



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10005/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10 February 2014

Determination Promulgated
On 24 March 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ZAINUDDIN ARIF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Blum, Counsel, instructed by J D Spicer Zeb Solicitors (87
Kilburn)

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Afghanistan, was born on 1 March 1995. Having entered the United Kingdom by lorry, he claimed asylum on arrival on 24 February

2009. The respondent refused his claim a year later, on 25 February 2010, but granted discretionary leave until September 2012, because he was a minor.

2. On 1 September 2012, before the expiry of his existing leave, the appellant applied for further leave to remain, renewing his asylum application.
3. The respondent refused this application as well on 25 October 2013, and the refusal letter is dated the same day. The respondent also made removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.
4. The appellant appealed against the refusal of further leave and his appeal was heard before First-tier Tribunal Judge Maciel, sitting at Columbus House, Newport, on 5 December 2013.
5. In a determination dated 11 December 2013, and promulgated shortly thereafter, Judge Maciel dismissed the appellant's appeal not only on the basis that he did not qualify for asylum or humanitarian protection, but also under Article 8. His claim under Article 8 had been advanced on the basis of his relationship to a Miss Salik, a British citizen. I use the word "relationship" neutrally, because one of the submissions now advanced on behalf of the appellant is that Judge Maciel misunderstood his case, which was that he was "engaged" to Miss Salik, considering instead that the case had been put on the basis that his relationship with that lady "was akin to marriage".
6. The appellant's appeal on asylum grounds (and on the grounds that he would otherwise be at risk on return to Afghanistan) was dismissed on the basis of adverse credibility findings which the judge made.
7. The appellant now appeals against Judge Maciel's decision, leave having been granted on 10 January 2014 by First-tier Tribunal Judge Saffer. As noted by Judge Saffer when setting out his reasons for granting permission to appeal, "no application is made regarding the asylum, humanitarian protection or Article 3 findings or decisions", which as noted above, were founded on the adverse credibility findings which Judge Maciel made. This appeal is limited to the dismissal of the appellant's Article 8 claim. It is submitted in the ground that Judge Maciel's findings in respect of Article 8 are vitiated by errors of fact which she made.
8. The errors which the judge is said to have made have been set out in the grounds of appeal and in the course of his cogent but concise arguments before me, Mr Blum explained further their significance. As the submissions made on behalf of both parties at the hearing were recorded contemporaneously by myself, and are contained within the Record of Proceedings which I made, in which I attempted to record contemporaneously everything which was said, I shall not set out all the arguments which were made in full, but shall refer below only to those parts of the submissions which I need to record for the purposes of this determination. I have, however, had regard to everything which was said on behalf of both parties, as well as to all the documents which are contained within the file, when considering

whether or not there was a material error of law in Judge Maciel's determination such that her decision must be remade.

9. For the purposes of this determination, it is necessary for me only to set out the more significant errors which it is said on behalf of the appellant that Judge Maciel made.
10. Both the appellant and Miss Salik gave evidence that they had an intimate relationship. Although this did not appear to have been challenged on behalf of the respondent, and although the appellant in re-examination and Miss Salik in cross-examination claimed they had undergone an Islamic marriage, the judge rejected this evidence. At paragraph 56, she states that "apart from what the appellant stated in re-examination and what Miss Salik stated in cross-examination, there is no evidence of an Islamic marriage". Judge Maciel does not appear to have made any finding with regard to the evidence which she records at paragraph 28 as having been given by Mr Niazi, said to be the appellant's mother's cousin, that "he stated that he went with his friends to Miss Salik's home and met with her parents and there was an agreement for them to be married. A nikka ceremony was done in front of her parents". He is also recorded as having stated after referring to the nikka ceremony having been done in front of Miss Salik's parents that "they have not had their 'big wedding day'".
11. Mr Niazi's evidence regarding this aspect of the appellant's case did however appear to have been accepted at paragraph 54 where Judge Maciel found

"that although they have undergone what Mr Niazi terms as an 'Afghani marriage', Miss Salik had in fact stated she had not done her 'big wedding' [and had] confirmed that by this she meant that she had not left her father's house to join her husband's home".
12. Judge Maciel then goes on to conclude that "this would mean that she would not have an intimate relationship with the appellant". It is the appellant's case that by so finding the judge was making cultural assumptions which she was simply not entitled to make. It was submitted on behalf of the appellant in particular that as a matter of fact intercourse is not prohibited between a couple once there has been an Islamic marriage, or "nikka", and there was no basis upon which the judge could properly find that this appellant and Miss Salik would not have had an intimate relationship as they claim. This cultural assumption was said to have infected the rest of her findings as to the nature of the relationship.
13. The appellant in his statement had maintained that he had met Miss Salik at a party which took place in London, when he was living outside London. Judge Maciel at paragraph 56 of her determination notes (as one of her reasons for rejecting the case put forward on behalf of the appellant) that "there is no evidence before me as to how the appellant found his way to a party in London when he has been cared for by Social Services outside London". She also states as follows in this paragraph:

"The appellant would have been 14 years old at the time that he met Miss Salik who would have been 15 years old. I find it unlikely that Miss Salik would

have been at a party with her parents during which she would have been in a position to speak freely with the appellant.”

14. Mr Blum in argument submitted that the judge’s assumption that the appellant would not have found his way to a party in London when he was being cared for by social services outside London and his finding that it was unlikely that this couple would have been able to talk to each other freely at a party displayed two errors. The first is that there is a procedural impropriety, in that in a determination where a great deal related to what was said or done by the parties, it does not appear that the appellant was ever asked how he made his way to the party. If an adverse inference was going to be made because of something which was never put, natural justice would have required that this be put to the appellant and Miss Salik to enable them to give an explanation, both in relation to the manner in which he says he made his way to the party and the circumstances in which he was able to speak to her. This was a fundamental breach of natural justice.
15. The other criticism which must be made of this aspect of the determination is that the judge was making a cultural assumption that a 15 year old Muslim girl would not have been permitted to talk to a boy at a party. Again, this is a cultural assumption which is not supported by any reference to any evidence which was given. It was the appellant's case that it is both dangerous and impermissible to form conclusions based on cultural assumptions in circumstances where neither party has been asked to explain how they were able to speak to each other.
16. As the judge’s finding at paragraph 62 that the appellant had not established a family life with Miss Salik was founded on these cultural assumption and procedural improprieties, these errors were material.
17. Mr Blum very sensibly did not suggest that the judge would have been bound to come to a different conclusion had he considered the evidence properly and had the proceedings been fair, but in the circumstances of this case, the appellant did not have a fair trial. Accordingly, there should be a rehearing as to Article 8 only; it was accepted that there was no basis upon which the rejection of the appellant's asylum claim could be challenged.
18. On behalf of the respondent, Mr Wilding emphasised that there had been inconsistencies throughout the evidence, and that there were issues which arose as to when the evidence relating to there having been an Islamic marriage had been given. The judge was entitled to reach the findings she did because there had been a lack of evidence before her. While Mr Wilding did accept that there were what he described as “unfortunate aspects” within the determination, it was nonetheless the respondent's case effectively that any errors were not material.
19. In answer to a question from the Tribunal, Mr Wilding accepted that the best way forward, if an error of law was found, was to remit this appeal back to the First-tier Tribunal.

20. In the course of his reply, Mr Blum emphasised that the judge's conclusion that there was no family life was dependent on his finding as to whether or not the appellant had been able to meet Miss Salik and the circumstances in which they met. That was the core basis upon which the claimed relationship developed. If the judge had gone wrong legally in his assessment of this, even if she had been entitled to rely on other evidence as well, unless one could say she could only have reached the decision she did if the errors had not been made, these errors are material. On the facts of this case, it could not be said that she must have reached the same conclusions.

Discussion

21. In my judgement, Mr Blum's substantive points are well-founded, and the criticisms which he made with regard to the determination cannot just be disregarded as "unfortunate aspects of that determination". I do not consider that Judge Maciel has given adequate reasons for finding that it was unlikely that Miss Salik would have been at a party with her parents during which she would have been in a position to speak freely with the appellant. It does not appear that she was ever asked as to what she would or would not have been allowed to do, and there must be at least the very real possibility that this finding was based on an implicit assumption that young Muslim girls would not be allowed to speak to a boy at a party. Given that this young man was able to travel from Afghanistan to the UK while still a boy, if it was to be suggested that it was unlikely that he could have made his way to a party in London when he was under the supervision of social services outside London, I agree with the submission made by Mr Blum that this should at least have been put to him.
22. I also agree that the finding that because Miss Salik had stated that she had not done her "big wedding" and had confirmed by this that she meant that she had not left her father's house to join her husband's home, this would mean that she would not have an intimate relationship with the appellant (at paragraph 54) is inadequately reasoned, and would appear to be based on a cultural assumption which the judge has made, and, in light of his finding in the same paragraph that they had "undergone what Mr Niazi terms as an 'Afghani marriage'" and which might well have been a nikka was quite possibly wrong as well.
23. These errors were material because it cannot be said that even if the errors had not been made, the judge would have been bound to have reached the same decision with regard to the appellant's Article 8 claim. Her finding that the appellant has not established a family life with Miss Salik (at paragraph 62) which was a relevant factor which had to be taken into account when the judge conducted a proportionality exercise, was based at least in part on the findings which the judge was not entitled to make, or at any rate have not been adequately reasoned.
24. It follows that the decision with regard to Article 8 must be remade.
25. Having had regard to paragraph 7 of the President's Practice Statements to the Immigration and Asylum Chamber of the Upper Tribunal, I consider that the effect of the errors contained within the determination as identified above was such that

with regard to his Article 8 appeal, the appellant was effectively deprived of a fair hearing. I also consider further that the nature and extent of the judicial fact-finding which will now be necessary, in order for this aspect of the decision to be remade, is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal, as was accepted (in the event that I found against the respondent with regard to there having been an error of law) on behalf of the respondent and I shall so order. I accordingly make this decision below and shall also give directions for trial.

Decision

The determination of First-tier Tribunal Judge Maciel is set aside, insofar as she dismissed the appellant's appeal under Article 8, as containing a material error of law.

I direct that the appellant's appeal, insofar as it relates to his Article 8 claim, be remitted for a rehearing by the First-tier Tribunal, sitting at Columbus House, Newport, to be put before any judge other than First-tier Tribunal Judge Maciel.

Signed:

Date: 14 March 2014

Upper Tribunal Judge Craig