IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06576/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2016	**On 8 April 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

AM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Radford of Counsel instructed by J D Spicer Zeb Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born on [ ] 1992. He arrived in this country on 25 January 2007 and applied for asylum. This application was refused on 10 May 2007 but he was granted discretionary leave to remain until 2 June 2009 when he

would be 17½ years old. The applicant made an in time application to extend his leave but this application was not decided until 30 March 2015. The appellant appealed the decision and his appeal came before a First-tier Judge on 6 October 2015. The judge dismissed the appeal in a decision promulgated on 30 October 2015.

2. The appellant applied for permission to appeal in grounds settled by Ms Radford. It was and is submitted that the judge made a fundamental mistake in his view of the chronology in paragraph 89 of the decision where, having referred to the appellant's application in May 2009, he states as follows:

> "That application was refused on 13 November 2009 however the appellant made a further application on 15 March 2013. The covering letter from his solicitors again set out the appellant's claim that his father had been accused of planning terrorist activities against the government officials in Kabul and was accused of being involved with Hezb-e-Islami. It goes on to state that the appellant is of the view that someone had been spying on his father and had informed the authorities that his father was working for Hezb-e-Islami."

3. Counsel points out in paragraph 11 of the grounds that it was the undisputed position that the November 2009 decision had never been served. The application under consideration and appeal was accordingly not dated 15 March 2013 as the judge had surmised but 26 May 2009. In paragraph 143, for example, the judge finds it relevant to note that the respondent did issue a reasons for refusal dated 12 November 2009 in relation to the application of 26 May 2009 and in paragraph 144 he stated as follows:

> "Although there may have been a delay in the appellant's case being finally resolved the appellant has been made aware by the respondent that they did not accept his case throughout and was aware from the refusal in November 2009 that they did not accept his further submissions at that time."

4. Counsel makes the point that the appellant did not know of this refusal as it had not been served.

5. The application made in May 2009 had been outstanding for six years and this had a bearing on the proportionality of the appellant's removal. The respondent had breached her statutory duties relating to children and she had not properly considered her discretionary policy under chapter 53 enforcement instructions and guidance. The applicant fell within the discretionary policy and the appellant's case should have been decided under the transitional arrangements. In relation to Article 8 the delay in considering an in time application was of significance in the light of **EB (Kosovo) v Secretary of State [2008] UKHL 41**. The judge had accepted that there would clearly be considerable hardship to the appellant were he to be expected to establish himself in Kabul. The mistake of fact in this case amounted to an error of law.

6. The second ground advanced by Counsel related to the judge's findings on risk on return. The judge found that if the appellant did not wish to return to his home area he could relocate, for example to Kabul. The judge refers to **AK (Afghanistan) [2012] UKUT 00163 (IAC)**. The judge states in paragraph 135 that he had taken into account the findings in **Naziri [2015] UKUT 437** but this was a case involving fresh claims and the further evidence considered in **Naziri** was not the same as the evidence before the First-tier Judge. The evidence postdated the evidence before the Upper Tribunal in **Naziri**. Moreover the appellant belonged to an enhanced risk category even if the country guidance case of **AK** remained good guidance. The appellant was arguably more vulnerable by having had no experience of living in Afghanistan since the age of 14, some nine years previously. He had no contact with his family in Kabul and was not currently in contact with anyone there.

7. Ms Radford relied on the grounds and the skeleton argument before the First-tier Tribunal. The delay in this case impacted on the respondent's policies and the applicable rules. The judge had proceeded on the assumption that the appellant had overstayed for four years and had applied as an adult. There had in fact been a very significant period of delay and the appellant's discretionary leave had continued throughout and had not been brought to an end in 2009 as the judge had appeared to think.

8. The delay had a material impact on Article 8 as submitted in the grounds. Although it was said there had been deception it was significant that the appellant had been of a young age and had arrived as an unaccompanied asylum seeker. It was not the case that the appellant could not succeed whatever the delay because his status had been precarious. The decision had not been lawful because the wrong Immigration Rules had been applied and the interference was not necessary. The appellant had established a private life because of the failure of the respondent to act lawfully. The respondent had taken no steps to trace the appellant's parents between 2007 and 2009. The appellant had developed private life over six years. Account would have to be taken of the appellant's age. He had been 15 when given leave to remain and 17 when he had made the application under consideration. The appellant had been chasing up the Home Office for a decision.

9. In relation to the second ground **Naziri** had been upheld in **HN and SA (Afghanistan) v Secretary of State [2016] EWCA Civ 123** but it remained the case that this was a judicial review on **Wednesbury** grounds. The judge had been in error in saying that the Tribunal had considered further evidence – the judge appeared to have considered the case as an appeal rather than a review case. Furthermore as stated in the grounds, the further evidence considered in **Naziri** was not the same as the further evidence submitted in this case. All the evidence in this case postdated the evidence given in **Naziri**. The judge needed to look at the recent evidence. The appellant would be at particular risk and none of his vulnerabilities had been addressed.

10. Mr Avery submitted there had been no material error of law although there might have been a mistake in relation to the decision in 2009. The appellant never had had a legitimate basis of stay in the UK. He had always known from the outset that he had been given leave to remain as a minor. His claim had been rejected at that stage. His stay was clearly precarious. Section 117B provided that little weight should be given to a private life established by a person at a time when their immigration status was precarious. The appellant's situation was always precarious and he had known that. There was nothing to indicate that the appellant's family were not in their home area as the judge had found in paragraph 152 of his decision. The findings made by the judge were perfectly sound. The judge had dealt with the issue of tracing and contact with family members in paragraphs 129 to 131 of the decision. The matter should be considered under the current Rules and there were no transitional provisions. The case of **Naziri** did not disturb the existing country guidance.

11. Ms Radford submitted in reply that the transitional provisions had been dealt with in her skeleton argument at paragraph 42. People who had been granted limited leave to remain before 2012 were to have applications to vary that leave considered in line with the Asylum Policy Instruction. The respondent should have asked herself whether circumstances had changed so that discretionary leave was no longer warranted. The treatment of the appellant's Article 8 application was based on the wrong questions which were unnecessarily restrictive. The date of the application had long preceded the 2012 changes to the Rules. The appellant had the right to remain until his in time application had been decided and he could not realistically be expected to return.

12. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the judge's decision if it was materially flawed in law. It is clear from the extracts which Ms Radford refers to in her grounds that the judge did not appear to have appreciated the significance of the fact that the 13 November 2009 had not been served. As far as the appellant was concerned he had made an application in time in May 2009 and this application had not been decided until 2015. The judge appears clearly to have proceeded on the basis that the application in May 2009 was refused on 13 November 2009 and paragraph 144 of the decision makes it clear that the judge considered that the appellant "was aware from the refusal in November 2009 they did not accept his further submissions at that time."

13. This does appear to me to be a fundamental mistake in the light of the point that appears to have been accepted between the parties that that decision was not served.

14. There was an undoubted lengthy delay in the appellant's application in 2009 being dealt with and this clearly impacts on the development of the appellant's private life as stated in **EB (Kosovo)**. Other points are argued by Counsel in relation to the policy and guidance and tracing duty. Because of what appears to be an important error in the analysis given by the judge to the chronology of the events in this case the significance of the arguments were not appreciated.

15. In relation to the risk facing the appellant on return I accept the criticisms made about the consideration of the appellant's evidence which was not the same as that considered in **Naziri**. Moreover **Naziri** was a judicial review case, as Counsel points out.

16. Despite having taken into account the clear and forceful submissions made by Mr Avery I note that the appellant was a child when he arrived and made an application as a child and great care has to be taken when considering such applications. There was on any view a lengthy delay in considering this application. The judge did not approach matters on the correct factual basis.

17. Counsel submitted that because of the degree of fact-finding required the matter should be remitted for redetermination on all grounds. Ms Radford made it clear in paragraph 17 of her grounds of appeal that she did not challenge the findings that the appellant was not of interest to the authorities or the Taliban. Those findings were not infected by the error of law.

18. For the reasons I have given and in the light of the extent of the fact-finding required it is appropriate that this appeal be remitted for a fresh hearing before a different First-tier Judge.

Anonymity Direction

The anonymity direction made by the First-tier Judge stands.

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 23 March 2016

G Warr
Judge of the Upper Tribunal