The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: AA/11154/2014**

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination & Reason Promulgated**
On January 12, 2016	**On January 14, 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR A T
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

Appellant	Ms Johnstone (Home Office Presenting Officer)
Respondent	Mrs Chaggar, Counsel, instructed by RBM Solicitors

DECISION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant, citizen of Bangladesh, arrived in the United Kingdom on September 24, 2009. He applied for asylum on December 30, 2009 but the respondent refused his application on March 5, 2010 although he was granted discretionary leave until March 4, 2013 to remain as an unaccompanied minor and because he was considered to have established family life with is aunt in the United Kingdom. On March 1, 2013

he applied to extend his leave but this was refused on November 3, 2014. He appealed this decision on December 16, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

3. The appeal came before Judge of the First-tier Tribunal Hawden-Beal on February 5, 2015 and she allowed the appeal under article 8 ECHR in a decision promulgated on February 17, 2015. Confusingly, she also found the decision was not in accordance with the law.

4. The respondent sought permission to appeal that decision on February 23, 2015 on the ground the Judge had erred by allowing the appeal under article 8 ECHR by failing to have regard to section 117 of the 2002 Act and for not only allowing the appeal on article 8 grounds but for also finding the decision was not in accordance with the law. Permission to appeal was granted by Judge of the First-tier Tribunal Shimmin on March 16, 2015 on both grounds.

5. The matter came before me on the above date and on that date I heard submissions from both Ms Johnstone and Mrs Chaggar.

6. The First-tier Tribunal made an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I extend that order.

ERROR IN LAW

7. Judge of the First-tier Tribunal Hawden-Beal confusingly dismissed the appeal on asylum/humanitarian protection grounds as well as finding there neither articles 2 or 3 ECHR were engaged. She then proceeded to allow the appeal on article 8 grounds but then remitted the decision back to the respondent because she found the decision was not in accordance with the law due to the respondent's failings on tracing the family of unaccompanied asylum seeking children.

8. Mrs Chaggar accepted that Judge of the First-tier Tribunal Hawden-Beal's positive two findings were in conflict and in the absence of any explanation for the confusing conclusions I must find an error in law and I set aside the findings made in the appellant's favour. Mrs Chaggar confirmed there was no challenge to the remaining decsions and no cross-appeal had been made in any event. .

9. I indicated to both representatives that no further evidence was needed because Mrs Chaggar confirmed that the appellant's circumstances were unchanged from those before Judge of the First-tier Tribunal Hawden-Beal.

10. I therefore invited submissions from both representatives as to the disposal of the article 8 claim and/or whether the matter should be returned to the respondent on the basis the decision was not in accordance with the law.

11. Mrs Chaggar wished to adduce in submissions the respondent's policy published on August 18, 2015 as it contained transitional provisions for dealing with discretionary leave where the original discretionary leave had been granted before July 9, 2012. The appellant's original grant of leave was granted in March 2010 and would therefore be caught by this policy. Ms Johnstone objected to this arguing the policy had not been argued in the First-tier Tribunal.

12. In R (app Baktear Rashid) v SSHD 2004 EWCA 2465 Admin Davis J held that the principle of legitimate expectation in public law, as opposed to the doctrine of estoppel in private law, was a principle of fairness in the decision making process. It was a wholly objective concept, not based upon any actual state of knowledge of the individual. Although the appellant in the instant case did not know of the policy, he was entitled to assume - indeed, he had a legitimate expectation - that whatever applicable policy was in existence at the time would be applied to him.

13. As I was remaking the decision and having regard to the principle of fairness Ms Johnstone's argument carried little weight especially as it was a published document. I therefore allowed the introduction of that policy.

14. Ms Johnstone submitted that the First-tier Tribunal had not had regard to section 117B of the 2002 Act. The appellant was now 19 ½ years old and his asylum application had been rejected as long ago as December 30, 2009. Whilst he had been granted discretionary leave she submitted he only had temporary leave and following the decision of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) his immigration status was precarious because he was removable when his leave expired. The Tribunal had to have regard to the fact he was not financially independent and was wholly reliant on an aunt and uncle who stated they would be unable to support him if he were returned. She submitted the Tribunal had to have regard to the importance of immigration control and she submitted that even if article 8 was engaged it would not be disproportionate to return him. As to article 8 she submitted that he was now an adult and any claim for family life had to be viewed in that light. He had been granted leave when he was a minor and because at the time the respondent accepted he had a family life with his aunt. However, his circumstances had now changed and he was no longer thirteen years of age but was now a young adult. The fact tracing may not have taken place was not a reason to find the decision was not in accordance with the law because he was now an adult and at the date of decision the respondent was not obliged to undertake any tracing because he was over he age of 18. Any delay had not prejudiced him because he had not lost the benefit of any policy.

15. Mrs Chaggar submitted that there was family life and this was something the respondent had recognised in 2010. He had continued to live with his aunt and his family life had continued. She argued that the respondent's transitional policy meant that he should have been given extended leave and she invited me to remit the matter back to the respondent for her to apply her own policy. Alternatively, she argued that section 117B factors were positive for the appellant because he spoke English and had never claimed public funds albeit she accepted that he was not entitled to claim benefits due to his age and the fact he was in full time education. She submitted that the appellant should be granted further discretionary leave to remain.

DISCUSSION AND FINDING

16. For the reasons set out above I found there had been an error in law. The Tribunal must either dismiss a claim, allow it or find the decision was not in accordance with

the law. By allowing the appeal under human rights and finding it was not in accordance with the law the Tribunal erred and for that reason I set aside those two aspects of the First-tier Tribunal's decision.

17. If a decision is not in accordance with the law, then that must be the first finding made. A decision on article 8 grounds need only be made if the decision is in accordance with the law. In Dhudi Saleban Abdi [1996] Imm AR 148 Peter Gibson LJ said: "I shall therefore proceed on the footing that, if it can be shown that the Home Secretary failed to act in accordance with established principles of administrative or common law, for example if he did not take account of or give effect to his own published policy, that was not in accordance with the law".

18. Mrs Chaggar referred me to section ten of the respondent's policy entitled "Asylum Policy Instruction".

19. Section 10.1 states-

> "Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted …
>
> Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of decision. If the circumstances remain the same the individual does not fall within the restricted leave policy and the criminality thresholds do not apply a further three years DL should normally be granted …
>
> If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy … the further leave application should be refused."

20. The appellant had been granted discretionary leave when he was thirteen years of age and when his application was made he was living with his aunt who was both providing accommodation for him and caring for him. The respondent granted discretionary leave on those facts. The position facing the respondent in November 2014 was different. Although the application had been made when he was 16 ½ years of age the respondent did not make a decision until he was over the age of eighteen by which time he was an adult. His discretionary leave primarily had been granted because the respondent has a policy for unaccompanied minors that grants them discretionary leave to remain up to 17 ½ years of age.

21. When the respondent considered his application I am satisfied that there had been two significant changes. Firstly, the appellant was no longer a minor and could not therefore benefit from the respondent's policy on unaccompanied minors and secondly, any family life assessment had to be as an adult rather than as a minor. For these two reasons I am satisfied that this appellant could not benefit from the policy set out above and accordingly I must consider his application under article 8 ECHR only because no argument under the Immigration rules has been advanced.

22. The starting point is whether there is family life in an article 8 sense. The appellant is now an adult and neither his aunt nor uncle have any dependency on him. He has a dependency on them to to the extent that he continues to live with them and is financially supported by them. They receive a pension and as previously stated they would be unable to support him if he was back home as their income is insufficient.

23. Whilst I accept there is evidence of some financial support I have to consider his relationship to his aunt and her family in light of Kugathas v SSHD [2003] INLR 170. The Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In JB(India) and Others v ECO [2009] EWCA Civ 234 the Court of Appeal said that financial dependence "to some extent" on a parent did not demonstrate the existence of strong family ties between adult children and the parent nor did weekly telephone calls evidence anything more than the normal ties of affection between a parent and her adult children. In AAO v Entry Clearance Officer [2011] EWCA Civ 840 the Court of Appeal held that family life would not normally exist between parents and adult children within the meaning of Article 8 in the absence of further elements of dependency, which went beyond normal emotional ties. However, in Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) the Tribunal said that a review of the jurisprudence discloses that there is no general proposition that Article 8 can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.

24. Each case therefore must be assessed on its facts and in considering whether there was family life I have regard to the following factors:

    a. The appellant has been living in the United Kingdom with his aunt and her family since September 2009. He had come to the United Kingdom after his father arranged for an agent to bring him here and it was always intended he would live with his aunt and her family.

    b. His asylum claim was rejected on March 5, 2010 but he was granted discretionary leave to remain until March 4, 2013 in accordance with the Home Office Policy on unaccompanied asylum seeking children and based on the fact he had family life with his aunt at that time.

    c. He has continued to live with his aunt since that date and has now lived with her between the ages of 13 and 19.

    d. His mother abandoned him in 2005 and he was taken to his aunt's house because his father lived and worked in Saudi Arabia. His mother has never been located. After three months his aunt and other relatives began to mistreat him and he was treated like a servant. He was assaulted by one of his aunt's nephews. He reported what was happening to his father but he did not report that matters to the police.

e. His father told him he would help him and he arranged for him to leave and go and live in Dhaka until he met an agent who arranged for him to fly to the United Kingdom.

f. He has no contact with his mother or any other family in the United Kingdom.

g. He has been educated here and has a family life.

25. Family life involving adults is difficult especially when the relationship is not even mother/father/sibling. Whilst I accept he has been living with his aunt's family it remains questionable there actually is family life in an article 8 sense in light of his age and the authorities referred to above. However, as he came here as a 13-year-old and has spent the last six years with his aunt and her family I am prepared to accept there remains a family life and I also accept he has established a private life.

26. I have to apply the tests set out in Razgar [2004] UKHL 00027 and clearly if he were removed then both his family and private life would be interfered with but this would be in accordance with the law because the appellant has been unable to satisfy the Immigration Rules or demonstrate removal would place him at risk or persecution or serious harm. Removal would also be for a reason specified in article 8(2) ECHR and the issue turns on proportionality.

27. In assessing proportionality, I must have regard to Section 117 of the 2002 Act and in particular the provisions of section 117B. Section 117B(1) of the 2002 Act confirms the maintenance of effective immigration control is in the public interest.

28. The appellant gave his evidence in English and whilst he currently is financially supported by his aunt he is not financially independent. His family life was established whilst he was here lawfully but both his private and family life has developed whilst his immigration status has been precarious. Section 117B specifically states that little weight should be attached to a private life that has been established when his immigration status was precarious but there is no similar provision for family life.

29. The fact he does not meet the Immigration Rules is also a factor I must have regard to and Mrs Chaggar invited me to take into account the failure to carry out any tracing for the appellant and the delay in dealing with this current appeal.

30. In so far as tracing is concerned the appellant was an adult when the decision was taken and there is no responsibility on the respondent to try and trace any family for the appellant. Mrs Chaggar accepted there was now no legal obligation on the respondent due to his age.

31. In any event, his evidence was he had no family he could turn to and his evidence was that his father lived in Saudi Arabia. The failure to trace is not a material factor in those circumstances.

32. The appellant lodged this application in March 2013 but the respondent did not take a decision until November 2014. Any delay is undesirable but Mrs Chaggar did not argue the appellant had lost out on any entitlement by the delay and it is clear that if the application had been dealt with earlier it would have led to him having to make a

further application once he turned 17 ½ years old because any leave under the policy applied would not have taken him beyond that date. I therefore find any delay is not prejudicial.

33. In assessing the proportionality of removal I have taken into account all of the above factors. The respondent must show that removal would not be disproportionate and Ms Johnstone's submission is that he is fit and well, nineteen years of age and has benefited from his stay in the United Kingdom.

34. With regard to his private life claim I am satisfied that his private life has been created whilst his stay was precarious. It was precarious because he had no guarantee he would be allowed to remain and he was only told he could remain until March 2013 and any subsequent extension was clearly something he would have to apply for and as can be seen its grant is not automatic. I do not find removal would breach any private life right created by virtue of article 8 ECHR.

35. With regard to his family life I accept he has enjoyed family life but importantly that life was enjoyed predominantly on the back of the respondent's own policy on unaccompanied minors. Whilst leave was granted having regard to family life with his aunt I am mindful that when that application was made he was thirteen years of age and living with his nearest family member. That situation is different to that facing me today as I am now dealing with a young adult and whilst becoming an adult does not mean family life ceases the appellant's age is a factor to consider in any proportionality assessment.

36. I have regard to the fact immigration control is in the public interests and although I accept Mrs Chaggar's submission that he does not receive any public funds he is nevertheless not financially independent. The family life was created because he entered the United Kingdom in the circumstances he did and whilst he continues to enjoy it I cannot overlook the fact he is now an adult, fit and well, educated in two languages and he has spent the majority of his life in Bangladesh. His relationship is not one of parent/child but aunt/nephew.

37. Balancing all of the above factors I conclude that removal would not be disproportionate and accordingly I dismiss his appeal under the Immigration Rules.

DECISION

38. There was a material error and I set aside the earlier decision in so far as article 8 and the finding the respondent's decision was not in accordance with the law. In all other respects the First-tier decision is upheld

39. I have remade the decision and dismiss the appeal under ECHR legislation.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

FEE AWARD

I make no fee award as I have dismissed the appeal.

Signed: Dated:

Deputy Upper Tribunal Judge Alis