Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10078/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision and Reasons Promulgated**
On 2 February 2016	**On 10 February 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

BN
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr O James instructed by Asylum Justice

REMITTAL AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge O'Brien) which dismissed BN's appeal on asylum and humanitarian protection grounds but allowed the appeal under Article 8.

3. For convenience, I will refer to the respondent as "the claimant" throughout this determination.

Background

4. The claimant is a citizen of Afghanistan who was born in 1997. His precise age is a matter of dispute.

5. The claimant arrived in the UK in July 2008 and he was arrested. He claimed asylum on the basis that his father was an Army Commander who had been killed by the Taliban and that he was at risk of being kidnapped or forcibly recruited by the Taliban in Afghanistan. The Secretary of State refused the claimant's application for asylum on 5 October 2010 but granted him discretionary leave until 22 September 2013 on the basis that he was an unaccompanied asylum-seeking minor. On 2 September 2013, the claimant applied for further leave but that application was refused by the Secretary of State on 5 November 2014 and a decision was made to remove him to Afghanistan under s.47 of the Immigration, Asylum and Nationality Act 2006.

The Appeal

6. The claimant appealed to the First-tier Tribunal. Judge O'Brien rejected the appellant's account as "inconsistent and incredible" in relation to his claim to be at risk in Afghanistan.

7. Nevertheless, Judge O'Brien went on to consider the claimant's claim to remain in the UK under Article 8. He concluded that the claimant's removal would breach Article 8.

8. The Secretary of State appealed against Judge O'Brien's decision to allow the claimant's appeal under Article 8.

9. On 13 October 2015, the First-tier Tribunal (Judge Reid) granted the Secretary of State permission to appeal on all grounds. Thus, the appeal came before me.

10. The claimant did not appeal against Judge O'Brien's decision to dismiss the appeal on asylum and humanitarian protection grounds and, as a consequence, the Judge's decision in respect of those matters stands.

The Submissions

11. Mr Richards, who represented the Secretary of State, relied upon the grounds of appeal.

12. First, he submitted that the Judge had erred in law by failing to make any finding in respect of the claimant's age. The claimant accepted that he was born in 1997 and had been allocated a date of birth of 1 January 1997. Mr Richards submitted that the claimant was, therefore, either 17 or 18 years of age at the date of the hearing on 3 September 2015. Mr Richards submitted that the Judge's failure to make a finding in respect of the claimant's age vitiated his application of the Article 8 rules, namely para 276ADE of the Immigration Rules (HC395 as amended) and also his decision that a breach of Article 8 had been established.

13. Secondly, Mr Richards submitted that the Judge's finding that the appellant would return to Afghanistan without any family to support him had failed to take into account the adverse credibility finding which the Judge had made in respect of the claimant's asylum and humanitarian protection claims.

14. Thirdly, Mr Richards submitted that in applying para 276ADE the Judge had been wrong to find that the claimant met the "suitability" requirements in Appendix FM, in particular S-LTR.2.2 as the claimant had provided false information or made false representations by giving a false account, rejected by the Judge, in making his asylum claim.

15. Finally, Mr Richards submitted that the Judge had failed properly to apply s.117B in carrying out the balancing exercise required for proportionality, in particular by stating that "less weight" should be given to the requirement of maintaining effective immigration control.

16. Mr James, who represented the claimant, first submitted that the "suitability" point did not arise. He submitted that the claimant had not made an "application" to which para 276ADE(1)(i) applied the suitability requirement in S-LTR.2.2 of Appendix FM. Further, in any event, he submitted that there was a distinction between a case where a Judge found that a claimant had lied or not told the truth and this case where the Judge had simply not been persuaded that the claimant had established his claim.

17. Secondly, Mr James submitted that the Judge had not materially erred by failing to make a finding as to the appellant's age as he had approached paragraph 276ADE on the alternate bases that the appellant was 17 or 18. He submitted that the Judge was entitled to find under para 276ADE(1)(iv), if the claimant was 17, that it was unreasonable for him to return to Afghanistan. Likewise, the Judge had considered the application of para 276ADE(1)(vi) on the basis that the claimant was 18. Although the Judge had applied a "significant obstacle" test to the claimant's integration in Afghanistan rather than as was required a "very significant obstacle" test to his integration, the Judge's finding was sufficient to meet that requirement.

18. Thirdly, Mr James submitted that the Judge had properly found that the appellant would have no family on returning to Afghanistan. There was reliable evidence that the Red Cross were unable to locate his family and, therefore, even though the claimant had not been believed in his asylum claim the Judge was entitled to consider the claimant's circumstances on return on the basis that he would not be able to locate his family.

19. Finally, Mr James submitted that although the Judge had perhaps "clumsily" worded his application of s.117B in carrying out the balancing exercise in para 50 of his determination, he was entitled to conclude that "less weight" should be given to the requirement of maintaining an effective immigration control because the claimant met the requirement of the Rules.

Discussion

20. In my judgement, there are a number of difficulties in the Judge's determination in allowing the appeal under Article 8 which make his positive finding unsustainable.

21. First, in applying para 276ADE the Judge needed to consider the application of that rule in discreet ways depending upon whether the claimant was 17 or 18. That is because para 276ADE(1)(iv) applies to a claimant who is under the age of 18 and who had lived continuously in the UK for at least 7 years discounting any period of imprisonment. Such a claimant will satisfy the requirement in para 276ADE(1)(iv) if it "would not be reasonable to expect the applicant to leave the UK".

22. By contrast, if the individual is aged 18 or above and has not lived continuously in the UK for 20 years, the requirement in para 276ADE(1)(vi) is that:

> "... there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

23. Without making a finding in respect of the claimant's age, the Judge sought to apply both para 276ADE(1)(iv) and (vi) separately. If the claimant met both requirements it could be argued that any failure by the Judge to make a factual finding on what is clearly a highly relevant matter (the claimant's age) would be immaterial. The claimant would succeed under para 276ADE whether he was 17 or 18. The difficulty is that the Judge did not properly apply para 276ADE(1)(vi) to the claimant.

24. In paragraph 29 of his determination, when setting out by way of summary, the relevant private life provisions in para 276ADE in the case of an 18 year old he stated that the claimant must establish that there would be "significant obstacles to [his] integration" into Afghanistan. Likewise, in paragraph 48 he found that there "would be significant obstacles to his integration into Afghanistan".

25. Both of those statements misstated the requirement in para 276ADE(1)(vi) that there must be established "very significant obstacles". The addition of the word "very" to the phrase in the Rules heightens the level of obstacles that must be established in order for an individual to succeed. That misdirection is an error. I am not satisfied that the Judge would necessarily have come to the same conclusion if he had correctly directed himself that the claimant must establish "very significant obstacles" to his integration into Afghanistan. The Judge's reasoning, which is linked to his finding that it would be unreasonable for the purposes of para 276ADE(1)(iv), is found at paras 43-48 of his determination as follows:

> "43. The Appellant does not know exactly when he was born, but accepts it was some time in 1997. He has been allocated the birthdate of 1 January 1997, and is deemed to be 18, but could quite easily be 17.
>
> 44. The Appellant tells me, and I accept, that he still speaks some Dari but is now far from fluent. He has now spent just over 7 years in the country, including the entirety of his time in education, and it is unsurprising that English is his dominant language. For the same reason, I accept that the Appellant cannot speak, read or write Pashto, and that he has lost a great deal of his cultural ties with Afghanistan.
>
> 45. Instead, he has developed very close ties in the United Kingdom, including a sincere relationship with a girl he hopes to become engaged to and eventually marry, and a loving bond with his adoptive family.
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> 46. These are matters which, in my judgment, would make it unreasonable for the Appellant to be returned to Afghanistan.
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> 47. The Appellant's former foster mother was told by his former solicitors that efforts had been made by the Red Cross to locate the Appellant's family but had been unsuccessful. The Respondent has also been unable to locate his family. I accept on the balance of probabilities that the Appellant would return without any means of finding or contacting his family.
>
> 48. In the circumstances, even if the Appellant was aged 18, I find that there would be significant obstacles to his integration into Afghanistan."

26. I have considerable difficulty in concluding that those circumstances necessarily amount to "very significant obstacles". I do not say that they could not amount to such obstacles but they cannot necessarily do so. Consequently, the Judge's misdirection results in his finding in respect of para 276ADE(vi) being unsustainable. The Judge's finding in respect of para 276ADE(1)(iv) is only determinative if the claimant is not 18 years of age.

27. As a consequence, this was not a case where the Judge correctly found that the claimant met the requirements of para 276ADE regardless of whether the claimant was 17 or 18 years old and, as a result, his finding briefly reasoned in paras 50 and 51 that the Secretary of State's decision

was disproportionate is also flawed. It is premised upon the claimant succeeding under para 276ADE whether he is 17 or 18.

28. Paragraphs 50-51 are as follows:

> "50. Therefore, whether the Appellant is 17 or 18, in my judgment he satisfies today the requirements of paragraph 276ADE, notwithstanding that he might not have done so at the date of the decisions under challenge. It follows that, although I give little weight to the Appellant's family life (as required under s117B(5) of the 2002 Act), I am entitled to give even less weight to the requirement of maintaining effective immigration controls.
>
> 51. In the circumstances, I conclude that the Respondent's decisions are a disproportionate interference with the Appellant's Article 8 rights and permit the appeal on that basis."

29. As the wording of para 50 clearly demonstrates, in any event, the Judge also misdirected himself as to the effect of s.117B(5) of the Nationality, Immigration and Asylum Act 2002.

30. As is well known s.117B sets out a number of "public interest considerations" which must be considered in all cases where the Tribunal is determining the "public interest question" under Article 8.2 in deciding whether a decision made by the Secretary of State breached Article 8 of the ECHR. It states as follows:

> "... little weight should be given to a private life established by a person at the time when the person's immigration status is precarious."

31. There is no doubt that the claimant's immigration status was, indeed, "precarious". At no time has he had anything better than limited leave to remain in the UK. However, s.117B(5) only applies to an individual's "private life" and not, as the Judge states in para 50, to the claimant's "family life". The only relevant aspect of s.117B that applied to an individual's "family life" is in s.117B(4) which states that:

> "Little weight should be given to –
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is within the United Kingdom unlawfully."

32. That provision, of course, had no application to the claimant. He is not in the UK "unlawfully". To the extent that the claimant was relying upon "family life" with his girlfriend whom, the evidence was, they wished to marry, the Judge made no finding as to whether or not she was "a qualifying partner" but, in any event, as I have already pointed out s.117B(4) would not apply given that the claimant had limited leave to remain in the UK and so was not here "unlawfully".

33. It follows that the Judge also misdirected himself in carrying out the balancing exercise in para 50 of his determination applying s.117B(5) which was simply inapplicable. Whilst that was an error potentially in the claimant's favour, it remains part of a brief and less than adequately reasoned passage leading to the appeal being allowed under Art 8.

34. It may well be that the Judge was entitled to conclude, if the claimant did in fact meet the requirements of para 276ADE, that the requirement of "maintaining effective immigration control" which is stated to be in the public interest by s.117B(1) of the 2002 Act was potentially, at least, less weighty. However, as I have already pointed out, that was not a sustainable finding by the Judge.

35. Finally, the finding in paras 47-48 cannot stand including that the applicant would have no family in Afghanistan. Mr James' submitted that the Judge's finding in para 47 that the claimant had no family on return is not flawed, I do not agree. That latter finding is flawed by the Judge's failure to take into account his adverse credibility finding in respect of the appellant's account. Whilst the Judge was entitled to take into account the efforts made by the Red Cross to locate the claimant's family unsuccessfully, in reaching any finding as to whether the claimant has any family in Afghanistan he was required to take into account his adverse credibility and his rejection of the claimants account including what he said had happened to his father in Afghanistan. Consequently, I am satisfied that the Judge's finding in para 47 is flawed and cannot stand.

36. Although the Secretary of State had not directly challenged the Judge's finding in para 46 that it would be unreasonable, assuming the claimant to be under 18, for him to return to Afghanistan, that finding is tainted by the Judge's view (wrongly arrived at) that the claimant has established he has family in Afghanistan. It falls for the reasons I gave in para 35 above.

37. For these reasons, the Judge's findings in respect of para 276ADE and Article 8 as a whole are flawed and cannot stand.

38. Finally, there is the issue of the "suitability" requirement in S-LTR.2.2 which is relevant to a consideration of paragraph 276ADE because of para 276ADE(1)(i) which is in the following terms:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any other ground in S-LTR.1.2 to S-LTR.2.3. and S-LTR.3.1. in Appendix FM; …"

39. S-LTR.2.2. of Appendix FM provides as follows:

> "Whether or not to the applicant's knowledge –
>
> (a) false information, representations or documents have been submitted in relation to the application (including

false information submitted to any person to obtain a document used in support of the application); or

(b) there has been a failure to disclose material facts in relation to the application."

40. If that provision is satisfied then by virtue of S-LTR.2.1. the applicant will "normally be refused on grounds of suitability". It is self-evidently a discretionary matter.

41. Mr James first submitted that the provision did not apply because the claimant had not made an application for leave to remain under para 276ADE(1). I do not accept that submission. It is clear that on 2 September 2013 the claimant did make an application for further leave to remain in the UK. That application was for refugee status. Paragraph 326B of the Rules in "Part 11" dealing with "Asylum" states that:

> "Where the Secretary of State is considering a claim for asylum or humanitarian protection under this Part, she will consider any Article 8 elements of that claim in line with the provisions of Appendix FM (Family Life) which are relevant to those elements and in line with paragraphs 276ADE-276DH (Private Life) of these Rules unless the person is someone to whom Part 13 of these Rules applies. "

42. Part 13 is concerned with individuals subject to deportation and has no application to this claimant.

43. Therefore, the claimant's application for asylum was, in effect, also a claim to remain under Article 8 including consideration of paragraph 276ADE.

44. Secondly, Mr James submitted that the suitability requirement in S-LTR2.2 did not apply on its own terms because this was not a case where the claimant could be said to have provided false information etc as required by that provision. This, Mr James submitted, was simply a case where a Judge had not been persuaded of the claimant's case rather than making a positive finding that it was untrue.

45. I accept that a Judge could reject an individual's asylum claim without making any finding that the individual had provided false information etc as part of that claim and application under Article 8. For example, an individual's subjective fear on return could be entirely genuine but objectively any risk could be found not to be well-founded. However, a finding that an individual's account is "inconsistent and incredible" is a finding that it is not true. It is a finding that the claim is false. It is not necessary for the Judge to state specifically that the claim is a "fabrication" if that is the substance of what he or she decides.

46. In this case, it is clear that the Judge found that the claimant's account was not true because it was "inconsistent and incredible". The claimant

had, therefore, provided false information. It must, of course, be established that he (or another) acted dishonestly (see, AA v SSHD [2010] EWCA Civ 773). In his very brief conclusion in para 49, the Judge did not address this issue. The Judge was wrong, in my judgement, to conclude in para 49 that the claimant's case did not fail of the suitability requirements incorporated in para 276ADE(1)(i). The claimant fell, potentially, within the terms of S-LTR.2.2 subject to proof of dishonesty. The only issue was, thereafter, whether applying S-LTR.2.1. this was a case where "normally" the suitability requirement should be applied against the claimant. Of course, the Judge never considered the exercise of that discretion and that is a matter (together with the issue of dishonesty) which will fall to be considered when the decision in respect of Article 8 is remade if the Secretary of State continues to rely on the 'suitability' requirement in S-LTR.2.2.

Decision and Disposal

47. For these reasons, the Judge's decision to allow the appeal under Article 8 (including 276ADE) involved the making of an error of law. That decision cannot stand and is set aside.

48. The Judge's findings are flawed in a number of respects. Bearing in mind the nature and extent of fact finding required in remaking the decision in respect of Art 8, and having regard to para 7.2 of the Senior President's Practice Statement, this is an appropriate case to remit for a re-hearing in the First-tier Tribunal restricted to Art 8. His decision in respect of the claimant's asylum appeal and under Art 2 and 3 of the ECHR shall stand. Whilst his primary findings in paras 44-45 can stand, the remainder of his findings in respect of para 276ADE and Art 8 are not preserved.

Signed

A Grubb
Judge of the Upper Tribunal

Date: