IAC-TH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01148/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th December 2015	**On 13 January 2016**
Prepared 23rd December 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR AFTAB KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss G. Capel of Counsel
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Afghanistan born on 13th March 1990. He appeals against a decision of Judge of the First-tier Tribunal Geraint Jones QC sitting at Hatton Cross on 6th May 2015 who dismissed the Appellant's appeal against a two decisions of the Respondent. The first dated 5th December 2014 was to refuse to grant the Appellant asylum under paragraph 336 of the Immigration Rules HC 395. The second dated 9th January 2015 was to remove the Appellant as an illegal entrant.

2. The Appellant arrived in the United Kingdom in June 2008 (when he was 18 years of age). He claimed asylum on 19th February 2012 and was granted permission to work on 30th May 2014. On 4th June 2014 the Appellant sought judicial review which resulted in the Respondent issuing the two appealed decisions in this case. By the time the Appellant claimed asylum in this country he had married a British citizen ("the Sponsor"). The couple have a daughter 2 years of age.

3. Prior to coming to the United Kingdom the Appellant had applied for a visit visa for the United Kingdom using a false or forged Pakistani passport in 2007 in a different name. When asked his reason for coming to the United Kingdom the Appellant told the Respondent that he had wanted to work at Bagram Airport as a translator for the Americans. The Taliban found this out through their information networks and the Appellant was warned by people in his village that the Taliban were coming to kill him. He was assured by everyone he knew that the United Kingdom was the best option for him. He travelled via Italy where he was arrested but chose not to claim asylum in that country. He had delayed his claim for asylum by some three years because he was really scared.

4. Judge Jones wrote at paragraph 14:

> "He did not elaborate upon what caused him to be scared about the prospect of seeking asylum with a view to remaining permanently in this country. Indeed for somebody who had undertaken a journey through Iran, travelled by lorry to Italy over a period of 90 days, travelled to a channel port on the continent and then eventually successfully entered this country by clandestinely boarding a lorry, it seems strange that such a person should be talking about being scared to go to a civilian office to claim asylum."

The Explanation for Refusal

5. The Respondent noted that the Appellant's family still lived at the Appellant's home address in Afghanistan. It was considered inconsistent that the Appellant's family would come face-to-face with the Taliban and that his mother would be beaten and yet they still remained at the same address whilst the Appellant who had never had any personal threats from the Taliban felt it necessary to leave Afghanistan. The Taliban had only visited once which did not demonstrate much interest in the Appellant. The Respondent also noted the Appellant's immigration history and considered that Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 applied to claim due to the delay. The Respondent considered that the Appellant would be able to return to his home area of Laghman Province in Afghanistan and live there as he had done in the past.

The Determination at First Instance

6. At paragraph 37 the Judge set out his findings of fact. In particular he found that the Appellant had deliberately and cynically desisted from

applying for asylum when he first arrived in this country because he wanted to position himself to maximise his prospect of remaining. The Appellant knew that his prospect of being granted asylum had he applied upon arrival would have been remote. The Judge took into account Section 8 of the 2004 Act, rejecting the Appellant's explanation for the delay particularly given the Appellant's lengthy journey to come to this country. The Appellant's account of how the Taliban might know of the Appellant's possible intention to apply to become a translator was found to be "utterly unconvincing and vague". The Appellant was not a genuine asylum seeker but a would be economic migrant who would go to considerable lengths including obtaining a false or forged Pakistani passport and making a deceptive visa application in his bid to remain permanently in this country which was his European country of choice. He had chosen not to make an asylum claim in Italy, France or Belgium or any other European countries through which he had travelled. As the Judge did not accept the Appellant's core account the Appellant's appeal insofar as it was based on asylum and Articles 2 and 3 of the European Convention on Human Rights failed. The Judge did not proceed to consider internal relocation although he was addressed on that point because the claim did not get that far.

7. The Judge also rejected the Appellant's alternative argument that country conditions in Afghanistan was such that they met the threshold in Article 15(c) of the Qualification Directive (2004/83/EC). The Judge rejected that argument at paragraph 48 stating that on the basis of the evidence adduced and the available background material including the Country of Origin Information Report and other documents set out at paragraph 46 of the determination the Appellant came nowhere near satisfying the requirements of Article 15(c).

8. The Judge heard evidence from the Appellant's wife regarding the relationship with the Appellant and at paragraph 40 the Judge turned to consider family and private life under the Immigration Rules (paragraph 276ADE of the Immigration Rules and Appendix FM) and outside the Rules under Article 8 of the Human Rights Convention.

9. The Appellant could not meet paragraph 276ADE in relation to private life because of the long residence requirements. The Judge rejected the Appellant's claim to come within the provisions of Appendix FM on suitability grounds. The Appellant could not meet the requirements of Section S-LTR.1.6 which provides that an applicant would be refused limited leave to remain on grounds of suitability where the presence of the applicant in the United Kingdom is not conducive to the public good because of the applicant's conduct. This can include convictions which do not fall within paragraphs S-LTR.1.3 to 1.5, character, associations or other reasons make it undesirable to allow them to remain in the United Kingdom.

10. As the Appellant could not meet the Immigration Rules the Judge wrote at paragraph 49 "that leaves Article 8 ECHR, woven in with Section 55 of the 2009 Act and Section 117B(6) of the 2002 Act". The Judge found there

was family life between the Appellant, his wife and child. Little weight was given to any private life built up by the Appellant. The Appellant could make an out-of-country application under the Immigration Rules for settlement as a spouse and/or it would be open to the Appellant's wife to accompany the Appellant to Afghanistan. It would not be disproportionate to require the Appellant to depart. The appeal was dismissed on all grounds.

The Onward Appeal

11. The Appellant appealed against the decision, out-of-time, making two main points. The first was that the Judge had dismissed the appeal under the Immigration Rules on Section S suitability requirements without giving the Appellant an opportunity to address that point. This issue had not been raised by the Respondent in the refusal letter or by the Judge during the course of the hearing. The second point was that the Judge had failed to discharge the duty under Section 55 of the 2009 Act to safeguard and promote the Appellant's daughter as a primary consideration. It was not reasonable to expect the Appellant's wife to accompany the Appellant to Afghanistan. It was argued that the Judge had found the relationship between the Appellant and his wife was not a genuine one and that the Appellant had entered into it purely for immigration advantage.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Ford on 27th July 2015. He found it arguable that the Judge may have made a material error of law in refusing to accept further submissions on the Section S Suitability issues and treating them as out-of-time given what the Judge had stated at paragraph 44 of the decision [I deal with this point in more detail below see paragraph]. It was not however arguable that there was a difference in the Appellant's favour in treating the child's bests interests as a very important factor to be weighed in the proportionality balance [on the one hand] and considering it was a primary consideration [on the other]. Nor was it arguable that the Judge had failed to adequately consider the risks to the Appellant's wife and daughter in relocating to Afghanistan as it was never proposed that they should relocate.

13. The Respondent replied to the grant of permission on 5th August 2015 stating that the Judge had given both parties a further fourteen days to provide written submissions on Section S suitability but as nothing was received by the Judge it was open to him to proceed with the hearing. The Judge had directed himself appropriately.

The Preliminary Issue

14. At the outset of the hearing Counsel for the Appellant, Ms Capel, raised a preliminary issue. The grounds of appeal against Judge Jones' decision settled by Ms Capel herself had not engaged with the Judge's dismissal of the asylum appeal. Counsel said that she had only been given a copy of the decision granting permission to appeal a few days ago. She did not

know why her instructing solicitors had not appealed the dismissal of the asylum claim. She sought leave to submit amended grounds of appeal out-of-time so as to argue against the Judge's findings under asylum. I indicated that I was not prepared to extend time for the service of a cross appeal against the Judge's dismissal of the asylum appeal.

15. The Appellant and his representatives had had ample time to prepare an appeal against the asylum decision if they so wished. Counsel had prepared the grounds of onward appeal (dated 17th June 2015) having represented the Appellant in front of Judge Jones and was aware of the arguments put on the Appellant's behalf. It was open to counsel to advise the Appellant to appeal to appeal the asylum decision when she received instructions to advise on appeal and/or settle grounds. Even taking the Appellant's claim at its highest the asylum appeal was on its face a weak one and the Judge had had no difficulty in dismissing it. The Upper Tribunal have stressed that late applications to appeal should not be entertained unless there were very good reasons for so doing. In **EG and NG [2014] UKUT 143** it was held that The Upper Tribunal cannot entertain an application purporting to be made under Rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for permission to appeal and has either refused or declined to admit the application. In this case there were no good reasons for such a late application since no explanation had been given to me why an appeal had not been lodged earlier and the claim itself was a weak one. I indicated therefore that the matter would proceed on the basis of what the Appellant had appealed, that is to say the claim to a private and family life.

The Article 8 Submissions

16. At paragraph 44 of the determination the Judge had written:

> "I am very mindful of the fact that neither representative addressed me on the suitability requirements for leave to remain. I did not raise that issue during the hearing. Accordingly that is why in the foregoing paragraph I have referred to forming a "preliminary" view on this matter so as to give each party an opportunity to make representations on this issue. Thus this decision is provisional and will only become final in accordance with the following provisions:
>
> (a) The Appellant and the Respondent may each submit written submissions to me dealing with any issue relevant to Section S-LTR within fourteen days of receipt of this decision, copied to one another.
>
> (b) After considering any such written submissions I will issue a final decision which may or may not follow my preliminary decision.
>
> (c) In the event that neither party files written submissions within fourteen days of receipt of this decision this decision will stand as the final decision in this appeal."

17. The case was heard at Hatton Cross on 6th May 2015 and the determination was date stamped as promulgated on 14th May 2015 some

eight days later. The determination was received by the Appellant's solicitors on 18th May 2015 according to a date stamp affixed in their office and they sent written submissions on the Section S Suitability point to the Tribunal on 29th May 2015. The submissions did not dispute that the suitability requirements must be met for the Appellant to satisfy the requirements of paragraph 276ADE(vi). However the fact that an individual had failed to establish the credibility of his account so as to qualify for international protection was not in of itself grounds for refusal on the basis that their conduct or character was called into question because they had made a "bogus" asylum claim. The Judge's findings as to the Appellant's state of mind were not proved to the standard of balance of probabilities. Whilst the Appellant had made a false application for a passport he had done so in order to avoid being harmed by the Pakistani police. This met a basic minimum level of plausibility. There was no elucidation of Section STLR.1.6. Not all forms of bad conduct were sufficient to make it undesirable that a person remained in the United Kingdom. A Judge should be slow to open the issue of an Appellant's inability to satisfy the suitability requirements in circumstances where this was not raised by the Respondent.

18. In oral submissions it was argued that the Judge's failure to take into account submissions on Section S made a difference to the Judge's treatment of whether the Appellant could satisfy Appendix FM by way of having leave as a parent. The appeal should be allowed and the matter should be remitted back to the First-tier to be heard de novo. Furthermore the issue of asylum and Article 8 were interlinked on the issue of credibility. The Judge had stated that both the Appellant and his wife were aware of what was described as a bogus asylum claim. This caused a cross over from the asylum case to the family life claim.

19. In response the Presenting Officer accepted that the Judge had made an ambiguous direction at paragraph 44 of his determination. It was reasonable that the case should go back to the First-tier Tribunal to be re-heard but not de novo as much of what the Judge said in the determination could be saved. This would be with the exception of the Judge's remarks at paragraph 37(vi) which were to do with the Judge's finding that the Appellant had deliberately and cynically desisted from applying for asylum when he arrived in the country because he wanted to position himself to maximise his prospect of remaining the Judge's findings could be preserved.

20. Counsel contended that the Judge should not have raised Section S Suitability at all and there should be a re-hearing. What the Judge should have done if he wished to raise Section S was to have adjourned the case. The Appellant also took issue with the refusal of grant of permission in relation to the possibility of the wife travelling to Afghanistan with the Appellant and the treatment of the child's best interests. The Judge had made a finding of deception which if unchallenged would lead to a refusal of a visa for the Appellant for a period of ten years. The Judge had not had

regard to the dangers to the wife in going to Afghanistan. The Judge had not taken into account letters from the Appellant's friends.

Findings

21. The issue in this case is one of procedural fairness. Did the Judge deal fairly with the Appellant's claim to remain in this country under the Immigration Rules Appendix FM and paragraph 276ADE and outside the Rules under Article 8? If he did and his conclusions on those points are sustainable then the appeal fails. If he did not treat those matters fairly then regardless of any view which I might take of the merits of the Article 8 claim, it is plain that the Appellant has not had a fair hearing at first instance on this issue and the matter should be remitted back to the First-tier to be heard de novo on the issue of the Immigration Rules and Article 8.

22. I do not accept the argument that the appeal in relation to asylum, Articles 2 and 3 and Article 15(c) of the Qualification Directive should be remitted back to the First-tier. In my view the Judge has dealt adequately with those issues and they are a discrete matter not infected by any challenge to the Judge's treatment of the Appellant's claim to private and family life. As I have indicated the asylum claim was a weak one. Whether the Appellant's wife knew that the Appellant's claim for asylum was weak is beside the point. The weakness of the claim was demonstrated by the Judge in relation to issues (such as the unexplained delay in claiming) which arose independently of the relationship with the wife. I was not prepared to allow the Appellant to appeal out-of-time against the dismissal of the asylum appeal for the reasons which I have given above and that decision stands.

23. However when one comes to look at the issue in relation to private and family life the position is very different. In my view it is plain (and indeed was conceded as such by the Presenting Officer) that matters did go wrong at first instance. There was nothing wrong with the Judge raising a new matter that had not been raised by the Respondent. Nor was there anything wrong with the Judge inviting written submissions on the point. The difficulty was that if the Judge was going to do that he had to ensure that both directions for the service of further evidence/submissions were properly made available to the parties to enable them to respond.

24. It does not appear that the Judge raised the new issue of Section S Suitability requirements during the course of the hearing. I have to say at this point that it is not entirely clear why the Judge did in fact raise that issue at all. I would agree with the submission made in the Appellant's responses (which unfortunately did not get to the Judge) that just because the Appellant's claim to asylum had failed it did not mean that the Appellant's character was of such unsuitability as to disqualify him from consideration under Appendix FM.

25. The main difficulty is that the parties would not have known at the end of the hearing on 6th May 2015 that there was anything further for them to do in this appeal. It would have been a far better course for the Judge to have made a clear direction at that point before sending out his determination. The parties should have been invited to make submissions under Section S by 4pm on a certain date with the Judge giving the reason why he was requesting those submissions and he could have put down his preliminary views at that point to direct the submissions. The Judge would then be able to wait until the relevant date and time had passed and then promulgated the determination. Unfortunately the Judge chose not to do that but instead to send out his determination with the direction that further submissions were to be sent within fourteen days of receipt. Somehow or rather the wires got entangled and instead of a provisional determination being sent out to the parties with time given to them to reply, the determination was sent out as a promulgated document. It was promulgated eight days after the case was heard which was within the fourteen day period in any event. It was thus impossible for the Appellant to have complied with the direction of the Judge.

26. I would add some observations. There is no doubt that the Appellant and his wife have a family life together with their daughter. The Judge accepted that at paragraph 52 of his determination. He also found that it was not reasonable to expect the couple's child to relocate to Afghanistan (see paragraph 42). The issue in the case is whether the Appellant can meet the Immigration Rules and if he cannot and the appeal falls to be considered outside the Rules whether there are insurmountable obstacles to the Appellant returning to Afghanistan to make an application for entry clearance from there. It will be necessary to consider the best interests of the couple's child as a primary consideration. Section S Suitability was not raised by the Respondent at first instance and for the reasons which I have given above the issue is in any event of limited value. The fact that the Appellant has chosen to make a false claim for asylum (after an unexplained delay) is not in my view sufficient of itself to meet the requirement of Section S in any event.

27. I accept the argument that the failure to give the Appellant an opportunity to address Section S Suitability (despite its questionable relevance) infected the Judge's findings under both Appendix FM and paragraph 276ADE and in consequence the test of compelling reasons to allow an appeal outside the Rules. There is no alternative therefore to set that part of the Judge's decision aside. The issue of private and family life under the Immigration Rules and Article 8 will be remitted back to the First-tier to be heard by a different Judge. That aspect of the case will be heard *de novo*.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law in dismissing the Appellant's asylum claim and claims under Articles 2 and 3 of the Human Rights Convention and Article 15(c) of the Qualification

Directive. I uphold the decision of the First-tier Tribunal to dismiss those appeals.

The decision of the First-tier Tribunal did involve an error of law in dismissing the Appellant's appeals under the Immigration Rules paragraph 276ADE and Appendix FM and Article 8 and I have set that part of the decision aside. I re-make the decision by allowing that part of the appeal and remitting it back to the First-tier Tribunal to be heard *de novo*.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 12th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As no fee was payable there can be no fee award in this case.

Signed this 12th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft