



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/11097/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 4th January 2018**

**Decision & Reasons Promulgated
On 9th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**M H
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel instructed by Lawrence and Co.
Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have decided to make an anonymity direction in the terms that appear at the end of this decision. This is because I have concluded that it is necessary to protect the interests of the Appellant's daughter who is a child.
2. This is an appeal by MH who was born on [] 1990 and is a citizen of Afghanistan. He appeals against the decision of Judge Woolf to dismiss his appeal against refusal of his protection and human rights claims. The

basis of his protection claim was that he was at risk of being killed by the Taliban on return to Afghanistan due to his work as an interpreter for the Americans and because the Taliban believe that he is a British spy due to the fact that he has resided in the UK since 2010.

3. The basis of his claim under Article 8 was and is that he is married to a Lithuanian national exercising European Community treaty rights in the UK with whom he has a young daughter. It was also argued on his behalf that it was incumbent upon the Tribunal to have regard when assessing his claim under Article 8 to the fact that the Respondent had unlawfully failed to give effect to an earlier decision by the Tribunal (dated 9th October 2014) in which it found that the Appellant had satisfied all the requirements for leave to remain as a student.
4. The Appellant's protection claim was supported by an expert in Afghan affairs, Dr Giustozzi. In broad terms, Dr Giustozzi concluded that the Appellant's account of the threats he claimed to have received from the Taliban was entirely plausible, that he was at risk on return from the Taliban by reason thereof, and that he could not safely relocate to Kabul.
5. At paragraph 65 of her decision, the judge accepted that the Appellant's account was credible and that he was indeed at risk of being killed as a collaborator were he to return to his home area of Ghoroband district at Parwan province. For the reasons she set out at paragraphs 68 and 69, however, she disagreed with Dr Giustozzi's conclusion that it was unreasonable to expect the Appellant to relocate within Afghanistan, specifically, to a central Kabul.
6. The judge further concluded (at paragraphs 70 and 73) that given that the outcome of the Appellant's application for an EEA residence card had yet to be determined, it was not appropriate to address the appellant's argument that it would be unreasonable for him to relocate with his Christian wife to a Muslim country, or indeed to carry out any meaningful assessment of the effect that removal would have upon his family life for the purposes of considering the claim under Article 8.

The grounds of appeal

7. With apologies to both Mr Chelvan (who settled the original grounds) and to Mr Nicholson (who expanded upon them in his renewed application for permission to appeal) I shall attempt to summarise the appellant's arguments.
8. Firstly, it is said that the judge ought to have determined the protection appeal on the basis that the Appellant's wife *would* return with him to Afghanistan given the Presenting Officer's argument in the First-tier Tribunal that she "could" do so.
9. Secondly that it was irrational to find that the Appellant could safely relocate to central Kabul given -

- (a) the uncontradicted opinion of Dr Giustozzi that he could not; and
 - (b) that it was not known in which part of Kabul his family had been staying at the time when they received the so-called 'night letter' threatening the Appellant's life
10. Thirdly, the judge failed to have regard to the Respondent's failure to give effect to the Appellant's successful appeal on 9th October 2014 against refusal to grant his application for limited leave to remain as a student when carrying out the Article 8 assessment.

Discussion

11. The first ground is in my view misconceived. So far as the protection claim is concerned, the critical question was not whether the wife of the appellant *could* follow him to Afghanistan, but rather whether she *would* do so. In stating that the appellant "could" return to Afghanistan with his wife, the Presenting Officer was simply adopting a shorthand form of the usual argument under Article 8 that it was reasonable for family life to be enjoyed outside the United Kingdom. However, for the purposes of the protection appeal, the judge's error was if anything in failing to make findings concerning the credibility of his wife's claim that she would not follow the appellant to Afghanistan under any circumstances rather than in failing to make the assumption that she would do so.
12. Turning to the second ground, Dr Giustozzi had this to say at paragraph 32 of his report dated 12th May 2017:
- "In summary the case of Mr Mohammad is fully plausible. Interpreters are one of the categories at highest risk in Afghanistan. Alleged spies are another such category. The risk will be greatest in his home district of Ghoroband which is now quite heavily infiltrated by Taliban. In Kabul too however he will be at risk unless he manages to earn enough money to settle in central Kabul. Given his profile the only way he could do so would be to resume his job as an interpreter which would again place him at risk whenever he left the central neighbourhood of Kabul for work or for whatever reason. The uncle is unlikely to let him to live in his house given the risk associated with him."
13. This is what the judge said about the matter at paragraphs 66 to 69 of her decision:
- "66. The issues regarding whether there is a sufficiency of protection and/or whether the Appellant can safely relocate to Kabul remain to be considered. Having accepted that the Appellant's family were in receipt of a night letter whilst staying with his uncle there I conclude that he cannot go and live with his uncle. Dr Giustozzi states at paragraph 29 of his report relocating would reduce the risk to the Appellant from the Taliban only in certain conditions. The safest location will be in central Kabul however if the Appellant relocated finding accommodation will be difficult and expensive. As of early 2011 even in the most remote and inaccessible parts of Kabul (at the mountain sides) the average

family house was rented for \$220 to \$300 a month with no running water or electricity provided. The cost of a single bedroom apartment in Kabul was estimated in 2014 at about \$175 outside the city centre. Often young male labourers share a flat or a house. It is not uncommon to see even four such people living in a single room. The cost of a bed in such accommodation will be of some tens of dollars a month depending on the location and the conditions. Dormitories with up to ten people sharing a room also exist even at lower rates of \$10 to \$12 dollars per month. As of September 2015 the cost of a single bed in a hostel is about \$70 to \$100 a month ... In safe central areas of Kabul the typical cost of a small flat with two bedrooms, a kitchen and a bathroom range between \$350 to \$400. A three bedroom flat costs \$600 to \$700 because it is rare for Afghans to live alone and it is common to have rather large families one bedroom flats are almost non-existent.

67. At paragraph 30 [Dr Giustozzi] states “Unless the Appellant resumes working as an interpreter earning a livelihood could be a challenge for the Appellant as he would have to deal with a shrinking job market and a deep economic and social crisis while lacking a social and kin network to support him.” Towards the end of the same paragraph he states that a single man would need at least \$200 to survive. He mentions various occupations and daily rates for labourers and unskilled workers.
68. On this issue I am inclined to depart from Dr Giustozzi’s conclusion that the Appellant would have to take up low paid work that would not provide him with a sufficient income. The Appellant is an educated man who previously found work in Kabul in a clerical capacity working as an information officer working for UCAC dealing with the college admissions in Kabul. Dr Giustozzi comments on the general decline in the economy and low wages for unskilled but does not address the Appellant’s previous experience in relation to finding more skilled work which clearly sustained him in the past or the qualifications he obtained whilst in the UK. I appreciate some seven years have passed since the Appellant came to the UK and the situation for someone with the Appellant’s education characteristics might have changed but as Dr Giustozzi does not address the Appellant’s particular skills and previous experience of working in Kabul I am not satisfied that his report is supportive of the Appellant’s claims that he will be unable to support himself if he lived in the central area of Kabul.
69. The Appellant maintains he would not be safe in Kabul because of the fact that the Taliban found his family and issued the second night letter throwing it into his uncle’s compound. Dr Giustozzi was made aware of the Appellant’s claims and in his final paragraph notes that his uncle is unlikely to let him live in his house given the risk associated with it but does not indicate anywhere in his report that this will place the Appellant at risk in central Kabul. I appreciate that the Appellant has a subjective fear of being killed or abducted due to the targeting of his cousin who returned to Afghanistan to go to a wedding and of course due to the abduction of his family on their way to Jalalabad I accept that those incidents and that Dr Giustozzi’s report would suggest

that it would be unsafe for the Appellant to travel outside Kabul. However I see no reason why the Appellant would choose or be obliged to do so.”

14. When assessing an issue of internal relocation, the ultimate question is whether the person can (a) relocate to an area where he would not have a well-founded fear of harm, and (b) reasonably be expected to stay in that part of the county [paragraph 3390 of the Immigration Rules]. Whilst it is true that Dr Giustozzi did not address the question of the Appellant’s current skills-set when considering his prospects of gaining employment in central Kabul, neither was there any evidence that clerical work of the type in which he had previously been engaged remained available. Moreover, the appellant was plainly at risk in the event of him leaving the confines of central Kabul and, whilst it was not clear in which district it had occurred, it was accepted that family members had been targeted by the Taliban whilst they were in that city. Considering all these matters in the round, it does not seem to me to have been reasonably open to the judge to conclude that the appellant could safely *and reasonably* be expected to stay indefinitely in central Kabul.
15. The way in which Mr Nicholson put his argument in support of the third ground was that, whilst section 117B(4) of the Nationality, Immigration and Asylum Act 2002 requires the Tribunal to attach little weight to private life established at a time when a person is in the UK unlawfully, to do so in the case of Appellant would be unfair given that this situation had only come about as a result of the Secretary of State’s wrongful refusal of his application for leave to remain. The judge’s failure to factor this into the Article 8 balancing exercise had thus been a material error of law. However, this does not appear to be the way in which the argument was put in the First-tier Tribunal. Rather, it seems to have been put on the basis that the Appellant ought to be compensated, by a grant of leave to remain on private and family life grounds, for the historic injustice that he had suffered due to the failure to grant him leave to remain as a student. In relation to this particular argument, the judge found (at paragraphs 76 and 77) that the appellant had failed to establish that he had suffered any detriment as a result of the failure to grant him leave to remain following his successful appeal. This finding that was in my view reasonably open to her.
16. However, there is in my judgment a far more fundamental difficulty with the judge’s assessment of the appellant’s claim under Article 8. I mentioned at paragraph 10 (above) the judge failed when considering the appellant’s protection claim to assess the credibility of the claim by the appellant’s wife that she *would* not follow him to Afghanistan. Moreover, when considering the appellant’s claim under Article 8, the judge also failed to deal with the question of whether the appellant’s wife *could* follow him to Afghanistan; that is to say, whether it would be reasonable to expect her to do so. She instead side-stepped the issue:

“70. There is an added complication by reason of the Appellant’s marriage to a European national who is a Christian. No doubt that

is why Judge Oliver was persuaded that the Appellant's application for an EEA residence card should be determined before consideration was given to his protection claim. Some clarity with regard to the Respondent's decision on that application would have made my decision a little simpler. Nevertheless at the date of this hearing it has not been established that he qualifies for a residence card nor is there any requirement that he leaves the UK. Should he succeed in his EEA application there is no requirement for him to leave the UK. In those circumstances I find it impossible to assess whether or not he will be required to go to Afghanistan with his wife and his infant daughter. I am therefore not satisfied that the fact that he has a Christian European wife will act as a barrier to his return to central areas of Kabul at the date of the hearing.

...

73. The Appellant has sought to argue the Respondent's decision is unlawful under Article 8 of the ECHR by reason of his family and private life here. Unless and until the Appellant established a right to remain as a spouse of an EEA national I cannot be satisfied that he will be separated from his wife and infant daughter by reason of this decision. This necessitates that I restrict my consideration to matters relating to his private life."
17. In many ways, the question to be considered under the Article 8 was the converse of that under the protection claim. The question that the judge ought to have addressed in relation to the former was whether it was *reasonable* for the appellant and his wife to enjoy their family life outside the United Kingdom. The answer to that question was not dependent upon whether or not the appellant's wife was willing to relocate to Afghanistan, and it was certainly not dependent upon the outcome of the appellant's application for an EEA Residence Card. It was however dependent upon the judge's view of whether it would be reasonable for a person from an entirely different social, cultural and religious background to relocate to a country that she had not previously visited, whether the Appellant had a genuine and subsisting parental relationship with his child and, if so, whether would it would be reasonable to expect that child to leave the territory of the European Union in order to follow his father to Afghanistan or for the child's relationship with his father to be effectively severed as a consequence of his remaining in the United Kingdom. None of these highly pertinent questions were addressed by the judge. This was clearly a material error of law which, though not raised in the grounds, was one that Mr Clarke readily conceded was 'Robinson obvious'.

Remaking the decision

18. Having just handed down my decision in respect of the errors of law, I have heard further representations in relation to remaking the decision, both on protection claim grounds and Article 8 family life grounds. I have been persuaded that it is appropriate for me to remake both decisions without a further hearing.

19. Judge Woolf found that there was a general risk to the appellant on return to Afghanistan. That finding is preserved. The only outstanding issue is whether the appellant could safely and reasonably be expected to relocate to central Kabul. Given that I have already held that the finding that he could do so was unsustainable on the evidence, it follows that I remake the decision by allowing the appeal on protection grounds.
20. So far as Article 8 is concerned, I was initially concerned as to whether it was appropriate for me to remake the decision given the absence of any material findings of fact by the First-tier Tribunal. I have nevertheless been persuaded that I can do so upon the basis of the known facts and the existing evidence. One of the known facts is that the Appellant's appeal against refusal of his application for an EEA residence card has been allowed since the time that his appeal was heard by Judge Woolf. I trust that on this occasion the Secretary of State will make good that decision by issuing the appropriate document. One of the consequences of doing so would be that if the Appellant were to be removed to Afghanistan then he could immediately return to the United Kingdom using the EEA Residence Permit that I assume will now be issued to him. It may be, therefore, that what I am about to say in relation to the Appellant's Article 8 claim will prove somewhat academic.
21. It is not disputed that the appellant enjoys family life with his wife in the United Kingdom and that the consequences of his removal are therefore sufficiently serious to engage the potential operation of Article 8. Subject only to the operation of section 6 of the Human Rights Act 1998, any decision to remove the Appellant would be lawful and made in furtherance of the legitimate objective of maintaining the economic wellbeing of the country through the consistent application of immigration controls. The remaining question is whether removal would be proportionate to that end.
22. The appellant's wife is a Christian and a Lithuanian national who speaks the language of her country origin. I infer that she also speaks English to a reasonable level given that it is the only language that she has in common with the Appellant. She does not however speak Pashtu, or any of the other languages spoken in Afghanistan. Afghanistan is thus a country that would be totally alien to her at a social and cultural level. I therefore conclude that it would not be reasonable to expect her to enjoy her family life with the Appellant in Afghanistan.
23. The best interests of the Appellant's daughter (a citizen of Lithuania) are a primary consideration. Those interests require her to be raised by both her parents in a stable environment. It follows that if the Appellant were to be removed to Afghanistan, her best interests could only be met by both her and her mother following him to that country. The effect of his removal would thus be to require a child who is a citizen of the European Union to leave its territory. This would be contrary to European Union law as well as contrary to the best interests of the Appellant's daughter. The alternative would be for the appellant's wife and daughter to remain in the United

Kingdom, thereby effectively severing their respective familial relationships with the Appellant. As has been repeatedly stated in the relevant jurisprudence, this will rarely be a proportionate consequence of removal in furtherance of immigration control. One example of where it might be proportionate is in a case involving a foreign criminal. That is not however suggested in this appeal.

24. I therefore conclude that the Appellant's removal would not strike a fair balance between the public interest in immigration control and the right of the appellant to respect for private and family life.

Notice of Decision

1. The appeal is allowed and the decision of the First-tier Tribunal to dismiss the appeal on all grounds is set aside.
2. The decision is remade by substituting a decision to allow the appeal on grounds that the appellant's removal would be (a) contrary to the obligations of the United Kingdom under the Refugee Convention, and (b) unlawful under section 6 of the Human Rights Act 1998.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed

Date: 7th February 2018

Deputy Upper Tribunal Judge Kelly