IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01285/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 October 2014	**On 4 November 2014**

Before

Upper Tribunal Judge Southern

Between

AMAN ESMATULLAH AMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Graham, Counsel instructed by St Law Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Afghanistan born on 20 June 1995, has been granted permission to appeal against the decision of First-tier Tribunal Judge Walters, who by a determination promulgated on 23 July 2014 dismissed his appeal against a decision of the respondent to refuse to vary his leave by way of the grant of further leave to remain.

2. The appellant arrived in the United Kingdom on 28 November 2011, concealed in the back of a lorry, as an unaccompanied minor seeking asylum. His asylum application was refused but he was granted discretionary leave to remain until 20 December 2012 on account of his age. His appeal against refusal of asylum was dismissed. On 15 December 2012, which was a few days before his discretionary leave expired, he submitted an application for further leave on the basis of rights protected by Article 8 of the ECHR.

3. In the letter from his solicitors that accompanied that application dated 13 December 2012 it was said that he was still relying on an asylum claim on the basis of being an unaccompanied minor but before the judge Counsel confirmed that that was not being pursued and the only matter at large was the issue of whether there would be an impermissible infringement of rights protected by Article 8 of the ECHR in connection with his right to respect for the private and family life he had established in the United Kingdom if leave were not granted. Mr Graham, who appears on the appellant's behalf today as indeed he did before the First-tier Tribunal, confirms that that is still the position.

4. In that letter from his solicitors the following matters were asserted on the appellant's behalf. The appellant's parents are deceased. His father died in an accident in 2008 and his mother died of natural causes in 2006. He has no remaining close relatives in Afghanistan. The uncle who arranged for his journey to the United Kingdom has now moved to Pakistan and the appellant's older sister is now also in the United Kingdom. His younger sister remains in Afghanistan but her whereabouts are unknown. Both of the appellant's brothers are now settled in the United Kingdom and the appellant has been living with one of those brothers and his family who have supported him financially. As a minor the appellant has family life with those relatives and he has established also a strong private life, making friends and pursuing English language courses.

5. The respondent in the refusal letter first considered the Article 8 claim under Appendix FM of the Immigration Rules. This was an application that could not succeed under paragraph 276ADE because the appellant did not meet the requirements concerning his length of residence in the United Kingdom and because, as he had lived in Afghanistan for the first fifteen years of his life, he being just 17 years old when he made the application, the respondent did not accept that he had lost ties with his country of nationality.

6. The respondent then said this:

> "It has been considered whether your application raises or contains any exceptional circumstances which, consistent with the right to respect for family and private life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of leave to remain in the United

> Kingdom outside the requirements of the Immigration Rules. It has been decided that it does not. Your application for leave to remain in the United Kingdom is therefore refused."

7. Before the Judge of the First-tier Tribunal the appellant's representative accepted that the decision of the respondent that the appellant's claim could not succeed under the Rules was unassailable. Therefore the judge heard oral evidence from the appellant and from the brother with whom he had been living. The effect of that evidence was to confirm all that had been asserted on the appellant's behalf in the solicitors' letter I have just referred to.

8. The judge also heard oral evidence from the appellant's tutor at the college where he had been taking courses in the English language. The tutor spoke positively about the appellant's good attitude towards his studies and his success in examinations. He said that the appellant had achieved a good deal within a relatively short period of time under difficult circumstances relating to what he referred to as the tragic circumstances concerning his immediate family which I take to be a reference to the death of both of the appellant's parents.

9. The conclusions reached by the judge are to be found between paragraphs 32 and 35 of the determination, which I reproduce in full:

> "Ms Mogbeyi [the respondent's representative] submitted that following the case of Gulshan (20030 UKUT 640 (IAC) the facts of this case did not make it exceptional. She relied on paragraph 15 of Gulshan where it is stated that "exceptional means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate."
>
> As I have specifically discounted the evidence that the Appellant's Article 2 and 3 rights would be breached if he is returned (the fear here is fear of the Taliban) I did not find that a return to Kabul would result in unjustifiably harsh consequences for the Appellant.
>
> It was submitted by Mr Graham [the appellant's representative] that the Appellant's "physical and moral integrity" would be threatened by a return to Kabul because it would put him in the "zone of tension". However, Mr Graham submitted no country material which showed in what way an ordinary returnee (who feared no Article 2 or 3 threats) could be adversely affected by the circumstances that apply to all ordinary citizens in Kabul.
>
> I therefore did not find that I was required to conduct a "freestanding" Article 8 judgement."

10. The grounds upon which permission to appeal has been granted may be summarised as follows:

(a) The judge erred in failing to take into account relevant factors including the appellant's age, health, vulnerability, closeness of social ties, family history, dependants and cultural traditions.

(b) In particular the judge failed to have regard to the strong bond of dependency between the appellant and his relatives in the United Kingdom as well as the absence of any relatives or other family or social support in Afghanistan.

(c) The judge also erred in failing to have regard to factors identified in the documentary evidence relied upon including the witness statements and numerous letters of support and evidence of the appellant's strong emotional and financial ties with his brother and other family members in the United Kingdom.

(d) The judge failed to consider adequately the impact of removal on the appellant's moral and physical integrity.

(e) The judge was wrong to refuse to carry out an assessment of the Article 8 claim outside the Immigration Rules.

11. Having heard brief submissions from both representatives it is clear that there is a consensus between the parties as to the best way forward which I reflect in what I say next. The applicant's claim under Article 8 was one that had no prospect of succeeding under the Immigration Rules but that though did not mean that it was bound to fail. All we know about the assessment of the Article 8 claim carried out outside the Rules by the respondent is that which is said in the refusal letter. I have to say that that is a wholly inadequate assessment which makes no pretence at all of engaging with matters the appellant had put forward about his circumstances. I have no doubt that the approach taken by the judge was legally flawed. The grounds of appeal to the First-tier Tribunal could not have made more clear that the appellant was advancing a claim that there would be an infringement of rights protected by Article 8 of the ECHR as a consequence of the decision or the decisions under appeal.

12. Section 86(2) of the Nationality, Immigration and Asylum Act 2002 makes clear that the judge is required to determine any matter raised as a ground of appeal. This judge has simply declined to do that. The reason given by the judge for declining to carry out a proper assessment of the Article 8 claim was that there was no protection claim made out or at large before him. If he thought that there was some form of threshold test to be met before the appellant could expect his claim under Article 8 of the ECHR to be assessed outwith the constraints of Appendix FM of the Rules he was wrong to do so. The judge made no attempt to engage with all that had been advanced on the appellant's behalf concerning the private and family life he said he had established here or the asserted dependency he said had characterised those family relationships. There was no attempt at all to strike a balance between the competing interests

in play. As was observed by Lord Justice Aikens in **R (MM & Ors) v Secretary of State for the Home Department [2014] EWCA Civ 985** at paragraph 129:

> "I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker."

13. For all of these reasons I am entirely satisfied that the judge made an error of law and so his decision cannot stand as it is. The question is where we go from there. Because the judge simply declined to determine as he should have done the human rights appeal that was before him there has been no determination by the First-tier Tribunal of that ground of appeal, despite the fact that a good deal of written and oral evidence was offered and relied upon. That oral evidence will have to be received afresh. In those circumstances, and given that the circumstances of this particular appellant do not necessarily indicate that any particular outcome must inevitably be the result, it is common ground and agreed between the parties that the most appropriate way forward is to provide the appellant with that which he has not yet been given which is the right to present his arguments before the First-tier Tribunal. Therefore the appeal will be remitted to the First-tier Tribunal so that the human rights grounds can be considered and determined.

Summary of decision:

14. The first-tier Tribunal made an error of law and the decision to dismiss the appeal is set aside.

15. The appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed 

Date: 31 October 2014

Upper Tribunal Judge Southern