



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/01726/2015

THE IMMIGRATION ACTS

Heard at Stoke on Trent
On 3 November 2015

Decision and Reasons Promulgated
On 19 November 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Said Safi

[No anonymity direction made]

Claimant

Representation:

For the claimant: Not represented

For the appellant: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Said Safi, date of birth 1.1.93, is a citizen of Afghanistan.
2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Somal promulgated 28.8.15, allowing, on human rights grounds, the claimant's appeal against the decision of the Secretary of State, dated 15.12.14, to refuse his asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 17.8.15.
3. First-tier Tribunal Judge Kinnell granted permission to appeal on 28.9.15.

4. Thus the matter came before me on 3.11.15 as an appeal in the Upper Tribunal.

Error of Law

5. There was no appeal or cross appeal against the decision of the First-tier Tribunal to dismiss the appeal on both asylum and humanitarian protection grounds and thus those decisions must stand as made.
6. For the reasons set out below I found such error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Somal to allow the appeal on human rights grounds should be set aside and remitted to the First-tier Tribunal to be remade.
7. First, having dismissed the asylum and humanitarian protection claims, Judge Somal proceeded to consider article 8 ECHR on the Razgar five-stage test, without any reference to the Immigration Rules in relation to private and family life under Appendix FM and paragraph 276ADE. It is now trite law that any consideration of private and/or family life outside the Rules under article 8 ECHR should be viewed through the lens of the Rules, which form the Secretary of State's proportionate response to such claims. The judge has identified no compelling reasons to consider human rights outside the Immigration Rules and not considered whether there are insurmountable obstacles to continuing family life outside the UK. For these reasons alone the decision is flawed and cannot stand.
8. The reasoning of the First-tier Tribunal in allowing the appeal on human rights decision is difficult to understand. Judge Somal appears to have focused on the claim that Mr Safi was in a relationship with a Czech citizen. At §28 it is stated that she entered the UK at age 15 as a dependant of her parents and that her father is exercising Treaty rights in the UK as a worker, and that all her immediate family are in the UK. At §31 Judge Somal stated that the claimant's partner is an EEA national who has a strong bond with her own parents who are exercising Treaty rights in the UK. For reasons unclear in the decision, Judge Somal considered it was not a viable option for the family unit to relocate to the Czech Republic. At §32 the judge stated, "This appellant and his partner are a young couple with two children with no obvious ties or reasons to live in Czech Republic." At §33 the judge further stated, "His partner is an EEA national who has lived outside Czech Republic for many years and would be unable to exercise her rights as an EEA national in the UK where she lives with her support network of immediate family nearby." I fail to understand this last sentence; it makes no sense at all.
9. Judge Somal appears to have confused and conflated the human rights claim with the Treaty rights of an EEA national. The fact is that the claimant's partner, although a Czech national, is not exercising Treaty rights in the UK and thus has no entitlement to remain in the UK at all. Neither the claimant nor his partner have any legal status or right to reside in the UK. No cogent reasons have been identified as to why the family could not continue their family life in the Czech Republic, where the claimant's partner is entitled to reside. Judge Somal appears to have used article 8 ECHR as a dispensing provision to find the claimant should have leave to remain without any basis for doing so. This is not the case of a partner seeking to remain in the UK with a British citizen or person with settled status in the UK. Just because his

partner is an EEA national does not confer any rights to either of them or their children to remain in the UK. As I understand it, the claimant was originally granted discretionary leave as an unaccompanied minor to remain in the UK for a period of 6 months. He has now been here illegally for some 8 years. It is difficult to see on what basis the First-tier Tribunal Judge found it would be disproportionate to require the claimant to leave or the family to continue their family life in the Czech Republic.

10. It follows that the decision of the First-tier Tribunal is flawed for manifest error of law and cannot stand.
11. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
12. In all the circumstances, I remit the human rights decision to the First-tier Tribunal on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine afresh the appeal in relation to human rights grounds only.

Conclusions:

13. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision allowing the appeal on human rights grounds should be set aside. The unappealed decision to dismiss the appeal on asylum and humanitarian grounds must stand.

I set aside the decision.

I remit the decision in the appeal to the First-tier Tribunal to be remade, preserving the unappealed decisions to dismiss the appeal on asylum and humanitarian protection grounds.



Signed
Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

14. The appeal is remitted to the First-tier Tribunal sitting at Stoke on Trent;
15. The decision to dismiss the appeal on both asylum and humanitarian protection grounds is preserved. The sole issue for the First-tier Tribunal will be private and family life on human rights grounds;
16. The estimated length of hearing is 3 hours;
17. Interpreters will be required in Pashto and Czech;

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.



Signed
Deputy Upper Tribunal Judge Pickup

Dated