



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/10052/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke

On 30th June 2016

**Decision & Reasons
Promulgated
On 6th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

AMIRWAFI DAWLATZY
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs D Dhaliwal of Counsel instructed by JD Spicer Zeb Solicitors

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

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge Kershaw of the First-tier Tribunal (the FTT) promulgated on 4th April 2016.
2. The Appellant is a male citizen of Afghanistan born 1st January 1997 so he is now 19 years of age. The Appellant arrived in the United Kingdom illegally in September 2009 and claimed asylum. His claim was refused

but he was granted discretionary leave to remain as an unaccompanied asylum seeking child. The discretionary leave to remain ended on 1st July 2014 and in June 2014 the Appellant applied for further leave to remain.

3. This application was refused on 23rd June 2015, and the Appellant's appeal was heard by the FTT on 4th March 2016.
4. The FTT found that the Appellant would not be at risk if returned to Afghanistan, and decided that the Appellant was not entitled to asylum, or a grant of humanitarian protection, and that to remove him from the United Kingdom would not breach any of his human rights protected by the 1950 European Convention on Human Rights (the 1950 Convention).
5. The Appellant applied for permission to appeal to the Upper Tribunal. Permission was granted by Judge Grant-Hutchison on one ground only, and I set out below the grant of permission in part;

- "2. It is submitted that the judge erred in law on the basis of:
 - (a) approaching the test of credibility of the Appellant's account from the rationale of the country of adjudication and not the country of origin at paras 43 to 45 of the decision and reasons (reference is made to Karanakaran v SSHD [2000] EWCA Civ 11);
 - (b) the Appellant's failure to provide independent evidence or documentary evidence about his father's death when the Appellant was only 11 years of age on arrival and no such specific corroboration is required; and
 - (c) failing to consider the cultural norms of Afghanistan in the context of family tracing.
3. The judge considered the evidence and made appropriate findings which were open to him to make. It was open for the judge to consider what weight he felt it appropriate to place on the evidence before him. The judge finds that as the Appellant's evidence in relation to the death of his father was scant, documentary evidence would have been of assistance not that the Appellant required to corroborate his evidence. There is no error for the judge to suggest that the Red Cross seek out his mother or siblings in addition to his uncle with whom his mother and siblings were living. The judge has given adequate reasons for his decision.
4. However it is arguable that the judge has misdirected himself in not considering sections 117A to D of the Nationality, Immigration and Asylum Act 2002 when considering the Appellant's Article 8 claim outside the Immigration Rules."

6. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was noted that permission had been granted only in relation to consideration of Article 8. It was submitted that although the judge had used the word 'exceptional' an exceptionality test had not been applied. It was considered that the FTT did not err in finding that the circumstances did not warrant a consideration of Article 8 outside the rules, and therefore a section 117B consideration was not required. In any event, if the FTT had gone on to consider the application outside of the rules, the grounds

do not refer to any factors which would arguably have led to a different conclusion.

7. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FTT decision contained an error of law such that it should be set aside.

The Oral Submissions

8. Mrs Dhaliwal submitted that the FTT had failed to carry out a proper Article 8 assessment, and had failed to carry out the correct approach outlined in Razgar [2004] UKHL 27. The FTT failed to consider any of the factors set out in sections 117A - D of the 2002 Act.
9. The FTT erred in paragraph 65 by recording;

“There is nothing exceptional about this Appellant’s case such as to warrant consideration outside of the rules.”
10. Mr McVeety relied upon the rule 24 response but accepted that the FTT had erred by making reference to ‘exceptional’ in paragraph 65, which was not the test to be applied. However Mr McVeety argued that the error was not material, as the FTT had considered the relevant issues at paragraph 64 when considering the Appellant’s private life pursuant to paragraph 276ADE(1). There was therefore no need for the FTT go on and consider Article 8 outside the Immigration Rules.
11. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

12. Both representatives accepted that permission to appeal had only been granted in relation to the FTT’s approach to Article 8 outside the Immigration Rules. I therefore have to decide whether the FTT erred by failing to carry out an Article 8 assessment outside the Immigration Rules.
13. In my view Mr McVeety was correct to accept that there is an error of law in paragraph 65 in making reference to ‘exceptional’ and the FTT should have considered the guidance contained in SS (Congo) [2015] EWCA Civ 387 paragraph 33 which I reproduce below in part;

“In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of ‘very compelling reasons’ (as referred to in ME (Nigeria) in the context of the rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State’s formulation of the new rules in Appendix FM.”

14. Therefore the appropriate test that should have been considered by the FTT is whether there were compelling circumstances which required consideration of Article 8 outside the Immigration Rules.
15. It is not in dispute that the Appellant could not succeed by relying upon the provisions of Appendix FM in relation to family life. The findings made by the FTT in relation to private life pursuant to paragraph 276ADE(1) have not been challenged.
16. The FTT made findings in paragraphs 49 and 56 which have not been successfully challenged. These findings are that the FTT was not satisfied that the Appellant was in any danger from anybody in Afghanistan, there was no feud in existence, and the Appellant was not being sought by any particular person or family. The FTT was not satisfied that the Appellant has no family in Afghanistan and therefore was not satisfied that the Appellant is an orphan.
17. The Appellant's Article 8 claim is based on the fact that he has lived in this country since 2009, and been educated here, has obtained qualifications by reason of his education, and made friends. He submitted a witness statement dated 11th June 2014 which indicated that at that time he was living in semi independent accommodation and that he received support from Kent Social Services.
18. At the date of the hearing before the FTT the Appellant was an adult, and although described by the FTT as being 18 years of age, it would seem that he was in fact 19 years of age at the date of hearing.
19. It could not be said that the Appellant had established a family life that would engage Article 8. At paragraph 64 the FTT acknowledges that the Appellant arrived in this country when he was around 11 years of age, and that his teenage years had been spent here. The FTT describe the Appellant as having developed a great deal in this country between the ages of 11 and 18, and developed skills that could be utilised in Afghanistan.
20. The FTT found that the Appellant would have no language difficulty and stated;

"I have taken into account his education and the fact that he has achieved a number of things whilst in the UK but these are things that can only assist him should he be returned."

Having taken all these factors into account, the FTT went on to find that the Appellant's appeal could not succeed pursuant to paragraph 276ADE(1).

21. I do not find that there are factors that have not been considered by the FTT when considering 276ADE(1) that would need to be considered under Article 8 outside the Immigration Rules.

22. It is correct that the FTT did not consider section 117B of the 2002 Act, but this would not need to be considered unless Article 8 was considered outside the Immigration Rules. If section 117B was considered, then the fact that the Appellant can speak English would not have assisted his case, as the Upper Tribunal in AM Malawi [2015] UKUT 0260 (IAC) found that an Appellant can obtain no positive right to a grant of leave to remain from either section 117B(2) or (3) whatever the degree of his fluency in English or the strength of his financial resources.
23. Section 117B(5) would have to be taken into account, which states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The Appellant has always had a precarious immigration status in that he has only ever had limited leave to remain. Therefore the FTT would have had to accord little weight to the private life that he has established.
24. I therefore conclude that although the FTT erred in believing the test for considering Article 8 outside the rules to be one of exceptionality rather than compelling circumstances, the error is not material, because the FTT considered all relevant matters when considering Article 8 pursuant to paragraph 276ADE(1).

Notice of Decision

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

Anonymity

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

Signed

Date

Deputy Upper Tribunal Judge M A Hall

1st July 2016

TO THE RESPONDENT FEE AWARD

As the FTT decision stands, so does the decision not to make a fee award.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

1st July 2016