IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11951/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st March 2016	**On 25th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MASTER MD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr James Collins (Counsel)
For the Respondent: Ms A Brocklesby-Weller (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Samimi, promulgated on 21st January 2016, following a hearing at Hatton Cross on 17th December 2015. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State

subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan, who was born on [ ] 1997. He appealed against the decision of the Respondent Secretary of State refusing his application for refugee status and humanitarian protection dated 19th March 2012, following which the Appellant was granted discretionary leave until 18th March 2015.

The Appellant's Claim

3. The Appellant's claim is that he lived in Qalai Village in a district of Kabul Province and that his father was a teacher at the School and also community leader. Some six months before the Appellant came to the UK two masked men visited the Appellant's home and told his father to stop teaching and being a community leader. Some two weeks later four masked armed men went to the Appellant's home and killed his parents and younger brother whilst the Appellant was in the toilet. The Appellant took a bus to Sara-e-Shamali and there one of his father's friends arranged for the Appellant to travel to the United Kingdom to join his uncle Izat Ullah. The Appellant now fears that if returned to Afghanistan he would be killed by the people who killed his family.

The Judge's Findings

4. The judge observed how, "The core issue in his case relating to firstly the fact that his father had been threatened by the Taliban on account of teaching girls, together with the fact his father worked as a community leader has not been challenged" (see paragraph 18). However, both the Appellant and his uncle returned to Afghanistan in 2012, as his grandmother was unwell and dying and had requested them to see them one more time (paragraph 19). The judge did not find there to be satisfactory evidence as to the killing of the Appellant's family members.

5. However, the Appellant's account of his father having been threatened by the Taliban and his work as a teacher and community leader "has not been challenged either in the refusal letter or at the hearing before me" and that being so the judge held that, "I am prepared to give the Appellant the benefit of the doubt in regard to this aspect of his claim" (paragraph 20).

6. The judge referred to the applicable authorities in this area (see paragraph 21) he went on to note how the Appellant had been looked after in this country by his uncle since his arrival at 14 years of age. He went on to hold that,

> "The Appellant is still extremely close to his uncle and the relationship has now developed to a relationship akin to father and son. I accept the Appellant's removal from the United Kingdom, would effectively

> disrupt and deprive him of a relationship that has been the main support of emotional, and psychological support for him in the United Kingdom".

The judge went on to hold that the Appellant was now 18 years old but, "The bond between them does extend beyond normal family ties" and that there was compelling circumstances in this case, referring to the established authorities on this point (see paragraph 24).

The judge went on to also hold that there were "insurmountable obstacles" to the continuation of family life between the Appellant and his uncle who clearly did visit Afghanistan for family visits, but

> "The Appellant has developed a close family bond akin to parent and child (with his uncle Mr Ullah) during the last four years. I do not find that the Appellant's immigration status has been precarious during the last four years" (paragraph 26).

The judge then went on to allow the appeal both on asylum grounds and on human rights grounds with reference to Article 8.

Grounds of Application

7. The grounds of application state that the judge erred in law by failing to make adequate findings on the availability/protection and the possibility of internal relocation. Moreover, in respect of the judge's Article 8 findings, it was said that he erred in finding that the Appellant's status in the UK was not precarious, when he had been granted discretionary leave to remain as an unaccompanied minor.

8. On 5th February 2016, permission to appeal was granted.

Submissions

9. At the hearing before me Ms Brocklesby-Weller, appearing as Senior Home Office Presenting Officer on behalf of the Respondent, submitted that the judge had not taken a holistic approach to the evidence. The Taliban would not have the time or the inclination or the ability to seek out the Appellant if he had internally relocated elsewhere. The judge had no basis for concluding (at paragraph 23) that, "There is a reasonable degree of likelihood that the Appellant does not have any relatives in Afghanistan". Moreover, individuals are returned to Kabul without any difficulty and this has always historically been the case. Reference was made to the case of **AK (Afghanistan) CG [2012] UKUT 00613**. Therefore, to allow the appeal on asylum grounds was simply wrong.

10. Second, as far as Article 8 was concerned the judge had said that there were "insurmountable obstacles" and had referred to the case of **Agyarko [2015] EWCA Civ 440**, but this overlooks the fact that the Appellant's uncle had in 2012 taken the Appellant to Afghanistan to see his dying grandmother, and the Appellant returned safely back to this country.

There was no proper Rule base assessment by the judge. It was also wrong for the judge to say that the Appellant's immigration status was not precarious because in **AM (Malawi) [2015] UKUT 0260** it was held that a person's immigration status was "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. This was a case where the Appellant was a minor and he was granted discretionary leave in accordance with the Secretary of State's policy in relation to unaccompanied minors. This meant that the factors that were central to his grant of leave were no longer extent, after he had reached the age of majority and the Appellant would have no legitimate expectation of being allowed to remain here. Whilst the Appellant here studied in the UK, there was no reason why he could not use these skills to benefit himself in Afghanistan. There is no reason why his uncle and the uncle's wider family would be incapable of offering familiar support and remittances to assist him while he was in that country.

11. For his part, Mr Collins submitted that he would have to concede that the Appellant's asylum appeal could not have been allowed, on the basis of the findings made by the judge. He would have to concede that the Grounds of Appeal by the Secretary of State were correct at paragraph 4(b) in that the judge had failed to make lawful findings on the availability and sufficiency of state protection or, in the alternative, the possibility of internal relocation to another area, such as Kabul. The facts are clear in the determination (see paragraph 8(a)) that the Appellant comes from Qalai Village which is a province of Kabul. People are being returned to Kabul and it would be entirely feasible for him to be returned there, provided that the judge was able to show circumstances which prevented that, which she had not been able to do in this determination.

12. However, on the Article 8 issue, the judge's findings are entirely sustainable and this appeal by the Secretary of State could not be allowed on that basis. This is because the Appellant had been out of Afghanistan since the age of 14, he had no family there, and he had developed a relationship of father and son with his uncle, Mr Ullah.

13. The judge had found family life to be in existence (see paragraph 24). The judge had observed that there were "compelling circumstances" (which have not been considered under the Rules) and with respect to which the appeal could be allowed outside the Rules. He had referred to the leading cases of **SS (Congo) [2015] EWCA Civ 387** and **Dube [2015] UKUT 90**. The judge had regard to the fact that whilst expressed in mandatory terms, the considerations in Sections 117A to 117D, are not expressed as being exhaustive.

14. This meant that given what had been taken into account it was an entirely sustainable decision by the judge to have concluded as he did. Mr Collins helpfully submitted that it was unfortunate that the judge had used the word "precarious" in unintended manner given that which had already been shown by the Tribunal in **AM (Malawi)**.

15. In reply, Ms Brocklesby-Weller submitted that the judge had confined himself to a consideration of a localised threat but had not considered whether internal relocation would be available. Kabul, the capital city, was not the same as living in the provinces. It was not accepted that the Appellant would face a risk of ill-treatment or killing in Kabul. Second, as far as Article 8 was concerned the judge did use the word "precarious" and this had a clear statutory meaning to it, which arguably led him into error.

Error of Law

16. The Rules make it clear that the Upper Tribunal may (but need not) set aside the decision of the First-tier Tribunal (see Section 12(2)(a)). I find that the judge fell into error in allowing the appeal on asylum grounds because he simply failed to consider whether internal relocation to Kabul would be a viable option for the Appellant, and not least given that the Appellant actually hails from the district of Kabul. The judge has not made findings that are sustainable on the availability of sufficiency of state protection in this regard.

17. Notwithstanding this to be the case, I do not set aside the decision quite simply because the appeal could have been, and was indeed, properly allowed under Article 8 ECHR. The judge made findings that the "Appellant is clearly extremely close to his uncle and a relationship has now developed to a relationship akin to father and son" and that "there are compelling circumstances in this case" because "the bond between them does extend beyond normal family ties" (paragraph 25).

18. As to the question whether there were "insurmountable obstacles" to the Appellant returning back to Afghanistan, the judge held that, "the Appellant has built a family and private life during the period of discretionary leave, in the form of extensive friendships and has done well in his education" and a letter from Sankofa Care described the Appellant's progress and conduct as "exemplary" (paragraph 26). The fact that the judge refers to the Appellant's immigration status as not being "precarious" is unfortunate and wrong in the light of the decided cases, but is not an error as such that it would undermine the final outcome of his decision with respect to Article 8.

19. The recent case of **Rajendran [2016] UKUT 00138** makes it clear that notwithstanding the fact that Section 117B sets out a list of relationships, when one is considering matters outside the statute, "This does not mean that family relationships outwith the scope of Section 117B are to be ignored" (see paragraph 38). This is because the considerations there "are inexhaustive and courts and Tribunals are obliged by Section 117A(2)-(3) to apply such considerations in the context of answering the wider 'public interest' question" (see paragraph 38).

20. The judge in this case performed a fact-finding exercise that did indeed lead to findings of fact that are fettered in. with these wider considerations and he is entitled to so do.

21. It must not be overlooked that the judge concluded that, “At a time when the Respondent has accepted that there is a high degree of conflict, and where the Appellant effectively has lost contact with all forms of social and family support network” that this does “Amount to factors that amount to ‘exceptional circumstances’” (see paragraph 26).

22. The judge was correct to find that the Appellant’s removal in these circumstances would be disproportionate as against the interests in immigration control and the economic wellbeing of this country (paragraph 26).

Notice of Decision

In the circumstances the determination of the judge shall stand.

An anonymity direction is made.

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 11th April 2016