



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/00333/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 July 2014**

**Oral determination given following
hearing**

**Determination Sent
On 28 July 2014**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAHEL KHAN

Respondent

Representation:

For the Appellant (Secretary of State): Mr G Saunders, Home Office Presenting Officer

For the Respondent (Mr Khan): Ms H Short, Counsel, instructed by Hammersmith and

Fulham Community Law Centre

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision made by First-tier Tribunal Judge Hembrough which is dated 22 April 2014 and was

promulgated shortly thereafter following a hearing at Hatton Cross on 7 April 2014. For ease of reference throughout this determination I shall refer to Mr Khan who was the original appellant as “the claimant” and to the Secretary of State who was the original respondent as “the Secretary of State”. The claimant’s appeal was against the decision of the Secretary of State refusing him further leave to remain and giving directions for his removal to Afghanistan under Section 47 of the Immigration, Asylum and Nationality Act 2006. The claimant submitted that he was entitled to asylum and that was the major part of his claim. For the reasons which follow it is not necessary for the purposes of this determination for his asylum claim to be examined in any detail at all. It is sufficient that I record that Judge Hembrough dismissed his appeal on asylum grounds and there has been no challenge against this part of his decision. However, I should record, as will be apparent below, the judge made positive findings with regard to the truthfulness of the claimant and also of his witnesses, and in particular his girlfriend Raubika Ali who is a British citizen of Iranian descent. Although the judge did not accept that the claimant was entitled to asylum he allowed the appeal under Article 8 and it is this aspect of his determination which is now challenged by the Secretary of State, permission to appeal having been granted by First-tier Tribunal Judge Cheales on 13 May 2014.

2. The grounds of appeal argue that the judge should have but did not follow the guidance given in *Gulshan* [2013] UKUT 00640 regarding which it is said (at paragraph 3 of the grounds) “that the Article 8 assessment shall only be carried out when there are compelling circumstances not recognised by [the] Rules”. It is said that “in this case the Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable”. At paragraph 2 of the grounds it had been argued that any Article 8 assessment should only be made after consideration under the Rules which, as found by the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192 are a complete code. At paragraph 4 of the grounds it is submitted that it is clear from the decision of this Tribunal in *Gulshan* that “an appeal should only be allowed where there are exceptional circumstances”. It is said that in *Nagre* [2013] EWHC 720 the Administrative Court (Sales J) had “endorsed the Secretary of State’s guidance on the meaning of exceptional circumstances, namely ones where refusal would lead to an unjustifiably harsh outcome”. It is said that “in this case the Tribunal has not followed this approach and thereby has erred”.
3. Then at paragraph 5 of the grounds it is submitted that the Tribunal had “failed to provide adequate reasons why the appellant’s circumstances are either compelling or exceptional”. The respondent then sets out her submissions with regard to the claimant’s circumstances as follows:

“It is submitted that the [claimant] has spent the majority of his life in Afghanistan including his youth and formative years and could fully re-adapt to life there. It is submitted that he has family in Afghanistan and it would not be unduly harsh for him to trace them

and resume contact with them once more. Despite his residence of five years, it is submitted that there is no evidence he has become estranged from his country of origin where he spent the first twelve years of his life. Any qualifications he has obtained in the UK could be used to obtain employment in Afghanistan. Any friendships and connections he has made in the UK could be continued via modern methods of communication and visits.”

4. Then at paragraph 6 of the grounds it is submitted that “had the Tribunal taken these issues into consideration they **would** [my emphasis] have found that the decision to remove is proportionate”. A Rule 24 response was settled by Counsel (Ms King, not Ms Short who appeared before the Tribunal today) in which answer is made to the grounds. There is no need to set out the contents of this response in full at this stage.

The Hearing

5. I heard submissions on behalf of both parties, and I am grateful to both Mr Saunders and Ms Short for the succinct manner in which their respective arguments were put before me. I recorded the submissions contemporaneously and as these submissions are set out in my Record of Proceedings it will not be necessary for me to repeat everything which was said during the course of the hearing. I have however had regard to everything which was said as well as to all the documents contained within the file whether or not the same is specifically referred to below.
6. On behalf of the Secretary of State Mr Saunders relied on the grounds and submitted that following the decision of this Tribunal in *Gulshan* before considering Article 8 outside the provisions of the Rules one first had to find that circumstances exist which had been variously formulated as “compelling circumstances” or something leading to “unjustifiably harsh” consequence. Although it was accepted that as submitted in the Rule 24 response exceptionality was not a test, nonetheless the *Gulshan* test had to be formulated in terms of compelling circumstances. What was said on behalf of the Secretary of State in this case was that the judge had proceeded straight to an assessment of Article 8 proportionality without first going through the necessary intervening step of deciding whether or not there were circumstances which took the case outside Article 8 as formulated now within paragraph 276ADE of the Rules or elsewhere within the Rules.
7. On behalf of the claimant Ms Short submitted first of all that the argument that the claimant had spent the majority of his life in Afghanistan was misleading. It was of course correct and a matter of fact that the claimant had been in this country six years and he was now 18 but these were the most formative years of his life. Ms Short reminded the Tribunal that no complaints had been made by or on behalf of the Secretary of State with regard to the judge’s fact-finding. In this case the judge had found that the claimant was a truthful witness who had been in this country for six years, he was in a genuine relationship, he was training

as an electrician and had made the most of his education. He has regular contact with his foster carers. At a later stage in her argument Ms Short also reminded the Tribunal that the judge had accepted that he had no current contact with his family in Afghanistan and it was not clear whether or not he would be able to get back into contact with that family were he to return.

8. With regard to the argument set out at paragraph 2 of the grounds that the judge had not considered when making his Article 8 assessment the provisions of the Rules (“that was not done in this case”) this was clearly wrong because it is plain from paragraph 41 of the determination that the judge was fully aware of the fact that the claimant could not succeed under paragraph 276ADE of the Rules. I set out the relevant paragraph in which the judge stated as follows:

“41. As regards Article 8 the appellant has no family in the UK and the provisions of Appendix FM of the Immigration Rules are therefore inapplicable. It was accepted in submissions that [he] could not meet the requirements of paragraph 276ADE...”.

9. The judge then stated that he was then going on to consider the Article 8 position with regard to “the existing domestic and European jurisprudence” in light of the guidance given in *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (this is a reference to the Tribunal decision and not to the Court of Appeal decision, but nothing turns on this in my judgment because the principle is the same which is that this is a two-stage process) and *Izuazu (Article 8 – new rules)* [2013] UKUT 45. Ms Short then submitted that one could not sensibly find either “compelling circumstances” or “unjustifiably harsh” circumstances without carrying out of an assessment of what was important under Article 8. This exercise could not be carried out in a vacuum. If the Secretary of State’s arguments had any merit a court would have to do a three-stage test. First a Tribunal or court would have to consider whether or not a claim could succeed under 276ADE. Then the Tribunal would have to consider whether there were exceptional circumstances which entitled the Tribunal to consider whether or not the claimant might nonetheless succeed but then, thirdly, there would have to be an Article 8 proportionality assessment. It was the claimant’s submission that if it were apparent there was nothing of substance in the Article 8 claim then in those circumstances one did not need to carry out a second-stage assessment, but if there might be something in that claim it would be otiose to carry out the same test twice because the same circumstances would be applicable. In this case the factors which needed to be considered were precisely the factors which were considered by the judge. These were that the claimant had been in this country for six years which were the formative years of his life; he had had no contact with his family; he was in a strong relationship with his girlfriend; he had weakened societal and cultural ties with his country of origin; and he had no experience as an adult in that country. These were the same circumstances which found his

positive Article 8 claim and the compelling or unjustifiably harsh circumstances on which he relies.

10. Ms Short submitted that it was very important that the Secretary of State is not saying that no rational decision-maker could have come to this conclusion and on this point Mr Saunders accepted that he could not properly mount a perversity challenge to the decision, notwithstanding the way in which the Secretary of State's submissions had been drafted at paragraph 6. Mr Saunders accepted that "that would be too high a hurdle".
11. Ms Short reminded the Tribunal of the factors which had been identified on behalf of the Secretary of State as being relevant at paragraph 5 of the grounds but explained why these factors were not arguable. It was said at paragraph 5 that there was "no evidence that [the claimant] has become estranged from his country of origin where he spent the first twelve years of his life". In fact the judge had found at paragraph 46 of his determination that "his social and cultural ties to his country of origin have significantly weakened during the time he has been in the UK" (and I note in this regard that there had been no challenges made to this fact-finding).
12. Also, although it was said on behalf of the Secretary of State that there was no evidence that the claimant had become estranged from his country of origin, the judge had found that the claimant "had no experience of living independently in Afghanistan and had never even visited Kabul as a child".
13. It is also said in paragraph 5 of the grounds that the claimant had "spent the first twelve years of his life in Afghanistan" which (earlier) was said to include "his youth and formative years". That was not consistent with the judge's finding at paragraph 49 that the claimant had "spent the majority of his youth here". In effect the argument at paragraph 5 was simply trying to go behind the judge's findings and so the assertion at paragraph 6 of the grounds could not stand either.

Discussion

14. Although a different judge might have come to a different conclusion it is clear in my judgment that the judge did approach his task properly. He first of all considered whether or not the claimant could succeed under paragraph 276ADE but as it was not suggested on behalf of the claimant before him that he could, he did not need to do more than say as he did at paragraph 41 that the provisions of Appendix FM of the Rules were "inapplicable" and that it was also accepted that he could not meet the requirements of paragraph 276ADE. Thereafter he had to consider whether or not there was anything sufficiently compelling about the Article 8 claim and he did this by considering the established jurisprudence. As I observed to Mr Saunders during the course of the hearing and I emphasise this now, at paragraph 50 the judge found as follows:

“50. Looking at the evidence before me in the round I find that it would now be unduly harsh to remove the appellant to Afghanistan and that his removal is not proportionate to the legitimate aim identified above.”

15. Given that the judge found that the claimant’s removal would be “unduly harsh” he could not have come to any other finding than that there were compelling reasons why he should consider the claimant’s position outside paragraph 276ADE of the Rules. The judge identified within his determination those factors which led him to the conclusion that the removal of this claimant would be unduly harsh. These have already been set out above and were that he spent his formative years of his youth here (in my judgment the judge was entitled to place great weight on the fact that the six years the claimant had spent in this country were from the ages of 12 to 18) that he had no current contact with his family, that he had a strong relationship with his girlfriend, that he had no experience as an adult in Afghanistan and that his societal and cultural ties with that country had been significantly weakened. As Mr Saunders has accepted that a perversity challenge cannot properly be mounted, in my judgment there is no other basis upon which this judge’s findings can be challenged. He asked himself the right questions and he has given adequate reasons for answering those questions in the way in which he did. His finding that the removal of this claimant to Afghanistan in the circumstances as he found them to be from the evidence which he heard was open to him and there is no error of law in his approach. It follows that this appeal by the Secretary of State must be dismissed and I so find.

Decision

There being no error of law in the determination of the First-tier Tribunal the appeal by the Secretary of State is dismissed and the decision of the First-tier Tribunal allowing the appeal of the claimant under Article 8 is affirmed.

Signed:

Dated: 21 July 2014

Upper Tribunal Judge Craig