



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

Appeal number: HU/00034/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 5/11/15

On 9/11/15

Before

**MR JUSTICE PHILLIPS
UPPER TRIBUNAL JUDGE WARR**

Between

**WAHEED KHAN
(Anonymity Direction Not Made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Radford, of counsel, instructed by Turpin and Miller,
Solicitors (Oxford)

For the Respondent: Mr P Naith, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan and his date of birth has been assessed as being 1 January, 1993. This assessment was made by Immigration Judge Archer in a determination dated 28 April, 2010. The judge rejected the appellant's account but accepted that he was his claimed age.

2. The applicant then applied for further leave to remain on the basis that he was a refugee. The respondent refused the application on 27 October, 2010 and an appeal against that decision came before Immigration Judge Blum (now Upper Tribunal Judge Blum) on 9 December, 2010.
3. The judge accepted that the appellant's father killed his mother on the basis of what he believed to be an act of adultery. He accepted that the appellant's father came to believe that the appellant was the product of the adultery. He found that the appellant had not attended any school and had been abused by his father and stepmother and that his father had attacked him with a knife and that the appellant had had to flee to the village elder. When the appellant was returned to the family home the judge accepted that his father had tried to shoot the appellant that the appellant was able to escape making his way to a shrine.
4. The judge did not find that the appellant was being targeted for a Convention reason. His father, the judge found, wished to harm the appellant because he believed the appellant was not his biological son. This did not, in the view of the judge, constitute a particular social group. The judge found however that the appellant did fear his father who had already bribed the local police and that his father did wish to harm the appellant. The judge found there was an insufficiency of protection for the appellant and relocation would be unduly harsh.
5. The judge dismissed the appellant's asylum appeal and his claim for humanitarian protection and his appeal under Article 8. However he allowed the appeal under Article 3.
6. This determination does not appear to have been the subject of challenge by either party. On 20 January, 2011 the respondent granted the appellant humanitarian protection valid until 19 January, 2016.
7. In June 2014 the appellant was sentenced in respect of two offences of conspiracy to supply heroin and cocaine and was sentenced to 6 years imprisonment to be served concurrently.
8. The respondent decided to deport the appellant for reasons contained in a notice accompanying a letter dated 23 March, 2015. The notice itself is dated 23 March, 2013 (rather than 2015) but that is acknowledged to be a mistake. In the notice it is said that the appellant had the right of appeal exercisable from within the United Kingdom although the possibility was held out that the claim might be certified under section 94B of the 2002 Act. In the accompanying letter, however, it was stated that the appellant only had a right to appeal the refusal of his human rights claim after he had been

deported. It was said that the appellant's human rights protection status was no longer valid.

9. The appellant appealed and his appeal came before First-tier Tribunal Judge Eldridge on 3 July, 2015. The judge noted that the respondent appeared to be relying on sub- paragraphs (i) and (ii) of paragraph 339G. The material part of paragraph 339G reads as follows:

"A person's humanitarian protection granted under paragraph 339C will be revoked or not renewed if the Secretary of State is satisfied that at least one of the following applies:

- (i) the circumstances which led to the grant of humanitarian protection have ceased to exist or have changed to such a degree that such protection is no longer required;
- (ii) the person granted humanitarian protection should have been or is excluded from humanitarian protection because there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes..."

10. The judge accepted the findings made by Judge Blum and found that the respondent had not made out of her case in relation to paragraph 339G (i). The judge found that the appellant would still be at risk from his father and would not be able to relocate safely to avoid the danger.

11. The judge however was satisfied that the respondent had made out of her case to revoke the appellant's grant of humanitarian protection under subparagraph (ii) of paragraph 339G on the basis of the fact that the appellant had been convicted of very serious crimes. This conduct warranted the withdrawal of international protection and he had not demonstrated very compelling circumstances to outweigh the public interest in his deportation: s.117C(6) of the 2002 Act.

12. The judge dealt with an argument in relation to asylum in the following paragraph of his determination:

"The appellant's claim for asylum was refused by the respondent and the appeal in that regard was dismissed by Judge Blum. The appellant seeks to rely upon that ground before me on the basis of him being a member of a particular social group. This is dealt with only briefly by Ms Radford in her skeleton argument at paragraph 12. In her oral submissions she made it plain this was on the basis of the stepmother's family. On the basis of my findings of fact concerning this family, which reflect those of Judge Blum, I do not accept this contention. Whatever risk there is to the appellant, he has not shown it is for a Convention reason. His claim under the Refugee Convention cannot succeed."

13. The appellant appealed against the judge's decision on two grounds. The first ground is that the judge was compelled by his findings to allow the appeal under Article 3 of the ECHR.
14. The second ground was that the judge had erred in finding that the appellant was not a member of a particular social group. While Judge Blum's findings formed the starting point they could not be followed if they were wrong in law. The judge had misinterpreted the submissions. The appellant was not at risk as a member of his stepmother's family. He was persecuted because he was his mother's son. The family was a well-established social group. Reference was made to Fornah v Secretary of State [2007] 1 AC 412; [2006] UKHL 46.
15. The error was material because the applicant could not be excluded from refugee status on the sole basis of the seriousness of the crime he had committed and it would be necessary to consider whether he constituted a present danger to the community by reference to Article 1F of the Refugee Convention.
16. On 12 August, 2015 permission to appeal was granted by First-tier Tribunal Judge Parkes. Having recited the grounds Judge Parkes stated as follows:

"The judge found in paragraph 32 that the respondent had not shown that it was right to revoke the protection given to the appellant under paragraph 339G of the rules, it is therefore arguable that the dismissal of the appeal on that ground was erroneous. Permission to appeal is granted."
17. On 20 August, 2015 the respondent filed a response pointing out that paragraph 339G set out five reasons why humanitarian protection could be withdrawn and while the judge had rejected 339G (i) he had upheld the respondent's decision under paragraph 339G (ii) which was relevant to the revocation of humanitarian protection that the appellant had been granted.
18. It is clear that the respondent did not interpret the grant of permission as including the argument based on the appellant belonging to a particular social group and accordingly being entitled to asylum.
19. At the hearing we invited Mr Naith to clarify the apparent contradiction between the decision notice and the accompanying letter. Counsel's position was that the letter was simply mistaken.
20. Having taken instructions Mr Naith confirmed that it was accepted that the appellant had at all times the right of appeal in-country under Article 3 and accepted further that the appeal should be allowed on that ground although he stood by the point made in the response in relation to humanitarian protection.

21. Ms Radford said it was nevertheless desired to proceed with the point based on the asylum appeal since the appellant would be in a better position if he had asylum status. The grant of his appeal under Article 3 would result in him being given a period of leave which would be a matter for the respondent.
22. She submitted that appellant was a member of a family and the product of an adulterous union with his father's deceased wife. His parentage was a reason for this persecution. He was a social group of one, an illegitimate child.
23. Counsel referred to the facts in the case of K (the first appellant in Fornah) set out at paragraph 2 of the Opinion of Lord Bingham. She submitted that the House of Lords had accepted what had been said by Laws LJ in R v Immigration Appeal Tribunal, Ex p De Melo [1997] Imm AR 43, 49-50:

"It is necessary next to examine the second question: is the alleged or actual persecution 'for the reasons of ... membership of a particular social group'? Mr Kovats [for the Secretary of State] submits as follows. Where an individual is persecuted for a *non*-Convention reason, concurrent or subsequent threats (or, presumably, acts) against his family likewise cannot be regarded as persecution for a Convention reason. If it were otherwise, the person initially ill treated—here, the father—would have no claim to asylum under the 1951 Convention, and so it would be anomalous were the members of his family, persecuted or ill-treated simply because of their association with him, to be accorded Convention rights.

I do not consider that this argument is correct. Let it be assumed that an individual has been ill-treated or terrorised for a reason having nothing to do with the Convention. He has no Convention rights. But, on the view I have taken, his family may form a particular social group within the meaning of the Convention. If then *they* are persecuted because of their connection with him, it is as a matter of ordinary language and logic, *for reasons of* their membership of a family—the group—that they are persecuted. I see nothing anomalous in this. The original evil which gives rise to persecution against an individual is one thing; if it is then transferred so that a family is persecuted, on the face of it that will come within the Convention. The definition of 'refugee' in article 1 of the Convention treats membership of a particular social group as being *in pari materia* with the other 'Convention reasons' for persecution: race, religion and so forth. Mr Kovats' argument implies, however, that membership of a particular social group is (at least on some sets of facts) to be regarded as merely adjectival to or parasitic upon the other reasons. With deference to him, that in my judgment amounts to a misconstruction of article 1 with the consequence that his submission proceeds on a false premise. Moreover I incline to think that the argument accords to the persecutor's *motive* a status not warranted by the Convention's words. The motive may be to terrorise the person against whom the persecutor entertains ill will (for a 'non-Convention' reason) by getting at his family; but when it comes to the question whether the family are persecuted by reason of their

membership of a particular social group—the family—I do not see that the persecutor's motive has any relevance."

24. Counsel argued that the appellant was targeted because he was believed to be illegitimate and he was a member of a particular social group. In order to exclude him from the refugee Convention it would be necessary to show that he was a present danger to the community.
25. Mr Naith submitted this was a family dispute and did not raise a Convention reason. The appellant was simply one individual in the family. He was not being persecuted by virtue of membership of a particular social group.
26. At the conclusion of the submissions we reserved our decision. It is agreed that the appeal should be allowed under Article 3.
27. It may be that the First-tier Judge was confused by the conflict between the decision notice and the letter but it is now accepted that he had jurisdiction in respect of Article 3 and in the light of his findings it is clear that the appeal must be allowed on that ground.
28. As we already noted, in granting permission to appeal, the judge appeared to confine argument to the issue arising under paragraph 339G. It does not appear that permission was granted in respect of the argument based on asylum and particular social group. Having heard submissions de bene esse we fully understand why Judge Parkes did not find the point arguable.
29. We observe firstly that the findings made by Judge Blum do not appear to have been the subject of challenge by either party. Secondly, the Judge Everett records that the matter was only raised briefly in a skeleton argument and although his understanding of the oral submissions is disputed we do not find that he erred in concluding that "Whatever risk there is to the appellant, he has not shown it is for a Convention reason."
30. Counsel submitted that the findings made by Judge Blum were only the starting point and drew an analogy with the facts in K. The appellant had been persecuted because of his parentage.
31. The facts in K are summarised in paragraph 2 of Fornah as follows:

"The first appellant is an Iranian citizen. She is married to B with whom, and their child, she lived in Iran. In about April 2001 B disappeared. It appears he was arrested, and he has since been held in prison without, so far as the first appellant is aware, charge or trial. On her one visit to him in prison he appeared to her to show signs of ill-treatment. The grounds for his detention are not known. About two or three weeks after B's disappearance Revolutionary Guards, agents of the Islamic Iranian state, searched the first appellant's house and took away books and papers. About a week later the Revolutionary Guards again visited

the first appellant's house: they searched the house further, and insulted and raped her. Following this incident the first appellant made herself scarce. She was not again approached by Revolutionary Guards and nor were members of her family. But the school year began on 23 September 2001 and on the following day the headmaster of the school attended by her son, then aged 7, told her that the Revolutionary Guard had been to the school to make enquiries about the boy. The Adjudicator found that the Revolutionary Guards had approached the school in an open manner knowing that this would come to the attention of the first appellant and that it would cause her great fear. She was indeed very frightened, and fled from Iran with her son. The Adjudicator accepted that in the then current situation in Iran the families of those of adverse interest to the authorities could well be targeted. The first appellant travelled via Turkey to the United Kingdom where, on 5 October 2001, the day after her arrival, she claimed asylum."

32. In our view the circumstances of the appellant could hardly be more distant from those in K. This case concerns a personal vendetta by a father in the light of his belief that his son was illegitimate. The appellant was targeted by the father because of his own personal characteristics, not as a member of a particular social group. Whether or not Judge Eldridge was confused by counsel's submissions about the step-mother's family we see no merit in the argument that the appellant fears persecution as a member of a particular social group. Doubtless it was for that reason that permission was not granted to argue the point.

DECISION

We find the First-tier Judge erred in law in respect of the claim under Article 3. We re-make the decision.

The appeal is allowed under Article 3.

The decision of the First-tier Judge to dismiss the appeal in all other respects stands.

Anonymity Order

No anonymity order was made by the First-tier Tribunal and we make none.

Fee Award

The judge found that no fee award was paid or payable and we make no fee award.

Signed

Upper Tribunal Judge Warr

6 November 2015