



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09722/2013

THE IMMIGRATION ACTS

Heard at Field House
On 8 May 2014

Determination Sent

Before

UPPER TRIBUNAL JUDGE FREEMAN
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MIN
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A. Radford, Counsel instructed by JD Spicer Zeb Solicitors
For the Respondent: Mr T. Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before us following a grant of permission by a judge of the Upper Tribunal in relation to a decision of First-tier Tribunal Judge Cameron who

dismissed the appellant's appeal against a decision to refuse to vary leave to remain.

2. The appellant is a citizen of Afghanistan, born on 24 September 1994. He arrived in the UK on 14 November 2009 and claimed asylum on 26 November 2009. His application was refused but on 12 February 2010 he was granted discretionary leave to remain until 24 March 2012, albeit that the notice of decision refusing further leave to remain wrongly states that he was granted leave until 24 March 2010. That discretionary leave was granted on the basis that he was an unaccompanied minor seeking asylum.
3. The appellant appealed against the decision to refuse to grant him asylum (presumably under section 83 of the Nationality, Immigration and Asylum Act 2002) and his appeal came before Immigration Judge R.G. Walters on 7 June 2010. Judge Walters dismissed the appeal. Following a grant of permission to appeal the matter next came before Senior Immigration Judge Jordan and Deputy Upper Tribunal Judge Dawson on 4 October 2010. That Panel of the Upper Tribunal concluded that there was no "material" error of law in Judge Walters' decision, in fact finding no error of law at all.
4. An application made to the Upper Tribunal for permission to appeal to the Court of Appeal, in relation to the decision of the Upper Tribunal, was refused. We are not aware of whether the application was renewed to the Court of Appeal. If it was, the application must have been refused since we have not been informed of any such successful application.
5. The appellant then made an application on 23 February 2012 to vary his leave to remain. The application was refused and First-tier Judge Cameron heard his appeal on 22 November 2013. Permission to appeal was granted by a judge of the Upper Tribunal on the basis that it was "just" arguable that in reaching a decision as to risk on return as a 19 year old the judge failed to make adequate findings, which may have had an impact on the Article 8, refugee and humanitarian protection grounds. Other grounds were not however, excluded from the grant of permission.

Submissions

6. Ms Radford relied on the grounds of appeal to the Upper Tribunal. It was submitted that this was an unusual case in terms of the 'tracing' requirement because the appellant was in contact with his parents when he arrived but there were practical difficulties with the mobile phone contact.
7. The Respondent had failed to undertake tracing. The First-tier Tribunal was wrong to conclude that the Respondent had undertaken tracing. The Red Cross had attempted tracing in 2012 but that was years too late. In the asylum interview the appellant had stated that he had the telephone number for his family but the Respondent never sought to ask for the number. Had an effort been made to trace the appellant's family, information could have been provided that was relevant to

the asylum claim. The result of the Respondent's failure was that the appellant had lost contact with his family, which could not be regained.

8. The First-tier Tribunal's decision was based on the assumption that his family could meet him in Kabul. The decision of the Upper Tribunal in relation to the determination of Immigration Judge Walters was based on the decision in LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005 but it is now clear from KA (Afghanistan) [2012] EWCA Civ 1014 that the policy was not to undertake the duty to trace, or help trace relations of unaccompanied minor asylum-seekers. The appellant was dependent on the State to help him with contact with his family. If the Tribunal had been aware that he was not going to get that help, he would have been recognised as a refugee in accordance with LQ.
9. The failure to trace has meant that there is no durable solution in relation to the situation regarding the appellant's family. As a result of the failure of the Respondent the appellant had established a life in the UK for a period of four years. Return to Afghanistan now would be significantly more difficult.
10. As was said in KA, the difficulties that a young person would face do not cease on a person reaching the age of 18 years. The appellant would be at risk of destitution, exploitation, lack of access to education and indiscriminate violence.
11. In relation to humanitarian protection, there is a risk of indiscriminate violence in the appellant's home area. There was background evidence in relation to Laghman Province. In relation to relocation to Kabul, there was a different test of 'reasonableness'.
12. As to Article 8, the judge had been wrong to take into account that the appellant did not meet the requirements of the 'new' Article 8 rules. The First-tier judge did not spell out what the public interest in the appellant's removal was. There was a significant delay of 20 months before the Respondent made the decision to refuse to vary leave to remain. The Respondent bore the burden of proving that his removal was necessary for the enforcement of immigration control, taking into account the unlawful acts of the Respondent in terms of failure to trace and delay.
13. Mr Melvin submitted that the tracing issue was based on hypothetical assumptions, in terms of what could or could not have been established. The fact that the appellant's family obviously spent a large sum of money sending him to the UK suggests that it would be unlikely that any tracing would have been of assistance, since they would not have wanted to jeopardize their investment by facilitating his return to them. The failure to trace should be balanced against the over five years that he has been in the UK and the education that has been provided to him.
14. As indicated in KA there is support provided to failed asylum seekers returning to Afghanistan. The argument in relation to destitution and exploitation is not borne out by the country guidance.

15. As regards Article 8, the judge had made an assessment of his private life in the UK. He was now an adult and his underlying asylum claim was not accepted. It would be safe for him to return to Kabul as a young, able-bodied adult. Any error of law in relation to the issue of delay was not material.

Our assessment

16. The duty on the Secretary of State to endeavour to trace arises from Article 19(3) of Council Directive 2004/83/EC as implemented by the Asylum Seekers (Reception Conditions) Regulations 2005 ("the 2005 Regulations"). Often referred to in shorthand as 'the duty to trace', it is more accurately described as a duty to endeavour to trace. However, we adopt the common shorthand expression.
17. It is apparent from [84]-[86] of his determination that Judge Cameron concluded that the Respondent had attempted to trace the appellant's family. At [84], referring to the original reasons for refusal letter dated 12 February 2010 at [41], he stated that "the respondent must have made some attempt to contact the appellant's family members in Afghanistan". The refusal letter states that "we are unable to make contact with your family members in Afghanistan". At [85] the judge repeated that it appeared that there had been an attempt to trace and at [86] stated that he did not accept the submission that there had been a failure to exercise the duty to trace.
18. We are satisfied that Judge Cameron was wrong in his conclusion that the Respondent had undertaken any tracing duty. As is pointed out in Ms Radford's grounds, the reasons for refusal letter dated 14 October 2013 makes it clear that there was no effort on the part of the Respondent to undertake any tracing. At [55] it states that "You are now over 18 and family tracing has not been conducted in your case." At [57] the letter states that "Consideration has been given as to whether you have been disadvantaged due to the Home Office not initiating family tracing at this time." Paragraphs 61 and 62 of the refusal letter contain similar remarks.
19. In submissions at the hearing before Judge Cameron it was not suggested on behalf of the Respondent that there had been any effort to undertake tracing. Mr Melvin was similarly not able to provide us with any information on the point. Given the extent to which this has been a live issue at least ever since the hearing before Judge Cameron, and taking into account what is said in the refusal letter to which we have referred, we are entirely satisfied that the respondent did fail to undertake the tracing duty required of her under the 2005 Regulations, and in concluding otherwise there was an error of fact in the judge's decision amounting to an error of law. However, it does not necessarily follow that it is an error of law requiring the decision to be set aside.

20. Ms Radford submits that the failure of the respondent's duty in this regard may have had an impact on the determination of the asylum claim, and as an unaccompanied minor he would have been entitled to refugee status.
21. The Court of Appeal in EU (Afghanistan) [2013] EWCA Civ 32 considered issues concerning cases where there was such a failure of the Secretary of State's duty. At [5] a passage from the judgment of Maurice Kay LJ in KA (Afghanistan) was cited, as follows:

"There is a hypothetical spectrum. At one end is an applicant who gives a credible and cooperative account of having no surviving family in Afghanistan or of having lost touch with surviving family members and having failed, notwithstanding his best endeavours, to re-establish contact. It seems to me that, even if he has reached the age of 18 by the time his appeal is considered by the tribunal, he may, depending on the totality of the established facts, have the basis of a successful appeal by availing himself of the Rashid/S principle and/or section 55 by reference to the failure of the Secretary of State to discharge the duty to endeavour to trace. In such a case Ravichandran would not be an insurmountable obstacle. At the other end of the spectrum is an applicant whose claim to have no surviving family in Afghanistan is disbelieved and in respect of whom it is found that he has been uncooperative so as to frustrate any attempt to trace his family. In such a case, again depending on the totality of established facts, he may have put himself beyond the bite of the protective and corrective principle. This would not be because the law seeks to punish him for his mendacity but because he has failed to prove the risk on return and because there would be no causative link between the Secretary of State's breach of duty and his claim to protection. Whereas, in the first case, the applicant may have lost the opportunity of corroborating his evidence about the absence of support in Afghanistan by reference to a negative result from the properly discharged duty to endeavour to trace, in the second case he can establish no such disadvantage."

22. That passage, at least in terms of what is said about the "protective and corrective principle, needs to be read in the context of what is said in [6] of EU about the limits of the principle. There the Court said this:

"I have to say that, like the Court of Appeal in *S*, I have great difficulties with the judgments in *Rashid*. In cases that are concerned with claims for asylum, the purpose of the grant of leave to remain is to grant protection to someone who would be at risk, or whose Convention rights would be infringed, if he or she was returned to the country of nationality. Of course, breaches of the duty of the Secretary of State in addressing a claim may lead to an independent justification for leave to remain, of which the paradigm is the Article 8 claim of an asylum seeker whose claim has not been expeditiously determined, with the result that he has been in this country so long as to have established private and family life here. But to grant leave to remain to someone who has no risk on return, whose Convention rights will not be infringed by his return, and who has no other independent claim to remain here (such as a claim to be a skilled migrant), is to use the power to grant leave to remain for a purpose other than that for which it is conferred. In effect, it is to accede to a claim to remain here as an economic migrant. The principle in *Rashid* has been referred to as "the protective principle",

but this is a misnomer: the person seeking to rely on this principle needs to do so only because he has been found not to be in need of protection. I do not think that the Court should require or encourage the Secretary of State to grant leave in such circumstances either in order to mark the Court's displeasure at her conduct, or as a sanction for her misconduct."

23. Returning to the relevance of the "hypothetical spectrum" referred to at [5] of EU, Judge Cameron set out the credibility findings made by Judge Walters as long ago as June 2010. In essence he found that the appellant had not given a credible account of his brother having been abducted by the Taliban and of the appellant himself having been the subject of an attempted abduction or recruitment. The Panel of the Upper Tribunal found that there was no error of law in Judge Walters' decision. Judge Cameron found in favour of the appellant in terms of his evidence of contact with his family.
24. Following the principles established in Devaseelan [2002] UKIAT 00702 Judge Cameron took as his starting point the credibility findings made by Judge Walters. He made his findings in line with the decision of Judge Walters. He referred at [77] to the submission that "the respondent's duty to trace the appellant's family should enable me to go behind [Judge Walters'] finding given that it was based on Judge Walters' view in relation to the appellant's family and his current contact with them."
25. He referred to and quoted from various authorities relied on by the appellant, including the two we have cited above. He made further findings, at [90], that the appellant has no family with whom he is in contact and at [92] that he had no family to whom he could turn for assistance in Afghanistan.
26. Although Judge Cameron proceeded on the premise that the Respondent had at least attempted tracing, a false premise as we have found, he considered whether the failure to have actually traced the appellant's family resulted in any prejudice or disadvantage to the appellant. At [87] he stated that he did not accept that "the duty to trace" would have interfered with Judge Walters' findings. He concluded that the appellant had not suffered a disadvantage "by the respondent's inability to trace his family."
27. Whilst therefore, Judge Cameron wrongly concluded that the respondent had at least attempted to trace the appellant's family, in our view his assessment of the asylum ground of appeal would not have rendered any different outcome even had he concluded that there was a failure in the duty to endeavour to trace. The result in both cases on Judge Cameron's analysis would have been the same.
28. Of course, the argument before us depends for its success in establishing that had the respondent in fact done what she was required to do, and used her resources to endeavour to trace the appellant's family, at least using the contact details that he had, the outcome might have been different. The appellant's family might have provided information that would have supported his claim for asylum.

29. However, we agree with Mr Melvin's submission that this is speculative. In the first place, we bear in mind, as Judge Cameron did because he quoted the passage, what was said at [10] of EU as follows:

"Lastly, I should mention a point made by the Secretary of State which I consider to have substance. Unaccompanied children who arrive in this country from Afghanistan have done so as a result of someone, presumably their families, paying for their fare and/or for a so-called agent to arrange their journey to this country. The costs incurred by the family will have been considerable, relative to the wealth of the average Afghan family. The motivation for their incurring that cost may be that their child faces risk if he or she remains with them in Afghanistan, or it may simply be that they believe that their child will have a better life in this country. Either way, they are unlikely to be happy to cooperate with an agent of the Secretary of State for the return of their child to Afghanistan, which would mean the waste of their investment in his or her journey here. "

30. The point was repeated by the Upper Tribunal in SHL (Tracing obligation/Trafficking) Afghanistan [2013] UKUT 00312 (IAC) at [29].
31. Secondly, and related, is the question of what the credibility findings were, first by Judge Walters and then adopted by Judge Cameron. At [33] Judge Walters found that if any of the young men in the appellant's village had been forcibly abducted by the Taliban it would have been common knowledge within a few hours and the news would have spread amongst the appellant's school friends. It would appear, he concluded, that the appellant's family were the only ones targeted in this way, the appellant having said that this was because the family are wealthy (at least comparatively).
32. Building on that background at [37] he said that he did not accept as credible that the Taliban, with their assumed local knowledge and ability to penetrate the population, would have been unable to find the appellant at his uncle's house during the one or two weeks that he was hiding there. On the basis of the appellant's account, he did not find it credible that the appellant would have had to undertake the long and dangerous journey to the UK when safety was apparently available at his uncle's house. He did not accept that the family, whom the appellant described as wealthy, would not have been able to find a home to move to in Kabul.
33. At [42], dealing with the appellant's evidence that he was in contact with his father by phone on his journey to the UK and that he failed to claim asylum in Italy or France, Judge Walters concluded that the evidence suggests that the appellant's father's primary motive was to get the appellant to the UK, rather than to the first safe country where he could claim asylum.
34. What was said at [42] by Judge Walters is significant in the context of the passage we have quoted from [10] of EU. That, and the basis of the adverse credibility findings made by Judge Walters (undisturbed on appeal to the UT), lead to the conclusion that the failure of the Secretary of State to fulfil her tracing obligation

would not have affected the outcome of the asylum appeal. Even if the respondent had been able to make contact with the appellant's family, it is not reasonably likely that any information would have been forthcoming that would have provided any credible support for the appellant's claim. That conclusion itself is not speculation. It is rooted in the adverse credibility findings to which we have referred and is consistent with authority.

35. We do not consider that there is any scope for any "corrective" grant of leave as a result of the respondent's failure of duty in relation to tracing. The appellant is not a person who has established that he is in need of protection in the terms of his claim for asylum, being a fear of the Taliban.
36. It is to be remembered that the appellant is now 19 years of age, as he was at the time of the hearing before Judge Cameron. There was, and is, nothing to indicate that he is particularly vulnerable. We accept that there is no bright line in terms of age, whereby a person under 18 could be said to be vulnerable to exploitation and other dangers yet not so simply by reason of being just over 18. The Upper Tribunal has more than once concluded that it is reasonable and not unduly harsh for a person in the appellant's situation to relocate to Kabul.
37. The UNHCR guidelines to which we have been referred themselves indicate that relocation to an area without family support would not cause undue hardship for single able-bodied men and married couples without identified vulnerabilities who may in certain circumstances be able to subsist without family and community support in urban and semi urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and are under effective government control. Kabul, to where the appellant would be returned, is such a place.
38. We do not consider that the evidence put before the First-tier judge establishes that in the appellant's home area there is a threat to the appellant's life by reason of indiscriminate violence with reference to Article 15(c) of the Qualification Directive. The skeleton argument that was before the First-tier Tribunal does refer at [21] to Laghman Province but only in terms of the COI report for February 2013 at paragraphs 8.40-8.42, which does not establish an Article 15(c) risk.
39. Judge Cameron did not accept that the appellant would be at risk in his home area. Even if as has been suggested the background evidence does indicate a risk of indiscriminate violence in his home area, he would be able to live in Kabul, which is what the judge found. We do not consider that there is anything in the evidence which indicates that it would be unreasonable to expect him to do so. The UNHCR guidelines do not reveal that it would be unreasonable for him to relocate to Kabul even without family support.
40. We do not accept that Judge Cameron failed to take into account the appellant's particular circumstances in assessing the reasonableness of internal relocation. At [101] he referred to the appellant's "profile". There he refers to the appellant's age,

then 19. At [96] he refers to the appellant being an intelligent young man, concluding that there was no reason why he could not use his education that he has obtained in the UK to assist him with work in Afghanistan. At [97] he concludes that it would not be unreasonable to expect the appellant to relocate to Kabul. He took into account, referred to, and quoted from, various authorities that were relied on on behalf of the appellant in relation to the situation for returning children and young persons in Afghanistan.

41. So far as Article 8 of the ECHR is concerned, it is clear from [56] of the determination that the issue of delay was raised at the hearing before the First-tier Tribunal. The delay is said to arise in terms of the date of the application for further leave to remain (23 February 2012) and the decision to refuse further leave which is dated 4 October 2013. That is period of almost 20 months. On behalf of the appellant it is submitted that the delay, as well as the unlawful failure in relation to the tracing duty, has an impact on the legitimate aim.
42. On the point of pure delay alone, in EB (Kosovo) [2008] UKHL 41, the House of Lords said this:

“14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant’s claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant’s precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it was noted that “It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status”. This reflects the Strasbourg court’s listing of factors relevant to the proportionality of removing an immigrant convicted of crime: “whether the spouse knew about the offence at the time when he or she entered into a family relationship” see *Boultif v Switzerland* (2001) 33 EHRR 1179, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes...”

43. Although the point was raised before the First-tier judge he did not refer to it in his assessment of proportionality under Article 8. We are satisfied that in failing to do so he erred in law. However, we do not consider that this is an error of law that requires the decision to be set aside because we are not satisfied that it is an issue which could have affected the outcome of the appeal. Twenty months delay is not a delay of such magnitude as to fall within the first two categories described in EB, even taking into account the appellant's age at the date of decision or the length of time that he had been in the UK, which was about four years. Similarly, we do not consider that the delay could be shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.
44. The skeleton argument on behalf of the appellant emphasises the importance of the tracing obligation in terms of finding durable solutions for separated children with a minimum of delay. It is said that the appellant's private life was established whilst the Secretary of State postponed the search for a durable solution through failing to trace the appellant's parents, and during the period of delay in dealing with the application which is the subject matter of this appeal.
45. We do not accept that the combination of delay and the failure of the Secretary of State in relation to the tracing obligation undermines the legitimate aim, expressed in shorthand by Judge Cameron as the maintenance of immigration control. In the first place, for the reasons we have given we do not regard the delay between the making of the application and the decision to refuse further leave to remain as being 'unlawful'. That it took about 20 months for a decision to be made in relation to the application for further leave to remain does not mean that, once it was decided that the appellant had no basis for being granted further leave, the respondent was not entitled to conclude that he should leave the country.
46. We note the authorities referred to in the appellant's skeleton argument that was before the First-tier Tribunal on the question of what is described as "historic injustice". The first of the cases cited is NH (India) [2007] EWCA Civ 133, said to relate to Gurkhas. That citation however, is incorrect. The passage quoted in fact comes from NH (Female BOCs, exceptionality, Art 8, para 317) British Overseas Citizens [2006] UKAIT 00085 which has nothing to do with Gurkhas. The other decision relied on is Patel, Modha and Odedra [2010] EWCA Civ 17. However, in terms of the historical wrong that those cases were concerned with, those appellants would potentially have been permitted settlement in the UK but for the historical wrong. We do not consider that, by parity of reasoning, this appellant would, or even might, have had an appeal allowed on Article 8 grounds or qualified for settlement, had the tracing duty been undertaken.

47. The further contention in relation to Article 8 and the determination of the First-tier Tribunal concerns the application of the 'Article 8' Immigration Rules. It is argued that the First-tier judge impermissibly took into account that the appellant failed to meet the requirements of the 'Article 8' Rules. We were referred to the decision in Edgehill [2014] EWCA Civ 402 which deals with the transitional provisions and their relationship to certain applications made before 9 July 2012. The application for further leave to remain in the appeal before us was made on 23 February 2012.
48. For present purposes we accept that the Article 8 Immigration Rules did not apply to the appellant's case because his application was made before 9 July 2012. However, we do not accept that the First-tier judge took into account in his assessment of proportionality that the appellant was not able to meet the requirements of those Rules. Under the sub-heading "Human rights and the 1950 Convention" Judge Cameron dealt in the first paragraph with Article 3 of the ECHR, concluding that the appellant was not able to succeed under Article 3 in the light of his conclusions on the asylum ground of appeal.
49. In the next paragraph, [103], he stated that "With regard to article 8 the appellant cannot meet the requirements under the immigration rules." There is then an assessment in 'pure' Article 8 terms but without any reference to the appellant's inability to meet the requirements of the Article 8 Immigration Rules. At [104], when embarking on the 'pure' Article 8 assessment the paragraph begins with the words "In relation to article 8 generally...". That, and the fact that there is no further reference to the inability to meet the requirements of the Immigration Rules makes it plain that when stating that the appellant was unable to meet those requirements the judge was simply stating a fact and thus no further consideration of the Immigration Rules was required. Even accepting that the Immigration Rules did not apply in any event, we do not accept that the judge fell into error by taking into account the appellant's failure to meet those Rules. That formed no part of the proportionality assessment.
50. In summary, whilst we are satisfied that the First-tier judge did err in law in the respects to which we have referred, those errors of law are not such as to require the decision of the First-tier Tribunal to be set aside.

Decision

51. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal however, is not set aside and the decision to dismiss the appeal on all grounds therefore stands.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek

15/05/14