

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Birmingham

Date of Hearing: 6 October 2006

Before:

**Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Immigration Judge Sommerville**

Between

LQ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant:

Mr J-P Waite, instructed by Paragon Law

For the Respondent:

Mrs Maher, Home Office Presenting Officer

A person's age is an immutable characteristic. Although it changes constantly, one can oneself do nothing to change what it is at any particular time.

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan. He was born on 1 August 1991 and so is now aged 15. This is the reconsideration of his appeal against the decision of the respondent on 2 November 2005 refusing to recognise him as a refugee. He has limited leave until 30 October 2008 and accordingly has a right of appeal against the refusal of asylum under s83 of the 2002 Act.
2. The Immigration Judge took the view that "the 1951 Convention is not engaged", because the appellant is adequately protected by his leave to remain in the United Kingdom. It was, we think, common ground before us, and it is certainly the case, that that was an error in law. The 1951 Convention goes to status. Section 83 of the 2002 Act entitles an appellant to assert his status as a refugee independently of any risk of removal. It was the Immigration Judge's task to assess whether, at the date

of the hearing before him, the appellant had the status of a refugee. His failure to do so amounts to a material error of law.

3. The Immigration Judge summarised the appellant's case as follows:

"10. The appellant's evidence is that he is a Shia Hazare originating from Nawabab in Ghazni Province, Afghanistan, the only child of a manual labourer, when he could find work, who died in 2003. His mother disappeared in 1997. To escape the fighting, the appellant and his father went to Iran, his mother disappearing around this time possibly a casualty of the fighting although the appellant's father would not discuss it. They set up home in the city of Hayrez near Shiraz in south Iran and the appellant's father worked when he could, mostly factory work. The appellant had some education in Farsi. The appellant's father became ill and died in 2003. The appellant's father's cousin, [...], helped care for the appellant's father in his dying days.

11. The appellant remained in the room his father had rented and received food from the factory where his father had worked but he rapidly ran out of money and had to leave. The appellant accepted an offer from [his father's cousin] to live with him, his wife and two children. [The cousin] proved to be unkind and made the appellant earn his keep by working in the kitchen of the factory where his father had worked. [The cousin] was never satisfied and this led to beatings at his hands. He bears a scar to the right side of his chest from this. On that day the appellant had been to town and spent some of his money thereby enraging [him].

12. At the beginning of August 2005, [the cousin] required the appellant to leave. He took all the appellant's money except for a sufficient sum to pay an agent to take the appellant out of the country. For fear of further beatings from [...], the appellant complied. He travelled for 25 days but is aware only of passing through Turkey and France where the agent abandoned him leaving him to cling on to a small compartment of a lorry which 'would take me somewhere safe'. This proved to be the United Kingdom where he arrived on 7 September 2005 and claimed asylum directly he found a police station the next day."

4. The Immigration Judge did not wholly accept the appellant's evidence. He did not believe very much of what he said about his own finances or about [his father's cousin's] treatment of him; and he did not accept the view that the appellant faced a real risk from [the cousin] if he were returned to Afghanistan or Iran. He stated that he did not find "the appellant's claim of having no more than a single uncaring, indeed hostile, relative to be persuasive", but he clearly did accept that the appellant's parents are dead. Further, he made a clear finding at paragraph 36 of his determination that:

"I differ from the respondent in that, if the appellant went back now, I find that the appellant would be at risk of an Article 3 breach".

The basis for that finding was the expert evidence before him, which the Immigration Judge accepted, subject of course to his own findings about the

personal credibility of the appellant. He found that there would be no adequate reception facilities in Afghanistan and that, as an orphan, the appellant would be subject to the risks of exploitation and ill treatment adumbrated in that evidence.

5. The sole remaining question is, therefore, whether the appellant's ill-treatment would amount to persecution for one of the reasons mentioned in Article 1A(2) of the Refugee Convention. The only one proposed is "membership of a particular social group". The Immigration Judge took the view that, insofar as the appellant's claim to risk of persecution for membership of a particular social group depended on his being a child, it could not succeed, because age is not an immutable characteristic. As he wrote at paragraph 26 of his determination,

"If there is anything that is not immutable, it is age. The appellant gets older by the day. He is not immutably a child. Neither is the issue of immutability frozen in time to the moment of decision."

6. We are persuaded by Mr Waite's submissions (to which Mrs Maher offered no very spirited objection) that the Adjudicator erred in this conclusion. We think that for these purposes age is immutable. It is changing all the time, but one cannot do anything to change one's own age at any particular time. At the date when the appellant's status has to be assessed he is a child and although, assuming he survives, he will in due course cease to be a child, he is immutably a child at the time of assessment. (That is not, of course, to say that he would be entitled indefinitely to refugee status acquired while, and because of, his minority. He would be a refugee only whilst the risk to him as a child remained.)
7. Mrs Maher's submission was that if the appellant's age at any moment is immutable, the risk to him as a "street child" is not. He might at any moment be adopted or receive some other form of care. We regard that submission as pure speculation. There is nothing in the evidence before us or before the Immigration Judge to suggest that there is any prospect that the appellant, if returned to Afghanistan, would be able to achieve any change in his circumstances. We note Mrs Maher's reminder that the Immigration Judge did not find the appellant wholly credible. But his findings do establish that the appellant is an orphan and would be at risk. In the light of the expert evidence, we conclude that the risk of severe harm to the appellant, as found by the Adjudicator, would be as a result of his membership of a group sharing an immutable characteristic and constituting, for the purposes of the Refugee Convention, a particular social group. We therefore substitute a determination allowing his appeal under s83.

C M G OCKELTON
DEPUTY PRESIDENT