



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02137/2014

THE IMMIGRATION ACTS

Heard at Field House
On 4 August 2014

Determination Sent
8 August 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMED HEYDARI
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr T Melvin a Senior Home Office Presenting Officer

For the Respondent: Ms S Akinbolu counsel instructed by Duncan Lewis & Co

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Iran who was born on 1 November 1991 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Adio ("the FTTJ") who allowed, on Article 8 human rights grounds, the claimant's appeal against the Secretary of State's decision of 12 January 2014 to remove him from the UK pursuant to section 10 of the Immigration and Asylum Act 1999.

2. The claimant arrived in the UK clandestinely on 7 August 2006. He claimed asylum the next day. The claim was refused on 27 September 2009 but as he was a minor he was granted discretionary leave which expired on 27 September 2009. He submitted a further application for leave on 24 September 2009. This was refused on 7 April 2011. He did not appeal in time. However, he made an appeal on 20 July 2011 which was dismissed on 28 July 2011. His appeal rights were exhausted on 16 August 2011. The Secretary of State received a pre-action protocol on 13 February 2012 and responded on 21 February 2012 maintaining the decision. At some stage the Secretary of State was having difficulty in obtaining a travel document in order to remove the appellant from the UK. He was put on temporary release. The claimant was arrested on 12 January 2014 and put on reporting conditions with which he failed to comply.
3. The claimant appealed against the removal decision and the FTTJ heard his appeal on 7 May 2014. Both parties were represented by counsel. The claimant gave evidence as did the friend with whom he was living. There was a witness statement from the friend's mother with whom they both lived.
4. The FTTJ recorded that the claimant was not pursuing the appeal on Refugee Convention, humanitarian protection or Articles 2 or 3 human rights grounds. In this respect he also followed the findings of the Immigration Judge who had heard the earlier appeal by the claimant. In deciding the appeal on Article 8 human rights grounds the FTTJ said that he was guided by JS (Former unaccompanied child - durable solution) (Afghanistan) [2013] UKUT 568 (IAC) and Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC). He found that the claimant could not succeed under the Immigration Rules because he did not have family in this country and had not spent sufficient time here. He went on to consider the Article 8 grounds outside the Rules and whether there were any other compelling features.
5. The FTTJ found that the claimant had attempted to commit suicide. He had established a private life in this country and had been here since 2006. Applying the guidance in JS and Razgar, R (on the Application of) v Secretary of State for the Home Department [2004] UKHL 27 principles he found that the appeal turned on the final question, the proportionality of the proposed interference with the claimant's private life human rights. He found, not only that the claimant had attempted suicide, but that he was on medication and obtaining regular medical support for his depression and awaiting a further operation for treatment of haemorrhoids. There had been unsuccessful attempts to trace his family in Iran through the Red Cross. Social services had continued to support the appellant after his 18th birthday and this support had only recently come to an end. He had been living with a friend and his mother for the last five years and the friend had saved him from taking his own life. The FTTJ found that the claimant was still in a vulnerable position and there would be no adult support for him in his own country. He had come here at the age of 15 as an unaccompanied minor and had been here for eight years.

He concluded that it would be a disproportionate interference with the claimant's right to respect for his private life to remove him from the UK at this time. He allowed the appeal on Article 8 human rights grounds only.

6. The Secretary of State applied for and was granted permission to appeal submitting that the FTTJ erred in law by failing to give reasons or adequate reasons for findings on material matters. The FTTJ had failed to identify compelling circumstances not recognised by the Rules or exceptional circumstances. The facts of the case did not bring the claimant within JS. The grounds go on to refer to country information about Iran from a number of sources which, it is argued, show that the claimant would be able to obtain proper medical treatment and support.
7. There is a Rule 24 response from the claimant's representatives.
8. Mr Melvin said that he wished to add a further ground of appeal namely "irrationality". Prior to the hearing the Secretary of State had made no application to amend the grounds of appeal and when I asked Mr Melvin exactly what the amended grounds would say he indicated that he had not put them in writing. I offered him the opportunity to do so before I considered the application but on reflection he withdrew this.
9. Mr Melvin submitted the judgement of the Court of Appeal in Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558 and drew my attention to paragraphs 40 to 44. He submitted that there were no compelling circumstances in this case. There was a lack of medical evidence showing a future risk of suicide and no evidence that the claimant had attended the medical appointments referred to in the notices of appointment sent to him. There were sufficient health services in Iran to assist him and give him the care he might need. I asked Mr Melvin whether the evidence referred to in paragraphs 6 to 10 of the Secretary of State's grounds of appeal to the Upper Tribunal were before the FTTJ. Eventually and reluctantly, Mr Melvin accepted that there was no indication that this or indeed any other country material submitted by the Secretary of State was before the FTTJ. I can find no indication that any of this evidence was before the FTTJ. Mr Melvin then submitted that the FTTJ had not considered the question of the availability of adequate health facilities in Iran.
10. Mr Melvin argued that the FTTJ had not given adequate reasons for allowing the appeal on Article 8 human rights grounds. I was asked to find that the FTTJ had erred in law, to set aside the decision and to remake it myself without the need for any further evidence or submissions.
11. Ms Akinbolu argued that the Secretary of State's submissions amounted to no more than an attempt to reargue the case without revealing any error of law. It could not be an error of law for the FTTJ not to take into account evidence which was not before him. He had found as a fact that the claimant had attempted suicide and on all the evidence this was a conclusion open to him. It

did not have to be confirmed by independent medical evidence. The Secretary of State had not challenged the findings of fact. The claimant had lived with a friend and his mother for several years. The Red Cross had been unable to find any member of his family in Iran. It was clear that the FTTJ had applied the appropriate JS factors and that he had in mind and applied the tests in Gulshan.

12. Ms Akinbolu submitted that it was open to the FTTJ to find that the claimant was a young and vulnerable person whose private life rights outweighed the public interest in removing him from the UK. She asked me to find that there was no error of law and to uphold the determination. If I was against her and decided that the decision needed to be remade she submitted that it was difficult to see how I could come to any different conclusion. I reserved my determination.
13. I find that the Secretary of State's grounds of appeal do not challenge the FTTJ's findings of credibility or fact. Whilst there is no independent medical report which states in terms that the claimant has attempted suicide there is some indirect evidence in the letter from a NHS Trust Mental Health Services Department giving him an appointment and letters from Richmond Wellbeing Service. Even if there had been a challenge to this finding I would have concluded that on the evidence before him, including the documentary evidence, the claimant's evidence and the evidence of his friend, it was open to the FTTJ to reach this and related conclusions.
14. I find that FTTJ followed the correct approach of first considering whether the claimant could succeed on Article 8 human rights grounds under the Immigration Rules. The conclusion that he could not, for the reasons given in paragraph 26, is correct and unchallenged. The FTTJ directed himself by reference to Gulshan and, whilst there is no specific reference to the question of whether "there were arguably good grounds for granting leave to remain outside the Rules", I find that there were ample reasons for the FTTJ to go on to consider whether the claimant could succeed outside the Rules. The FTTJ's reference to "compelling factors" in paragraph 26 is, I find, sufficient indication that he was considering the "compelling circumstances not sufficiently recognised under the Rules" referred to in Gulshan.
15. I can find nothing in Haleemudeen to indicate the need for any different approach to that set out in Gulshan. The decision in this case is not one taken under a part of the Immigration Rules which are contain a complete code ruling out consideration outside the Rules.
16. The summary in JS, prepared by the author of that determination, Blake J, states;

"(1) A local authority's obligations to an appellant as an unaccompanied child and asylum seeker and his status as a former

relevant child after he becomes 18 do not of themselves determine the outcome of a decision on an appellant's immigration status but may provide evidence relevant to those issues.

- (2) *The failure of the Home Office to endeavour to trace family members of a child asylum seeker is only relevant to an immigration appeal after the appellant ceases to be a child, where he is able to show a causal link between that failure and issues relevant to the outcome of the appeal.*
- (3) *For an unaccompanied asylum seeking child, the best durable solution is to be reunited with his own family unless there are good reasons to the contrary. Where reunification is not possible and there are no adequate reception facilities in the home country, an appropriate durable solution may be to grant discretionary leave during the remaining years of minority and then arrange a return to the country of origin. Where the child is of a young age on arrival, cannot be reunited with his family and will spend many years in the host state during his minority a durable solution may need to be found in the host state.*
- (4) *Where the appellant is no longer a minor, the duty on the Secretary of State under s.55 of the Borders, Immigration and Citizenship Act 1999 no longer arises but when making the assessment of whether removal would lead to a breach of article 8 all relevant factors must be taken into account including age, background, length of residence in the UK, family and general circumstances including any particular vulnerability and whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs.*
- (5) *In the context of Afghanistan it is also necessary to take into account the guidance in AA (Unattended children) Afghanistan CG [2012] UKUT 16 (IAC) about the risks to unattached children in the light of the reminder in KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014 in the judgment of Maurice Kay LJ at [18] that there is no bright line across which the risks to and the needs of a child suddenly disappear.*

17. I find that what the FTTJ properly considered fell foursquare within the requirements of subparagraph (4). The FTTJ could only consider the appeal on the basis of the evidence before him. My attention has not been drawn to and I cannot find any indication that the Secretary of State submitted evidence

which could have led the FTTJ to the conclusion that there were adequate psychiatric and support services for the claimant's needs in Iran.

18. I find that on all the evidence before him and his clear findings of fact it was open to the FTTJ to find that the claimant was a vulnerable young adult and that there were compelling circumstances (or factors) which would make his removal from the UK "at this point in time" a disproportionate interference with his Article 8 private life rights.
19. I the FTTJ did not make an anonymity direction and I have not been asked to do so.
20. I find that the FTTJ did not err in law and I uphold his determination.

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Signed
Upper Tribunal Judge Moulden

Date 5 August 2014