



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10814/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 22 January 2016

Decision and Reasons Promulgated
On 2 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

RASUL KHAN MARUFKHAİL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Read counsel instructed by Middlesex Law Chambers
For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.

3. The Appellant entered the United Kingdom as a 14 year old claiming asylum on 29 May 2009. His application was refused on 6 August 2009 but he was granted discretionary leave until 21 February 2013. He appealed the refusal of asylum. His appeal was dismissed in a decision dated 19 December 2009 after a hearing before Immigration Judge Martineau on 27 November 2009. He was refused permission to appeal that decision. On 25 February 2013 the Appellant applied for further leave to remain. The Secretary of State refused the Appellant's application and set out the reasons in a letter dated 13 November 2014. The Appellant appealed that decision and his appeal came before First-tier Tribunal Judge De Haney on 19 January 2015. The Judge dismissed his appeal on all grounds. The Appellant was granted permission to appeal that decision and on 30 November 2015 the matter came before me for an error of law hearing. I found errors of law in respect of the assessment under paragraph 276 ADE(1) and Article 8 and a I adjourned the hearing for those matters to be reheard before me.

Legal Framework

4. The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability.
5. As the Appellant is in the United Kingdom, I can take into account evidence that concerns a matter arising after the date of the decision in accordance with Section 85(4) Nationality, Immigration and Asylum Act 2002.
6. In relation to claims under Article 8 these are addressed by Appendix FM and paragraph 276ADE of the Rules and the Secretary of State's Guidance. If an applicant does not meet the criteria set out in the Rules then guidance issued by the Secretary of State in the form of instructions provides in effect, that leave to remain outside the rules could be granted in the exercise of residual discretion in 'exceptional circumstances' which are defined in the guidance and must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2.
7. The provision that is of relevance in this appeal , paragraph 276ADE (vi), provides:

“(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.”
8. It is now generally accepted that the new Rules do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

“30. ... if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules.”
9. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

“64. ... there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules.”

10. More recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

“In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of “very compelling reasons” (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State’s formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. “

11. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering ‘the public interest question’, have regard in all cases to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the ‘public interest question’ means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

12. The S117B considerations are as follows:

- “(1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to—
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.

- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.”

Evidence

13. On the file I had the Respondents bundle. I had a copy of the reason for refusal letter. The Appellant put in an appeal before the first tier which was numbered 1-47 and a second bundle of documents before me numbered 1-20.
14. I heard evidence from the Appellant and Naveed Khan and there is a full note of their evidence in the record of proceedings.

Final Submissions

15. On behalf of the Respondent Mr Harrison made the following submissions:
 - (a) He relied on the reason for refusal letter of 13 November 2014.
 - (b) The refusal letter addressed paragraph 276ADE(1)
 - (c) In relation to Article 8 he argued that there was little evidence of private life that could not be replicated in Afghanistan: the Appellant had friends and acquaintances.
 - (d) In relation to family life there was no family life in the UK. The Appellant had a relationship with his foster family that was a short term arrangement. The family took on this role on the understanding that this would be a short term arrangement.
 - (e) The Appellant had been refused asylum and was granted discretionary leave for a limited period with no legitimate expectation that it would be extended at maturity.
 - (f) The relationship between adult non blood relatives required evidence of more than emotional ties if it was to amount to family life for the purpose of Article 8.
 - (g) The evidence that he had no family in Afghanistan was unreliable as it was not credible that given he made friends with an Afghan male from the same village he was unable to secure continued contact with his mother. There was no sustained or ardent attempt to re engage with his family.
 - (h) It was notable that social services had a different view of the circumstances in which he came to move from the foster family.
 - (i) There were no compelling circumstances to warrant a grant of leave outside the Rules.
16. On behalf of the Appellant Mr Read made the following submissions:
 - (a) The Appellant was vulnerable as a former looked after child and he relied on JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00568 (IAC). This he argued was relevant to whether the Appellant met the requirements of paragraph 276ADE(vi) and whether he was capable of overcoming the obstacles.

- (b) To the suggestion that the Appellant had not tried to establish contact with family in Afghanistan the Appellant had stated that he had succeeded until 18 months ago when he was unable to contact his mother, something had happened. The Appellant would not have support in his country of origin and therefore the test under paragraph 276ADE(vi) was met.
- (c) In relation to Article 8 and paragraph 117B he argued that in relation to private life while the provision required little weight to be attached to private life it did not say no weight.
- (d) The Appellant did have a family life in the UK with his foster family and he suggested that it was more than normal emotional ties even though he was an adult given that the local authority had corporate responsibility for the Appellant until he was 21.

Findings

17. On balance and taking the evidence as a whole, I have reached the following findings.
18. The Appellant is a 20 year old citizen of Afghanistan who has lived in the UK since his arrival on 29 May 2009 when he was 14.
19. The starting point for all my considerations in this case must be that the Appellant's claim for asylum was dismissed by Immigration Judge Martineau after a hearing on 27 November 2009. That decision remains unchallenged and a number of the factual findings are relevant to the issues that I have to determine. Among the findings made by the Judge were that the Appellant had an uncle who had funded his flight to the UK which he specified as the destination (paragraph 36); that the Appellant gave false details to British Immigration officers in France(paragraph 36); there were serious discrepancies in his account of circumstances in Afghanistan specifically in relation to what family members he had (paragraph 37); there was a tradition of general closeness in family relationships among the Pashtun (paragraph 38); the Appellant had concealed the existence of his paternal uncle in the asylum interview saying that he only had paternal cousins but he accepted in oral evidence that his father had a brother; there were discrepancies in his account in relation to how he lived in hiding (paragraph 39); the paternal uncle could offer him refuge(paragraph 40)

276ADE(vi)

20. I remind myself that the only private life provision of the Rules that the Appellant could meet is paragraph 276ADE1(vi) given that he lived for the first 14 years of his life in Afghanistan and has only lived in the UK for 6 years.
21. In assessing whether the Appellant would face very significant obstacles in integrating into the country to which he would have to go if required to leave the UK. I have taken into account that the Appellant is a former relevant child who was in the care of the local authority and that they continue to have duties in respect of his welfare. However, that does not mean that he cannot be removed. I am satisfied that, as was said in FS on which Mr Read relies :

"It was not argued on behalf of the appellant that the fact that he is a former relevant child receiving assistance from the local authority meant for that reason alone that he could not be removed. In our judgment any such a contention would be unsustainable.

The resolution of the appellant's immigration status depends not on whether he is in receipt of care under the provision of the Children Acts but on whether he is able to show an entitlement to remain in accordance with the law or the immigration rules. “

22. I take into account that he was resilient enough to come to the UK when he was 14 and was ‘mature and motivated’ enough when he was 16 years old to not only choose to move out of his foster home but indeed move far from his foster parents who live in Southall to live in Liverpool. He has maintained an independent life and household since then.
23. I take into account that the Appellant still speaks Pashtu and to whatever extent he has integrated into the UK he nevertheless appears to have many friends among the Afghan community some of whom attended in support of his case before me including one who originates from his own village. He has of course matured since he left Afghanistan and acquired valuable skills as a result of the education he has received in the UK.
24. I have of course assessed whether the Appellant would receive family support in integrating back into Afghanistan. The Appellants case before me was that he would have no such support as he had lost contact with his mother and had no contact with anyone else. In determining whether I found his evidence to be credible on this important issue I have taken into account the adverse credibility findings made by Judge Martineau which remain unchallenged. I note with particular concern that the Judge found that the Appellant specifically lied about what family he had in Afghanistan failing to make any mention of paternal uncle who culturally was more likely to assist him and when asked by Mr Harrison in cross examination about family in Afghanistan he again stated that he only had maternal uncles. I am therefore satisfied that the Appellant has not been truthful about what family he has in his home country and I do not find it credible that the uncle who went to the no doubt considerable expense of funding his flight would be untraceable or uninterested in his welfare.
25. I also note that while he claims to have lost contact with his mother he accepted that he had not asked for the assistance of social services in contacting her and no evidence was produced before me to show what efforts if any he had made since he became an adult to contact his family through the Red Cross. I note that he also accepted that although one of his friends in Liverpool originates from his home village he has not sought to make enquiries through him to trace family members. I am satisfied that he has made no such effort because he knows it does not assist his desire to remain in the UK.
26. I take into account the letter dated 14 January 2016 from the Appellants Social Services Advisor Va’a Mulipola whose description of the Appellant as mature and motivated I have used. While I note that Mr Mulipola suggests that a return to Afghanistan would have a detrimental effect on his physical and emotional well being there is no medical evidence of this. I also note that Mr Mulipola’s assessment is largely based on the benefits the Appellant has received from living in the UK and the support of his friends and foster family. Mr Mulipola makes no reference to his family in Afghanistan and is of course not privy to the concerns that I have expressed about how he has described his family circumstances. Mr Mulipola also expresses concerns about the general country situation apparently based on a BBC documentary but I am of course bound by caselaw.

27. Taking all of the above into account I am not satisfied that the Appellant would face very significant obstacles in reintegrating into Afghanistan.
28. Mr Read has submitted that the Appellant's rights under Article 8 of the Convention are engaged although there was no articulation of any compelling circumstances that prevailed in his case. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27 also taking into account s 117B of the Nationality Immigration and Asylum Act 2002.

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

29. It is argued before me that the Appellant has a family life with his foster family. I have considered that argument very carefully. I take into account that at a time when the Appellant had his own family in Afghanistan he came to live with Mr Khan and his family as a foster child where he lived under the auspices of social services for 2 years and 3 months from when he was 14 until he was 16. However well motivated Mr Khan is that was a contractual relationship for which the Khan family would have been paid by the local authority.
30. The circumstances in which he came to leave this foster placement are the subject of very contradictory evidence. Mr Mulipola is very clear in his letter that the Appellant made an independent decision when he was 16 to not only move out of Mr Khan's home but moved far from him to settle with a friend in Liverpool. M Khan by contrast suggests in his witness statement that
 "... it was social services who forced him to move out as he was no longer a minor. I assert that my family and myself were perfectly happy to have him continue staying with us as part of our family, but circumstances made him move ..."
31. I note that the Appellant in evidence in chief also suggested that the decision to move out was not made by him although he accepted in cross examination when faced with Mr Mulipola's comments that in fact it was his decision to move out.
32. I am therefore satisfied that both Mr Khan and the Appellant attempted to present an untruthful picture of the circumstances in which the Appellant moved out after 2 years as it they perceived it to be unhelpful to his claim of having a family life with Mr Khan.
33. The exact nature of the Appellants relationship with Mr Khan's wife are also unclear as she not only did not attend any of the hearings of his appeal, unlike Mr Khan, but she also produced no witness statement. I note that the daughters although not at court produced a supporting letter. The explanation for her absence before me was that she had to assist her teenage daughters getting ready for school. I did not find this a credible explanation for her absence given the assertion that this was a relationship akin to a family one and the importance of the decision being made to the Appellants future.
34. While I do not exclude the possibility of a long term fostering relationship amounting in a fact specific case to a family life, given the relatively brief period of the Appellants relationship with Mr Khan and his family and the fact that the Appellant clearly chose not to live with them anymore and simply visits them twice a month I do not accept that this amounts to family life for the purpose of Article 8. Moreover even if I accepted that theirs was a family life, given that the Appellant is now 20 years old

and is in law an adult there would need to be some evidence of a relationship that went beyond normal emotional ties between an adult and their closest family members. In the light of all of my findings I am not satisfied that the Appellants relationship with Mr Khan goes beyond a close friendship. I accept that support a claim of private life.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

35. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

36. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate his conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

37. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy his private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

38. It is unnecessary for me to set out again all the circumstances that the Appellant relies on in his plea to be permitted to remain in the United Kingdom. I take into account all of the factors that were relevant to my consideration of paragraph 276ADE (1). All that I have said about those circumstances is applicable here and I have taken account of it in the context of considering proportionality.

39. Consideration of the issue of proportionality is 'consideration of "the public interest question" as defined by section 117A(3) of the 2002 Act. I am therefore required by section 117A(2)(a) to have regard to the considerations listed in section 117B.

40. I therefore note that the Appellant does not meet the requirements of the Rules that address family and private life and they underpin the system of immigration control in the UK. The maintenance of immigration control is in the public interest

41. I accept that the Appellant speaks English.

42. The Appellant is not of course financially independent and is a burden on the UK economy as his care whether it be social, educational and health care have been funded by the UK.

43. I have determined that this is a private life appeal. I am satisfied that little weight should be given to the Appellants private life as it was established at a time when the Appellant's status in the UK was precarious. I note that he has a number of

supporting letters from friends but friendships can be maintained by other means and new friendships forged. He was granted discretionary leave which was always subject to review when he became an adult.

44. In determining whether the removal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellants life in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the Appellants removal.
45. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

Conclusion

46. I find that the Appellant has failed to discharge discharged the burden of proof on her to show that the terms of paragraph 276ADE(1)(vi) of the Rules are met.
47. On the facts as established in this appeal, there are no grounds for believing that the Appellant's removal would result in treatment in breach of ECHR.
48. I therefore find that the decision of the Respondent appealed against is in accordance with the law and the applicable Immigration Rules.

DECISION

- 49. The appeal is dismissed.**

Signed

Date 31.1.2016

Deputy Upper Tribunal Judge Birrell