



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

Appeal Number: HU/06070/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 8th November 2018**

**Decision & Reasons
Promulgated
On 29th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**TAMIM NICKYAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal of Counsel instructed by Sky Solicitors Ltd
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal and against the decision of Judge Malcolm made following a hearing at Hatton Cross on 2nd May 2018.

Background

2. The appellant is a citizen of Afghanistan born on 2nd March 1987. He appealed against the decision of the respondent, dated 19th April 2017, refusing his application for indefinite leave to remain as a victim of domestic violence.

3. He has a complex immigration history. He first arrived in the UK on 19th January 2010 and made an in-time application for leave to remain as a student. It was rejected but subsequently allowed on appeal and he was granted leave to remain until 22nd September 2011. He then made a further in-time application for leave to remain as a student until 27th January 2014 but his leave was curtailed with effect from 10th September 2012. On 7th September 2012 he made an in-time application for leave to remain under Article 8, varied to an application for leave to remain as a spouse which was subsequently granted until 22nd April 2016. On 6th June 2014 he made an in-time application for leave to remain outside the Immigration Rules under the domestic violence concession and then a further application on 4th September 2014 for indefinite leave to remain as a victim of domestic violence. That application was refused with a limited right of appeal on 25th November 2015.
4. The Immigration Judge allowed the appeal to the extent that the Secretary of State make a fresh decision, it having been accepted by the respondent that she was no longer relying on paragraph 322 of the Immigration Rules and therefore no longer alleging that there had been deception or that the suitability requirements were not met. Accordingly there had been no assessment under paragraph 276ADE of the appellant's right to private life.
5. The decision before Immigration Judge Malcolm was the result of the reconsideration by the respondent following the remittal.
6. In her decision the respondent noted that any submissions made by the appellant relating to his human rights had not been considered as an application for indefinite leave to remain as a victim of domestic violence because the domestic violence provisions were not considered to be human rights based applications. The respondent's position was that if the appellant wished to apply for leave to remain based on human rights grounds he ought to apply using an appropriate application form. Since the original application was made on 4th September 2014 and therefore received before 6th April 2015 the appellant was given a limited right of appeal against the refusal under the domestic violence Rules. However the human rights and exceptional factors under Article 8 could not be considered.
7. Judge Malcolm dealt with the appeal on the basis that the only matter to be considered by him was whether the appellant had been a victim of domestic violence. He decided that he was not and dismissed the appeal.

The Grounds of Application

8. The appellant sought permission to appeal on the grounds that the judge was wrong not to consider human rights arguments in his decision. It was mandatory for a public authority to consider the rights safeguarded by Article 8 in their decision-making and mandatory to consider all grounds specifically raised by an appellant in their Grounds of Appeal.

9. Permission to appeal was granted by Judge Boyes on 24th September 2018. In his reply dated 22nd October 2018 the respondent maintained his position.

10. The reply reads as follows:

“As stated in the reasons for refusal letter dated 19th April 2017 the application for indefinite leave to remain as a victim of domestic violence was refused as the appellant failed to meet the requirements of the Immigration Rules under paragraph D/DVILR.1.3. Any submissions made relating to human rights were not considered as an application for ILR as a victim of domestic violence is not considered to be a human rights based application. The appellant was informed that if he wished to apply for leave to remain based on human rights or other compassionate factors it was open to him to apply using an appropriate application form.

Appendix AR of the Immigration Rules sets out the types of application for which there is no right of appeal but there is the right to request an administrative review of a decision made by the Secretary of State. Under paragraph AR3.2.C of Appendix AR a decision made after 6th April 2015 on an application for indefinite leave to remain as a victim of domestic violence does not attract a right of appeal although an applicant can request an administrative review of such a decision.

However the application was made in time on 4th September 2014 and so was received before 6th April 2015. The appellant was therefore given a limited right of appeal in that he could appeal against the refusal under the domestic violence Rules. Human rights and exceptional factors under Article 8 of the ECHR were not considered as a part of the decision and the appellant did not have a right of appeal against any human rights issues. The respondent submits that the determination discloses no material error of law and that it is still open to the appellant to make a fresh application if he wishes to rely on human rights or other compassionate circumstances.”

Discussion

11. The appellant originally specifically raised human rights grounds in his grounds of appeal maintaining that the respondent’s decision was unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the appellant’s Convention rights that is his right to a private life if removed from the UK.

12. Mr Avery, for the respondent, says that for the purposes of this case he accepted that the judge ought to have considered human rights grounds when making his decision in this appeal.

13. Mr Iqbal said that he respected the pragmatic position of the Presenting Officer but it was a change from the respondent's position as set out in the Rule 24 and he asked for an adjournment in order that his instructing solicitor who was presently outside the UK could take further instructions in relation to the appellant's private life.
14. I refused the application for an adjournment. It has always been the appellant's case that he wishes his human rights claim to be considered. It is up to him to provide the evidence upon which he intends to rely. It is inconceivable that his instructing solicitor can properly be said to be unprepared for this matter to be resolved. In any event it would appear that there is no dispute as to the facts.

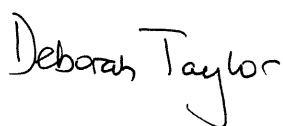
Findings and Conclusions

15. The appellant came to the UK in January 2010 and has remained here for nearly nine years. He did however make a visit to Afghanistan between January and May 2014. He has no family here and his stay has always been precarious although Mr Iqbal properly pointed out always lawful.
16. Mr Iqbal's main submission was that the appellant said that his wife had involved in his debt and he wanted to be able to clear his name.
17. The appellant cannot meet the requirements of the Immigration Rules which is the starting point for an assessment of his claim. None of the judge's credibility findings are challenged either in the grounds or today.
18. He has provided no evidence of any particular ties here although he will have made some having been in the UK for a fairly length period. On the other hand, he has made a relatively recent and lengthy visit back to his home country. His evidence of having been the subject of domestic violence was found not to be credible or persuasive, and his contention that he wants to clear his name in relation to debts must be seen in that context. No compelling or exceptional or compassionate circumstances have been raised which would render his removal disproportionate.

Decision

The original judge erred in law. His decision is set aside to the extent that he failed to consider the appellant's human rights. However the appellant's human rights appeal is dismissed.

No anonymity direction is made.



Signed

Date 24 November 2018

Deputy Upper Tribunal Judge Taylor