Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06400/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 November 2013	
	……

Before

DESIGNATED JUDGE MURRAY

Between

M A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Haji, Counsel, for Duncan Lewis & Co, Solicitors, Harrow
For the Respondent: Ms Alex Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan born on 1 April 1991. He appealed against the Secretary of State's decision dated 24 June 2013 dismissing his asylum claim, his claim on the humanitarian protection issue and his claim on human rights grounds. His appeal was heard by First-tier Tribunal Judge J J Maxwell and dismissed in a determination promulgated on 14 August 2013.

2. An application for permission to appeal was made on behalf of the appellant and permission to appeal was granted by Judge of the First-tier Tribunal V. A. Osborne on 9 September 2013. The grounds of application state that the appeal came about 6 years after the appellant had made his original application. The respondent had

argued that the appellant had absconded but it was found by the First-tier Tribunal Judge that this was not the case. The grounds of application state that the appellant has been treated unfairly and has been deprived of remedies which would have been available to him had the respondent dealt with his application within acceptable time limits. The grounds argue that the First-tier Tribunal Judge's consideration of the appellant's Article 8 rights are flawed as no weight was attached to the delay by the respondent.

The Hearing

3. Counsel for the appellant submitted that she is relying on the grounds of application. She submitted that the First-tier Tribunal erred in law by finding that the appellant was not a minor. This deprived him of the right to a fair hearing. This issue was not raised in the refusal letter. The respondent accepted the appellant's Afghan passport which shows he was born on 1 April 1991 and a passport is proof of age. The judge made reference to an age assessment report by Barnet Social Services. Counsel submitted that the appellant was unaware that age was an issue until he received the determination. On the date of the hearing the appellant had not seen the report and the report was prepared after a 20 minute interview. She submitted that the appellant had no chance to challenge it and so did not have a fair hearing. She submitted that as a minor, the respondent had responsibility for tracing the appellant's family in Afghanistan and the appellant should have been granted discretionary leave until he was 17½ years old. She submitted that thereafter, if it was found that he was at risk on return he would have been granted ILR as a refugee. She submitted that the appellant was not interviewed until 2013 so he lost these benefits. Counsel submitted that because of the delay the appellant missed the deadline for legacy cases by 4 months and has been prejudiced.

4. I was referred to paragraph 395C of the Immigration Rules and the Home Office Policy CH 53 EIG. Counsel submitted that the circumstances of the case have to be considered as a whole and not individually and the appellant's length of residence in the UK is a compelling and significant factor. She submitted that the 4 year policy was not considered and had it been, the appellant could well have been granted leave to remain. She submitted that unfairness is the result.

5. Counsel referred to the Article 8 claim and EB Kosovo [2008] UKHL 41. She submitted that this appellant's Article 8 claim was considered under the new Immigration Rules but should have been considered under the old Rules and should have been considered under the Legacy scheme. I was referred to the case of Mohammed [2012] EWHC 3091 (Admin) at paragraphs 34-36. In Mohammed it is stated that 4-6 years residence in the UK may be considered significant but a more usual example would be 6-8 years. She submitted that in 2011 the appellant had been in the United Kingdom for 4 years. Paragraph 46 of Mohammed deals with Rule 395C and Counsel submitted that the appellant in this case has been in the UK for between 4 and 8 years. The respondent delayed the case for 6 years and this should result in a grant of leave as there has been a change or an alteration of a

substantive criterion for leave to remain. Weight should be placed on significant periods of residence and this is a factor which weighs against removal.

6. Counsel submitted that the determination is unreasonable and the proportionality assessment has not been properly carried out. I was referred to the determination at paragraphs 45 and 46. The First-tier Judge accepted that the appellant is in a relationship. He has been with his girlfriend for 3 years. The judge put limited weight on this because his girlfriend stated that she does not know what the future holds but this should not diminish the weight put on this relationship. His girlfriend states that she will go to Afghanistan with the appellant if he has to go, but her mother will not let her. Counsel submitted that the judge refers to Article 8 and the relevant case law but he does not apply it. The judge states that the appellant and his girlfriend can keep in touch electronically and he can go back to Afghanistan and apply for a residence card but that is not the issue. The issue is the present relationship and his girlfriend's inability to leave the United Kingdom. I was asked to set aside the determination.

7. The Presenting Officer submitted that although she does not have a full copy of the age assessment report she has a letter from Barnet Social Services stating that the age assessment concludes that the appellant is over 18 years old. She submitted that the appellant must have been told about this and did not challenge the age assessment at any time.

8. The appellant's representative stated that the appellant had been unaware of the letter and it was not produced at the hearing.

9. The Presenting Officer submitted that she accepts that there has been a delay but based on the refusal letter and the Barnet Social Services' letter, the judge was entitled to come to the decision he did. She accepted that the appellant missed out on some things he would have been entitled to, if he had been found to be a minor but it had been found that the appellant was over the age of 18 when he came to the United Kingdom so the respondent did not require to try to trace the appellant's family in Afghanistan.

10. With regard to the Legacy issue, there has been no decision under the Legacy process. I was referred to the case of AZ Afghanistan [2013] UKUT 00270 (IAC). The Headnote in this case states "Where an appellant in an asylum appeal has previously been informed that his case has been considered as a Legacy case but no decision under the process had been made, a subsequent immigration decision following a rejection by the Secretary of State of his asylum claim is not rendered unlawful by reason of the failure to make a decision under the Legacy process."

11. With regard to paragraph 395C, the Presenting Officer submitted that this claim is distinguishable from the said case of Mohammed. This claim does not need to be considered under paragraph 395C. I was referred to the case of Aysha Khanum & Others [2013] UKUT 00311 (IAC). This states that paragraph 353B is not designed to

replace paragraph 395C. The decision whether to carry out a review or not, within the scope of paragraph 353B, is entirely at the discretion of the Secretary of State.

12. With regard to Article 8 and the appellant's relationship with his girlfriend, the Presenting Officer submitted that the judge does not dismiss this out of hand. What he does is find that the relationship is in its infancy. The couple has not decided to stay together for life. For Article 8 to be engaged this is required. The appellant and his girlfriend are not in a relationship akin to marriage. She submitted that there is no error.

13. The Presenting Officer submitted that she is relying on the Rule 24 response which refers to paragraph 14 of the determination. This deals with the appellant's age. The judge states that the appellant's then representatives were aware of the age assessment but it was never the subject of any challenge so the judge found that the appellant was over 18 years at the date of his application. The Rule 24 response states that Ground 1 of the application suggests that the appellant was not given an opportunity to challenge the age issue and was deprived of a fair hearing because he was taken by surprise but his current solicitors would have been in receipt of the Home Office bundle and so he would have been on notice as to what the issues were. The response states that the judge was entitled to find on the basis of the Barnet Social Services' report of 9 August 2007 that the appellant was not a minor and that was never challenged by way of judicial review. The appellant at the date of the decision was well over the age of 18, so the respondent did not require to consider matters which might have been material had he been a minor, e.g. the respondent did not require to trace the appellant's family members. As the appellant was found to be over the age of 18 he would not have been granted discretionary leave. The application was made on 7 August 2007. A Legacy case is when an application is made prior to 5 March 2007. The respondent has not made specific reference to paragraph 353B and CH 53 EIG in the refusal letter but the application was considered under the Immigration Rules, Appendix FM and 276ADE and the considerations are much the same as the said policy so the appellant has not been prejudiced in any way.

14. The response goes on to state that the challenge to the judge's finding on private life and the appellant's girlfriend's oral evidence is merely a disagreement with the findings of fact made and the judge took into account the respondent's delay. He acknowledges this at paragraph 44.

15. Counsel for the appellant submitted that proportionality relating to private and family life is not simply resting on the relationship between the appellant, his girlfriend and her mother, the delay has to be taken into account. Because of the delay the appellant has strengthened his ties to the UK.

Determination

16. The determination of the First-tier Judge refers to the appellant being in the charge of Barnet Social Services, who found him to be over the age of 18 on 9 August 2007. His

immigration history is that at this time Social Services ceased to support him and he instructed the Refugee Council to act for him. It is therefore clear that the appellant knew he was found to be over 18 years of age and this was never challenged. The Barnet Social Services' letter was sent to the Refugee Council and to Chartwell and Sadler, Solicitors London on 9 August 2007, so it cannot be argued that the appellant was unaware of it. The judge finds that the appellant was not an absconder. This goes in the appellant's favour in the balancing exercise.

17. As the appellant was over 18 when he lodged his claim for asylum he was not entitled to the benefit accruing as a result of the respondent's policy on unaccompanied asylum seeking children and there was no duty on the respondent to make enquiries to trace the appellant's family. The judge states that the appellant falls outside the criteria for having his claim dealt with under the Legacy policy, as to be considered under that policy the appellant would need to have been abiding his claim and resident in the United Kingdom for a minimum of 6 years. Many of the grounds of application are covered under the heading "Immigration History" in the determination.

18. At paragraph 16 the judge states "The unwarranted delay is not to be disregarded as it is a matter which is of significance in relation to any Article 8 claim that might arise and certainly shall not be a matter which counts against him in relation to any credibility findings I may make." He has clearly taken this into account.

19. At paragraph 22 (vii) the judge refers to the appellant's girlfriend and his girlfriend's mother. He is aware of the relationship and the extent of the relationship and deals with this adequately. They are not in a relationship akin to marriage.

20. At paragraph 29 the judge refers to the appellant's representative directing him to a number of passages in the background material and stating that much of this would have been relevant only if the appellant was a minor. The judge was entitled to come to the conclusion that the appellant knew that he had been found to be over 18 years of age.

21. With regard to Article 8 the judge refers to the relevant case law and the appellant's, his girlfriend's and her mother's Article 8 rights. At paragraph 44 the judge deals with proportionality. He considers the fact that the appellant claimed asylum immediately on arrival but the respondent did not interview him until June 2013. He finds that this was not the appellant's fault. He takes all the facts into account and explains his decision. All matters have been dealt with properly by the judge. There is no error of law in the judge's determination.

DECISION

22. As there is no error of law in the judge's determination, his decision must stand. The appellant's appeal is therefore dismissed on asylum grounds, humanitarian protection grounds and on human rights issues.

23. Anonymity has been directed.

Signed Date

Designated Judge Murray
Judge of the Upper Tribunal