IAC-FH-AR-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07356/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2015	**On 13 May 2015**

Before

THE HONOURABLE MR JUSTICE COLLINS

Between

INAMULLAH SHERZAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hoshi, Counsel, instructed by Brighton Housing Trust
For the Respondent: Mr L Tarlton, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by leave from a decision of First-tier Tribunal Judge Hodgkinson which was given on 11 December 2014. The appellant is a citizen of Afghanistan. He has a date of birth which has been estimated to be 1 January 1994. He arrived in this country having obviously had to go through other countries to get here in July 2009. He was thus then regarded as 15 years old.

2. He applied for asylum on arrival. He in fact came in the back of a lorry but his application was refused in November 2009. However since he was a minor the practice was to give such as him a limited leave to remain until they reached the age of 17½. Accordingly he was given leave to remain until 1 July 2011. He did not seek to appeal the decision refusing his asylum claim. He has said since that he was advised by those then representing him that he should not appeal. Quite why that advice was given if he was contending that his account should have been believed is difficult to understand. Nevertheless there is no reason to disbelieve that part of his evidence.

3. However in June 2011, shortly before his leave expired he applied for further leave to remain effectively renewing his asylum claim. Regrettably, and I am afraid all too regularly, it took a very long time for the Secretary of State to decide that claim. In fact it was not decided until September 2014.

4. Essentially in a very lengthy decision letter the appellant's account of the reason why he feared return to Afghanistan was disbelieved by the Secretary of State. What he asserted was that he and his father had been involved in what I suppose can be described as a battle with neighbours in relation to the ownership of land and in the course of an altercation one of then neighbours was killed. It was not clear from the various accounts given by the appellant, and indeed this was one of the matters which led to the First-tier Tribunal Judge not believing him, as to precisely what part he played in that death. At one stage it was said that he and his father were both responsible but, no doubt in order to explain why certainly until at least 2011 nothing had happened to the father and there had been no suggestion of any attempt by the neighbours to revenge themselves upon the father, he asserted that actually he was the only one who was as it were a target. But the result was he asserted a blood feud and that would mean that were he to be returned his life would be in danger.

5. In due course a Jirga was produced, that is to say a decision of the elders of the village, which apparently had been obtained by his father. Unfortunately for him the Jirga was entirely inconsistent with the account that he had given and that again was a matter heavily relied on by the First-tier Tribunal Judge.

6. Overall his account was disbelieved and the judge concluded that there never had been an incident such as he described and there was no blood feud. That conclusion was reached following a very detailed consideration of the evidence and as Mr Hoshi accepted, a proper and full reasoning by the judge and the appeal did not and does not seek to challenge that conclusion. It is important, however, for reasons that will become clear to note as a result that his presence here, certainly after the initial two years granted because he was a minor, was based upon what clearly would amount to a deception, the deception being that he had a valid claim for asylum when in reality there was no such claim.

7. The appeal is brought because of the approach made by the judge to his Article 8 claim. This was based on his private life. It was said that he had been here in this country since 2009, by the time the judge was considering the matter for some five

years or so, and he had built up, as is perhaps obvious, a life here. He had made friends, made contacts and had lost touch with Afghanistan. In particular the evidence so far as contact with his family was concerned was that he had last spoken, he said, to his father in June 2011, and it was his claim that he had had no contact with his father since that time.

8. One of the conclusions reached by the judge related to whether his father, indeed presumably the rest of his family, were still living in the village in question or even were still alive. What so far as material to this aspect was said by the judge is summarised really in his conclusion in paragraph 49 where he says this:

> "Having taken into account the totality of the available evidence, and with particular reference to the evidence to which I have referred above, even taking into account the appellant's youth at relevant times, and the lower standard of proof, I nevertheless conclude that the appellant is an individual whose core account lacks all credibility and is, in fact, a fabricated account. Consequently, I conclude that the appellant's account of the land dispute between him and the neighbouring family is fabricated. I find as a fact that neither the appellant nor his father killed anybody at all in Afghanistan in any circumstances. I conclude that the appellant did not flee from his home address contrary to his claim otherwise, and I find as a fact that his immediate family, comprising his parents and a number of siblings, continue to live at their home address in their home village. I conclude that the applicant's account, of having lost contact with his family is untrue and find as a fact that he continues to maintain some contact with his father in Afghanistan, despite his contention otherwise."

9. Mr Hoshi submits that that is essentially unreasoned and furthermore it was not directly put to the appellant in the course of the hearing that he did maintain contact with his father or that his family was still where they were. There was evidence in the form of an expert report and part of that was to follow up the Jirga and this expert had someone in Afghanistan who reported to him when sent to obtain information. He went to the village and obtained information from the elders. He was not asked to obtain any information about the appellant's family there. But if the father had died, certainly if he had been killed in consequence of any blood feud, one would have expected that to have been common knowledge. The reality is that once the appellant was comprehensively disbelieved there was in my view no reason at all why the judge should not have found as he did in relation to whether family ties were still maintainable in Afghanistan.

10. Mr Hoshi sought leave to amend his grounds to cover that particular point because it was not raised in his original grounds. I have considered the matter but it seems to me that whether or not he has leave to raise the point, the point is not one which is maintainable.

11. I turn then to what the judge said in relation to Article 8. It is of course common ground that the appellant cannot satisfy the requirements of the Rule which seeks to dictate how Article 8 is to be applied. So one has to go outside the Rules in order to consider whether there is a valid Article 8 claim. Certainly since both the lower Tribunal and this Tribunal is a public body within the meaning of Section 6 of the Human Rights Act it is necessary to consider whether there is a breach of an

individual's human rights and thus it is necessary for the Tribunal to consider whether return, assuming a private life has been established, is proportionate.

12. The way the judge put it in the last sentence of paragraph 55 founds the error of law which is relied on to enable this appeal to be brought. Having considered the Tribunal's decision in **Gulshan [2013] UKUT 00640 (IAC)** and the decision of the Court of Appeal in **LC (China) v Secretary of State [2014] EWCA Civ 1310** he concluded in this way:

> "In the present instance bearing in mind the particular circumstances applicable to the appellant as I find them to be, I am satisfied that there are no properly arguable grounds for giving consideration to the issue of the grant of leave to remain to the appellant under Article 8."

13. However he then goes on in 56, 57, 58 and 59 to consider matters which go to whether it would be proportionate, assuming there was an interference with private life.

14. The judge granting leave to appeal did so on the basis that reference to the **Razgar** test, which is what the judge did without actually naming **Razgar** specifically, was inconsistent with his earlier decision that there was no arguable Article 8 claim outside the Rules. It seems to me that the reality is that albeit he put it on the basis of no properly arguable grounds, what he was doing essentially was to identify his conclusion in paragraph 55 and then go on to give the reasons why in his view it was not proportionate to grant them leave to remain.

15. If one goes to the statutory provisions, I now have to take into account Section 117B of the 2002 Act as inserted by the 2014 Act and that provides by subsection (5) 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. Subsection (4) provides that little weight should be given to a private life established by a person when in the United Kingdom unlawfully. That one can well understand.

16. There is an interesting argument I am told by Mr Hoshi which has been raised in a number of Tribunal decisions as to what is meant by the word "precarious". Does it extend to cover any limited leave to remain or is more than that required? In my view it is quite unnecessary to go into the details of that argument and I do not propose to do so. What I do say is that it seems to me quite clear that where someone is here where that leave is granted as a result of making a false claim for asylum he can properly be regarded as here precarious.

17. Mr Hoshi submits that that was not the basis upon which the original two years was granted because the Rule was then to grant limited discretionary leave until a minor reached the age of 17½. Therefore that leave did not depend upon whether or not the claim was a valid claim.

18. However, continuing that leave and making a further application which enabled that leave to be continued under section 3C of the 1971 Act is in a different category. Once it was established, as it was that that extended leave was obtained in

circumstances that were akin at least to deception in as much as it was based upon a false claim for asylum, it seems to me quite clear that little weight should be attached to it. Whether because it is regarded as precarious or because as a matter of general approach to Article 8 and proportionality, having regard to subsection (1) of 117B which provides that maintenance of effective immigration controls is in the public interest it seems to me that it is entirely proper to attach little weight to the major period of presence in this country.

19. Whether or not there can properly be said to be an error of law in the decision of the judge it seems to me that it is perfectly clear that his conclusion is one not only to which he was entitled to come but is one which is a proper conclusion on all the evidence before him. I am entitled in this Tribunal, rather than send the matter back to take the view as I do that the conclusion reached was one which was entirely proper and indeed correct and that no purpose is to be served in seeking to have a further decision below.

20. I am bound to say that that is a conclusion that I personally would have reached had I been required to consider leave to appeal. I certainly would not have granted it because it seems to me that the ultimate conclusion was one which was an entirely proper conclusion on the evidence taken into account by the judge and on the basis of the correct approach to proportionality under Article 8.

21. Accordingly this appeal must be dismissed.

Notice of Decision

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed Date **5 March 2015**

Mr Justice Collins