Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08055/2013

THE IMMIGRATION ACTS

Heard at Newport **Determination Promulgated**
On 4 February 2014

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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr G Hodgetts instructed by Migrant Legal Project

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

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2. Although this is an appeal by the Secretary of State, for convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Afghanistan who was born on 3 June 1994. He arrived in the UK clandestinely on 1 July 2009. He claimed asylum the next day. On 26 October 2009, the Secretary of State refused the appellant's claim for asylum and humanitarian protection. The appellant appealed and on 29 August 2010 the First-tier Tribunal (Judge Holder) dismissed his appeal. However, on further appeal to the Upper Tribunal it was accepted that the Secretary of State had failed to consider her duty under s.55 of the Borders, Citizenship and Immigration Act 2009 and her policy in relation to unaccompanied children. Subsequently, the appellant was granted discretionary leave until 3 December 2011.

4. On 2 December 2011, he made an application for further leave to remain. On 8 August 2013, the Secretary of State refused that application. The appellant again appealed to the First-tier Tribunal. In a determination dated 8 October 2013, Judge Archer dismissed the appellant's appeal in reliance upon the Refugee Convention and Articles 2 and 3 of the ECHR. However, Judge Archer allowed the appellant's appeal under Article 8 of the ECHR. Judge Archer found that the appellant had "developed a high degree of private life in the UK" (see para 55 of the determination) and that the appellant's removal would be a disproportionate interference with that private life.

5. The Secretary of State sought permission to appeal to the Upper Tribunal against the decision that Art 8 was breached by the Respondent's decision on two grounds. First the Judge erred in law in failing to have regard to the relevant Immigration Rules as an expression of government policy (Ground 1). Secondly, the Judge failed to give adequate reasons for his finding that the appellant's remove would be disproportionate, in particular in the light of the evidence that the appellant had family in Afghanistan. Further, the Judge erred in finding that there had been a significant delay in dealing with the appellant's asylum application (some 20 months) and whilst delay was a weighty factor in assessing proportionality it was not determinative (Ground 2).

6. On 28 October 2013, the First-tier Tribunal (Judge Kamara) granted the Secretary of State permission to appeal:

> "3. In an otherwise well-reasoned determination the Judge arguably erred in law in failing to have any regard to the Immigration Rules in making his Article 8 assessment, particularly in a case where the appellant was unrepresented."

7. Thus, the appeal came before me.

Submissions

8. On behalf of the Secretary of State, Mr Richards relied upon the grounds of appeal.

9. First, he submitted that the Judge was required to take into account that the appellant could not succeed under the Immigration Rules, in particular the 'private life' provision in para 276ADE. That fact, which reflected Parliament's view on the issue of proportionality, had not been factored in by the Judge in his proportionality assessment. Mr Richards submitted that it was just not enough to say that the appellant did not meet the requirements of the Rules and then cast it aside and determine the appeal under Article 8.

10. Secondly, Mr Richards submitted that the Judge had accepted that the appellant had family in Afghanistan but he had not in any meaningful way put that factor into the balance when determining proportionality. In relation to the issue of delay in determining the appellant's asylum application, Mr Richards candidly acknowledged that, contrary to the assertion in the grounds, the Judge had specifically stated in para 56 of his determination that delay in itself was not determinative of the appellant's claim.

11. On behalf of the appellant, Mr Hodgetts submitted that the Judge had not erred in law.

12. As regards ground 1, he submitted that this was misconceived. The Judge had recognised that the appellant could not succeed under the Rules (see para 53 of the determination) and that he was considering the appellant's claim "outside the Rules" (see para 23 of the determination). Mr Hodgetts submitted that the Judge was required to do no more. He submitted that the Judge had made a "perfect direction" in determining the appellant's Article 8 claim in accordance with Razgar [2004] UKHL 27 (see para 53 of the judgment). Mr Hodgetts submitted that the grounds did not assert that the Judge was wrong to consider the appellant's Article 8 claim in accordance with Razgar.

13. In relation to ground 2, Mr Hodgetts submitted that the Judge had given adequate reasons for his findings. He pointed out that the grounds did not challenge the findings themselves. Mr Hodgetts referred me to a number of paragraphs in the Judge's determination. At para 41, Mr Hodgetts submitted that the Judge had taken into account that the appellant had "various family members" in Afghanistan. At paras 42-52 the Judge had set out in some detail the evidence both oral and written relating to the appellant's links with the UK and, in particular, his close relationship with "RC" who has autistic spectrum disorder and is blind. The appellant is his only friend and, RC's father gave evidence that there was a "special bond" between the appellant and RC. Mr Hodgetts submitted that the Judge was entitled to take into account this very close relationship which was not challenged in the grounds.

14. Mr Hodgetts submitted that the grounds' reliance upon the Judge's reference to delay was misconceived. It was clear from para 56 of the determination that the Judge recognised that delay was not "determinative" and that, in accordance with

the case law, he took that into account as relevant to the appellant developing stronger ties in the UK during a significant period in his life aged between 17 and 19. Mr Hodgetts submitted that the Judge's reasoning was adequate and he invited me to dismiss the Secretary of State's appeal.

Discussion

15. Ground 1 is in the following terms:

> "1. The Tribunal failed to have regard to the Immigration Rules in making its Article 8 assessment. In doing so it is respectfully submitted that it misdirected itself in law. In making a decision on an application it is necessary for the decision-maker to consider all the legislation relevant to that decision and to give reasons for the way that it applies that legislation to the facts of the case. In this instance the Tribunal had no regard at all to the relevant sections of the Immigration Rules. It is submitted that this simply cannot be an appropriate way for a sustainable decision to be made.
>
> 2. The Immigration Rules are a detailed expression of Government policy on controlling immigration and protecting the public. The Article 8 sections of the Immigration Rules reflect the Secretary of State's view as to where the balance lies between the individual's rights and the public interest. They reflect the broad principles set out in Strasbourg and domestic jurisprudence. Therefore, when a Tribunal considers an individual appeal it should consider proportionality in the light of this clear expression of public policy; and the Secretary of State would expect the Courts to defer to her view, endorsed by Parliament, on how, broadly, public policy considerations are weighed against individual family and private life rights, when assessing Article 8 in any individual case. The failure to do so means that the decision the Tribunal made on Article 8 is incomplete and that it is also unsustainable as it failed to consider a key element in the assessment of this case."

16. There is no doubt that the fact that the appellant could not succeed under the Immigration Rules was relevant to the Judge's assessment of proportionality in that the Rules reflect the Secretary of State's policy on how the public interest is to be weighted against an individual's family or private life. In particular, in this appeal the relevant rule is para 276ADE which deals with the circumstances when an individual can succeed in establishing a right to remain in the UK based upon his or her private life. This appeal is not concerned with any family life of the appellant in the UK. The private life rule (para 276ADE) and the family life rule (Appendix FM) do not, however, exclude consideration of Article 8 'outside the Rules'. This was made clear by the Upper Tribunal in Izuazu (Article 8 – New Rules) [2013] UKUT 0045 (IAC). At [40]-[43] the Upper Tribunal provided the following guidance:

> "40. We accordingly further endorse the Upper Tribunal's observation in [*MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC)*] that judges called on to make decisions about the application of Article 8 in cases to which the new rules apply, should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. If he or she does, there will be no need to go on to consider Article 8 generally. The appeal can be allowed because the decision is not in accordance with the rule.

> 41. Where the claimant does not meet the requirements of the rules it will be necessary for the judge to go on to make an assessment of Article 8 applying the criteria established by law.
>
> 42. When considering whether the immigration decision is a justified interference with the right to family and/or private life, the provisions of the rules or other relevant statement of policy may again re-enter the debate but this time as part of the proportionality evaluation. Here the judge will be asking whether the interference was a proportionate means of achieving the legitimate aim in question and a fair balance as to the competing interests.
>
> 43. The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the rules will depend both on the particular facts found by the judge in the case in hand and the extent that the rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom."

17. That guidance was, with one "slight modification", approved by Sales J in R (On the application of Nagre) v SSHD [2013] EWHC 720 (Admin) at [30].

18. Having cited, with approval, [40]-[43] of Izuazu, at [30] Sales J said this:

> "30. The only slight modification I would make, for the purposes of clarity, is to say that if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

19. As this makes clear, in principle, an individual may have a claim which transcends the provisions in the Rules. At [35], Sales J reiterated the importance of the Secretary of State's "residual discretion" to grant leave outside the Rules on the basis of Article 8. He said this:

> "35. The important points for present purposes are that there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules and that, consequent upon this feature of the overall legal framework, there is no legal requirement that the new rules themselves provide for leave to remain to be granted under the Rules in every case where Article 8 gives rise to a good claim for an individual to be allowed to remain. This had always been the position in relation to the operation of the regime of immigration control prior to the introduction of the new rules, and the introduction of the new rules has not changed these basic features of the regime."

20. More recently in Gulshan (Article 8 – New Rules – Correct Approach) [2013] UTUT 00640 (IAC), the Upper Tribunal again affirmed the point (at [24(b)]) that:

> "24(b) After applying the requirements of the Rules, only if they may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre".

21. At [27] the Upper Tribunal again stated:

> Only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for [the Judge] for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules…."

22. Although I was not referred to MF (Nigeria) v SSHD [2013] EWCA Civ 1192, nothing in the Court of Appeal's decision runs counter to what I have said when it is borne in mind that the Court of Appeal was considering the deportation rules, in particular para 398 of HC 395 (as amended). Para 398 is in the following terms:

> "**398.** Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

23. The reference to paras 399 and 399A is to provisions, encompassing in essence, respectively family and private life issues. As will be clear, where an individual cannot succeed under paras 399 and 399A then para 398 on its face states that it:

> "will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors." (my emphasis).

24. In MF the Court of Appeal concluded at [44]:

> "44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence."

25. There, unlike cases not concerned with deportation, an individual may succeed in resisting his deportation by establishing "exceptional circumstances" on the basis, as the Court of Appeal put it at [43] of MF, that there are "compelling reasons". By contrast, in the situation contemplated in Nagre and in this appeal, there is no explicit reference to "exceptional circumstances" in the relevant rules but, nevertheless, as Nagre and subsequent cases recognises, if there are sufficiently compelling circumstances an individual may succeed under Article 8 despite not being able to succeed under the relevant rules dealing with family and private life. The Court of Appeal in MF referred to Nagre (at [41]-[42]) without casting any doubt upon it.

26. Therefore, in my judgement, the case law recognises that if sufficiently compelling circumstances exist an individual may succeed in a claim under Article 8 even though he cannot succeed under the relevant Immigration Rules.

27. Reading Judge Archer's determination as a whole, it can be seen that he in effect followed precisely this line of reasoning. At para 53, he accepted that the appellant could not succeed under para 276ADE or Appendix FM of the Immigration Rules. There is no doubt that he had that matter fully in mind when he then went on to consider the appellant's claim under Article 8 'outside the Rules' (see paras 53 and 23). I therefore reject ground 1 that Judge Archer erred in law in failing to take into account that the appellant could not succeed under the Immigration Rules. As Mr Hodgetts pointed out, the grounds do not argue that the Judge was wrong to consider Article 8 'outside the Rules'. For the reasons I have given, he was entitled to do so and the real issue is whether his consideration of Article 8 and his ultimate finding that the appellant's removal would not be proportionate stands up to scrutiny.

28. That, then takes me to ground 2. In large measure, this is a 'reasons' challenge. As regards the issue of the 20 months which it took the Secretary of State to determine the appellant's asylum application, the Judge dealt with this at para 56 as follows:

> "56. There has been a significant delay since in dealing with the appellant's application and this weakens the legitimate aim of maintaining an effective system of immigration control. I find that the delay does not amount to such conspicuous unfairness as to constitute an abuse of power. Article 8 claimants ought not to be advantaged because of deficiencies in the control system. The delay is not in itself determinative of the appellant's claim. However, the appellant has developed stronger ties to the UK in many respects between the date of his application for further leave to remain and the refusal of 8 August 2013. 20 months is a hugely significant period for a young man between the ages of 17 and 19. The evidence clearly shows that the appellant has developed very deep and substantial links in the community generally and specifically with the C family and the families of S and K. He also has strong links to the UK through education and work."

29. In my judgment, the grounds' challenge to this aspect of the Judge's reasoning is without merit. The suggestion in the grounds is that the Judge took into account the delay as a "determinative" factor. In fact, the Judge said precisely the opposite in

para 56 namely that it was "not in itself determinative". Instead, the Judge took into account that the period of delay had strengthened the appellant's ties in the UK, in particular during a "significant period" for the appellant between the ages of 17 and 19 (see also para 42 of the determination set out below). That is one of the three ways in which Lord Bingham of Cornhill considered that delay could be relevant under Article 8 in his speech in EB (Kosovo) v SSHD [2008] UKHL 41 at [14]. There, Lord Bingham said this:

> "14. 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 delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under Art 8 will necessarily be strengthened."

30. The Judge did no more than this as undoubtedly he was entitled to do on the basis of the evidence he heard from a number of witnesses at the hearing and in a number of other witness statements that were submitted and not challenged before him.

31. The other matter raised in ground 2 is that the Judge failed to give adequate reasons why it was disproportionate to remove the appellant given that the evidence was that he had family in Afghanistan: no reasons were given by the Judge why he could not resume contact with them if he returned. Further, there was no reason why he could not maintain contact with his family and friends in the UK via modern methods of communication.

32. As I have already indicated, the Judge heard oral evidence from four witnesses and there was unchallenged written statements from a further seven witnesses. The Judge set out this evidence in some detail at paras 30 *et seq*. There was a significant amount of evidence showing the appellant's integration into the UK. At paras 41-42, the Judge accepted that the appellant had "various family members" in Afghanistan. At para 42, however, the Judge said this in relation to the appellant's ties to the UK:

> "42. …The appellant is a westernised young man who follows the Christian faith. I do not accept that it is in his best interests to return to Afghanistan on the basis that he can search for his father, brothers, sister and extended family members within the context of continuity of his social and cultural environment. It is difficult to see how a search for family relatives in a challenging region of Afghanistan can be in the appellant's best interests as compared to his current life in [E]. The underlying reality of this case is that the respondent has contributed to the westernisation of the appellant and his reliance upon family members and friends in [E] by the long delay in making a decision about his 2011 application for further leave to remain in the UK. He has been in the UK since he was 14 and his strongest cultural and social ties are now in [E]."

33. No challenge is made to the finding that it is in the appellant's best interests to remain in the UK. It is plain, on reading the determination and evidence as a whole, that the Judge was fully entitled to reach the finding that he did in para 42. At paras 43-47, the Judge dealt with the evidence concerning the appellant's relationship with RC. There is no doubt that this evidence was a significant factor in the Judge's

assessment of the proportionality of the appellant's removal. I, therefore, set it out in full:

"43. I also heard oral evidence from Mr AC ("A") who is a teacher at the comprehensive school in […] with extensive experience of dealing with teenage children. He adopted a letter dated 9 July 2013 (J31). The C family are Irish citizens. A states that the appellant is a truly exceptional young man. When they were first introduced by one of RC's carers the appellant had only been in the country for a short time. What made him stand out were his courteousness and his drive to become part of the community. He has a passion for learning and is most grateful for help. A's wife, D, and his son, RC are both disabled and RC has complex medical needs. The appellant contributes to the C family and has a special bond with RC who has autistic spectrum disorder. The appellant has broken through the barriers to communicate with RC and is now a very special part of his life. The prospective loss of the appellant to RC is something that worries the family greatly. Removal would be a devastating blow to the C family.

44. In oral evidence A confirmed that the appellant is RC's only friend. He cannot communicate with others. He is 18 and friends are very important. RC has Asperger's syndrome and cannot cope with change e.g. changes to his care package. He would be distraught and inconsolable if the appellant were to be sent back to Afghanistan. When changes occur in RC's life the family strategy is to talk over the situation and explain over and over again.

45. I have also seen letters from RC dated 2 August 2011 (J25-26) and 9 July 2013. RC is blind and disabled but nonetheless attended the oral hearing. He says that the appellant is really kind and helps with different things. He takes the time to speak to RC who sometimes has difficulty in hearing because he has auditory processing disorder. The appellant has learned to "sight" a blind person and is very good at it, unlike others. He can also run as a sighted guide which was helpful for the half marathon. The appellant regularly cooks for the family. He has introduced the appellant to Afghan music, food and games. They like each other an awful lot and RC hopes that the appellant can stay in the UK.

46. I have seen a letter dated 19 September 2013 from […] who is a Clinical Psychologist for the Child and Adolescent Mental Health Service. She has known of RC and worked with his parents for 20 months. RC has complex medical, sensory and psychological needs. He has developed a dependent relationship with the appellant over the last three years and their natural friendship is crucial for RC's social and emotional development. The appellant supports RC's social integration and reduces his isolation which are significant risk factors given his complex needs. Losing the appellant's friendship in terms of direct contact is likely to have a significant social and emotional impact. The appellant is likely to play an important role in RC's life long into his adult life.

47. I find that the appellant is effectively irreplaceable in RC's life given that he is the only genuine friend and their close bond. I find that repeated explanation for the appellant's absence might assist RC to deal with the loss but will not compensate for the void that will inevitably emerge in RC's life. I find that removing the appellant from the UK will be severely damaging to both the appellant and RC because of the deep and unique relationship that they have developed over a three year period. I find that they will not be

> able to communicate effectively through modern long distance methods of communication. Again, the respondent has contributed to the development of the relationship because of the delay in making a decision in relation to the appellant's 2011 application for further leave to remain in the UK."

34. Given the evidence concerning RC and his relationship with the appellant, I am in no doubt that it was open to the Judge to find in para 47 that their relationship could not be maintained effectively using "modern long distant methods of communication".

35. At paras 48-52, the Judge set out further evidence concerning the appellant's private life in the UK. At para 54, the Judge made the following finding:

> "54. I find that there is evidence of development of private life in the UK in terms of friends and engagement with the community. There is very substantial depth or breadth to the appellant's life in the UK as set out above. None of the evidence relating to the development of the appellant's private life in the UK is in dispute."

36. At para 55, the Judge went on to find that the appellant had developed "a high degree of private life in the UK" and that his removal would interfere with that private life.

37. In my judgment, this was one of those cases where the evidence rightly led the Judge to find that the circumstances justified consideration of the appellant's claim under Article 8 'outside the Rules'. Paragraph 276ADE, in particular, does not provide an avenue for vindication of private life of the "very substantial depth or breadth" that the Judge found to exist on the evidence. At para 57, the Judge weighed the public interest against the appellant's very strong private life as follows:

> "57. Overall I find that the interference with the appellant's protected right to private life is not proportionate to the legitimate objective that is sought to be achieved. The appellant has become a valuable member of the community with a very strong private life in the UK. The delay has significantly weakened the legitimate aim and strengthened the appellant's ties to the UK. Efforts to trace the appellant's family in Afghanistan are now underway but there are no results so far. In all the circumstances, removal of the appellant from the UK is not proportionate."

38. As Mr Hodgetts submitted, the Secretary of State's challenge is essentially a 'reasons' challenge. In relation to that, the Upper Tribunal gave the following guidance in Shizad (Sufficiency of Reasons: Set Aside) Afghanistan [2013] UKUT 85 (IAC) at [10]:

> "10. We would emphasise that although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, such reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the Judge. Although a decision may contain an error of law where the requirements to give adequate reasons are not met, this Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country

> Guidance is taken into account, unless the conclusions that the judge draws from the primary data before him were not reasonably open to him."

39. Shizad was cited with approval in MK (Duty of Give Reasons) Pakistan [2013] UKUT 0064 (IAC) at [11] *per* McCloskey J (President).

40. Reading the determination as a whole, the Judge carefully considered the evidence and made clear (unchallenged) findings of fact in relation to the impact upon the appellant and RC if he were removed. The Judge correctly applied the 5-stage approach in Razgar. The Judge acknowledged that the appellant could not succeed under the Immigration Rules but, nevertheless, established that the strength of his private life in the UK and the impact upon it if removed to Afghanistan outweighed the public interest. Reading the evidence and the Judge's findings together, I see no basis for concluding that his reasons were inadequate. It is entirely clear why he found in the appellant's favour. That conclusion is not, in itself, directly challenged in the grounds. In my judgment, Judge Archer was entitled to find that this was a case where the appellant could succeed under Article 8 'outside the Rules' a finding which is entirely consistent with the jurisprudence on the relationship between the new Rules and Article 8.

41. For these reasons, I also reject ground 2.

Decision

42. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Article 8 of the ECHR did not involve the making of an error of law. The decision stands.

43. The Secretary of State's appeal to the Upper Tribunal is, therefore, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: