



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02961/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 2nd February 2015

Determination Promulgated
On 3rd March 2015

Before

UPPER TRIBUNAL JUDGE COKER

Between

KUSHAL AHMADZAI
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Patel, counsel, instructed by Greater Manchester
Immigration Aid Unit
For the Respondent: Mr Diwynycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Afghanistan, arrived in the UK and claimed asylum. He was initially granted discretionary leave to remain until 6th June 2011 as an unaccompanied child. He applied for further leave to remain on asylum and human rights grounds, such application being refused on 13th March 2013, almost two years later. A decision to remove him under s47 Immigration Asylum and Nationality Act 2006 was made at the same time. The appellant appealed both decisions. His appeal against the variation appeal was dismissed by the First-tier Tribunal but the s47 decision was found to be unlawful. There has been no challenge by the respondent to that latter determination and thus the only appeal before the Tribunal now is the appeal against the variation refusal. The Upper Tribunal found an error of law in the determination of the First-tier Tribunal but in a determination promulgated after a hearing on 16th September 2013 his appeal was again dismissed. The Court of Appeal, in an order by consent, allowed the appeal without determining the merits and remitted it back to the Upper Tribunal for re-hearing with no findings retained.

2. The appellant had been 'age disputed' and Kent County Council had age assessed the appellant as having been born in 1991 and not 1994 as the appellant claimed. The appellant had been granted discretionary leave to remain as an unaccompanied minor with a date of birth of 19th April 1994 and not 19th October 1991 as age assessed.
3. The basis of the appellant's claim is set out in the first reasons for refusal letter (RFRL1) dated 6th June 2008 and the second reasons for refusal letter (RFRL2) dated 13th March 2013. RFRL1 states that appellant's date of birth is 19th April 1994; RFRL2 states that it is 19th October 1991. RFRL2 adopts RFRL1 and also (in [43]) states that

"It is also considered that you no longer qualify for Discretionary Leave as you are now aged over 17.5 years of age."

4. The basis of the appellant's claim, which is set out in both letters and the account of which is not challenged, is as follows:
 - (a) His father worked for Hesbi Islami when the appellant was young. When the Taliban came to power his father joined them. When the new government came to power his father left the Taliban and remained at home for a few years.
 - (b) His father joined the ISI
 - (c) Four or five months after his father joined the ISI, his father started to hide because he had found out that the US forces had arrested some people who also belonged to ISI. Whilst he was visiting a maternal uncle in Kabul, the uncle received a telephone call from his friend Zahir Khan from the appellant's village who told his uncle that the appellant's father had been killed by the Americans. The appellant claimed that Zahir Khan also told the uncle of a man who he believed had reported the appellant's father to the Americans. The appellant's maternal uncle took him to his father's home to arrange the funeral.
 - (d) During the week of the funeral, the man who allegedly reported the appellant's father to the US forces came to the family home twice; the first time at night and the family hid in the basement whilst the man entered the home and searched it. The second visit was during the day with a group of armed men and the family again hid in the basement for 3-4 hours.
 - (e) The man who came was head of the local security for the Afghan authorities and ran a military base outside the village.
 - (f) A week after his father's death the appellant and his family returned to Kabul with his maternal uncle and a week later the appellant left Kabul.
 - (g) The appellant asserts that the man who reported his father to the US forces is seeking to kill him because he believes that in accordance with local cultural traditions, the appellant would look to kill the man whose actions led to the appellant's father's death.
5. In so far as the age of the appellant is concerned, there was no copy of the age assessment on the file and neither the respondent nor the appellant had a copy. The only document referring to the local authority age assessment was the cover sheet of the report. Mr Diwynycz confirmed that the age assessment, in so far as these proceedings was concerned, was not 'Merton compliant' and that

although not conceding that the appellant had a 1994 birth, he was unable to submit that he was a 1991 birth. The appellant had produced his birth certificate to the Tribunal at an earlier hearing which gave his claimed year of birth as 1994. (I returned that birth certificate to the appellant's representatives.) I stated, to no objection from either party, that I would determine the appeal before me on the basis that the appellant had been born in 1994 as he claimed.

6. The appellant and Masto Khan gave oral evidence with the assistance of an interpreter. A number of issues arose during oral evidence:
 - (a) Hiding in the basement. The appellant said that he did not know whether the houses in his village were of common design and whether they had basements similar to the one he hid in. He described it as being at the side of the kitchen and covered with a carpet which would be lifted when the trapdoor was raised and then, when the trapdoor was pulled down, the carpet (which was partially attached to the trapdoor) would fall back into place. The appellant said that when the man came searching for him on the first occasion at night he, his mother, his brother and his sister were there and they all went down into the basement. He was unable to say how long they were in the basement but it was for what seemed a long time. On the second occasion he said that his uncle and his uncle's family were at the house because of his father's funeral and he told the man that the appellant and his family were not there; they still however hid in the basement but the man and his armed companions did not enter the house. The description given by the appellant of a trapdoor covered in a rug is different to that which he gave in other evidence and which was relied upon in the application to the Court of Appeal namely that access was through a hole in the clay oven room covered up with laundry and other household clothes.
 - (b) Contact with other children/their homes in the village. The appellant said that although he had friends in the village they did not go into each other's houses. He used to travel down paths with friends to the Madrassa but generally he was not allowed out to play because of the number of booby traps around. He would walk home with friends from the Madrassa but during his time there the teacher would not permit them to speak to each other. He was unaware of how many houses there were in the village.
 - (c) Contact with family. The appellant said he had no contact with the uncle who had arranged his passage to the UK; the only contact he had was with his mother and the last time he spoke with her was in 2011 when she called his number from a public call box. He says he didn't ask where she was.
 - (d) Uncle. The appellant, in his second witness statement dated 11th April 2013, had named the uncle who assisted his passage to the UK as Khayesta Khan. But Khayesta Khan had died in 2002. The appellant said that the uncle who had helped him come to the UK was in fact called Ajab. The appellant said that when his uncle Khayesta Khan had died, his wife had married her husband's brother and they lived in the same house. It was her oldest son (Masto

Khan) who was in the UK and with whom the appellant had been living after he ceased to be in the care of Kent Social Services on 23rd June 2008. He said in oral evidence that as a child his cousins had said they were Khayesta Khan's children and so he thought that Ajab was Khayesta Khan. He said that his mother called the man brother and he called him uncle. Masto Khan and the appellant claim to have no contact with Ajab Khan. Masto Khan left Afghanistan in 2002 after his father had been killed.

7. In submissions the respondent relied on claimed discrepancies in the appellant's account to undermine his overall credibility. In particular he referred to it being inconceivable that if the unnamed man who wanted to kill the appellant had wanted to find him then he would have found the trapdoor; he was able to search the house at night unchallenged. Mr Diwynycz submitted that at the very least basements would have been common place and in any event the carpet would have shown some wear such that it would have been clear that there was a trap door. It was also inconceivable that the uncle would have been able to prevent him from entering the house on the claimed second visit. He also relied on the appellant's misnaming of his uncle; the mis-description of the cousin as an uncle; that it was inconceivable that the appellant would not have visited other houses in the village or played with other children in the village. Although Mr Diwynycz acknowledged there had been delay by the respondent in dealing with the application that delay did not vitiate that the appellant had not been telling the truth in his accounts. He finally submitted that there was no credible reason why, even if his account was true, he could not, as a young man over the age of 18, relocate to Kabul.
8. Ms Patel submitted that the appellant's account had, broadly, been consistent throughout; that he had been a minor when he arrived (aged 13/4) and that the detail he had given in his oral evidence enhanced overall credibility. She relied upon the background material to support her submission that as a Pashtun and the eldest son he was expected to honour the culture and traditions and was thus at risk; this further enhanced the credibility of his account and the reasons why he had to flee. She relied upon the background material and country guidance cases in so far as internal relocation was concerned and in particular that he would have no support network on return because he had no contact with his uncle and in any event it was too close to his home area.
9. Ms Patel asserted that had a decision on his asylum claim been taken within a reasonable time period he would have been recognised as a refugee: there were no adequate reception facilities if he had been returned as a minor and the respondent acknowledged that they were unable to undertake adequate tracing arrangements. She submitted that as such he should, independently of the rest of his claim be recognised as a refugee now.
10. Her further submission as regards Article 8 also relied upon delay and that Home Office policy was such that in the light of the policy in force he would and should have been granted settlement. She relied in addition upon the emotional ties he has with his cousin which have continued even though he is now aged over 18 – he speaks English, is integrated into society and supported independently of any public funds.

Discussion

11. The appellant in his second witness statement dated 11th April 2013 states that it was his uncle Khayesta Khan who arranged for his travel from Afghanistan in 2008. He also describes Masto Khan as the son of the uncle who arranged his passage out of Afghanistan. On 23rd June 2008 the appellant was transferred from the care of Kent Social Services to Masto Khan, who describes himself on the family authorisation form as the appellant's maternal uncle. That form is certified as having been accurately translated to Masto Khan and signed by him. The appellant had not, from the evidence, spent any time with Masto Khan until he came to the UK – Masto Khan had left Afghanistan shortly after his father's death. It is difficult to understand how, some five years after his arrival in the UK the appellant can describe his deceased uncle not only as the person who arranged his travel to the UK but also as the father of his cousin with whom he had been living for the past five years. There was no satisfactory explanation why Masto Khan had described himself as the appellant's uncle when he was his cousin.

12. The fundamental basis of the appellant's claim is that he was being sought by the person who notified the authorities of his father's involvement with ISI who in order to pre-empt a revenge attack from the appellant was looking to kill him. Although this has been a consistent theme in his accounts, the mere fact of consistency does not render an untrue account true. Although the respondent relied in submissions upon the lack of contact the appellant had with other children and families as an element pointing towards a lack of credibility when considered along with the evidence I am not satisfied that this indicates or contributes to a lack of credibility. The way in which children interact in other countries and cultures cannot be analysed through our eyes. Similarly the lack of knowledge of the appellant of the structure of other houses and that he claims he did not go into other houses. However of considerable importance in assessing the credibility of the appellant's account are three factors: firstly that the person who it is claimed came to the house looking for him to kill him did not search for and find the trapdoor; secondly the possible prevalence of such pre-emptive strikes and thirdly the appellant's inability to give the correct name of the uncle who helped him to the UK. Even if not all houses have basements with trapdoors, it is inconceivable that none did and thus inconceivable that a person looking for a family during the night with a view to killing one of them would not have searched for and found such a basement. Had the basement been hidden in the manner described initially by the appellant then the whole family descending into it would have been apparent because the entrance would not have been covered. The second description of the trap door and entrance to the basement is likely to be more accurate. But the man's search was unhindered. The family were there and although the house may have been sparse it would not present as uninhabited.

13. Although I was directed to sections of the background material identifying and describing blood feuds and honour, particularly amongst the Pashtun, (and of course I accept that these occur) it was evident from that material that the majority of such feuds spring from land or water disputes, or as a result of the claimed behaviour of women bringing dishonour. The COI February 2013

report refers in paragraph 9.17 to a report from Landinfo (Norwegian Country of Origin Information Centre) which commented on pre-emptive revenge and states:

Landinfo is not aware of any sources presenting information indicating the prevalence of pre-emptive revenge (ie murdering the male relatives of a victim in order to make the other group unable to avenge the initial murder). In Landinfo's experience, such scenarios are unlikely, as they violate Pashtunwali and most possibly will be considered unacceptable by local communities. It is likely that the local community would intervene and impose serious sanctions, for example expulsion from the area. Moreover in the Afghan context it would be extremely difficult to kill all male family members in a family who could be given responsibility for carrying out revenge. This would normally involve a large number of men.

14. I was not directed to any information that contradicted this statement and I have been unable to find anything in the documents presented to me to cast doubt on that information.
15. The appellant's explanation that he did not know that his uncle was called Ajab was, quite simply, incredible. His explanation may have been sufficient for a young child but not for a 14 year old which was how old he was in 2008 when he came to the UK; and by the time he wrote his witness statement in 2013 he had been living with his cousin for some five years. I cannot speculate on the reasons for this attempt to explain why he did not know his uncle's name or why he got his uncle's name wrong but whatever the reasons that lack of transparency damages his credibility.
16. I am not satisfied to the lower standard of proof that the appellant's account that he was sought by the (unnamed) man who had allegedly disclosed his father's name to the Americans thus resulting in his father's death is credible. I am not satisfied that this man came to his home and tried to find him or that he was being sought in a pre-emptive revenge attack.
17. I have serious doubts whether the appellant's father (or indeed his uncle Khayesta Khan) is dead but even if he or they are I am not satisfied that his father died in the circumstances claimed. I am not satisfied that the appellant was at risk of being persecuted by an un-named man or that he had to flee Afghanistan. I find that the appellant did not require international protection when he left Afghanistan for the reasons he claimed.
18. Turning now to the submission that had the respondent not delayed taking a decision then, because of his age, the appellant would have been recognised as a refugee. I do not accept that submission. Between his arrival in the UK in 2008 and about April or so in 2011 he was in contact with his mother. Although the respondent did not undertake any tracing arrangements, at that time it was not necessary because of the contact the appellant had. Although the appellant says he did not ask his mother where she was it would have been perfectly in order for arrangements to have been made that during the next contact he made such enquiries. His evidence, and that of Masto Khan, was that the appellant's mother used to visit the uncle in Kabul (they were brother and sister). Again there is no reason to suppose that such contact did not continue after the appellant had left Afghanistan and that arrangements could not have been made

for his return accordingly. I do not therefore accept the submission that had the respondent made an earlier decision then the appellant would have been recognised as a refugee.

19. In so far as the submission that if the appellant should have been recognised as a refugee on or shortly after arrival then he should be recognised as a refugee now is concerned, this submission misses the point that recognition as a refugee is recognition of the need for international protection. This appellant, now, has no need of international protection. That submission fails.

20. Ms Patel submitted that because the appellant had been granted discretionary leave under the policy in force prior to 9 April 2012, then in accordance with the transitional arrangements in force, his application for further 3 years discretionary leave to remain should have been considered in accordance with that policy. The appellant sought asylum in 2008. On 10th June 2008 he was granted 3 years discretionary leave to remain until 6th June 2011. On 6th June 2011 he submitted an application for further leave to remain. It is the refusal of that application on 13th March 2013 that has resulted in this appeal.

21. According to the transitional arrangements on discretionary leave to remain:

- All decision made on Discretionary Leave on or after 9 July 2012 will be subject to the criteria set out in this guidance.
- Where the decision was taken before 9 July 2012 but an appeal allowed on or after 9 July on Article 8 family life or private life grounds, staff must refer to IDI CH8 (Family Members transitional cases).
- Individuals granted DL on a date prior to and including 8 July 2012 may apply to extend that leave when their period of DL expires. Decision makers must apply the following guidance:

Applicants granted Discretionary Leave before 9 July 2012

- Those who, before 9 July 2012, have been granted leave under the Discretionary Leave policy in force at the time will continue to be dealt with under that policy through to settlement if they qualify for it (normally after accruing 6 years Discretionary Leave).
- Consideration of all applications for further periods of leave will be subject to a criminality check and the application of criminality thresholds, including in respect of cases awaiting a decision on a further period of Discretionary Leave on that date.
- Applications for further leave from an individual granted up to 3 years Discretionary Leave **before 9 July 2012** must be subject to an Active Review.
- Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of 3 years Discretionary leave should be granted.
- If there have been significant changes or the applicant fails to meet the criminality thresholds, the application for further leave should be refused.
- ...

22. On 9th June 2014 the applicant submitted an application for indefinite leave to remain on the grounds that his earlier Discretionary Leave to remain had been extended by operation of s3C Immigration Act 1971. No decision appears to have been taken on that application.

23. I was not provided with a copy of the Discretionary Leave policy in force prior to 9 July 2012. Ms Patel submitted that I should take this into account in terms of

Article 8: he would but for the delay by the respondent in processing his application, have been granted a further period of Discretionary Leave to remain and would by June 2014 have accrued at least 6 years DL and thus be entitled to indefinite leave to remain.

24. The reasons for refusal letter dated 13th March 2013 states

1. You have made an application for Further Leave to remain in the United Kingdom which has been considered in accordance with the "Active Review" procedures set out in the Home Office Asylum Instruction on Discretionary Leave. This replaced Exceptional Leave to Remain on 1st April 2003. The purpose of this review of your case is to determine whether you qualify for Further Leave to Remain in the UK.
2. Consideration has been given to whether you continue to be eligible for Limited Leave to Remain in the UK in accordance with the Home Office Instruction on Discretionary Leave

....

24....It has also been concluded that you no longer qualify for Discretionary Leave as you are now aged over 18 and no longer qualify under the Discretionary Leave policy.

.....

43....It is also considered that you no longer qualify for Discretionary Leave as you are now aged over 17.5 years of age.

25. On 6th June 2011 the appellant was aged 17 and a couple of months. The skeleton argument submitted on behalf of the appellant for his hearing before the First-tier Tribunal, which was relied on before me, does not set out any sections of the policy under which it is claimed that the appellant would have been given a further three year period of Discretionary Leave to remain. I was not provided with anything to show that an appellant in the applicant's position namely a minor who had been given 3 years DL who then sought to vary that leave would inevitably have been granted a further period of three years. The skeleton and Ms Patel did not draw my attention to any document before me which supported her submission. The submissions do not take issue with the reasons for refusal letter dated 13th March 2013 in so far as the Active Review is concerned other than to refer to the extensive delay by the respondent in reaching a decision and that the respondent in considering the application under Article 8 has applied the Rules which came into force from 9th July 2012 and had incorrectly considered Article 8 because of the transitional provisions. The reasons for refusal letter refer to "Active Review" and reference is made to the appellant no longer qualifying because he is now an adult. If a decision had been taken by the respondent within say 6 months of submission of the application, the appellant would have been under 18 years old. I have nothing before me to say that he would have been granted 3 years Discretionary leave to remain as oppose to a further short period of DL. Although the transitional provisions clearly state that the application for further leave to remain is to be considered under the previous policy, I am unable to conclude on the basis of the information before me that the decision to refuse the appellant further Discretionary Leave to Remain was not in accordance with that policy and thus not in accordance with the law.

26. Ms Patel submitted that the consideration by the respondent of Article 8 was flawed not only because she had approached her assessment purely through

the “new” Rules but also because she had failed to take full account of the close and emotional ties that the appellant had with his cousin upon whom he was dependant and had failed to take full account of all the factors relevant for assessment of the appellant’s circumstances. She submitted that although the application should be considered under the “old” Rules, any removal of the appellant would in any event be disproportionate because of the nature and extent of his close ties and circumstances in the UK.

27. The appellant relies upon his relationship with his cousin as amounting to a relationship over and above that existing between two adults who are related. He draws upon his age when he arrived in the UK and his ensuing dependency. Whilst it is correct that the appellant has been looked after by his cousin, it does appear that the cousin has spent varying periods of time in Pakistan with his wife and family. There was no detail of the amount of time he spent there or for what periods of time. Although there was no evidence about Masto Kahn’s income or how he supported the appellant financially I do accept that there is financial support because the appellant does not appear to be drawing any benefits and lives with Mr Khan. Nevertheless there was no evidence before me of a particularly close emotional bond or that, now the appellant is aged nearly 22 that relationship is anything more than a family relationship as would be expected between adults. There was no evidence before me of particular emotional dependency although I accept that he is more likely to be emotionally dependant upon his cousin than many 22 years olds would be because of the nature of his background and that Mr Khan is his only relative in the UK. But I do not accept that this is sufficient to conclude that the relationship between the appellant and his cousin is such as to engage Article 8 as family members. However that relationship obviously is a matter to be factored in as part of his private life. It is plain that the appellant has established private life for the purposes of Article 8.
28. The appellant has now been in the UK for almost 7 years. He is now nearly 22 years old. He claimed asylum on arrival and was granted DL almost immediately. He has remained in the UK lawfully since then, initially pending a response to an application to vary his leave and then pursuing his appeal rights. He speaks English fluently and has clearly made good progress with his education, obtaining a number of creditable qualifications. He has no criminal convictions. He came to the UK as a young teenager and although he had the support from his cousin when he first arrived in the UK he lost contact with his mother after only a few years when he was still a minor and his cousin could not, particularly as they had not known each other in any meaningful way in Afghanistan, replace that relationship. Although there was no evidence of Mr Khan’s financial position it is clear that he is providing at least a minimum of financial support for the appellant. The appellant is well integrated in the UK as evidenced by his English language fluency and educational achievements.
29. No explanation has been forthcoming from the respondent as to the reasons for the delay in reaching a decision on the application to extend leave to remain. Had the decision been made within a reasonable time the appellant would still have been a minor albeit possibly over 17 ½ years old. Ms Patel did not identify any particular harm caused to the appellant by the delay in terms of his physical or emotional well being although it is obviously reasonable to conclude that he

would have suffered at least some anxiety. Although the skeleton argument refers to the appellant's ties in Afghanistan being significantly reduced it was not clear on what basis this was argued from the evidence before me. The appellant lives with his cousin, an Afghan national, and it seems clear that he retains some links with the Afghan community here in the UK if only because his cousin does (his cousin does not appear to speak English at all fluently). Although the skeleton submits that the respondent has failed to identify any legitimate aim this was, quite properly, not pursued by Ms Patel.

30. The applicant has established his private life in the UK whilst lawfully present. Precarious means "dependant on chance" (Oxford dictionary); "dangerously lacking in security or stability" (Free dictionary). According to the Collins dictionary: "precarious If your situation is *precarious*, you are not in complete control of events and might fail in what you are doing at any moment. ADJECTIVE Our financial situation had become precarious." The appellant's situation plainly does not fall within the definition of precarious in its ordinary use. Although his leave was of limited duration he plainly was not likely to fail at any given moment; his status was not dangerously lacking in security or stability and he was not dependant on chance. To find otherwise makes no distinction between those who have lawful leave to remain in the UK and those who are either illegal entrants or overstayers. His status was not precarious.
31. The respondent has set out in s117B that in considering the public interest question the Tribunal must in particular have regard to the considerations set out in s117B of the 2002 Act. Taking those factors particularly into account and the totality of the matters set out above (including the outcome of his asylum claim), I am satisfied that to remove the appellant would be a disproportionate interference in his right to respect for his private life and would result in the respondent being in breach of her responsibilities under Article 8.

Conclusions:

I dismiss the appeal on asylum, Article 3 and humanitarian protection grounds.

I allow the appeal on Article 8 human rights grounds.

Date 2nd March 2015

Upper Tribunal Judge Coker