



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/04395/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 12<sup>th</sup> May 2016

Decision & Reasons Promulgated  
On 19<sup>th</sup> May 2016

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N N

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms K Pal, Senior Home Office Presenting Officer

For the Respondent: Ms S Saifolahi, Counsel instructed by Tower Hamlets Law Centre

**DECISION AND REASONS**

1. This is an appeal to the Upper Tribunal by the Secretary of State, with permission, against a decision of the First tier Tribunal, Judge Callow, promulgated on 14<sup>th</sup> October 2015 following a hearing at Taylor House on 10<sup>th</sup> August 2015. In that

decision the Judge dismissed the Appellant's appeal on asylum, humanitarian protection grounds and under Articles 2 and 3 of the ECHR but allowed the appeal under Article 8 of the ECHR.

2. For the purposes of continuity and clarity, in this decision I shall continue to refer to NN as the Appellant and the Secretary of State as the Respondent.
3. The Appellant has an uncontested, estimated date of birth of 1<sup>st</sup> January 1997, making him now 19 years of age. The Appellant arrived in the UK and claimed asylum on 17<sup>th</sup> March 2009, at a time when he was 12 years of age. His asylum application was rejected in August of 2009 and his appeal against that decision dismissed in October of the same year. However, in accordance with her policy the Secretary of State granted the Appellant discretionary leave on 26<sup>th</sup> October 2009 valid until 13<sup>th</sup> October 2010. By that time he was aged 13. Prior to the expiry of that leave the Appellant made a further application for leave to remain, again on the basis of the Refugee Convention. That was rejected for the same reasons as previously but he was granted further discretionary leave to remain valid until 10<sup>th</sup> July 2014. He did not appeal against that decision.
4. Prior to the expiry of the Appellant's discretionary leave he made a further application on 13<sup>th</sup> June 2014 re stating his asylum claim. That application was rejected by a decision taken on 15<sup>th</sup> January 2015 and at the same time a decision was made to remove him under section 47 of the Immigration Asylum and Nationality act 2006. It was his appeal against those decisions which came before the First tier Tribunal in August of 2015.
5. There is no necessity to rehearse the basis of the Appellant's asylum claim as it was once again rejected and that rejection has not been challenged before the Upper Tribunal. Having rejected his claim for international protection the Judge went on to consider Article 8. The Judge's consideration of Article 8 commences from paragraph 28 of the Decision and Reasons concluding with the decision after paragraph 38.
6. The Judge identified that the private life requirements find expression in paragraph 276ADE of the Immigration Rules and set out that the only relevant provision as far as this Appellant was concerned was paragraph 276ADE (vi). Paragraph 276ADE (vi) provided, at that time, that the Appellant must be aged 18 years or above, has lived continuously in the UK for less than 20 years but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK. So far as that is concerned the Judge found that it had not been established that the Appellant met the requirements of 276ADE (vi) as it was in

force at the time of the Respondent's decision. The Judge then went on to consider Article 8 outside the Rules identifying, correctly at paragraph 23 that it is for the Appellant to demonstrate that he has an arguable case and that there may be good grounds for granting leave to remain outside the Rules and if so it is then necessary to apply a proportionality test with reference to Article 8 standards.

7. The Judge then set out the law and a variety of cases relevant to an Article 8 consideration and at paragraph 30 referred himself to the case of Razgar [2004] UKHL 27. He then identified that this case was clearly about proportionality, the Appellant having clearly established a private life in the United Kingdom. At paragraph 38 the Judge considered section 117B of the Nationality, Immigration and Asylum Act 2002, as he was required to do, noting that it is in the public interest to uphold immigration control. The Judge noted that currently the Appellant is not financially independent but he then noted that it must be accepted that in due course he is likely to be qualified with a degree and thereafter will establish his own financial independence. He noted that whilst it might be argued that his leave became precarious once the Respondent refused further leave to remain in June 2014, a conclusion is nonetheless reached that it was during the periods of discretionary leave that the Appellant established a meaningful private life and that that is deserving of weight. He noted the country guidance shows that as a very young person returning to Kabul on his own there are obstacles in the way of integration. The current socio economic situation for returnees, together with all the other facts commented upon, make the Appellant's removal a disproportionate interference with his right to respect for a private life and the Judge accordingly allowed the appeal.
8. It is fair to say that these comments are not the totality of the facts upon which the Judge based his comments. He had considered the Appellant's position earlier in the decision when setting out the Appellant's background. The Appellant comes from Kabul province; about thirty five minutes drive from Kabul. At the time he left Kabul his parents were there but he has since found out from his mother that his father has been killed.
9. When he first arrived in the UK the Appellant was subject to the care of Monmouth County Council and placed with foster parents. However, once he had established contact with his aunt and uncle, who live in the UK, he moved to live with them and has lived with them since approximately 2010.
10. The Judge noted the contents of the Secretary of State's refusal dated 15<sup>th</sup> July 2015 wherein it was said that the British Embassy in Kabul did not have the facility to trace families of unaccompanied asylum seeking children from Afghanistan but noted that the Appellant had had no contact with his family there.

11. At paragraph 29 of the decision the Judge noted once more that the Appellant arrived in the UK at the age of 12 and that for the most part has lived with his uncle and members of his family which constitutes an important element in his private life. The Judge also noted that he has attended school and was at that time awaiting A level results with a plan to study chemistry at the City University. By the time the case came before me he had in fact secured a place to study bio chemistry at Kingston University and he plans to be a teacher .
12. The Secretary of State's grounds on which permission to appeal were granted submit that the Judge erred in assessing the case on an Article 8 basis outside the Rules. It is said that the Appellant cannot meet paragraph 276ADE as he has not been in the United Kingdom for over half his life and had not been here for seven years at the date of the application for further leave. It is also asserted that the Judge erred in his application of section 117B of the 2002 Act. The Judge found that he is not currently financially independent and the Judge erred in looking to the future as that was highly speculative. The Judge failed to count the cost to the UK education system if the Appellant obtains grants or loans to further his education as he wishes. There is also criticism of the Judge's consideration of his leave having been precarious when he had discretionary leave. The Secretary of State argues that discretionary leave is precarious.
13. Before me Miss Pal relied on the grounds particularly at paragraph 2 arguing that the Judge failed to adequately assess the claim under paragraph 276ADE (vi) and had not considered exceptional circumstances. She also argued that the Judge erred in his consideration of what was precarious and in looking to the future.
14. Miss Saifolahi, on the Appellant's behalf, referred to the Rule 24 notice, submitted late but which I gave permission to admit. That argued that the decision did not contain errors of law. In particular where the Judge had indicated at paragraph 38 of his decision that the Appellant had established a meaningful private life during the periods of discretionary leave that private life is deserving of weight was not a finding in error of law and she submitted that while section 117B (5) states that little weight is to be attached to a private life established when a persons immigration status is precarious, it does not state that no weight is to be attached and as such there is no error of law.
15. Before me she expanded upon this ground with, I find, some force. It must be remembered that when the Appellant arrived in the UK he was a very young child, aged only 12 and unaccompanied. He was given discretionary leave in accordance with the Secretary of States policy and on the basis that he could not be removed.

That being the case he cannot be criticised for establishing a private life; such is inevitable. Whilst his asylum claim was rejected, again note must be taken of his extreme youth at the time of the incidents he relied on and his age coming to the United Kingdom. He ought not to be criticised for making such a claim given his extreme youth and it was not rejected on credibility grounds.

16. Miss Saifolahi referred me to the case of Treebhawon and others (section 117B (vi) ) [2015] UKUT 00674 (IAC). She specifically referred me to paragraph 17 of that case which reads as follows;-

“the two “*little weight*” provisions of section 117B do not readily satisfy the appellation of Parliamentary statements of the public interest, in view of the terms in which they are phrased compared with the formulation of the public interests statements in subsections (2), (3) and (6). Furthermore, the two “*little weight*” provisions relate to matters which, in practice, are invoked by the person concerned rather than the Secretary of State, namely a private life and/or a relationship formed with a qualifying partner during such persons sojourn in the United Kingdom. It is noted in Deelah, at [21], the focus of these discrete statutory provisions is choices and decisions which have been made by the person or persons concerned in their lives and lifestyles.”

17. The point Miss Saifolahi makes in this regard is that the Appellant, as a child with discretionary leave and no ability to return to Afghanistan, had no choice in the matter.
18. She also referred me to the case of Forman (SS 117 A-C considerations) [2015] UKUT 00412 (IAC) which makes clear that the matters to be considered under section 117 are not an exhaustive list. She noted that the Judge had found the Appellant and his uncle - his witness, to be entirely credible. It is accepted that he had arrived at the age of twelve. It was accepted that he had lost contact with his mother and that his father had been killed. The Secretary of State had undertaken traces so far as she was able which effectively was none and the Appellant had been living with relatives in the UK since 2010 and had established a very meaningful and significant private life in that time.
19. She argued that at the date of hearing he was 18 years and 7 months. He has now been offered a place to study Bio-Chemistry at Kingston University with a plan to teach those subjects thereafter. He is supported emotionally and financially by his uncle and there was no error of law on the part of the Judge to look to the future on

the basis of how the Appellant has done thus far with his studies and his plans for the future that he is likely in future to be financially independent.

20. It is also of note that the Appellant's level of English is excellent particularly on the basis that he has been studying since his arrival as a child. The Judge's decision, whilst it may not been a decision reached by every Judge, was nevertheless not perverse and open to him on the basis of the evidence. She also pointed out that his asylum claim had not failed on credibility but rather the lack of a Convention reason and matters of risk on return.

21. Having read the First tier Tribunal's decision with care and taking into account the Secretary of State's grounds, the Rule 24 response, the case law relied upon and the submissions, I agree that the Judge's conclusions were not perverse and were properly based on the evidence and open to him on the basis of that evidence. True it is that another Judge may have decided the case differently on these facts but that does not render this Judge's decision perverse. Section 117 is not an exhaustive list and it is of note that there are no factors counting against the appellant. I accept that whilst section 117 indicates that little weight should be given to a private life built up whilst a person's position is precarious, a young child given discretionary leave and who is not returnable has to be given more latitude in that regard than an adult who has chosen to overstay and build up a private life. It is self evident that a child from the age of 12 upwards who masters the language, who makes friends, who succeeds in the education system and lives with relatives will have built up a very significant private life and it is also far from insignificant that this Appellant has lost contact with his family in Afghanistan who he has seen when he was aged only 12.

22. I find that the First tier Judge's is not tainted by an error of law and it is upheld.

### **Notice of Decision**

The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Date 13<sup>th</sup> May 2016

Upper Tribunal Judge Martin

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings

Signed

Date 13<sup>th</sup> May 2016

Upper Tribunal Judge Martin