colvin's decision, there is a record of what was said to have been a preliminary discussion at the outset of the hearing. At [3] the judge said:

> "As a preliminary matter (and after taking instructions) Ms Griffiths for the appellant confirmed that the appeal is based on risk on humanitarian protection and human rights grounds. I have before me the bundles from both the appellant and the respondent."

6. The appellant submits that the judge erroneously misunderstood what Counsel had submitted to her. The basis of the disagreement is set out in a witness statement dated 12 July 2019 from Eleri Griffiths, a barrister at One Pump Court Chambers, who appeared for the appellant before the First-tier Tribunal. Ms Griffiths writes:

> "My contemporaneous note of the hearing includes the following record of the discussion. I have corrected typographical errors and put in brackets the speaker or context to assist.
>
> *[FtTJ] … I understand it's much more about what happened here and question of whether or not to go back or relocating to Kabul – (they) send to Kabul anyway. As I understand that is the case before I read submission. Will (otherwise) have to read the asylum interview. My own view is it's about what's happened here and what his position is now … we can do the first – not sure what benefit will give because medical evidence is there now and most relevant to the position ongoing. Take instructions on that. Then let us know what we are doing. Meanwhile – will do that check.*
>
> *Explained we don't agree with the determination but put his case on the basis of his circumstances now.*
>
> *[FtTJ] Am I ok to say that it is risk on return in relation to his present position now is what we are deciding today. Yes.*
>
> *Want to put the case as it is now.*" [sic throughout]

7. It is clear from the verbatim note taken by Ms Griffiths – which necessarily is in a shorthand format – that there was some form of misunderstanding in relation to what was agreed to be a preliminary issue. Before me, the appellant submits that he had not formally conceded that the asylum limb of the claim was no longer in issue, but rather that the focus was merely one of humanitarian protection. Realistically, however, Mr Hodson recognises that the materials in the appellant's bundle upon which an asylum appeal could realistically have succeeded were minimal.

8. The question for my consideration is whether the judge misunderstood Ms Griffiths, or whether Ms Griffiths misunderstood the way she was putting the case to the judge on the other? Secondly, if there was a misunderstanding which was the fault of the judge, is that material to the outcome?

9. It is clear that there is a degree of ambiguity inherent to the phrase "focus on what is happening now". The judge's Record of Proceedings records the discussion in similar terms, noting that the focus of the proceedings was the contemporary position of the appellant.

10. By way of preliminary observation, it is hardly surprising that the judge considered that the consequence of focusing on "what is happening now" was that the asylum elements of the appeal were no longer the focus of the proceedings. The appellant's asylum appeal had been dismissed relatively recently, and – as set out below – that finding would form the starting point of any future judicial findings. The focus of the asylum appeal had been events which were said to have taken place in Afghanistan. In that context, by stating that the focus would be "what is happening now", the submissions of Ms Griffiths would naturally have had the effect of leading the judge to concentrate on the country conditions in Afghanistan and the circumstances of the appellant's return, with no attempt to displace the earlier judicial findings that the appellant was not at risk on the basis of a Refugee Convention ground.

11. In order to ascertain whether the judge fell into error in the approach that she adopted, it is necessary to look at what was actually submitted, in addition to what Ms Griffiths retrospectively considers that she meant when making those submissions.

12. Turning to the skeleton argument which Ms Griffiths relied upon in her closing submissions, it does state at [3(i)] that, "[b]y way of summary" the appellant contends that:

> "the Secretary of State's decision would breach the United Kingdom's obligations under the Refugee Convention. The Appellant has a well-founded fear of persecution on grounds of imputed political opinion (perceived Pro-Taliban (Son of perceived Taliban member), perceived pro-Allied/Forces supporter, and membership of a particular social group, individual perceived as Westernised, individual at risk of recruitment;)" (sic throughout).

13. In light of [3] of the skeleton argument, there is superficial force in the grounds of appeal upon which the appellant obtained permission to appeal. However, when Ms Griffiths' skeleton argument is examined in further depth, it is clear that there was minimal, if any reliance on the Convention grounds which she now claims the judge failed to consider. At [11] Ms Griffiths listed what she described as the "issues" in the appeal:

    "a) Devaseelan: whether the Tribunal should depart from the conclusions of the previous determination of FtTJ Andonian in the present case.

    b) Credibility – whether it is reasonably likely that the Appellant is telling the truth.

    c) Whether the Appellant would be at risk on return to Afghanistan.

    d) Whether, for the same reasons the Appellant qualifies for humanitarian protection on account of facing serious harm under Article 15(a) or (b) of the Qualification Directive.

    e) Whether, for the same reasons the Appellant's removal would breach Articles 2-3 of the ECHR.

    f) Whether, the Appellant qualifies for humanitarian protection on account of facing serious harm under Article 15(c) of the Qualification Directive.

    g) Whether the Appellant should be granted leave on account of his medical conditions/mental health.

    h) Article 8 – inside and outside the Rules."

    Mr Hodson highlights that at [11(c)] there is a generic reference to whether the appellant would be "at risk" on return to Afghanistan. The difficulty with that submission is that the skeleton argument does not specify the nature of the risk which the appellant is said to face under that sub-paragraph, nor does the necessary presence of a Convention nexus appear to be demonstrated by Ms Griffiths' summary of that issue. Although when one reads paragraphs (d) and (e) of [11] of the skeleton argument it is possible, on one view, to deduce that the author of sub-paragraph (c) may have been addressing the issue of risk arising on a Convention ground, that is not stated in terms. Taken at its highest, therefore, the submission that the judge misread the skeleton argument is a submission that the judge failed to infer that the generic reference to "risk" in [11(c)] was a reference to a risk of being persecuted on a Convention ground.

14. Looking to the judge's Record of Proceedings as retained on the Tribunal's file, it is clear that the basis upon which Ms Griffiths made her closing submissions orally did not seek to raise a Convention ground. At the outset of the hearing before me I outlined to both the appellant and respondent's representatives how the submissions were recorded in the Record of Proceedings. I adjourned over lunch to enable both advocates

to reflect on the position, in recognition of the fact they understandably would not have had sight of the Tribunal's Record of Proceedings.

15. The issues upon which Ms Griffiths addressed the judge orally at the conclusion of the appeal were as follows:

- sufficiency of protection;
- the general safety situation and humanitarian situation in Kabul;
- whether the appellant would be perceived as westernised;
- the appellant's mental health;
- AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC) distinguished;
- the European Asylum Support Offices guidance on conditions in Kabul;
- Article 8 and proportionality; and
- the positive impact that a grant of leave would have upon the appellant.

16. It is plain from the skeleton argument, and the submissions as outlined, that there was no attempt to engage with, let alone depart from the previous findings of Judge Andonian. In that decision, Judge Andonian made the following operative findings in relation to the appellant's claim that he was at risk from the Taliban on account of his father being allegedly murdered by them:

> "16. I have made allowances for the appellant's age and have considered his evidence from the point of view of a minor but nevertheless notwithstanding viewing his evidence in that light I still am convinced that he was intentionally making up stores [sic] as he was going along and that he was not a credible person. It was clear to me that he had no fear of persecution in his country. It is not credible that the Taliban covered their faces at all times to avoid being recognised but then suddenly uncovered their faces when killing his father. That is a nonsense as by covering their faces the Taliban would be identified by the appellant and his family members and that is not what they would want to happen.
>
> 17. I cannot see what interest the Taliban would have in this appellant. …".

17. Those findings represent the starting point for any consideration of the appellant's protection appeal. Plainly, in the absence of any attempt to engage with them, it cannot realistically be said that the asylum question remained a live issue before the judge, or that the judge erred by failing to make findings on that issue.

18. At [41] to [47] of her skeleton argument, Ms Griffiths considered the issue of the appellant's claimed "westernisation". This, the skeleton argument appeared to contend, amounted to a Convention ground for the appellant

to be recognised as a refugee. At [47] the skeleton argument states the following:

> "The Appellant not only visibly and audibly westernised [sic], but identifies personally as westernised. In particular he speak [sic] of the changed [sic] in his approach to customs, religion and values, including equality. It is submitted that such views will plainly place him at risk on return having regard also to the objective country material on identification on return."

That assertion, with respect, appears to be aspirational when compared to the evidence given by the appellant as recorded by the judge. It is worth quoting [7] and [8] extensively:

> "7. He [the appellant] has lost contact with his family in Afghanistan after losing his phone in France. The situation in his home area of Kunduz is said to be bad and he has no relatives in Kabul. He left the village with his younger brother, [G], leaving his mother and two other brothers there. He got separated from [G] in Turkey and has not heard anything about him since. He misses his family every day. He has tried to locate his family through the Red Cross but this has failed. He tries not to even think about what might happen if he is sent back to Afghanistan. He finds it hard to imagine as his life is here now and he would be returning as a different person. He also would not be able to cope in a place like Kabul without all the support that he has around him now. While he can speak Pashtu and reads a little his writing in the language is not food [sic]. He has no education that will help him there and no skills that would enable him to support himself. Mentally he would be in a high state of fear and anxiety.
>
> 8. In cross-examination he said that he has some friends from Afghanistan in the UK but none from his area. He has tried everything to contact his family including asking his foster family to help him. He had three younger brothers and has no contact with the brother that left with him. He is trying to find an apprenticeship to finish his carpentry qualification together with attending college. He has educated himself since being in the UK but does not know if carpentry skills will help him in Afghanistan. He has tried to stop reading the news about Afghanistan as it affects his mental state particularly when he fears for his family. The Taliban are still in control in his home area. He cannot return to live in any part of Afghanistan as he will have no support."

There has been no challenge to the accuracy of the judge's record of the appellant's evidence.

19. As may be seen from the oral evidence the appellant gave, he made no reference to his newly found claimed "westernised" status. Having read through his witness statement dated 10 May 2019, there is no account in that document of his newly found claimed westernised status, or of his "identification" in that way. To the extent that there is any issue arising from the appellant's claim to be perceived or likely to be at risk as a westernised person, it is clear that the judge had no materials before her

which would have enabled her to find that the appellant had acquired an immutable characteristic of being a westernised person, assuming that it would be possible to make out a Convention ground based on such an immutable characteristic. There is simply no support in the evidence that was before the judge for the contention that the appellant was a member of a particular social group on account of being a westernised male.

20. Accordingly, therefore, the preliminary discussion that the judge engaged in at the outset of the hearing must be viewed in the context of the submissions that were eventually advanced before her. There was no attempt to provide a factual basis upon which the judge could properly depart from the starting point concerning the core asylum claim previously advanced by the appellant as dismissed in the decision of Judge Andonian. Secondly, to the extent that the skeleton argument sought to raise the issue of his westernisation, the evidence the appellant gave was at odds with that contention and revealed only the sort of difficulties which a person who has resided in this country for a considerable period is likely to face upon their return. The analysis the judge conducted of that issue reveals that there can be no suggestion that the appellant enjoys particular social group membership on account of his perceived westernisation. However, as reflected in the appeal being allowed on humanitarian protection grounds, the appellant's likely reception in Kabul was a matter which would be affected by his lack of experience of the city, and by his age, his vulnerability and his mental health difficulties.

21. In conclusion, therefore, the judge was invited to consider the appeal on the basis which was primarily related to the issues she would later find in favour of the appellant upon, namely humanitarian protection. There does appear to have been a misunderstanding, but from the judge's perspective she considered the case on the basis she was invited to consider it, and indeed did so in a way which has not been impugned by the respondent. As such, I find there is no error of law in the judge's decision. Any misunderstanding at the outset of the hearing was not attributable to the fault of the judge and the judge resolved the case in accordance with the way it had been presented to her and there can be no criticism, with the greatest of respect to Ms Griffiths, that she misunderstood the issues that she was supposed to consider.

22. In any event, had the judge misunderstood the nature of the concession, there was no material before her which could realistically have enabled the appeal to succeed on asylum grounds, as Mr Hodson recognised. Although the judge did not err, had she done so, the error would not have been material and the decision would not need to be set aside.

Notice of Decision

This appeal is dismissed. The decision of Judge Colvin stands.

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 his 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 *Stephen H Smith* Date 10 October 2019

Upper Tribunal Judge Stephen Smith