



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/03436/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 November 2014

Determination Promulgated  
On 19 November 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR SHAWALI KHAN AHMADZAI  
(No Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms B Smith of counsel instructed by Kesar & Co

For the Respondent: Mr C Avery a Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Afghanistan who was born on 13 April 1994. He has been given permission to appeal the determination of First-Tier Tribunal Judge Obhi ("The FTTJ") who dismissed his appeal against the respondent's decision of 12 May 2014 to refuse to grant him further leave to remain in the UK. His application was made on Refugee Convention and Article 8 human rights grounds.

2. The appellant came to the UK on 14 November 2008 and was placed in the care of the local authority Children's Services. He claimed asylum but this was refused on 25 February 2009. He was granted discretionary leave to remain until he was 17 ½ years old. He pursued his claim for asylum but that appeal was dismissed by the Tribunal on 22 May 2009. He then made his application for further leave to remain on 15 September 2011 which led to the refusal now under appeal.
3. In relation to the asylum claim the appellant claimed that his father and two of his uncles and his eldest brother fought for the Taliban against the government. His father and uncle and brother were killed. His paternal uncle wanted the appellant to join the Taliban but his mother was against this. The appellant feared that his uncle would make him join the Taliban and fight for them. The FTTJ found that the appellant had not established that he had a well-founded fear of persecution for a Convention reason and dismissed those parts of his appeal in which he claimed asylum and humanitarian protection. The appellant does not seek to challenge these conclusions in his grounds of appeal to the Upper Tribunal.
4. The appellant's Article 8 human rights claim was based on the private and family life he claimed to have built up in the UK. His evidence was that he had been here for five years and seven months and had established a family life with his foster carer with whom he lived between June 2009 and June 2010. He also had a relationship with his uncle living in the UK, his wife and five-year-old son. He had lived with them between 2010 and 2012 after which he maintained a relationship through regular weekly visits. He had established a relationship with JK and she had become pregnant with his child. However, she had had a termination because she was young and still studying. He said that her family approved of their relationship. The appellant wishes to continue his education in the UK and had been offered a place at a college in Northampton to study for a degree in engineering. He claimed that to remove him would have a disproportionate impact on his family and private life.
5. The FTTJ heard oral evidence from the appellant, JK, his foster carer, his uncle's wife and his support worker. The findings of fact which relate to the human rights claim are set out in paragraphs 29 to 34 of the determination. The FTTJ considered the Article 8 human rights grounds under the amended Immigration Rules contained in Appendix FM and paragraph 276ADE. In paragraph 34 she reached the conclusion that the appellant had not shown that he met these requirements. She went on to say that she could only consider the Article 8 grounds outside the Immigration Rules if she was satisfied that there were compelling reasons to do so. She found that this test was not met and went on to dismiss the appeal on human rights grounds.
6. The appellant applied for and was granted permission to appeal, submitting that the FTTJ erred in law by considering the Article 8 human rights grounds under the new Immigration Rules and not under the earlier jurisprudence

where the appropriate tests are set out in Razgar, R (on the Application of) v Secretary of State for the Home Department [2004] UKHL 27 because the appeal was against the respondent's decision of 12 May 2014 pursuant to his application made on 15 September 2011. The new Rules had come into force on 9 July 2013, after the date of the appellant's application. The authorities of Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402 (02 April 2014) and Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558 (02 May 2014) are relied on. It is argued that there has been no proper consideration of the delay on the part of the respondent, aspects of the appellant's private life and the effect of removal on people important in his life. Finally, it is submitted that the FTTJ erred in that the appellant did not come to this country to seek asylum and to obtain an education but to get away from his uncle who was trying to force him to fight for the Taliban.

7. There is a Rule 24 response from the respondent in which it is submitted that the FTTJ did not err in law, the only issue was that of private life and Haleemudeen should be followed rather than Edgehill.
8. I have been provided with the judgement in Haleemudeen, Edgehill and Odelola v Secretary of State for the Home Department [2009] UKHL 25 (20 May 2009) and the Statement of Changes in Immigration Rules coming into effect on 9 July 2012.
9. Ms Smith submitted that this was one issue appeal, whether the FTTJ should have applied Razgar principles or the new Rules. This turned on the interpretations of Edgehill and Haleemudeen. The appellant argued that the new Rules contained transitional provisions, at paragraph 91. These only applied if the provisions under the heading "Implementation" did not apply. She placed reliance on paragraph 4.3 of the Explanatory Memorandum.
10. I was referred to paragraph 7 (background), 22 onwards (discussion) and 32 (conclusion) in Edgehill. Haleemudeen made no reference to the transitional provisions. She accepted that Haleemudeen and Edgehill were at odds. In Haleemudeen the Court of Appeal looked only at the Rules in force at the date of the decision. There was no reference as to when the new Rules came into force. She submitted that this was a material error and the decision should be set aside. Not all the material evidence been taken into account and I was asked to remit the appeal to the First-Tier Tribunal to be reheard with no findings preserved and the oral evidence given again. There would have to be evidence directed to addressing the provisions of the Immigration Act 2014. In reply to my question, Ms Smith confirmed that the asylum decision was not challenged.
11. In his submissions Mr Avery accepted that the Court of Appeal in Haleemudeen had made no reference to Edgehill. He relied on the respondent's Rule 24 response. Edgehill was decided in the context of the

provisions of paragraph 276ADE. Haleemudeen addressed more general and wider principles. In reply to my question he submitted that the paragraphs which assisted were 41 and 42 although he accepted there was no direct reference to the precise provisions of the Statement of Changes in Immigration Rules.

12. The respondent's position was that no findings of fact made by the FTTJ had been challenged. Given these findings it was difficult to see how the FTTJ could have reached a different conclusion even if Razgar principles had been applied. Mr Avery submitted that there was no material error of law because any judge properly directing himself or herself would have concluded that the appellant failed under Razgar principles. The appellant had made false asylum claim. He still had family in Afghanistan. There was no lacuna in the findings as they related to the human rights grounds. The FTTJ had dealt with all material issues. However, if I was against him in relation to the error of law he submitted that the findings of fact should stand.
13. In her reply, Ms Smith referred me to the context of Edgehill, set out in paragraphs 12 and 15 which showed that it was a case addressing Article 8 human rights grounds. The FTTJ had taken an approach restricted to Article 8 under the Rules. A properly applied Razgar approach would consider the effect of the proposed removal on those close to him as well as the conditions he would face on return to Afghanistan.
14. I reserved my determination.
15. I have given careful consideration to what both representatives agree are the conflicting and opposite conclusions reached by the Court of Appeal in Edgehill and Haleemudeen. With great respect it seems to me that there were more detailed submissions on the point and a closer analysis in paragraphs 22 to 33 of Edgehill 33 than was the case in Haleemudeen where the main analysis is contained in paragraphs 40 and 41. I reject the submission that the analysis in Edgehill did not cover Article 8 human rights grounds. It is clear that it did. I prefer the analysis in Edgehill and conclude that in this appeal as the appellant made his application for further leave before 9 July 2012 and the respondent had not made a decision on it by that date then the Article 8 grounds should have been considered in line with what I will refer to as the Razgar jurisprudence rather than the Article 8 provisions of the Immigration Rules which came into effect on that date. I note that the point was taken by counsel in her skeleton argument before the FTTJ.
16. The grounds of appeal to the Upper Tribunal submit that the FTTJ failed to consider the effect on the appellant of delay by the respondent, made no adequate examination of the appellant's private life and failed to consider the effect of his removal on those people who were important in his life. I find no arguable merit in these grounds which are in substance no more than a disagreement with conclusions properly reached by the FTTJ on all the

evidence. In the light of my conclusion as to the law to be applied any delay did not cause the Article 8 grounds to be considered under principles which were not in effect at the date of the application. The delay meant that the appellant was able to build up a stronger private life than might otherwise have been the case. On the evidence as to the appellant's relationship with others the FTTJ was entitled to conclude that he had a private life but not a family life.

17. I find that the decision to apply the Rules which came into effect on 9 July 2012 was an error of law. I must consider whether it was a material error or, put another way, an error which should result in my setting aside the decision. After determining the appeal on Article 8 grounds under the Rules the FTTJ went on to consider whether she should consider them outside the Rules. She concluded that she should not because there were no compelling reasons to do so. I accept that that statement did not indicate that there had been a full consideration under Razgar principles. However, I have considered the FTTJ's findings of credibility and fact in paragraphs 28 to 34, separating them from her reasoning and analysis. I find that any judge properly directing himself or herself was bound to have reached the conclusion that the Article 8 private life grounds turned on the last test, proportionality, and the respondent had established that it would be a proportionate interference with the appellant's right to respect for his private life to remove him from the UK.
18. The FTTJ did not make an anonymity direction. I have not been asked to do so and see no need for one.
19. Whilst the determination does contain an error of law I find that it was not a material error and I uphold the decision to dismiss the appellant's appeal on both asylum and human rights grounds.

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Signed  
Upper Tribunal Judge Moulden

Date 17 November 2014