



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

Appeal Number: AA/07807/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court

**Determination
Promulgated**

On 16th May 2014

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Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR H H
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bedford (Counsel)

For the Respondent: Mr N Smart, (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Pirotta promulgated on 12th December 2013, following a hearing at Birmingham Sheldon Court on 4th December 2013. In the determination, the judge dismissed the appeal of the Appellant, who applied for, and was

subsequently granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan who was born on 6th May 1978. He appeals against the decision of the Respondent Secretary of State dated 20th June 2013 to refuse to grant him asylum and to refuse to grant him humanitarian protection.

The Appellant's Claim

3. The Appellant's claim is that when he claimed asylum in September 2008, he did so on the basis that he had joined the Taliban in 1998, was paid to fight for them until 2001, but was now at risk after escaping from the Taliban (paragraph 14) putting him at risk both from the Taliban and from the government forces who are looking for people associated with the Taliban (paragraph 29). In Afghanistan, the Appellant had been a village leader. He was then selected as a commander for the Taliban in 1998. This was after the Taliban had killed his father in 1996, who was also a commander in the Taliban, leading to the Appellant then replacing his father as a commander.

The Judge's Findings

4. The judge did not find the Appellant to be a credible witness of fact. She held that it was simply implausible for the Appellant to assert that he was selected as a commander for the Taliban in 1998 after his father had been killed by the Taliban in 1996. There were two reasons for this.
5. First, there was a gap of two years between 1996 and 1998, and the suggestion that there would be a vacuum in the leadership of a fighting body for two years was simply not credible. Second, the Appellant's appointment as a commander was not credible, not only because he had no combat or leadership experience, but also because to appoint a man as a commander whose father had been killed, was not plausible lest he held some animosity towards the Taliban and harmed their cause (paragraph 28).
6. The judge also was not satisfied that the Appellant had discharged the burden of proof upon him that the government was attempting to arrest him (paragraph 29). The two witnesses who appeared on behalf of the Appellant at the hearing, namely Mr F and Mr N were not plausible in the evidence that they gave (see paragraphs 30 to 35). It was true that the Secretary of State had delayed some four years between the making of

the application in 2008 and the giving of the decision in 2013 “but there is no evidence that the Appellant has suffered disadvantage or prejudice by the delay and he had no legitimate expectation of being permitted to stay in the circumstances” (paragraph 43).

7. Finally, consideration was given to the Appellant’s Article 8 rights “but he has not submitted any evidence of private and family life, though he has been in the United Kingdom since 2007” and “there is no evidence of family life, dependency other than normal adult ties or friendships” and “there is no evidence of current education or work” (paragraph 48). The appeal was dismissed.

Grounds of Appeal

8. The Grounds of Appeal state that the judge erred in her consideration of the Article 8 claim because she did not adopt the five stage approach recommended in **Razgar [2004] 2 AC 368**, and failed to give proper consideration to the unexplained delay in the Respondent dealing with the Appellant’s application.
9. On 14th January 2014, permission to appeal was granted on the basis that consideration of the alleged delay in the Respondent’s consideration of the Appellant’s application was arguably inadequate.
10. On 21st February 2014, a Rule 24 response was entered by the Respondent Secretary of State to the effect that the Appellant’s account was not credible and the judge had given several adequate and cogent reasons for finding that the Appellant was lacking in credibility. In any event, as far as Article 8 was concerned the case of **Nagre** and **MF (Nigeria)** make it clear that there have to be “compelling circumstances” for an Appellant to succeed under Article 8.

Submissions

11. At the hearing before me on 16th May 2014, Mr Bedford, of Counsel, appeared on behalf of the Appellant. He handed up a very well compiled bundle of authorities, containing nine decisions, which he carefully took me through. Mr Bedford had three submissions before me. First, there was the manner in which the judge had made her final conclusions. She had ended with the statement that, “the Appellant is not a credible witness and I reject the claim that he was sought as implausible ...” (paragraph 39). Mr Bedford submitted that it was not enough for the judge to say that the Appellant was “implausible” because proper reasons had to be given for why his account lacked credibility. This had not been done in the preceding paragraphs of the determination from paragraph 31 onwards to paragraph 38. Mr Bedford relied upon the well-known

judgment of **HK [2006] EWCA Civ. 1037**, which appeared at Tab 4 of his bundle.

12. That was a case, submitted Mr Bedford, where the court had referred to the determination of the Tribunal below as being one which was described as being a “careful decision” (see paragraph 31), and the court had gone on to consider the approach to credibility finding, which was directly relevant to the instant case (see paragraphs 33 to 41 in particular). It had said that “the Tribunal has, quite rightly, given its reasons for not believing HK’s evidence, and it is incumbent on us to see whether those reasons bear analysis” (para 33). Yet, the court has still found the determination below to be in error.
13. Second, submitted Mr Bedford, there were two witnesses in the present case who had appeared on behalf of the Appellant. They were referred to in the determination by the judge as a “Mr F” and a “Mr N” (see paragraphs 32 to 33). Yet, the judge dismissed their evidence even though she was unable to say that their credibility was impugned in any way. In **HK** there were lessons to be drawn in this respect as well (see paragraphs 46 to 48) as the Court had referred to cases such as these “will normally involve an appellant from a very different cultural background from that of the Tribunal” (para 46). What was important in the instant case was that the Appellant’s story was not contradicted in any way by the background evidence. Third, there was the question of Article 8 rights.
14. The judge had failed to follow the “**Razgar** principles”, when making her decision at paragraphs 48 to 49, where she had simply said that “the Appellant sought to engage Article 8 but he has not submitted any evidence of private and family life though he has been in the United Kingdom since 2007” (paragraph 48).
15. Mr Bedford submitted that it was accepted that the Appellant did not fall under paragraph 276ADE(v), but he had applied in 2008, and his application had only been rejected in 2013, several years afterwards, and corrective relief should now be given him (see **EA (Afghanistan)**), because the Appellant’s claim had not been determined within one year.
16. In reply, Mr Smart submitted that he would rely upon the Rule 24 response. This was a case where the Appellant was simply not credible. In **HK [2006] EWCA Civ. 1037** the evidence regarding the appellant concerned “some aspects of this evidence which might otherwise have seemed dubious (eg: the existence of the Wunde, the initiation, the scarring on the chest, the use of biting ants, the presence of body parts and three leaves of the path, the presence of a Temne speaker)” where cultural knowledge was essential (para 41). This is because the Appellant’s case was that that some men had taken the Appellant for a walk, dug a hole in the ground, and forced him to put his private parts into the hole, thus enabling the ants in the forest to bite away at him – all of which was

designed to amount to some character building initiation ritual. The judge disbelieved this account. The expert said it was plausible.

17. The Court of Appeal said that the judge should not have disbelieved an improbable story from the advantage point of a judge in the United Kingdom, but should have taken into account what was said in the expert report. Here there was no expert. There is no question of an improbable story. There is simply the question as to the judge making findings of fact on the basis of what the witnesses themselves said. The fact was that the judge's findings were extremely thorough. This is clear from paragraph 28 of the determination. At paragraph 32, the judge makes findings that were entirely open to her.
18. Two witnesses had turned up at the hearing, and Mr Bedford's submissions were that witnesses would not willingly perjure themselves. However, perjury was not the issue. What the judge found as a fact was that one of the witnesses "gave quantitative descriptions of the location of the meeting" (paragraph 33). It was difficult to see why this was not a finding that the judge could make.
19. Finally, as far as Article 8 was concerned there was a wealth of recent case law in the form of **Gulshan [2013] UKUT 00640, Nagre, MF (Nigeria)** and others, which confirmed that the Immigration Rules on Article 8 were a complete code. Only if there are compelling circumstances, is the case made out for going outside the Immigration Rules and looking at freestanding Article 8 jurisprudence. In this case, the Appellant himself would offer no evidence at all about his Article 8 rights. That left the question of delay alone. However, delay was relevant only insofar as it pointed to the existence and creation of Article 8 rights. Delay in itself was not indicative of an Article 8 right per se.
20. In reply, Mr Bedford submitted that he would summarise his arguments as follows. First, if the Appellant's father was a commander then the son would be a commander regardless of the experience that he had (see paragraph 32). If the Secretary of State delayed in making a decision then the judgment of Mr Justice Collins in **FH** (at paragraph 8 and paragraph 25) applied as did the case of **MK** (see Tab 5), because this was a case of unreasonable delay (paragraphs 34 and 35). If the delay was such as to be unacceptable and unreasonable then the direct effect of this was that the decision subsequently reached was an unlawful decision and on that basis alone it stood to be set aside.

No Error of Law

21. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside that decision. I come to this conclusion notwithstanding Mr Bedford's valiant efforts to persuade me otherwise.

My reasons are as follows. First, as far as the question of credibility findings were made by the judge, it is clear that these findings were open to the judge, and were properly arrived at. The nub of the claim is assessed at paragraph 28 of the determination. Mr Bedford did not explain why the judge could not have concluded, as she did, that if the Appellant's father died in 1996 as a commander of the Taliban, there would be a gap of two years before the Appellant himself was made a commander.

22. The judge did not consider this to be plausible. She did not consider it to be plausible not least because, on the basis of the Appellant's case, the Taliban "then installed a man they did not know, who had no combat or leadership experience, when there are others who have already been members and had fought in the past, who would have been better suited to the task". In fact, the judge also explains that, "nor is it credible that the Taliban would appoint a man as a commander whose father they had killed, lest he held some animosity towards them and harmed their cause" (paragraph 28).
23. In short, there is not one reason, but many reasons, that the judge gives for finding this claim to be inherently implausible. The judge was entitled to do so. It has to be borne in mind that the Taliban had themselves killed the Appellant's father. The judge held that it did not make sense for the Taliban to then appoint the Appellant as a commander in his father's place.
24. Second, there is a question of the witnesses. It is said that by analogy with what was said in **HK**, just because something is found to be unlikely, did not mean that it was not likely to have happened, and my attention was drawn to the expert evidence in that case. However, the position here is markedly different. There was the evidence of Mr F. It was said that this "witness knew his father but the only link between the Appellant and M H is the Appellant's evidence that the Appellant told the witness, Mr F, that that man was his father" (paragraph 32) and the judge held that, "it is not credible that a commander would leave the scene of the fight and to accompany injured men to a clinic" (paragraph 32). There was Mr N. The judge explained why his evidence was not credible (paragraph 33). The judge referred to the "contradictory descriptions of the location of the meeting" (paragraph 33). The judge also referred to the fact that when a description was given the "description was completely different from the appearance of the man the witness met in the mosque in Smethwick fifteen years later" (paragraph 34).
25. In any event, as the judge explains "the witness said he heard and saw him only for a short time as the other man was doing most of the talking, he did not pay much attention to the man who was not speaking" (paragraph 35).
26. Accordingly, it is not a question of a witness perjuring himself. It is simply a question of whether the judge can give decisive weight to the evidence

given by such a witness. In this case, the judge held that she could not give decisive weight in the manner required by the Appellant.

27. Finally, there is the question of Article 8. There are two points here. First, the Appellant himself had “not submitted any evidence of private and family life, though he has been in the United Kingdom since 2007” and the judge held that “there is no evidence of family life, dependency other than normal adult ties or friendships” and “there is no evidence of current education or work” (paragraph 48). The Appellant could not succeed under the Immigration Rules. It was unnecessary for the judge to go outside the Immigration Rules to look at Article 8 jurisprudence from the Strasbourg court.
28. This is now clear following **Nagre [2013]** and **MF (Nigeria) [2013]** as well as most importantly **Gulshan [2013] UKUT 00640**. Second, there is the question of delay. In this case, as Mr Smart submitted, the fact that the Appellant claimed to have been a commander in the Taliban was something that possibly required a greater degree of investigation by the Secretary of State, than would otherwise have been the case, and this led to some delay. That may or not be true. What is important is that this was not an Appellant who previously had the benefit of falling under a particular policy, as would be the case of a child whose family had to be traced under Regulation 6 by the Secretary of State and where this had not happened.
29. This leaves simply the case of delay as a delay. Delay per se is not evidence of Article 8 rights. The logic of the argument in **EB (Kosovo)** by the House of Lords was to the effect that delay can enable a person to cast down roots and to develop their Article 8 rights.
30. In this case the judge found that there was no such evidence presented before her. The judge was entitled to do so. Delay in itself amounted to nothing. Accordingly, there is no error of law.

Decision

31. There is no material error of law in the original judge’s decision. The determination shall stand.
32. Anonymity order made.

Signed

Date

Deputy Upper Tribunal Judge Juss

5th June 2014

