



IAC-AH-PC-V2

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

Appeal Number: AA/00413/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16th April 2014**

**Determination
Promulgated
On 7th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR ZU
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iqbal, Counsel

For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Afghanistan born on 1st January 1996. The Appellant claimed asylum in the UK on 4th December 2009. His application for asylum was refused on 18th January 2010 and he was subsequently

granted discretionary leave until 12th May 2013. On 7th January 2014 the Appellant's application for further leave to remain in the United Kingdom was refused. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Meah sitting at Taylor House on 18th February 2014. In a determination promulgated on 19th February 2014 the Appellant's appeal was allowed on asylum grounds and pursuant to Article 3 and Article 8.

2. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 3rd March 2014 and on 12th March 2014 First-tier Tribunal Judge Foudy granted permission to appeal. Judge Foudy noted that the grounds argued that the judge had failed to give reasons as to why he found there was no sufficiency of protection in Kabul and also that the grounds argued that the judge misdirected himself with regard to Article 8 in that the judge did not consider the Immigration Rules and the decision in *Gulshan [2013] UKUT 00640*. On 3rd April 2014 the instructed solicitors for Mr ZU filed a detailed Rule 24 response. That Rule 24 response submitted that the test is not one of sufficiency of protection when considering the issues of internal relocation and that an individual holistic assessment of all relevant factors is required as set out in *AH (Sudan) v SSHD [2007] UKHL 49*. Further so far as the claim pursuant to Article 8 is concerned the Rule 24 response notes that whilst the judge did not cite *Gulshan* it is submitted that he clearly followed the guidance from the Tribunal on Article 8 approaches and that at paragraph 25 the judge has acknowledged that the Immigration Rules could not be satisfied. The Rule 24 request asks me to dismiss the appeal and to find that there is no material error of law.
3. It is on that basis that the appeal comes before me. The Appellant is represented by his instructed Counsel Ms Iqbal, Ms Iqbal is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Deller. This is an appeal by the Secretary of State. However for the purpose of continuity throughout proceedings Mr ZU is referred to as the Appellant herein and the Secretary of State as the Respondent.

Submissions/Discussion

4. Mr Deller starts by making the very appropriate and proper concession that if I do not find there is an error of law under Article 3 of the European Convention of Human Rights then Article 8 is academic. He considers the question of consideration of the purported lack of adequate reasoning on the question of sufficiency of protection as to the risk on return to be the starting point.
5. Mr Deller contends that at paragraph 24 of his determination the judge made a loose comment on whether there is a risk of return to Kabul and that the judge has not dealt with the proper standard by saying that the risk does not go away if the Appellant is returned there. He accepts that there is some reference to case law in the determination but at first blush contends that the judge has not gone into sufficient detail to consider

whether or not Kabul is a reasonable safe place for the Appellant to be returned to. He submits that the dates are important noting that the hearing before the First-tier Tribunal Judge was only a month after the Appellant's 18th birthday. He accepts that 18 is not a "magic number" but still contends that there has to be some sort of analysis carried out as to whether or not the case law has been examined and that this is what the Immigration Judge has not done. He submits that the judge needs to have said more about why the Appellant could not be returned to Kabul. He does not seek to challenge the judge's findings so far as any return to Helmand is concerned.

6. So far as Article 8 is concerned Mr Deller contends that the key question is whether or not the judge has safely carried out the appropriate approach. He contends it is difficult without mentioning authorities to make a conclusion and the judge needs to show the principles that have been adhered to and that his reasoning in paragraph 34 is not sufficiently clear. He submits it is impossible to consider whether or not the judge did apply a "*Gulshan* approach" and as to use Mr Deller's words "why the Appellant is good enough to win if he doesn't meet the Immigration Rules." He asked me to find generally there are material errors of law and to set aside the judgment and to remit it to the First-tier Tribunal for rehearing.
7. Ms Iqbal relies on the Rule 24 response (of which she is the author). She submits in the first instance that the Secretary of State is getting the test wrong and as the Rule 24 response points out the test is not one of sufficiency of protection when considering the issue of internal relocation. She submits therefore that the first ground is not made out if it is considered that there has been a lack of adequate reasons given she submits that this has been addressed by the manner in which the judge has clearly set out his findings having analysed the Appellant's circumstances at paragraph 16 to 23 that:
 - (i) The Appellant was an individual who he believed had not been able to contact his family in Afghanistan despite attempts by him.
 - (ii) That there had been no attempts whatsoever by the Respondent in relation to this matter to trace the Appellant's family.
 - (iii) The Appellant had only just turned 18 at date of hearing and therefore the judge found merit in the Argument that there was "no bright line" across which the risks to, and the needs of, a child suddenly disappear.

That of course is an extract from the judgment in *JS (former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00568*.

8. Ms Iqbal points out that the judge has found that the appellant is at risk on return to his home area and has made an essential conclusion at paragraph 24 that he cannot return either to Helmand or Kabul because he is vulnerable. She submits it is necessary to look at the individual

circumstances of each case and that the judge has done this at paragraph 21 pointing out that he has had no contact with family members and that cumulatively the judge has looked at the relevant factors and has not carried out a mere “tick box” approach. Consequently she submits that the judge has made no material error of law in his assessment.

9. So far as the claim pursuant to Article 8 is concerned she accepts that there is no reference to the authority of *Gulshan* but submits that that does not matter provided the judge has adopted the correct approach and considered the correct principles which he has done. She submits that the judge has set out specific factors from paragraphs 28 to 34 which were not covered by the Immigration Rules but were of a compelling nature such as to make removal disproportionate. She states that it is important to look at the links that the appellant has built in the UK, that he has been here for some three years and that he was of a young age when he arrived and that he has made close family links with his foster family. Such factors were she submits similar to those considered in *Gulshan* and are compelling. Consequently she submits that there is no material error of law.
10. In response Mr Deller points out that with the failure to recite *Gulshan* it is necessary to look at what has been said in the judgment and that this is limited to a very few lines. He submits that the judge has not gone into sufficient detail and that if someone is to succeed under Article 8 then that is a matter of discretion, it is for the judge to set out why having given a detailed analysis that a case should post-*Gulshan* succeed under Article 8 and that the judge has failed to do so.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge’s factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge’s assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because

an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

13. The thrust of the Secretary of State in this challenge is put on two fronts, firstly that the First-tier Judge failed to apply the appropriate standard of proof, and secondly, he found that the risk of being forcibly recruited did not go away even in Kabul. I have heard detailed submissions on this point. I am not satisfied that there is a material error of law in the judge's decision. The issues are addressed between paragraph 16 and 24 of the determination. Paragraph 16 to 23 set out the evidence that was heard and took due consideration of the authority of *JS*. The judge made findings at paragraph 24. He analysed the position on return to Helmand and made a proper analysis; this being one that is actually conceded by Mr Deller as being a sustainable fact. Thereafter he made conclusions have previously analysed the Appellant's circumstances and made a finding that given the vulnerability of the Appellant together with the lack of family support (which the judge had directed himself to earlier in his determination) led to the conclusion there was a risk of the Appellant being forcibly recruited even in Kabul.
14. The judge has therefore carried out a proper and reasoned analysis fully supported as to why internal relocation would not be reasonable in the Appellant's circumstances. The correct test is whether it was reasonable on the facts of this particular Appellant's case for him to relocate to Kabul. The judge concluded that it was not reasonable and has given full and detailed reasons for reaching this conclusion. In such circumstances the decision does not therefore disclose any material error of law.
15. The second argument of the Secretary of State relates to whether or not the judge made a material error of law by failing to identify any exceptional or compelling reasons for ignoring the Rules and proceeding straight to the consideration of Article 8 jurisprudence. Mr Deller has been open enough as stated earlier in this determination to state that if there is no error of law with regard to the judge's analysis under Articles 2 and 3 (which there is not) then it could be easily argued that any analysis under Article 8 is academic. It is however for the judge to go on and properly make an Article 8 assessment. The Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad*:

"Where an area of the Rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to

go on to consider whether there are compelling circumstances not sufficiently recognised under them.”

16. That is the legal approach that should be adopted. Whilst there is no reference to any relevant authorities save to the guiding principles set out in Razgar in the judge’s determination it is clear from the judge’s findings in paragraph 34 the judge has considered this matter under Article 8 and therefore seemingly concedes that the appeal cannot succeed under the Immigration Rules. However at paragraph 34 the judge makes findings that the Appellant has a significant private life in the UK during the time he has remained in the UK lawfully and that when this is considered alongside his substantial family life rights it is sufficient to tip the overall Article 8 proportionality assessment and balance in his favour. Those submissions when looked at alongside the detailed specific factors that the judge has set out at paragraphs 28 to 33 of his determination represent findings of such compelling circumstances in the judge’s assessment as to make removal disproportionate. Thus whilst the judge has not specifically referred to the authorities he has approached the principles and whether any other judge would have come to a similar finding is not a matter that is before me. It is not argued that the decision is perverse. Further as mentioned above it remains a matter of debate as to the relevance of such a finding bearing in mind there was no error of law in the decision based on both asylum and Article 3. In such circumstances I am satisfied that overall there is no material error of law in the decision of the First-tier Tribunal and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Decision

The decision of the First-tier Tribunal does not disclose a material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

An anonymity order was made under Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

16th April 2014