



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/11994/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 September 2016  
Prepared 6 September 2016

Decision & Reasons Promulgated  
On 23 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GK

(ANONYMITY DIRECTION CONTINUED)

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Senior Presenting Officer  
For the Respondent: Mr A Reza, Counsel instructed by Sultan Lloyd Solicitors

**DECISION AND REASONS**

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.

2. In a decision promulgated on 26 May 2016 I decided that the Original Tribunal's decision by First-tier Tribunal Judge Ferguson (the judge) had contained an error of law in proceeding to consider the Article 8 claim outside of the Rules without an analysis to justify doing so. On this basis that part of the Original Tribunal's decision did not stand and the matter should be remade.
3. I gave directions. Those on behalf of the Claimant were not complied with but Mr Whitwell agreed, at my invitation, to look at the additional material provided in a witness statement of the Claimant, a supporting letter from Ms Tina Baker of Northamptonshire County Council and [DR], the foster parent of the Claimant. In considering the submissions made by Mr Reza I have borne in mind the contents of those statements to see whether they necessarily raise matters which fall at this stage to be considered or are pertinent to identifying exceptional circumstances in looking at this matter outside of the Rules.
4. Mr Reza identifies four points which he says collectively amount to the kind of compelling circumstances or exceptional circumstances which justify the consideration of Article 8 outside of the Rules. First, in brief that the Claimant has since he entered the United Kingdom been lawfully in the United Kingdom; Secondly, there has been a failure of the Secretary of State in carrying out tracing of relatives; Thirdly, there has been a period of unwarranted delay in dealing with the claim; Fourthly, the issue of the Claimant's foster family and a family in the UK whereas apparently he may not have one in Afghanistan was an important material circumstance.
5. Without doing injustice to those arguments in not setting them out more extensively it seemed to me that Mr Reza does raise circumstances which are of obvious importance to the Claimant who does not wish to return to Afghanistan and would rather stay in the United Kingdom where he has been since 2012.

6. I have in considering this matter fully taken into account the finding and reasoning of the judge and consider return to Afghanistan in the context where there is no remaining claim under the Refugee Convention or under the Humanitarian Protection provisions nor in relation to Articles 2 and 3 ECHR.
7. Given the judge's findings which also bear on the need for subsidiary protection it seemed to me that I approach these circumstances of the Article 8 claim in the reality that the Claimant is an Afghan who has at a young age relatively speaking left his home country and now faces a return to what remains unsettled circumstances. However the fact of his lawful presence in the United Kingdom is essentially neutral in terms of the consideration of this matter. Similarly the lack of tracing is now a matter long past, even assuming had it been done at an earlier stage it might have produced a result. In any event the case law on the lack of tracing is not intended to be punitive nor determinative of the need for protection: A matter which was ultimately dealt with in the general asylum/Humanitarian Protection claim that has been considered.
8. Further, it seemed to me in light of EB (Kosovo) v SSHD [2008] UKHL 41 that the delay is not of particular significance in terms of length of time and it does not appear to me that there has been significant delay by the Secretary of State nor that the Claimant has acted in reliance upon delay to his disadvantage or prejudice. Nor has he changed his position vis-à-vis what he has done in the United Kingdom reliant on delay or the inactivity of the Secretary of State.
9. Finally the issue of the Claimant's foster family is a matter of obvious concern in the general sense to a claim in relation to removal but it seemed to me that at the age he is now the issue of removal from a foster family, with whom he does not presently live, its significance diminishes albeit they will have provided valuable support in the earlier years of being fostered after 2012.

10. In those circumstances I conclude that the Secretary of State rightly identified that for reasons given the Claimant could not meet the requirements of the Immigration Rules and it did not seem to me that these circumstances indicate that the Rules are not sufficient to provide for claimants who have a sustainable basis for doing so. The basis to do so is set by the Secretary of State and Parliament and it is not for me to traduce it. In those circumstances I have decided, having considered the arguments that this is a case where I do not find the circumstances have that compelling quality that amounts to exceptional circumstances to consider the matter outside of the Rules.
11. I should emphasise that I do not require those compelling circumstances to meet a high threshold. The case law indicates, for example in SS (Congo) [2015] EWCA Civ 397, MM [2014] EWCA Civ 985, Agyarko [2017] UKSC11, that they should be the kind of exceptional circumstances that compel the engagement with Article 8 ECHR..

### **NOTICE OF DECISION**

The Original Tribunal's decision in allowing the appeal under Article 8 cannot stand.

The appeal under Article 8 ECHR is dismissed.

An anonymity order was made and should be continued.

### **DIRECTION REGARDING ANONYMITY - RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008**

Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 30 September 2017

Deputy Upper Tribunal Judge Davey

**TO THE RESPONDENT**

**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Davey