



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

Appeal Number: IA/23364/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7th January 2016**

**Decision and Reasons Promulgated
On 1st February 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M S

~~(No anonymity order made)~~

Respondent

Representation:

For the Appellant: Ms A. Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr. M. Saleem, counsel, instructed by Malik & Malik Solicitors

DECISION AND REASONS

History of Appeal

1. The Respondent, who was born on 1 February 1985, is a national of Afghanistan. He arrived in the United Kingdom on 30 December 1998, when he was 13 years old, and applied for asylum. His application was refused on 10 January 2001 but he was granted limited leave to remain until 8 August 2005.

2. He was refused further leave to remain on 12 January 2010 and appealed against this decision. His appeal was allowed on 8 February 2011 and on 18 March 2011 he was granted limited leave to remain until 7 February 2014.
3. On 6 February 2014 he applied for indefinite leave to remain but his application was refused on 14 May 2014. He appealed against this decision on 23 May 2014 and his appeal was allowed by First-tier Tribunal Judge Khan on 8 July 2015.
4. The Appellant appealed on 21 July 2015 and permission to appeal was granted by First-tier Tribunal Judge Cox on 19 October 2015

Error of Law Hearing

5. At the error of law hearing counsel for the Respondent confirmed that he was not seeking to cross-appeal against the finding in paragraph 39 of First-tier Tribunal Judge Khan's decision that the Respondent was not entitled to an automatic grant of indefinite leave to remain.
6. In her first ground of appeal the Appellant submitted that First-tier Tribunal Judge Khan had not stated the basis on which he had allowed the Respondent's appeal. I have noted that in paragraph 45 of his decision, he simply stated that he had allowed the appeal. In addition, the rest of the decision does not clarify the precise basis upon which the appeal was allowed. This, in itself, gave rise to a material error of law based on a lack of adequate reasoning.
7. Paragraphs 10 of the decision suggests that the Judge was considering the Respondent's appeal under paragraph 276ADE of the Immigration Rules and Article 8 of the European Convention on Human Rights.
8. At paragraph 40 of the decision the Judge found that the Respondent had lost all ties with Afghanistan and I find that this is a finding which was open to him on the evidence before him. However, this was the previous test for granting leave under paragraph 276ADE of the Immigration Rules and the Judge should have considered whether there were very significant obstacles to him integrating if he returned to Afghanistan, which he did not do. (This test applied in appeals after 28 July 2014.) This amounts to another material error of law.
9. In paragraph 42 of his decision the Judge also found that it would be a disproportionate breach of Article 8 of the ECHR to remove the Respondent to Afghanistan, as his girlfriend would not be able to go there with him. However, he did not consider the requirements for leave under Appendix FM of the Immigration Rules before starting to consider Article 8 of the ECHR outside the Rules, as required to do. He also fails to consider whether there were the necessary compelling circumstances to justify considering the case outside the Rules.
10. Counsel for the Respondent noted that the Judge had relied on the test in the case of *Razgar* but this was not sufficient on its own in the light of *R (on the application of Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) and subsequent case law.

11. I accept that the Judge did quote section 117A and B of the Nationality, Immigration and Asylum Act 2002 in paragraph 43 of his decision. However, in paragraph 44 he failed to note that for the purposes of sub-section 117B(1) the maintenance of effective immigration controls are in the public interest and that the Respondent was not entitled to leave within the Immigration Rules. He also failed to direct himself to sub-section 117B(4) which states that little weight should be given to a relationship with a British citizen when an applicant's immigration status is precarious, that is he only had limited leave to remain in the United Kingdom. This also amounts to a material error of law in his approach to Article 8 of the ECHR.
12. For all of these reasons I am satisfied that there were material errors of law in the First-tier Tribunal Judge's decision and findings and that it should be set aside.

Conclusions:

1. The First-tier Tribunal Judge's determination did include material errors of law.
2. The decision should be set aside and remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge M. A. Khan.

Date: 14 January 2016

Nadine Finch

Upper Tribunal Judge Finch