



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09294/2013

THE IMMIGRATION ACTS

Heard at Newport
on 27th February 2014

Determination Sent
on 4th June 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A J H

(Anonymity order in force)

Respondent

Representation:

For the Appellant: Mr Richards – Senior Home Office Presenting Officer.

For the Respondent: Mr Sinfield instructed under the Direct Access provisions.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Trevaskis promulgated following a hearing at Newport on 6th November 2013 in which he allowed AJH's appeal on Article 8 ECHR grounds against the refusal of further leave to remain in the United Kingdom.
2. AJH is an Afghan national born in 1995 and was therefore an adult at the date of the hearing. On 25th March 2010 he was refused asylum but granted

discretionary leave to remain in accordance with the Secretary of State's policy for accompanied minor asylum seekers until 24th May 2011. On 19th October 2011 he was refused further leave to remain against which he appealed and on 15th December 2011 his appeal was allowed, resulting in a grant of further leave until he attained the age of seventeen and a half on 1st July 2012. At that time the Secretary of State refused further leave to remain which was the decision challenged before the First-tier Tribunal.

3. Having recorded the evidence and submissions the Judge set out his findings relevant to the Secretary of State's challenge which can be summarised as follows:
 - i. There are no new grounds which would justify considering a fresh claim for asylum by [AJH]. He has referred to having made contact with Hafeez Ullah but has produced no evidence of contact or of any of the facts he claims to have been told [36].
 - ii. The SSHD has not taken any steps to trace [AJH's] family. She has failed to comply with her duty at the time of his asylum claim. The steps taken in 2013 do not fulfil that duty [37].
 - iii. AJH will be returned as an unaccompanied asylum seeking child having been granted discretionary leave as there were no adequate reception arrangements for him as a minor. There is no credible evidence the situation has changed [38].
 - iv. The SSHD's reasons for refusal letter does not address the negative impact of persons leaving the country, claiming he has family support on return. There is no evidence such family support exists or that he will not suffer the adverse treatment referred to in para 39 of the determination. If he has no family support he is likely to become a street child at risk of exploitation as mentioned in the COIR [40].
 - v. AJH has been living in the United Kingdom for almost 4 years and presents as somebody who has become "westernised". He has been educated in this country. All his activities will mark him out from his contemporaries in Afghanistan and he will not be able to assimilate into Afghan culture without encountering the kind of hostility referred to earlier in the determination, particularly if, as is suggested by SSHD he tries to establish independent living in Kabul [41].
 - vi. The reasons for refusal letter contains ample evidence of how dangerous life is in Kabul. Such danger will be increased for a

homeless, unsupported, westernised returning unaccompanied asylum seeking child such as [AJH] [42].

- vii. In relation to Article 8 ECHR, AJH has not enjoyed family life in the United Kingdom "because there is no evidence that she has been to the United Kingdom or is there any evidence that her sponsor is in the United Kingdom. The refusal of entry clearance to the Appellant is not an interference with that relationship which potentially engages Article 8 of the European Convention on Human Rights" [47].
 - viii. AJH has made many friends in the United Kingdom, including his carers, and removal would amount to an interference with such rights [48].
 - ix. The Judge was not satisfied that the removal is proportionate to the legitimate aim relied upon as he is a vulnerable young person who has led a blameless life in the United Kingdom, who has bettered himself academically, and absorbed Western culture. He has spent most of his formative years in the United Kingdom and been educated away from the cultural norms of society from which he fled. The level of danger and hostility he is likely to face in Afghanistan if removed will place the Secretary of State in breach of her obligations under Article 8. Considering JS (former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00568 the factors mentioned in note (4) militates against AJH's removal under Article 8 [50].
4. Ground one on which permission to appeal was sought alleges a misdirection of law in failing to have regard to the Immigration Rules as part of the Article 8 assessment. Ground two asserts, amongst other matters, a failure to give adequate reasons for findings on material matters specifically in relation to the finding in paragraph 37 that the Secretary of State had failed to take steps to trace AJH's family when there was evidence he had been in contact with his family until recent months and so he knew of their whereabouts, the SSHD had written to him advising him of other organisations that could assist in tracing his family in Afghanistan, he was asked to contact the SSHD by 15th July 2013 to confirm he was content for them to assist him in undertaking family tracing although no response was received from him or his representatives, and that in line with her obligations under the relevant case law the SSHD contacted the British Foreign & Commonwealth Office in Kabul with the details of AJH's family and where he claimed to live although they informed the SSHD that they did not have facilities to carry out tracing of the families of unaccompanied asylum seeking children from Afghanistan. The SSHD attempted to trace but to no avail.

Error of law finding

5. There are a number of legal errors in the determination such that it cannot stand. These include the reference in paragraph 36 to there being no new grounds which would justify considering the matter as a fresh claim asylum when the Secretary of State accepted the further submissions as a fresh claim but rejected the claim on its merits on the basis that nothing had changed from the original refusal of his asylum claim. It was, however, accepted the claim for asylum, humanitarian protection, and under Articles 2 and 3 fell by the wayside and could not be substantiated as AJH is no longer a child but an adult who has been in contact with his family and who had not substantiated his claim to face a real risk on return in the whole of Afghanistan.
6. Mr Sinfield's submission that this case was, in effect, an active review in which it was only ECHR that was relevant when considering the human rights elements and policies at the date of the grant of leave was accepted by Mr Richards who conceded he was in difficulties in relation to the first ground. Correspondence referred to Article 8 ECHR only although he submitted there was sufficient merit in the second ground.
7. In relation to the Article 8 assessment; paragraph 47 is clearly an example of a 'cut and paste' insertion as it relates to a completely different case involving a female applicant, UK-based sponsor, and the refusal of entry clearance.
8. I find legal error in any reference to AJH being returned as a child as this is not the case. He is a young adult and it was accepted by the Judge that he could safely return to Afghanistan in relation to the protection provisions.
9. I also find a further material error in that even if this issue was being considered under the provisions of ECHR only it was necessary for the Judge to undertake a proper balanced proportionality assessment in paragraph 50 of the determination. Although factors in AJH's favour are outlined there is no assessment of the Secretary of State's case. Although the Judge refers to head note (iv) of JS he fails to adequately assess the issues. That head note states "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."
10. As a result of these legal errors I find the determination must be set aside and remade although findings relating AJH's immigration history, circumstances in

the United Kingdom, and those relating to there being no basis for granting leave to remain under the protection provisions, shall be preserved findings.

Discussion

11. In JS (Former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00568 (IAC) it was held that (i) 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; (ii) 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; (iii) 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; (iv) 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; (v) In the context of Afghanistan it is also necessary to take into account the guidance in AA (Unattended children) Afghanistan CG [2012] UKUT 00016 (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.

12. No causal link between any alleged failure to trace family relevant to the outcome of the appeal in relation to the protection issues has been established although the evidence indicates that the SSHD did endeavour to undertake tracing and discharged her obligations in relation to AJH on the facts. It has not been shown that the SSHD's alleged failure to comply with the statutory duty to endeavour to trace the family has caused AJH such prejudice that it would be unfair now to remove him to Afghanistan.

13. It is accepted AJH has many friends in the United Kingdom, including his carers, and has been educated here. He may have led a blameless life in this country but it is not established that he should receive additional reward for doing what is lawfully expected of him. It is claimed that he is a vulnerable young person but this is not substantiated on the evidence and, in any event, he has been in regular contact with his family in Afghanistan and it has not been substantiated or established that he could not return to his family who can provide adequately for his ongoing needs. He claims to have lived in Afghanistan until aged 13 and it has not been substantiated that he is not able to return and reintegrate into life in that country. He is a Dari speaker.
14. Although the Judge referred to the level of hostility in Afghanistan it is accepted that individuals can return and indeed many have in considerable numbers according to the country material. The reasons for refusal letter sets out the Secretary of State's position regarding the weight to be given to the various factors and the legitimate aim being relied upon. AJH has not substantiated his claim that he cannot be returned.
15. AJH is now an adult living an independent life. He came here and made a false claim for asylum but was accommodated by the United Kingdom government during his minority. I reject Mr Sinfield's submission that conditions in Afghanistan are so appalling that AJH cannot be returned as if so he would have a credible claim for protection, which he does not.
16. The legitimate aim relied upon by the Secretary of State is the right to have valid and workable immigration controls to protect the economic interests/welfare of the United Kingdom, which has been found to fall within Article 8 (2) see FK and OK Botswana [2013] EWCA Civ 238 in which Sir Stanley Burnton said that "The maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense...All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8".
17. As an Afghan national AKH can only remain in the United Kingdom if the SSHD is willing to grant him such leave. Article 8 does not enable an individual

to choose a country which they wish to live in and it has not been established that the connections he has made are such as to make the decision disproportionate. There is no evidence friendships formed in the United Kingdom could not be maintained at arm's-length or that AJH will not be able to form new ties and friendships in Afghanistan within the protection of his family unit or elsewhere if required. It has not been established that the effect of removal in relation to the change in relationships and/or circumstances in general is such as to make the decision disproportionate.

- 18. Although AJH has established a private life recognised by Article 8 ECHR I find the Secretary of State has discharged the burden of proof upon her to prove that the decision to remove AJH to Afghanistan where he has family support, as an adult living an independent life, is proportionate to the legitimate aim relied upon. Accordingly the appeal must fail.

Decision

- 19. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

- 20. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 27th May 2014