



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

Appeal Number: AA/12480/2011

THE IMMIGRATION ACTS

**Heard at Field House
on 23 September 2013**

**Date Sent
On 15 October 2013**

Before

UPPER TRIBUNAL JUDGE PITT

Between

WAHEED GUL JABARKHEIL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms King, instructed by J D Spicer Zeb Solicitors

For the Respondent: Ms Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan, born on 1 July 1994.
2. The appellant maintains that he is a refugee and also entitled to leave to remain under Article 8 of the ECHR.

Background to the Appeal

3. The appellant claimed asylum on 13 April 2010. That application was refused on 25 August 2010. The appellant was granted discretionary leave to remain on the same date as it was accepted that he was an unaccompanied minor born on 1 January 1994 for whom adequate reception arrangements had not been made.
4. On 2 June 2011 the appellant applied for further leave to remain. That application was refused on 2 November 2011.
5. The appellant appealed the refusal and his appeal was heard by First-tier Tribunal Judge Simpson on 12 December 2011. She allowed the appeal as not in accordance with the law as the respondent had not complied with the tracing duty contained in Regulation 6 (1) of the Asylum Seekers (Reception Conditions) Regulations 2005 (Regulation 6).
6. On 17 January 2012 permission to appeal was granted to the appellant on the basis that First-tier Tribunal Judge Simpson should have determined the appellant's substantive asylum and human rights claims.
7. On 21 March 2012 the Upper Tribunal found an error of law in line with the grant of permission to appeal and set aside the decision of the First-tier Tribunal in order for the appeal to be remade.
8. The appeal was remade by Upper Tribunal Judge Macleman following a hearing on 24 April 2012. Judge Macleman found the appellant had been born on 1 July 1994. He dismissed the appeal without addressing the fact of the appellant's minority at the date of the hearing.
9. On 12 March 2013 the appellant obtained permission to appeal to the Court of Appeal against the decision of the Upper Tribunal. A Consent Order dated 17 July 2013 followed together with a Statement of Reasons which stated at paragraph 13:

“The Respondent accepts that since the Upper Tribunal assessed the Appellant to be a minor at the date of his hearing on 30 April 2012, it is a relevant factor for the Upper Tribunal to consider. It is therefore expedient for this matter to be remitted back to the Upper Tribunal for consideration of the Appellant's asylum and human rights grounds according to law.”
10. The appeal thus came before me to be remade in line with the indication in paragraph 13 of the Statement of Reasons.
11. The parties were in agreement that, in particular, the appellant's young age at the date of the hearing before me and the respondent's failure to comply with her duties under Regulation 6 should be taken into account by me when determining whether the appellant is a

refugee or should be allowed further leave to remain under Article 8 of the ECHR.

The Hearing

12. I heard oral evidence from the appellant through an interpreter in the Pushtu language and submissions from the legal representatives.
13. I was provided with two bundles of evidence from the appellant, one comprising 169 pages and the other comprising 563 pages of country evidence. In addition, I was provided with a statement from the appellant dated 9 September 2013 and a letter dated 13 March 2013 from the British Red Cross.

Accepted Facts

14. The following facts are not in dispute.
15. The appellant is an only child. His father was a Taliban commander. In mid-2009 the appellant's father was killed in battle. After his father's death, the Taliban, including the appellant's paternal cousin, tried to recruit him to fight for them. He was taken by force to join them but managed to escape. He returned to his home and found that his mother was not there and went to the home of his maternal cousin. His cousin took him to Jalalabad and arranged for an agent to take the appellant to the United Kingdom. He left Afghanistan in approximately July or August 2009 and arrived in the UK on 13 April 2010.
16. I also accepted the contents of the letter dated 13 March 2013 from the British Red Cross. The British Red Cross are an organisation with expertise in tracing family members and nothing was put before me to suggest that anything in their letter was not reliable. The letter was not challenged by Ms Holmes. I accept that the Red Cross have been informed that the appellant's mother died in 2011 and that they have been unable to locate the appellant's maternal cousin.

Submissions

17. Ms Holmes submitted that, irrespective of the respondent's failure to comply with her tracing duty, this appellant could not show a real risk of mistreatment on return; EU (Afghanistan) v SSHD [2013] EWCA Civ 32 cited.
18. She accepted the principle set out in EU and preceding case law that there is no "bright line" regarding risk and vulnerability when an individual becomes 18 years old and that there is not a definitive cut-off point at the age of 18 as regards returnability.

19. It remained the case, argued Ms Holmes, that this appellant could not show a real risk of mistreatment from the Taliban or any other source if returned to Kabul now, even taking into account his age.
20. The appellant had not shown a degree of vulnerability such that he could not be expected to relocate to Kabul. The main factor weighing for the appellant when assessing risk of return was his young age as he was 19 years old as of the date of the hearing. His history showed him to be someone of some competence. He had been able to adapt to life in the UK and studied successfully here. When still younger he had been sufficiently robust to manage the journey from Afghanistan to the UK and claim asylum on arrival.
21. Ms Holmes also referred to paragraphs 224 to 226 of AK (Article 15 (c)) Afghanistan CG [2012] UKUT 00163 (IAC). The appellant would be returning with a reintegration package which would place him in an advantageous position as regards further education, training and maintenance. There was little evidence of significant numbers of the internally displaced population suffering destitution or inability to survive at subsistence levels albeit the situation was recognised in AK as very difficult. The areas in which the appellant could expect to live would be less affected by indiscriminate violence in other parts of the city.
22. Paragraph 243 of AK set down that conditions in Kabul did not make relocation there unreasonable. This appellant was in a similar position to the appellant considered at paragraph 253 of AK where the Upper Tribunal had found as follows:

"Even considered as a single young male returning on his own without any family support, it is our finding that he would be able to live in Kabul in safety and without undue hardship. In particular, we do not think that rising prices for accommodation would prevent him finding shared accommodation and in this regard (as in regard to finding work) he would start from the advantageous position of being able to benefit from the returns package"
23. Where no risk on return had been demonstrated, Ms Holmes maintained that the failure of the respondent to trace the appellant's family could not make the appellant a refugee. She referred to paragraph 6 of EU (Afghanistan) which states:

"But to grant leave to remain to someone who has no risk on return, whose Convention rights will not be infringed by his return, and who has no other independent claim to remain here (such as the claim to be a skilled migrant), is to use the power to grant leave to remain for a purpose other than that to which it is conferred. In effect, it is to accede to a claim to remain here as an economic migrant. The principle in Rashid has been referred to as "the protective principle", but this is a misnomer: the person

seeking to rely on this principle needs to do so only because he's been found not to be in need of protection. I do not think that the Court should require or encourage the Secretary of State to grant leave in such circumstances either in order to mark the Courts displeasure at her conduct, or as a sanction further misconduct."

24. Ms Holmes also submitted that although it was accepted that the appellant had established a private life in the UK, he had been here for only a relatively short period of time, only just over three years, and there was nothing about his private life that made it particularly serious or significant. He could rely on the education he had received in the UK to assist him on return and use the reintegration package to seek further education or training or some form of employment in Afghanistan. Removal would not be disproportionate.
25. Ms King submitted that EU and the preceding case law set down the principle that the respondent's failure to comply with the tracing duty is a relevant factor when addressing the Refugee Convention and Article 8 of the ECHR. That case and others also set down that there is no "bright line" regarding risk to the appellant ceasing on his 18th birthday although she conceded that the risk must, to some extent, reduce as an individual matures.
26. She accepted that AK indicated that conditions in Kabul in general did not amount to a general risk on return but highlighted that the Tribunal in the same case did accept that conditions there were very difficult. Paragraph 243 of AK also indicated that the particular circumstances of an appellant must still be assessed, even where there was no general risk.
27. This appellant is still only 19 years old. He does not have any family to support him on return, his mother has died and his cousin is untraceable. He has no trade or skill by which he might earn a living so would have to seek work as an unskilled labourer, work sought by many.
28. Ms King also submitted that the respondent's failure to carry out her tracing duty whilst the appellant was still a minor had led to him being denied a grant of refugee status and the concomitant grant of five years' discretionary leave to remain. The letter from the Red Cross showed that the respondent would have been able to establish that the appellant was an orphan with no wider family to assist him. It was accepted that the appellant was a credible witness. Ms King submitted that he should now be put in the position in which he would have been but for the Secretary of State's unlawful conduct in failing to undertake any endeavour to trace the appellant's family.
29. In any event, continued Ms King, the respondent's failure to trace was also a factor relevant to the proportionality of the interference to the appellant's private life; paragraph 7 of EU cited.

30. In particular, Ms King submitted that the respondent's unlawful action in failing to trace should reduce the weight of afforded to the public interest in the proportionality assessment. The ratio of EU was not that the failure to trace was relevant only in the cases of a particularly vulnerable appellant or someone who had established a particularly strong private life in the UK. The respondent's failure and detriment arising therefrom was not a factor which should be negated by an appellant, such as this one, who had done relatively well in the UK without establishing a very strong private life and was without significant vulnerability. Regardless of the other aspects of his profile, he remained entitled to recognition in the Article 8 assessment of the detriment arising from the respondent's failure to trace his family.
31. In this case, the appellant should be granted leave to remain under Article 8 of the ECHR as a result of his young age, the very difficult life he would face in Kabul and the reduced weight to be afforded the public interest as a result of the respondent's failure to trace.

Discussion

32. It was not my judgement that the appellant has shown that he is at risk of mistreatment on return to Kabul.
33. It was not argued that he will face a risk there from the Taliban of forced recruitment.
34. The other aspects of his profile, considered against the country evidence and case law on risk on return to Kabul, is not sufficient to show a real risk of mistreatment on return.
35. That is so even taking into account at the highest his relatively young age, his having not lived independently thus far, lack of a profession and absence of any family support on return. He has some education from the UK which can assist him. He will have a reintegration grant to support himself with and provide him with an advantage if he wishes to study further or train for a profession. Set against the situation in general in Kabul as found in AK, this appellant's profile is not sufficient to show that return to Kabul would give rise to a real risk of mistreatment or that it is unreasonable for him to relocate there.
36. The respondent's failure to trace the appellant's family is undisputed. The detriment to the appellant arising therefrom cannot show him to be at a real risk of mistreatment however; EU, paragraph 7 applied.
37. The failure to trace the appellant's family is relevant to the proportionality assessment of the interference to the appellant's private life, however. It appeared to me that Ms King must be right, that the failure to trace, even following EU, has to be a factor of

relevance in that regard if, but for the respondent's failure to trace, would have been recognised as a refugee.

38. Ms King argued that the effect on the Article 8 assessment was that the weight to be afforded to public interest in the operation of an effective immigration policy and therefore the removal of the appellant, should be reduced. It did not appear to me, accepting her submission for the sake of argument, that it made a material difference to the proportionality assessment whether this factor reduced the weight on the respondent's side of the balance or added to that on the appellant's side. This factor can only be weighed once on one side or the other. Whichever route is taken, the appellant obtains redress in the Article 8 assessment for the detriment arising from the respondent's failure to trace.
39. In any event, even following Ms King's argument that weight detracted from the public interest as a result of the respondent's failure to trace, it was not my view that this was sufficient to assist this appellant.
40. There are matters clearly weighing in the appellant's favour when assessing whether it is proportionate for him to return to Kabul. AK concedes that even if it does not give rise to a general need for protection, the situation in Kabul is hard. The appellant is still a very young man. He has lost both of his parents and has no other relatives to turn to in Afghanistan. He has not had to support himself and live independently thus far.
41. It remains the case that he will be returning with some education gained in the UK. He will also have a reintegration grant that will give him some assistance in obtaining further education or training or simply supporting himself by way of accommodation and basic provisions. Afghanistan is not alien to him; he has been in the UK for only just over 3 years and spent the majority of his formative years in Afghanistan.
42. It was therefore my view, even after lowering the weight to be placed on the public interest to reflect the respondent's illegality in failing to trace and the detriment that arose therefrom for the appellant, that his removal would not amount to the "sufficiently serious" circumstances identified in Huang [2007] UKHL 11 as necessary for a decision to be found to breach Article 8.

Decision

43. I re-make the appeal, dismissing it on all grounds.

Signed:

Dated:

Upper Tribunal Judge Pitt