



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
PA/08768/2016

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**Decision & Reasons Promulgated**

**On: 1<sup>st</sup> August 2017**

**On: 3<sup>rd</sup> August 2017**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

Appellant

**And**

**Ahsanullah Niazai  
(no anonymity order made)**

Respondent

**For the Appellant: Mr Avery, Senior Home Office Presenting Officer**  
**For the Respondent: Mr Aitken, Counsel instructed by Satha & Co Solicitors**

**DETERMINATION AND REASONS**

1. The Respondent is a national of Afghanistan who is accepted to have been born in 1998. On the 13<sup>th</sup> April 2017 the First-tier Tribunal (Judge L. Nolan) allowed his appeal on human rights grounds. The Secretary of State now has permission<sup>1</sup> to appeal against that

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<sup>1</sup> Permission was refused by the First-tier Tribunal (Judge Ford) on the 4<sup>th</sup> May 2017 but granted upon renewed application by Upper Tribunal Judge Allen on the 16<sup>th</sup> June 2017.

decision.

2. The crux of the Secretary of State's appeal is that in reaching its conclusions the First-tier Tribunal materially erred in law in that it failed to apply the principles in Devaseelan [2002] UKIAT 00702 to findings of fact made by earlier Tribunals.

### **The *Devaseelan* Findings**

3. The Respondent Mr Niazai claimed asylum in the United Kingdom on the 5<sup>th</sup> April 2011. He was refused protection, but due to his young age was granted Discretionary Leave. He appealed against that decision to the First-tier Tribunal. In a determination dated 15<sup>th</sup> July 2011 the First-tier Tribunal (Judge Andonian) dismissed the protection 'upgrade' appeal. No findings were made on human rights, since at the date of the determination Mr Niazai had already been granted limited leave to remain. The only finding made by Judge Andonian that is pertinent to the present appeal appeared at paragraph 45 of that judgement: "it is simply not credible that the Appellant would not know where to contact his family". That was a finding upheld on appeal by Upper Tribunal Judge Pitt in her decision of the 30<sup>th</sup> May 2012.
4. On the 7<sup>th</sup> August 2013 Mr Niazai applied for further leave. This was refused on the 6<sup>th</sup> March 2015. His appeal came before the First-tier Tribunal (Judge Robison). In a decision dated the 17<sup>th</sup> September 2015 the protection element of the claim was once again rejected. In particular, it was not accepted that Mr Niazai faced any risk as a westernised returnee. Article 8 is addressed very briefly at paragraph 46 of the decision, the Tribunal finding that since he had lived most of his life in Afghanistan, it was not a disproportionate interference with his private life to send him there now. Although the Tribunal recorded evidence from the Red Cross that they had been able to trace Mr Niazai's family, no specific finding is made on that matter.
5. That decision was subject to an appeal to the Upper Tribunal. In a decision dated the 19<sup>th</sup> February 2016 Upper Tribunal Judge Hanson dismissed the appeal, which was concerned wholly with the protection findings made by Judge Robison. In his evaluation of the grounds Judge Hanson commented that it had not been shown that Mr Niazai would face any risk as a westernised returnee: "it has not been shown that he cannot re-adjust to the life he had prior to coming to the UK. No language or cultural issues have been made out even if the appellant has the mannerisms of a young person who has lived in the UK for some time" [at 13].
6. On the 26<sup>th</sup> July 2016 further representations were made on Mr

Niazai's behalf. The Secretary of State for the Home Department refused to grant leave but treated the representations as a fresh human rights claim and accordingly a further right of appeal ensued. It was that decision, dated 4<sup>th</sup> August 2016, that was subject to the appeal before the First-tier Tribunal in the instant appeal.

### **The Decision of the First-tier Tribunal**

7. The First-tier Tribunal dismissed the protection claim. No issue has been taken with that decision by either side.
8. In its assessment of Article 8 the Tribunal dealt first with paragraph 276ADE of the Immigration Rules. Noting that Mr Niazai had only spent six years in the UK, it directed itself that the only conceivable limb of that provision that might apply to him would be 276ADE(1)(vi). This required him to demonstrate that there were "very significant obstacles to his reintegration" in Afghanistan. The Tribunal's consideration of that rule is set out at paragraphs 50-52 of the decision. In summary it identifies the following factors as relevant to the question of whether there are "very significant obstacles":
  - i) Mr Niazai has spent the years aged 13-19 in the UK and is now a "typically British young man". As someone whose adult identity has been formed by an immersion into UK life and culture he would face significant hardship and difficulty in re-integrating himself into life in Afghanistan;
  - ii) His position is distinct from that of a UASM who has spent six years living with other (Afghan) family members in the UK, because he has been in the care of the state/foster families;
  - iii) His position is distinct from that of an adult who has spent six years living in the UK because these were formative years;
  - iv) Although he could in time re-acquire his native language skills the Tribunal accepted that Mr Niazai is now fluent in English and that he has lost his ability to communicate in Pashto and Dari;
  - v) The Tribunal accepted that he had lost touch with his family in Afghanistan;
  - vi) The background information indicates that young people without support networks face particular difficulties over and above those faced by all returnees, such as lack of

employment and housing;

- vii) He has missed out on schooling in the Afghan system, further compromising his ability to find work.

9. Having considered all of those matters cumulatively the First-tier Tribunal found itself satisfied that the test was met. Although it was not open to the Tribunal to allow the appeal 'under the rules' it considered its own positive finding relevant to the question of proportionality and went on to allow the appeal on Article 8 grounds, notwithstanding the public interest factors set out in s117B of the Nationality, Immigration and Asylum Act 2002 (as amended).

### **The Challenge**

10. The Secretary of State alleges that the First-tier Tribunal erred in law in the following material respects:

- i) In failing to apply the *Devaseelan* principles to the finding of Judge Hanson that there were no cultural or language issues arising in Mr Niazai's return to Kabul;
- ii) In failing to apply the *Devaseelan* principles to the finding of Judges Andonian and Pitt that Mr Niazai had not credibly shown himself to be out of touch with his family;
- iii) In failing to ascribe "little weight" to Mr Niazai's private life in accordance with s117B(5) NIAA 2002

### **The Response**

11. Mr Aitkin pointed out that there can be no doubt that the First-tier Tribunal was aware of the earlier determinations. It had expressly referred to them in its judgement and had directed itself to the *Devaseelan* principles at paragraphs 14, 34, 43, and 47 of the decision. The Tribunal had been entitled to draw its own conclusions as to the new material, namely: the country background reports on the difficulties faced by young returnees to Afghanistan, Mr Niazai's own evidence about his updated situation (and in particular his family and language ability), and the letter from the Red Cross, dated 12<sup>th</sup> August 2014. In respect of this latter document, which demonstrated that family tracing had been unsuccessful, it had been before the Robison tribunal but no findings had been made on it. As such it was plainly open to the Tribunal to make its own findings on this new material.

## Discussion and Findings

12. It is apparent from all of the decisions which precede my own that the primary focus of Mr Niazai's case has historically been his protection claim. Judges Andonian and Pitt were not concerned with Article 8 at all, given that Mr Niazai had leave to remain at that time. Judge Robison dealt with it in very brief measure and made no express findings on either of the factual issues raised in this appeal, namely whether Mr Niazai has lost the ability to speak Dari or Pashto and whether he has lost contact with his family. Judge Hanson did comment in the Secretary of State's favour in respect of both matters, but it is hard to see that when he did so it amounted to a new finding of fact: he simply adopted the findings of preceding Tribunals in the context of a discussion as to whether there was any 'error of law' in the protection decision of Judge Robison. There is no indication in the decision that Judge Hanson had regard to any up to date evidence about language when he made the comments that he did; nor is there any indication that either he or Judge Robison had considered or made findings on the evidence from the Red Cross that family tracing had yielded no results.
13. This is in contrast to the findings of Judge Nolan, who looked at those matters afresh through the prism of Article 8, whilst reminding himself of the earlier findings. See for instance the following passage at paragraph 50 (emphasis added):

"50....in this case what must be considered is the nature and quality of the years the appellant has spent in the UK as he is in a very different position from a person arriving in the UK as an adult, who has already grown up and spent their formative years in their country of origin. The appellant is also in a very different position from a young person who has lived in the UK from the age of 13-19 with their own family, as he arrived as an UASM and has been dependent upon the state and foster families from his arrival until he was considered able to live independently. **However, it was considered by the UT in February 2016 that the appellant had then been unable to demonstrate that he would be unable to re-adjust to life in Afghanistan. The appellant today gave evidence that he has lost much of his native language ability in Pashto and Dari, and that he instead now speaks fluent English.** The Appellant has been educated in the UK from the age of 13 years old, and has always been cared for by the state and foster families, and **I accept his evidence that he lost touch with his own family in Afghanistan and thus his foster families are the only family he has had since the age of 13.** Mr Aitkin submitted several pieces of

background information setting out the quite significant problems that young people experience after their forced removal back to Afghanistan, which include those problems common to all returnees (for example the difficulties finding accommodation and employment) and the particular difficulties faced by young returnees, especially those who are returned to Kabul without any family or other support networks to assist them in finding accommodation, employment or the other necessities of life....”

14. Judge Nolan made those findings on the evidence before him, having regard in particular to the direct oral evidence given by Mr Niazi. It cannot be said that he was oblivious to the significance of the earlier decisions (he made specific arrangements for these to be provided: see paragraph 23) or to the *Devaseelan* principles, which are repeatedly invoked throughout the determination. He has clearly reached a different conclusions - on the issues of language and family - to his predecessors, but I am unable to conclude that he did so in violation of the *Devaseelan* principles. He had regard to the earlier findings, but on the new, up to date evidence before him, reached a different conclusion.
15. I accordingly find that the Tribunal was entitled to conclude that the high test in paragraph 276ADE (1)(vi) was met, having regard to the cumulative weight of the factors identified at paragraphs 50 -52 of the decision. It follows that I need not address the second issue raised in the appeal, concerning the weight to be afforded to a private life developed under precarious circumstances. That is because paragraph 276ADE of the Rules reflects the Secretary of State for the Home Department’s view about where the balance should be struck in Article 8 cases. If an applicant shows he can meet the requirements therein, it follows that the Secretary of State must be satisfied that his removal would be disproportionate. Mr Avery accepted that this must be the case.

## **Decision**

16. For the reasons set out above I am not satisfied that the decision of the First-tier Tribunal contains a material error of law. The decision is upheld.
17. I was not asked to make an order for anonymity and on that facts of the case I see no reason to do so.

Upper Tribunal Judge Bruce  
2<sup>nd</sup> August 2017