



IAC-AH-KEW-V1

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

Appeal Number: AA/05345/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower Decision & Reasons Promulgated
Birmingham
On 18th January 2016 On 1st February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**ARIF ULLAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A White of Counsel, instructed by Coventry Law Centre

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge North of the First-tier Tribunal (the FTT) promulgated following a hearing on 22nd September 2014.
2. The Appellant is a male citizen of Afghanistan born 6th April 1994 and so was 20 years of age when he appeared before the FTT.

3. The Appellant entered the United Kingdom illegally in April 2009 and claimed asylum. His application was refused on 28th July 2009, but because he was a minor he was granted discretionary leave to remain until 6th October 2011.
4. Prior to the expiry of that leave, the Appellant on 28th September 2011 applied for further leave to remain which application was refused on 25th June 2012 and the Appellant appealed against that decision.
5. On 30th July 2012 the Respondent withdrew the decision and made a further decision on 10th July 2014, to refuse to vary leave to remain in the United Kingdom, and to remove the Appellant from the United Kingdom.
6. The Appellant appealed against that decision. The FTT heard evidence from the Appellant and found that he would not be at risk if returned to Afghanistan and he was therefore not entitled to a grant of asylum or humanitarian protection, and there would be no breach of Articles 2 or 3 of the ECHR. The FTT considered Article 8 of the ECHR outside the Immigration Rules and concluded that the Appellant's removal from the United Kingdom would be proportionate in pursuance of the legitimate aim of fair and firm immigration control, and therefore there would be no breach of Article 8.
7. The Appellant applied for permission to appeal to the Upper Tribunal. There was no challenge to the FTT findings that the Appellant would not be at risk in Afghanistan. Permission to appeal was sought in relation to the consideration of Article 8 by the FTT. The Appellant's claim had been based upon his private life, and the FTT had accepted that he had established a private life, and that his proposed removal would be an interference with that private life.
8. It was contended that the FTT had erred in considering proportionality and had failed to apply the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). It was contended that the FTT had not considered the effect of the Respondent's delay in making a decision, taking into account that the initial decision dated 25th June 2012 had been withdrawn, and was not replaced with a further decision until 10th July 2014. The Appellant had made his application on 28th September 2011.
9. It was also contended the FTT had failed to examine the effect of the Appellant being sent to Afghanistan, a country with which he has no ties or connection as his case was that he had been born in Pakistan and had always lived there, although his parents were Afghan citizens. The Appellant had only visited Afghanistan on three occasions when he was a child, staying for a few days on each occasion. In addition the Respondent had failed to attempt to trace the Appellant's family. It was contended that the FTT had failed to take into account that the Appellant had spent the first fourteen years of his life in Pakistan, and his remaining formative teenage years in the United Kingdom and is westernised.

10. Permission to appeal was initially refused by Designated Judge MacDonald, but following a renewed application, permission to appeal was granted by Upper Tribunal Judge Reeds in the following terms;

“It is arguable that the judge failed to take into account relevant considerations when reaching a decision on the proportionality balance under Article 8 relating to his private life. This being a case where he had been granted discretionary leave in 2009 that would expire in October 2011 and prior to that had made an application for leave which had not been decided until 10th July 2014. The Grounds of Appeal originally before the Tribunal set out that the transitional provisions applied and therefore it is incumbent upon the judge to consider the appeal on Article 8 grounds. It is further arguable that he had failed to take into account the Appellant’s personal circumstances when considering his private life and in particular that the removal directions were not to Pakistan, where it appeared he had resided prior to coming to the United Kingdom but to Afghanistan a place where it was asserted he had no connections. Whilst the grounds make reference to the judge’s failure to consider section 117B of the Immigration Act 2014, it is not stated how that would have made a material difference. However I grant permission on all grounds. For the avoidance of doubt, there is no challenge to the judge’s findings that he would not be at risk of persecution or serious harm if returned to Afghanistan.”

11. Following the grant of permission to appeal the Respondent lodged a response dated 3rd March 2015 pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending, in summary, that the FTT directed itself appropriately. The FTT took into account the Appellant’s private life, and the grounds fail to demonstrate how a consideration of section 117B of the 2002 Act would have made any difference to the outcome of the appeal.
12. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FTT decision should be set aside.

The Appellant’s Submissions

13. Miss White relied upon the grounds contained within the application for permission to appeal and confirmed that the challenge related to the FTT assessment of proportionality and the Appellant’s private life.
14. Miss White submitted that section 117B was relevant, in that there had been a delay by the Respondent, and this should have been considered in relation to the maintenance of effective immigration control. The FTT appeared to have accepted that the Appellant was brought up in Pakistan, but had not properly considered this when considering proportionality. Moreover the Appellant had been disadvantaged because the Respondent had not undertaken family tracing.

The Respondent’s Submissions

15. Mr McVeety submitted that the FTT decision disclosed no material error of law. The Appellant was being returned to Afghanistan because he had no legal status in Pakistan. With reference to section 117B, Mr McVeety submitted that there was no provision that dealt with delay. Section 117B confirmed that the maintenance of effective immigration control is in the public interest, and there were no factors contained within section 117B that would have assisted the Appellant's case.
16. In relation to tracing, Mr McVeety submitted that this had no relevance, as the Appellant was being returned to Afghanistan, and his case was that his family were in Pakistan.

The Appellant's Response

17. Miss White submitted that the Respondent's delay should have been taken into account, when the public interest in maintaining effective immigration control was considered.

My Conclusions and Reasons

18. I find no material error of law in the FTT decision for the following reasons.
19. The FTT did not accept that the Appellant had established family life that would engage Article 8, and that finding was not challenged. The FTT accepted that the Appellant had established a private life, and that his removal from the United Kingdom would disrupt that private life. The FTT went on to consider proportionality in relation to the Appellant's private life. It is not suggested that the FTT erred in applying the principles in Razgar [2004] UKHL 27.
20. The FTT took into account all material factors when assessing proportionality. The FTT found that the Appellant would not be at risk if returned to Afghanistan, and this finding has not been challenged. The FTT took into account that the Appellant had been in the United Kingdom since April 2009 and that he was a minor when he entered this country, and 20 years of age at the date of hearing. The FTT found that the Appellant had a relationship with his girlfriend, but it did not go beyond boyfriend and girlfriend. The FTT found that the Appellant spoke Pushtu and that he is an Afghan citizen. These findings, made by the FTT, are not disputed.
21. The FTT also found that the Appellant had been brought up in Pakistan but had previously visited Afghanistan on three occasions when he was a minor, staying for only three or four days in Jalalabad.
22. I do not accept that the FTT failed to examine the effect of the Appellant being sent to Afghanistan. The FTT in paragraph 18 considered the country guidance case law and concluded that the Appellant would not be at risk. In addition the FTT stated in paragraph 18;

“I accept that the Appellant may face some practical difficulties in starting a new life in Afghanistan and dealing with the uncertainties and moving to a new country; however, he has demonstrated an ability to deal with such difficulties during his stays in various countries on his way to the UK and after his arrival here.”

23. With reference to the tracing issue, the FTT did not err in finding that the Appellant had not been disadvantaged. The Appellant claimed that his family were in Pakistan, and that his parents had been killed, and the Appellant was being returned to Afghanistan, the country of which he is a citizen.
24. The FTT did err in failing to make any reference to section 117B of the 2002 Act. This error is not material. The Upper Tribunal found in Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) that it is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.
25. Section 117B(1) states that the maintenance of effective immigration controls is in the public interest. It is clear that the FTT had regard to this in considering proportionality. There is specific reference in paragraph 22 to the “legitimate aim of fair and firm immigration control.” The FTT balanced the Appellant’s circumstances against the need to maintain effective immigration control.
26. There is no reference within ss.117A-117D to delay. There are circumstances when delay by the Respondent may strengthen an Appellant’s claim. In this case there was a delay following the withdrawal of the decision in July 2012, as a new decision was not made until 10th July 2014. This was noted by the FTT in the first paragraph of the decision. The delay meant that the Appellant had spent longer in the United Kingdom, and there is no indication that the FTT did not take into account the length of time that the Appellant had been in this country.
27. The Upper Tribunal in AM (s.117B) Malawi [2015] UKUT 0260 (IAC) found that an Appellant can obtain no positive right to a grant of leave to remain from either s.117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. Therefore if the FTT had specifically considered those factors, it would not have assisted the Appellant, if he had given evidence that he was fluent in English and financially independent.
28. If the FTT had considered s.117B(5) then it would have had to have accorded little weight to the private life established by the Appellant when his immigration status is precarious. The Appellant has only ever had a precarious immigration status, because he has only ever had limited leave to remain in this country. The FTT erred in not considering this, but in the circumstances the error is not material, as this could not have assisted the Appellant’s case, and on the contrary, would have meant that little weight

could have been attached to the private life that he had established since April 2009.

29. The grounds display disagreement with the conclusion reached by the FTT in relation to Article 8 but they disclose no material error of law.

Notice of Decision

The making of the decision of the FTT did not involve the making of a material error of law such that the decision must be set aside. I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the FTT. There has been no request to the Upper Tribunal for anonymity and I see no need to make an anonymity order.

Signed

Date 22nd January 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

No fee is paid or is payable. The appeal is dismissed. There is no fee award.

Signed

Date 22nd January 2016

Deputy Upper Tribunal Judge M A Hall