



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

**Appeal Number: AA/07662/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 August 2015**

**Decision Promulgated  
On 2 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**N M**  
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr B Hoshi counsel instructed by Brighton Housing Trust  
For the Respondent: Ms A Holmes Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. An anonymity order was made in this case and shall continue.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Webb promulgated after a hearing on 5 December 2014 in which he dismissed the Appellant's appeal on all grounds .

**Background**

3. The Appellant was born on 1 February 1994 and is a national of Afghanistan.

4. On 1 October 2010 the Appellant applied for asylum when he was 16 years old after leaving Afghanistan in September 2008. The Appellant was refused international protection on 13 July 2010 but was granted Discretionary Leave until 1 August 2011. On 29 July 2011 the Appellant submitted an application for further leave to remain.
5. On 16 September 2014 the Secretary of State refused the Appellant's application and made directions for his removal under section 47 of the Immigration, Asylum and Nationality Act 2006. The refusal letter at paragraphs 20-109 gave a number of reasons for the refusal:
  - (a) The application for further leave was not to be treated as a fresh claim for asylum as all of the issues raised had been dealt with in the refusal letter of 13 July 2011.
  - (b) In view of the lack of detail about his paternal uncles' role in the Taliban it was not accepted that they were high ranking fighters in the organisation or that he would be forced by them to become a suicide bomber. Therefore it was not accepted that the Appellant would have any fear of the Taliban or from the Afghan authorities associating him with the Taliban.
  - (c) The Appellant was an adult male in good health and thus could return to Afghanistan.
  - (d) As someone with no profile there would be sufficiency of protection.
  - (e) As a returning failed asylum seeker it would be open to the Appellant to relocate to Kabul.
  - (f) The relationship with his girlfriend Emma Williams did not amount to family life within the Rules.
  - (g) The Appellant has regular contact with his brother who lives with a foster family but his brother does not have settled status and the relationship could be maintained in other ways.
  - (h) The Appellant did not meet the private life requirements of 276ADE.

#### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Webb ("the Judge") in a 24 page decision dismissed the appeal against the Respondent's decision. The Judge set out in the decision:
  - (a) The documentary evidence at paragraphs 7-9.
  - (b) The oral evidence of the Appellant at paragraphs 10-16.
  - (c) The oral evidence of the Appellant's 17 year old brother at paragraphs 17-21.
  - (d) The oral evidence of the Appellant's girlfriend at paragraphs 20-21.
  - (e) The submissions of the HOPO at paragraph 22 in 9 bullet points which were in essence that the decision in the brother's asylum appeal was the starting point in this case; there were credibility issues due to the failure to claim in other countries; there was no evidential basis on which it could be concluded that the Appellant's paternal uncles were in the Taliban or were prominent members; the claim was based on one conversation which amounted to a request and no consequences apparently flowed from his refusal; his credibility was damaged

by his failure to ask his mother about his paternal uncles after he left; the Appellant could relocate to Kabul; there was nothing sufficiently compelling about the case to warrant a grant of leave outside the Rules in that he had a girlfriend but they were not co habiting and his brother was in the UK but his status was precarious..

- (f) The submissions of the Appellant's counsel Mr Hoshi at paragraph 23 in 11 bullet points which were in essence that he accepted the decision made in relation to the Appellant's brother was the starting point but the fresh evidence including that related to the Appellant and the country situation mean that the decision should be made afresh; the failure to claim in order countries and in 2010 should not be held against him given his age; in respect of the claim that his evidence was vague account should be given of his age when he left Afghanistan and he referred to AA (Unattended Children) Afghanistan CG [2012] UKUT 00016 (IAC); if credible he is at risk on return and relocation would be unreasonable; the breach of the tracing duty had caused him prejudice in that he would not have family support on return; in relation to Article 8 he relied on the relationship between the Appellant and his girlfriend who was very vulnerable; his relationship with his brother was more than normal emotional ties and as he was a child his best interests should be a primary consideration; there were no countervailing factors to outweigh the best interests of the Appellant's brother.
- (g) The legal framework in relation to international protection at paragraphs 24- 28 and that included reference at paragraphs 26-28 of how to approach claims made by minors which the Judge acknowledges apply in this case as the Appellant was a child when he left Afghanistan .
- (h) The legal framework of Article 8 at paragraphs 29 - 32 and he sets out the requirement to look firstly at the Rules and then whether there are circumstances not recognised under the rules which would make the decision to remove disproportionate.
- (i) The relevance of Devaseelan [2003] Imm AR 1 to the Appellant's appeal was considered in cases involving different Appellants but where there was a material overlap in the facts.
- (j) At paragraph 38 he stated that there was a material overlap of evidence and the two brothers were relying on the same factual matrix as they left on the same day. He set out the findings made by the Judge in the Appellant's brothers case and summarised those findings at paragraph 39 that there was no evidential basis for concluding that the Appellant's uncles were Taliban activists or fighters who wished the Appellant or his brother to be suicide bombers ; no threats were issued to ensure the brothers complied and plans for their departure took some days while living in the same compound as the uncles; nor did the Appellant or his brother fit the profile of Afghani born child bombers.
- (k) At paragraph 40-41 he set out the background country material. He refers to the expert's view that forced recruitment is rare and suicide bombers are very rarely pre selected before training which is consistent with what is said in the relevant OGN.

- (l) At paragraph 42-47 he analysed the evidence of the Appellant and his brother and found discrepancies between their accounts and aspects of the Appellant's evidence that 'did not stand up well to cross examination.'
  - (m) At paragraphs 48-52 he set out his overall assessment of the claim for international protection concluding at paragraph 51 that he did not find the core account credible.
  - (n) At paragraphs 53-60 he set out the Article 8 considerations recording counsel's concession that the Appellant did not meet the requirements of paragraph 276ADE1 or Appendix FM. Given that the Appellant's brother was 17 years and 11 months at the date of hearing he found it artificial to pply the principles set out in ZH. He did not accept that the relationship went beyond normal emotional ties. He considered the relationship with between the Appellant and his girlfriend and found that it did not amount to family life. He considered the suicide risk to the Appellant's girlfriend and concluded that it would be managed by the girlfriend's family and the NHS.
  - (o) He found no causal link between the failure to trace and the issues relevant to the appeal.
  - (p) He found removal to be proportionate.
7. Grounds of appeal were lodged and on 16 March 2015 First-tier Tribunal Judge Shimmin gave permission to appeal on all grounds
8. At the hearing I heard submissions from Mr Hoshi on behalf of the Appellant that:
- (a) He accepted that the decision was a lengthy one and that was why his grounds were long.
  - (b) He suggested that there were two errors in relation to the assessment of the claim for refugee status and 6 in relation to Article 8.
  - (c) In relation to the refugee claim the Judge failed to take into account the Appellant's age at the time the events described.
  - (d) There was no recognition of the fact that the Appellant was recounting events that happened when he was 14 years old that occurred 7 years previously: there was no child sensitive assessment.
  - (e) In relation to the consideration of Judge Malin's decision he set out the legal framework and acknowledged that there was a material overlap between their cases. He failed however to make a clear finding as to whether he was prepared to depart from Judge Malin's decision and if not why not. The reasons that had been advanced by Mr Hoshi for departing from the previous decision was that Judge Malin heard no oral evidence from the Appellant's brother and this Appellant had also not given evidence and that Judge Malin had also failed to take into account the age of the Appellant's brother.
  - (f) In relation to the Appellant's brother it was an error of law not to take into account his brothers best interests.
  - (g) The Judge had misapplied the test in Kugathas suggesting at paragraph 56 that there was a requirement for dependency.

- (h) The Judge did not make a clear finding in paragraph 57 as to whether the Appellant and his girlfriend enjoyed family life together and the impact of her mental health on that assessment.
- (i) The Judge failed to assess the girlfriend's suicide risk by reference to both Article 3 and 8.
- (j) The judge was wrong to find that there was no causative prejudice in relation to the breach of tracing duty. The Appellant is 20 years old and if he has no family in Afghanistan that could support him this was relative to the assessment of proportionality.

9. On behalf of the Respondent Ms Holmes submitted that :

- (a) In relation to the submission that the judge had failed to take account of the Appellant's age he was clearly mindful of it directing himself at paragraph 26 of the vulnerability of minors. He was not required to repeatedly make reference to it.
- (b) The judge also made adverse findings about the Appellant's evidence at the time of the hearing not in relation to when he was a minor and his recall of that period.
- (c) In relation to Judge Malins findings, which were never challenged, there was tacit acceptance of them by the Judge.
- (d) The Judge made no findings about the brother's best interests but given his age at the time of the hearing and his findings about the nature of their relationship it would have made no difference to the decision. There was no evidence of a relationship between the brothers such as to allow the Appellant to benefit from it.
- (e) The Judge made clear that he did not accept that the Appellant and his girlfriend enjoyed family life together.
- (f) In relation to the girlfriends mental health issues even if that had been separately considered under Article 8 it would have made no difference to the outcome of the decision.
- (g) In relation to tracing the Judge found that there was no causative prejudice and this was a finding open to him. He also made the point that the Appellant was not a minor anymore and the relevance of this as an issue must diminish with age.

10. In reply Mr Hoshi on behalf of the Appellant submitted :

- (a) The Judge set out the relevant caselaw to assessing the evidence of children but had to demonstrate that he had applied it.
- (b) It was not clear what approach the Judge had to Judge Malins decision.
- (c) In relation to the assessment of the best interests of the Appellant's brother there was evidence before the Judge of more than normal emotional ties: they did not live together but intended to do so and had an unusually close relationship.
- (d) In relation to the suicide risk in relation to the Appellant's girlfriend under Article 8 the threshold for saying this failure was not material was a high one.

- (e) There was no authority for saying that the failure to trace was only of relevance up to the age of 18.

### **Finding on Material Error**

11. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law. I am satisfied that looking at this decision in the round the appeal is simply a sustained disagreement with the findings reached by the Judge after hearing the same arguments advanced by Mr Hoshi in the First-tier Tribunal.
12. In relation to the argument that the Judge failed to take into account that the Appellant was a child when the events relied on by him occurred I am satisfied that the Judge clearly demonstrated in his 'Findings of Fact' which start at paragraph 24 that he directed himself by reference to relevant law and guidance in considerable detail as to how the approach the evidence of children specifically at paragraphs 26-28 and recognised the fact that he had already recorded in the decision on a number of occasions that the Appellant was 14 when the events in issue occurred. Having opened his findings in this way with a clear analysis of the correct legal guidance I am satisfied that I cannot agree with the argument that he misdirected himself. Ultimately the fact that the Appellant was 14 at that time did not mean that the Judge had to accept he was a credible witness or indeed that the account he gave sustained an asylum claim. The Judge had the benefit of hearing from the Appellant and his brother about those events and reached findings that were open to him about the claim they made.
13. In relation to the argument that the Judge made no clear finding as to what approach he had taken in relation to the decision of Judge Malin I am satisfied that again he fairly set out the law as it applied to previous decisions involving different Appellants where there was a material overlap of evidence (Paragraphs 33-37). I am satisfied that he correctly applied that law by using as his starting point the findings of fact of Judge Malin at paragraph 38. He heard and recorded the arguments from Mr Hoshi as to why he should go behind the decision of Judge Malin but in rejecting them he nevertheless evaluated the evidence of the Appellant and his brother and decided the Appellants case on its own merits.
14. In relation to the challenges raised in respect of Article 8 I am satisfied that Mr Hoshi has not identified any factor that that the Judge failed to consider but is disagreeing with the weight he has given to the various findings he made in the assessment of proportionality: that is not an error of law. In relation to the best interests of the Appellant's brother the Judge clearly addressed at paragraph 55 the fact that at the time of the decision the brother was 17 years and 11 months old. He therefore came to the conclusion that it would be 'artificial' to apply the principles set out in ZH (Tanzania) v SSHD and I am satisfied that this was a finding open to him.
15. It was argued that the Judge misapplied the guidance given in Kugathas v SSHD [2003] EWCA Civ31 but I disagree as the Judge clearly agreed with Mr Hoshi's argument that the case had previously been too narrowly interpreted (paragraph 56). He was nevertheless entitled to find on the basis of the very limited evidence before him that the relationship between the two brothers did not go beyond normal sibling ties or find that they were 'dependent' in the same way as a married couple or parent

and minor child: he was manifestly not stating that dependency or such a relationship was the applicable test.

16. I am satisfied that the judge made clear findings in paragraph 57 that the relationship between the Appellant and his non co habiting girlfriend who was at University in Portsmouth while he lived in Worthing was not a family relationship. That was a finding open to him. I find that the Judge made clear and detailed findings at paragraph 57 and 58 about the girlfriend's suicide risk and on the evidence before him was entitled to conclude that her family and the NHS would take the appropriate measures to guard against her committing suicide if the Appellant was removed. The weight the Judge has given to this aspect of the Appellant case in the proportionality exercise was a matter for him.
17. The challenge to the Judges assessment of the tracing failure in paragraph 59 is I find unsustainable. The Judge has correctly directed himself as to the relevant law and applied it in a careful and detailed analysis of the facts of this case.
18. I remind myself of what was said Piglowska v Piglowski [1999] 1 WLR 1360 Lord Hoffmann said at p. 1372 that *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. ... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*
19. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were underpinned by a meticulous analysis of the law in relation to every issue raised and application of that law to the facts of the case.

## CONCLUSION

20. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

## DECISION

21. **The appeal is dismissed.**

Signed

Date 31.8.2015

Deputy Upper Tribunal Judge Birrell