Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **AA 06081-13**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **31.10.2013**
on **31.10.2013** sent out: **05.11.2013**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

MR IAN MOHAMMAD HAKIMZAI

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Kathryn Cronin* (counsel instructed by Kesar & Co, Tonbridge)
For the respondent: Mr Peter Deller

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Derrick Pears), sitting at Hatton Cross on 25 July, to dismiss an asylum and human rights appeal by someone who claimed to be a citizen of Afghanistan, born in 1994. The appellant arrived and claimed asylum on 3 November 2008: his claim was refused on 13 March 2009; but, because of his age, he was given discretionary leave to remain till 1 July 2010. Before then, he applied for further leave to remain, which was eventually refused on 10 December 2010. However, as the result of a first-tier appeal decision, the Home Office were required on 30 November 2011 to reconsider theirs; but they did not do so, refusing it again, till 18 June 2013, a further delay of over 18 months.

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2. The decision-maker noted at paragraph 13 that the appellant's brother Fazal had arrived in 2006: his case followed a similar pattern up to his making an in-time application for further leave to remain on 22 January 2010; but, as the decision-maker records it, he was "… granted ILR outside of the rules on 19/01/2011 because of a 'substantial delay' in his case". This delay had of course been one of less than 12 months. At paragraph 72 the decision-maker said this

> … the circumstances that gave rise to your brother's grant of indefinite leave to remain were not based on your familial connection. Consequently, you do not qualify for discretionary leave for the same reasons that he did.

Evidently the writer had forgotten why he himself had said Fazal had been granted indefinite leave to remain, as there was no attempt to deal with the delay in this appellant's case, or the consequent disparity in outcome.

3. Nor was the disparity point taken by the advocate in her skeleton argument or before the hearing judge in this case; but it was taken by another member of the firm in his grounds of appeal: though the permission judge did not grant permission on it, she did not refuse it either. It clearly arises on the face of the Home Office decision itself, though only if one's attention is drawn, as mine was, to the mismatch between paragraphs 13 and 72. In my judgment it raises a clear point of Human Rights Convention law on the application of article 8, and requires the decision to be re-made.

4. Miss Cronin made it clear that, if I reached that result, she would not seek to re-open the appellant's asylum claim, but only his case under article 8, and without calling any further oral evidence: the judge did not reject any aspect of the appellant's case on his circumstances in this country. Dealing with one point, not taken in the grounds, which she sought to argue, the judge did not accept that the appellant was a citizen of Afghanistan; but Mr Deller for his part agrees that this is implicit in the Home Office recognition of him as Fazal's brother.

5. Miss Cronin accepted that this appellant could not qualify for further leave to remain under the terms of the 'new Rules' now in force on the application of article 8. Though this is not a deportation case, both sides also accept that, in line with *MF (Nigeria)* [2013] EWCA Civ 1192 at paragraph 43, 'exceptional circumstances' must be required for the appellant nevertheless to qualify for further leave. These include (see paragraph 44) the application of the usual proportionality test.

<u>FAMILY LIFE</u>

6. So far as the appellant's enjoyment of family life in this country is concerned, *Ghising* (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC) makes it clear in the judicial head-note, though in a different factual context, that

> *… there is no general proposition that Article 8 of the European Convention on Human Rights 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.*

7. In this case, the appellant was, according to the statutory terminology under the Children Act 1989, set out by Miss Cronin, a 'child in need' on his arrival here; when he was placed in foster care by Kent County Council, he became a 'looked after child', till he was 16, when he became 'an eligible child' whom they were looking after. That means he is now a 'former relevant child', who, the Act assumes, will have a continuing need for care, at least by way of 'personal mentoring and guidance' till he reaches 21 (or 25, if further education or training were part of the plan). This does not of course mean that he has a right to family life with the local authority, and neither is it in any way exceptional, in the context of unaccompanied minor asylum-seekers generally; but it does amount to statutory recognition that the appellant's circumstances give him a right to consideration of his family life over and above someone who had grown up with the support of his parents.

8. In this appellant's case, the evidence (statement of the appellant's cousin Niaz Mohd. Jabarkhail, 12 July 2013) shows that he has no close relations in his home area, and nothing has been heard from his mother or his uncle in Pakistan. In this country, since he came out of foster care, he has been living not with, but close to his elder brother Fazal, and his elder cousins Niaz Mohd. and Sharbat Khan Jabarkhail. According to Niaz Mohd., this situation arose because the local authority social services department were required to carry out an assessment of whether his house would be overcrowded by the appellant's staying there with all of them, as a result of which they placed him in foster care, but found somewhere close to his relations for him when he came out of that.

9. Niaz Mohd. however says the appellant comes to their local mosque with them every Friday, and also comes over for football practice on Saturdays and games on Sundays. He will at least eat a meal with them every week-end; but local authority restrictions mean that a request has to be made for permission for him to stay over, which is not always possible. The appellant was to return to college for the present academic year.

10. In my judgment, all of this in the context of this appellant's individual history, and in the light of *Ghising*, means that he does have a family life in this country which attracts the protection of article 8 of the European Convention on Human Rights. There is certainly nothing exceptional about it; but it has to be taken account of in the usual balancing exercise, to which I shall now turn.

PROPORTIONALITY

11. Coming first to the considerations in favour of the appellant's removal, everyone knows that large numbers of young Afghan asylum-seekers have been allowed discretionary leave to remain till the age of 17½, as this appellant and his brother were, in recent years. That policy is followed in line with this country's international humanitarian obligations, and there is of course a strong general public interest in its not being allowed to become a side-door to voluntary migration, both because of the difficulties in dealing with immigrants already here, and so as not to encourage others to follow them in future.

12. As against that, this appellant is still only 19, and has no close relations to turn to in Afghanistan, and no traceable ones in Pakistan. He has a close family life with his brothers and cousins; though he does not spend the week with them, owing to the local authority's own rules, he does join them in the activities which no doubt they all consider important, mosque on Fridays, and football and meals together at week-ends.

13. In my view, the appellant's family life does not on its own make his removal disproportionate to the legitimate purpose of immigration control. If it were to be regarded as doing so, then many thousands of unaccompanied minor former asylum-seekers, from Afghanistan and elsewhere, would no doubt be in much the same position. It is no doubt to provide some check on the influx that the 'new Rules' have been approved by Parliament, requiring, as held in *MF (Nigeria)*, 'exceptional circumstances' before someone not otherwise qualified under them can be allowed to stay.

14. In my view, the only exceptional circumstances in this case consist in the disparity which resulted in the different treatment of the appellant and his brother Fazal. There is no material difference in their cases, except that Fazal was given indefinite leave to remain as the result of under 12 months' delay in considering his application, which was pending all that while. In this appellant's case, the first decision was reached in not unreasonable time, after less than six months. There was then another year, for which the Home Office can only be partly responsible, while the appeal process went on its way.

15. I have not been provided with the basis on which the First-tier Tribunal allowed this appellant's first appeal; but it does not seem to me that it would make much difference. On 30 November 2011 the Home Office were ordered to reconsider their decision on his application; but they did not do so till 18 July 2013. Meanwhile the appellant has settled down to the life he has with his brother and cousins. Even after that delay of over 18 months, the decision-maker did not make the connexion between the relevant periods in this appellant's case and Fazal. Perhaps, as Mr Deller suggested, that was because there was a difference in the route the cases took, with an intervening appeal in this appellant's; but, if so, that was a failure to connect for which the Home Office are responsible, not him.

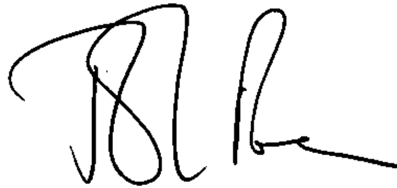
16. In my view it was also a failure which brings in what Lord Bingham of Cornhill said in *EB (Kosovo)* [2008] UKHL 41 at paragraph 16:

> Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.

That is exactly what has happened in this case, as between this appellant and his brother: the Home Office accepted their relationship and the delay which had taken place in the brother's case; but they failed to explain why the greater delay in this appellant's should not lead to a similar result.

17. I take the view that this feature of the case only can properly be regarded as exceptional, in view of the very particular circumstances involved; and, taking it into account together with the rest of the balancing exercise, I should regard it as disproportionate to the legitimate purpose of immigration control now to remove this appellant.

Appeal allowed



(a judge of the Upper Tribunal)