Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02235/2015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 22 January 2016 **On 15 February 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR ROHULLAH JABARKHEL
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Kiai, Counsel
For the Respondent: Mr Kotas, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

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1. The Appellant appeals against a decision of First-Tier Tribunal Judge Maka promulgated on 15 October 2015 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 26 January 2015 to remove the Appellant to Afghanistan and rejecting his protection claim. The Judge dismissed the Appellant's protection claim. The Judge also dismissed the Appellant's Article 8 claim but refused to make a concluded finding on the Appellant's Article 8 claim relating to his relationship with an EEA partner and their child (who was born twelve days before the hearing before the First-Tier Tribunal) or to deal with the best interests of that child. That forms the basis of one of the grounds to which I will need to return below.

2. The background facts are as follows. The Appellant is a national of Afghanistan. He claims to have arrived in the UK on 29 June 2011 by lorry. He claimed asylum on 13 July 2011. His asylum claim was rejected but he was granted discretionary leave until 26 October 2012. He made an in time application for further leave which led to the Respondent's decision refusing his claim and directing his removal. There was an issue in relation to the Appellant's age. He was assessed as having a date of birth of 26 April 1995 in an assessment on 30 December 2011 but the local authority thereafter apparently accepted his age as sixteen when threatened with judicial review in May 2012. The local authority had not however formally notified the Respondent that they withdrew their earlier assessment.

3. The Judge rejected the Appellant's protection claim on the basis that he did not find the Appellant credible. He did not need to deal with the age dispute issue because it was accepted that the Appellant was no longer a minor by the date of the hearing. The Judge did not accept that the Appellant would be at risk in his home area of Nangarhar and therefore did not need to consider relocation to Kabul. The Judge accepted the Respondent's submission that the Appellant still has family in Afghanistan. The Judge also did not accept that the Appellant could not relocate to Kabul. He did not accept that it would be unduly harsh for him to do so. In relation to Article 15(c) of the Qualification Directive ("Article 15(c)"), the Judge noted the case of AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC). The Judge also noted the Upper Tribunal's decision in R (Naziri and others) v SSHD [2015] UKUT 00437 (IAC) and noted that the Court of Appeal had granted permission to appeal in relation to that judicial review decision and had also granted an injunction to prevent removal to Afghanistan where persons were habitually resident in various provinces in Afghanistan including the province from which the Appellant comes. The Judge noted however that AK (Afghanistan) remained good law unless and until it was overturned. He did not accept that the Appellant would be at risk in Nangarhar because he did not believe his claim. He also found that the objective evidence did not show that the current security situation was such as to show that Article 15(c) would be satisfied. He found in any event that there

was no reason why the Appellant could not relocate to Kabul where there would be a sufficiency of protection.

4. In relation to the Appellant's Article 8 claim, the judge accepted that the Appellant had a private and family life in the UK and that there would be interference. He addressed the new factual situation about the relationship and child, however, on the basis that the Respondent's decision could not be impugned by failure to refer to this circumstance since she was unaware of it. When considering proportionality, the Judge considered those facts but indicated that he did not reach any concluded finding about the claim as presented at the hearing because he considered that the Appellant could present his claim to the Respondent following the appeal. The Judge accepted that the removal of the Appellant would impact on his partner but said that this could be considered further by the Respondent. He indicated that he could not reach a finding on whether the Appellant's partner had permanent residence as her status depended on that of her mother and it was not clear whether her mother was exercising Treaty rights. Their child could not be settled or British. He declined to make any findings on the durability of the relationship because it was "not before [him]". The Judge said that this could be considered if and when the Appellant made an application to remain as the extended family member of an EEA national. He also declined to make a substantive finding on the best interests of the Appellant's newly born child. In light of the recent birth, he expressed no further finding beyond noting that he had no evidence as to the Appellant's role in the child's life and noting the Appellant's precarious status.

5. Permission to appeal was granted by First-Tier Tribunal Judge Lambert on all grounds. This matter comes before me to decide whether the Decision contains an error of law and if so to re-make the Decision or remit the appeal to the First-Tier Tribunal for re-hearing.

Submissions

6. Ms Kiai clarified that this appeal is one which proceeds on the pre-Immigration Act 2014 statutory scheme. This was important because it impacted on the basis on which the Appellant said that the Judge could have allowed the appeal or alternatively on the reason why the Judge erred in his consideration of the Article 8 claim. I agreed with Ms Kiai that this is a pre-Immigration Act 2014 appeal. Paragraph 8(2) of The Immigration Act 2014 (Commencement No 4, Transitional and Saving Provisions and Amendment) Order 2015 provides that the amendments to the Nationality, Immigration and Asylum Act 2002 come into force except in relation to deportation cases and some points-based system cases where the decision under appeal is made on or after 6 April 2015. The decision here appealed was made on 26 January 2015 and accordingly the appeal proceeds under the statutory scheme prior to the Immigration Act 2014 amendments.

7. The Appellant's first ground is therefore to the effect that the Judge was wrong to decline to deal with the Article 8 claim as it was at the date of the hearing. It was accepted that a section 120 notice had been served by which the Appellant was invited to submit a statement of additional grounds. That is mentioned at [15] of the Decision. She submitted that the Judge's approach in failing to make concluded findings in relation to the Article 8 claim and section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55") was in error. Article 8 was raised as a ground of appeal. The Judge was bound to deal with the claim as presented to him. She accepted that there was an issue as to the Appellant's paternity of his partner's child but she submitted that the appropriate course where that remained disputed was to adjourn to allow DNA evidence to be produced. She pointed out that an adjournment had been sought. She also pointed out that both the Respondent and the Tribunal were aware of the Appellant's partner's pregnancy as the appeal had been transferred to enable the partner to give evidence.

8. Ground two focusses on Article 15(c). Ms Kiai argued that the Judge erred in his approach by reference to a "risk of persecution" which is not relevant to that Article. The grounds also take issue with the approach taken to the Appellant's relocation to Kabul. Ms Kiai submitted that the Judge did not properly consider the Memorandum of Understanding which was at the heart of the case of Naziri. She submitted that the Judge was incorrect to say that country guidance was binding until overturned [135]. The proper approach is to consider it binding unless there is further evidence to undermine it. Ms Kiai submitted that the grant of permission in Naziri was such further evidence and the Judge erred in failing to take account of the basis of that grant.

9. Ground three focusses on the Judge's consideration of the Appellant's credibility findings. Ms Kiai relied on the written grounds in this regard. The Appellant's case is that the Judge impermissibly engaged in speculation when considering the plausibility of the Appellant's account of his family history rather than properly assessing the evidence on the basis of the facts before him. That speculation was not grounded on the evidence before the Judge and he paid no regard to cultural norms which might exist in an Afghan family.

10. Mr Kotas submitted that the Decision was carefully reasoned and did not contain an error of law. In relation to ground one, Mr Kotas submitted that the real focus was section 55 as the Judge made findings that the Article 8 claim could not succeed. He submitted that the reliance on section 55 was a wholesale change of circumstances and was new evidence. He accepted that a section 120 notice had been served and that no precise format was required for the statement of additional grounds in response to that notice. He noted the Appellant's partner's statement in the bundle but submitted that a statement of additional grounds could not be implied from that

statement or the skeleton argument. He accepted that the Judge made only brief observations but he submitted that the grounds did not take issue with the inadequacy of findings. He submitted that twelve days was ample time for the Appellant's solicitors to submit a brief statement putting section 55 at issue.

11. In relation to Article 15(c), Mr Kotas took me to [137] where the Judge made findings on this issue. He submitted that there was no misdirection in the Judge's approach.

12. In relation to ground three, Mr Kotas pointed me to the very careful and detailed consideration of credibility in relation to the protection claim at [116] to [131] of the Decision. The findings which are challenged as speculation appear at [116] to [117]. The submission that those amount to impermissible speculation equates to a submission that reasons are required for the reasons already given.

Decision and Reasons

13. I begin my consideration of the grounds with ground one as if I find in favour of the Appellant on this ground, the appeal will need to be re-heard at the very least on the Article 8 claim.

14. The Judge considers the Article 8 claim at [142] to [149] of the Decision. The Judge heard evidence from the Appellant and from his partner which is set out at [81] to [90] and [91] to [102] of the Decision respectively. The Appellant's Counsel's submissions on this claim are at [110] to [111] of the Decision.

15. I accept that the Judge has at least begun a consideration of the Article 8 claim in the section starting at [143] and has reached a conclusion that the Article 8 claim should not succeed. The Judge's findings in this regard are however peppered with references to not making findings because it would be for the Respondent to consider all of the issues holistically when a claim based on this relationship was made to her.

16. Section 85 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides as follows:-

> "(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.
>
> (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
>
> (4) On an appeal under section 82(1) against a decision the Tribunal may consider evidence about any matter which it thinks

relevant to the substance of the decision including evidence which concerns a matter arising after the date of decision."

Section 85(4) is subject to exceptions set out in section 85A. None of those exceptions apply in this case.

17. Section 86 of the 2002 Act provides:-

"(1) This section applies on an appeal under section 82(1) …

(2) The Tribunal must determine -

(a) any matter raised as a ground of appeal …

(b) any matter which section 85 requires it to consider.

(3) The Tribunal must allow the appeal in so far as it thinks that –

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules) or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

…

(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal."

18. By virtue of the above provisions, the Judge was obliged to consider the evidence before him whether or not that evidence was before the Respondent. It was not open to him to do as he has done and to effectively abdicate responsibility to the Respondent to consider the Article 8 claim on a later application (which might or might not give rise to a right of appeal particularly if the Respondent were to use her certification powers). It may be open to the Judge to remit the section 55 claim to the Respondent to reconsider and make a fresh decision (see MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC). The Judge could therefore have allowed the appeal to the limited extent of remitting to the Respondent to consider that aspect. What it was not open to the Judge to do was to refuse to make any finding on this issue on the basis that the Appellant could make a further application to the Respondent. I am therefore satisfied that the Judge's approach to the Article 8 claim and particularly the section 55 issue was in error.

19. I infer from [12] of the Decision that the error may have been at least in part occasioned by the way in which the Appellant's Counsel put her submissions. It is there said that she submitted that the appeal should be allowed outright on the basis that the Respondent's decision was not in accordance with the law. Based on that submission, it is perhaps unsurprising that the Judge began his

consideration of the claim by finding as he did at [143] that the Respondent's decision could not be impugned on the basis of evidence which was not before her. However, that approach was in error.

20. For that reason, the appeal will need to be re-heard at least in relation to the Article 8 and section 55 issues and findings will need to be made about the nature and extent of the Appellant's relationship with his partner and child which will also quite probably require findings about the status of the partner and child.

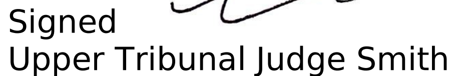
21. I go on to consider ground three as I need to consider whether the credibility findings in relation to the protection claim should be preserved on re-hearing. I agree with Mr Kotas' submissions that the Decision at [116] to [131] is a very careful and detailed consideration of the evidence. The Judge gives ample reasons for rejecting the Appellant's evidence. He heard the Appellant giving evidence and was clearly unimpressed by that evidence. Further, the findings at [116] and [117] do not amount to impermissible speculation in any event. The finding that the Appellant's mother would have told the Appellant about his father's involvement and rank with the Taleban has to be read in the context of the evidence that she told the Appellant in detail how his father was involved in the peace process and about the Taleban coming to their home. That the Appellant's father, if he was genuinely involved with the Taleban as claimed, would have wanted his son to join is also not speculative given the profile which the Appellant said that his father had. I do not find any error of law in relation to the credibility findings. Those were open to the Judge on the evidence. Those credibility findings stand.

22. I do not need to reach a conclusion on ground two. The protection claim in relation to Article 15(c) will need to be considered by the Tribunal as at the date of the re-hearing before it and it is not necessary for me to reach a concluded view. I would have rejected the ground in any event so far as that relied on the Judge having adopted an erroneous approach. It is clear from the final sentences of [137] and what is said at [141] that the Judge understood the test for Article 15(c) to be satisfied and that the test was different from that under the Refugee Convention. I accept that the Judge did err at [135] in finding that AK (Afghanistan) is binding on him as opposed to finding that it was a decision which ought to be followed unless there was later background material which undermined it. That error is not however material given the Judge's consideration of the background material at [137] and the Court of Appeal's grant of permission in HN (Afghanistan and others) v SSHD at [138]. However, I accept that the current situation in relation to Afghanistan will need to be considered by the Judge at the date of re-hearing. I therefore say nothing further about this.

23. Mr Kotas suggested that if I found there to be an error of law only in relation to Article 8 that the appeal could be re-heard in the Upper Tribunal. I have considered that submission carefully. However, in circumstances where the Judge has declined to make a number of factual findings about the relationship and the child, and applying the guidance, I consider it appropriate to remit the appeal for re-hearing before the First-Tier Tribunal to enable factual findings to be made at first instance. That will also enable the First-Tier Tribunal to take account of the outcome of the Court of Appeal case of HN. As I have already noted, however, the credibility findings of the previous Judge contain no error of law. Accordingly, the findings at [116] to [131] of the Decision stand.

DECISION

I am satisfied that the Decision contains an error of law. The Decision of First-Tier Tribunal Judge Gibbs is set aside save for the credibility findings at [116] to [131] of the Decision. The appeal is remitted to the First-Tier Tribunal for re-hearing by a different Judge.



Signed Date: 10 February 2016
Upper Tribunal Judge Smith