IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05881/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 January 2015	**On 15 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUSTAFA LAALI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms L Kenny, Home Office Presenting Officer
For the Respondent: Mr N Nason, Luqmani Thompson & Partners Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Miller promulgated on 28 October 2014 allowing the appeal of Mr Mustafa Laali against a decision of the Secretary of State for the Home Department dated 26 July 2014 to refuse to vary leave to remain in the United Kingdom and to issue removal directions.

2. Although in the proceedings before me the Secretary of State is the appellant, and Mr Laali is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Laali as the Appellant and the Secretary of State as the Respondent.

3. The history of the Appellant's case is a matter of record and I do not propose to repeat it in any detail. Suffice to say, he arrived in the United Kingdom in about August 2008 at the age of 13 years. He made an application for asylum which was refused for reasons set out in a 'reasons for refusal letter' ('RFRL') dated 4 November 2008. However, in accordance with the Secretary of State's policy in respect of discretionary leave for unaccompanied minors he was granted discretionary leave to remain until 3 November 2011. Towards the end of that leave he applied for variation of leave to remain and maintained that he was at risk if he were to be returned to Afghanistan. This application was also refused, for reasons set out in a RFRL dated 26 July 2014.

4. The Appellant's nationality was disputed in the RFRL of 4 November 2008, and indeed his credibility was rejected in respect of almost all material aspects of his claim.

5. In the subsequent RFRL dated 26 July 2014 at paragraphs 11 and 13 the decision-maker made reference to the earlier RFRL. Express reference was made to paragraphs 7-39 of the RFRL of 4 November 2008, and it was stated: "*the reasons provided in [the RFRL of 4 November 2008] still stand*". Those paragraphs included the paragraphs rejecting the Appellant's credibility and claimed Afghanistan nationality.

6. However, it may be said that there was a degree of ambiguity in the letter of 26 July 2014 in that in the heading of the letter the Appellant's nationality was stated as 'Afghanistan'. In the heading of the earlier refusal letter nationality had been stated as 'Afghanistan (disputed)'. The word 'disputed' does not appear in the more recent RFRL. Further there are certain passages in the more recent RFRL which appear to be premised on an acceptance that the Appellant's home area was in Afghanistan. In those circumstances it is perhaps not surprising that when the matter came before the First-tier Tribunal the Appellant's representatives in a Skeleton Argument dated 15 September 2014 suggested that the issue of nationality was no longer in dispute.

7. In the decision of the First-tier Tribunal Judge, at paragraph 12, it is expressly recognised that nationality was in issue in the refusal letter of 2008. It is not identified, however, that the Respondent in reaching the decision under appeal expressly relied upon the paragraphs in the first RFRL that rejected the Appellant's claimed

nationality. When the Judge reached the 'Findings and Conclusions' section of his determination he expressed the view at paragraph 31: "*it would appear that the Respondent now accepts that [the Appellant] is from [Afghanistan]*".

8. The grounds of challenge to the Upper Tribunal maintain that the Respondent continues to dispute the Appellant's nationality and indeed that is the position taken by Ms Kenny today.

9. It seems to me that faced with the potential ambiguity between the RFRLs, and more particularly the ambiguity in the instant RFRL of 26 July 2014 which on the one hand relies on express passages denying the appellant's Afghanistan nationality and on the other hand does not expressly state that such nationality is disputed in the heading of the letter, the First-tier Tribunal Judge should have sought clarification. There is no indication that he did so. In the circumstances it seems to me that the First-tier Tribunal Judge has not adequately engaged with the issues between the parties.

10. The Judge's approach to this issue is also material in the overall assessment of credibility. In respect of credibility, in any event in my judgement the reasoning at paragraph 31 of the First-tier Tribunal Judge's decision constitutes an inadequate treatment of the issues.

11. In the initial RFRL of 4 November 2008 a number of different matters were raised in respect of credibility, including in respect of the Appellant's account of his travel to the United Kingdom, his apparent inability to 'come up to proof' at interview compared with a statement that had been prepared prior to interview, and his denial of having been fingerprinted in France *en route* to the United Kingdom at a time inconsistent with other aspects of his account.

12. The First-tier Tribunal Judge expressed himself satisfied in respect of the Appellant's credibility and as regards the nature of the account advanced at the initial substantive asylum interview expressed the view that

> …"*it is hardly surprising that he did not have much knowledge of Afghanistan and gave contradictory answers to some of the questions which were put to him*"

bearing in mind his age at the time of his arrival in the United Kingdom. In my judgment that does not adequately address the issue of the Appellant's apparent ability to give a detailed witness statement but failure 'to come up to proof' in the course of the interview. Nor does the Appellant's age explain his clear lie at interview in denying that he had been fingerprinted in France

(where he also gave different details of his name and date of birth).

13. In all the circumstances in my judgment the First-tier Tribunal Judge failed adequately to engage with the issues of credibility and has not explained in a sustainable way his conclusion that the Appellant was a credible witness.

14. Further, the Judge having stated his conclusions in respect of credibility at paragraphs 31 and 32 of the determination, then completely failed to go on to make any assessment of risk of persecution in Afghanistan. Instead he proceeded directly at paragraph 33 to an assessment of 'internal relocation'. This is a significant gap in the decision and in itself renders the determination wrong in law.

15. Whilst it is suggested by Mr Nason that had the Judge engaged in such an analysis he could only have come to one conclusion, I do not accept that. In any event it is such a fundamental gap in the decision that it cannot be the case that this decision can stand as a proper assessment of an asylum claim to which anxious scrutiny should have been brought. In those circumstances the issue in respect of relocation is not adequately premised. In any event I am persuaded that the consideration of the issue of internal relocation is also inadequately reasoned.

16. In this context I note that the First-tier Tribunal Judge does not make any specific reference to the relevant country guidance case of **AK (Article 15(c)), Afghanistan CG [2012] UKUT 00163 (IAC)**, nor does the judge refer to any background material to explain why the characteristics he has identified in respect of the Appellant would present sufficient difficulties such as to make relocation to Kabul unreasonable.

17. Further it is unclear what the Judge meant in the phrase "*As a Hazara he would stick out in Kabul*". Mr Nason accepts that this is an unfortunate phrase. In my judgment it is entirely unclear on what basis this conclusion has been reached, or what the Judge particularly meant by it.

18. In all such circumstances so far as the decision in respect of the Appellant's claim for protection is concerned I find material errors of law to an extent that the decision must be set aside and remade.

19. The Judge in the alternative considered Article 8 of the ECHR by reference to the Appellant's private life in the United Kingdom: see determination at paragraph 34. The treatment of this aspect of the case is brief. Perhaps this is because the judge considered

that having allowed the case under the Refugee Convention this aspect did not require quite so much focus. Be that as it may, the Appellant's representatives have by way of a Rule 24 notice raised a challenge to the assessment of Article 8.

20. I am satisfied that the Judge's consideration of Article 8 was deficient both in fact and law. The Judge does not undertake a proper analysis by reference to a combination of the Immigration Rules and the wider aspects of a freestanding consideration of Article 8 pursuant to the **Razgar** principles. Instead, the Judge essentially finds as determinative the circumstance that the Appellant in securing himself a place at university may have deprived someone else of a place causing "*resentment on the part of British parents*". In my judgement the analysis in no way reflects a proper and careful consideration of the Appellant's private life beyond his university place, and does not involve a proper and careful identification of the countervailing public interest; necessarily the proportionality balancing exercise is defective given the flawed premises.

21. In the circumstances, given that the protection issues are to be reheard it seems to me that it is only right and proper that any rehearing of the appeal should be with all issues at large including the Article 8 issue.

22. There is one further matter that the Appellant sought to raise in the circumstances of the proceedings before the Upper Tribunal. On 4 November 2014 he completed 6 years in the UK with discretionary leave. This is a circumstance that both necessarily post-dates the decision that is the subject of the appeal before the Tribunal and also post-dates the hearing and determination of the First-tier Tribunal. It is argued on behalf of the Appellant that policy still in force is such that a person who has benefited from 6 years of discretionary leave will ordinarily be granted indefinite leave to remain. I make no comment on the correctness of that submission. It is not a matter that I have heard detailed argument on and I have not had consideration to any of the relevant policy documents and have not explored with the representatives the particular circumstances of the Appellant. However, for the present purposes Mr Nason emphasises his wish to be able to raise such an argument in the current proceedings. It seems to me that any challenge to the immigration decision that founds the jurisdiction of the Tribunal cannot involve a challenge that the decision was not in accordance with the law because of a failure to have regard to a policy which the Appellant accepts did not benefit him at the date of the Respondent's decision. In such circumstances – and with the *caveat* that I have not heard full argument on the issue - the only vehicle for exploring before the Tribunal the discretionary leave policy said to apply would appear

to be Article 8 of the ECHR. Bearing in mind that when the matter is reconsidered by the First-tier Tribunal the Tribunal will need to engage with Article 8 issues by reference to the circumstances at the date of hearing, it may be open for the Appellant to run an argument to the effect that the proportionality balance under Article 8 should reflect the policy.

23. That said, I make no comment on the merits of such a submission and I make no comment on the possibility and potential merits of the Appellant in the meantime making representations to the Secretary of State with reference to this policy. That is a matter for him and his advisers.

24. In conclusion I find that there has been an error of law. The effect of that error of law in my judgment is that neither party to this appeal has had a fair hearing and accordingly the appropriate resolution is for the decision to be set aside in its entirety and for the appeal to be reheard before the First-tier Tribunal, before any judge other than First-tier Tribunal Judge K S H Miller, with all issues at large. It is unnecessary to make any particular directions. Standard directions will suffice.

Notice of Decision

25. The decision of the First-tier Tribunal contained a material error of law and is set aside.

26. The decision in the appeal is to be remade by the First-tier Tribunal, before any judge other than First-tier Tribunal Judge K S H Miller.

Signed Date: 13 January 2014

Deputy Upper Tribunal Judge I A Lewis