Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07620/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2018	**On 5 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

[A A]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, Counsel instructed by Warnapala & Company
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of the Judge of the First-tier Tribunal Turquet who in a determination promulgated on 15 February 2017 dismissed the appellant's appeal against a decision of the Secretary of State to refuse to grant asylum.

2. The appellant, a citizen of Afghanistan, born on [ ] 1987, entered Britain as a student in 2010. He had leave to remain firstly as a student and thereafter outside the Rules until August 2015. In Britain he formed a

© CROWN COPYRIGHT 2018

relationship with a British citizen, [RT]. They have a child who was born on [ ] 2015.

3. It was the appellant's claim that he, having completed his studies, decided to go to Afghanistan in July 2015 to work there before returning to Britain for the birth of his son. He claimed that as soon as he arrived in Kabul he obtained work with a NGO in Nangahar Province and went to live there. There he met men with whom he had various political discussions. He was then targeted by the Taliban because he had criticised their rule. He was forced to leave Nangahar and return to Kabul. He then returned to Britain and was given leave to enter because he still had a current visa. He claimed asylum shortly after return.

4. Judge Turquet heard the appellant's evidence which she set out in some detail in paragraphs 6 onwards of the determination. She also considered a statement from [RT] which stated that their relationship had started in January 2015 and referred to the strong bond which the appellant had with his son. Her evidence was that the appellant visited her and his son every one or two weeks. The judge also noted statements from a friend of the appellant from Afghanistan who had stated that the Taliban had "dropped" a letter for the appellant saying that they were seeking to arrest him and bring him to justice and that he should give himself up or face serious consequences.

5. In paragraphs 21 through 26 the judge noted the reasons for refusal which referred to the fact that the letter from the Taliban had not been produced and stated that although the appellant had a copy of the letter from the Taliban that had not been submitted – the appellant blamed his legal representative for this - and that therefore the Secretary of State placed no weight thereon. She noted that the Secretary of State had stated that the appellant had not provided any evidence to show that the men whom he claimed had watched his house were involved with or connected to the Taliban and that the problems which he claimed to have suffered did not amount to persecution. In paragraph 27 she noted that the respondent argued that the appellant had not provided sufficient evidence that his partner was a British citizen and that even if it were accepted that she was it was noted that he did not live with her. The letter of refusal also stated that there was insufficient evidence to show that the appellant's son was a British citizen and that the appellant did not live with him. It was asserted that he could not show family life as set out in the provisions of Article 8 of the ECHR.

6. In paragraphs 32 onwards of the determination the judge set out her findings of fact. She did not accept that the appellant had worked in Nangahar and said that although he produced a contract no job description had been provided. She did not accept that he would have had a political conversation there shortly after arriving in Nangahar. She entirely discounted his claim of what had happened in Afghanistan.

7. Turning to the issue of the rights of the appellant under Article 8 of the ECHR the judge stated that she accepted that the appellant had a son but went on to say that she could not accept the appellant's reasons for not living in Cardiff with his partner and his son. She said that the accounts of the frequency of the visits varied from two to three days a week to once a week to once every two weeks to one day a month. She accepted that the appellant bought some food and said there was little evidence of the appellant having day-to-day contact with his son. She concluded that the appellant had not demonstrated that he intended to take an active role in the child's upbringing and therefore she concluded that he did not meet the requirements of paragraph R-LTRPT.1.1(d)(ii) with reference to E-ELPRT.2.3 and 2.4 as he failed to meet the eligibility requirements. She went on to say that as he failed in the eligibility requirements he could not benefit from criteria set out in EX.1 and therefore did not meet the requirements of Appendix FM as a partner or a parent.

8. She then found that the appellant could not meet the requirements of paragraph 276ADE under the Rules. There was nothing exceptional or compelling in his circumstances.

9. In paragraph 54 she stated that she had taken into account the public considerations in Section 117B of the 2002 Act. She then went through the requirements (1) through (5) of that section. What is of note of course is that the judge made no reference to the provisions of Section 117B(6).

10. In paragraph 55 she stated that the facts of the case had not tipped in the proportionality balance in the appellant's favour and therefore he could not benefit from the provisions of Article 8 of the ECHR – there would be nothing disproportionate in his removal.

11. The judge having dismissed the appeal the appellant appealed to the Upper Tribunal. The grounds of appeal first argued that the judge's findings on the issue of credibility were **Wednesbury** unreasonable and that she had not placed any weight on the fact that had been accepted by the Secretary of State that the appellant's story was internally consistent and that she had erred in not giving the appellant the benefit of the doubt. She had ignored the fact that there was evidence the appellant had continually chased his representative to provide the letter containing the threats made by the Taliban. Moreover the judge had specifically criticised the appellant for his claim that he had gone to Nangahar but this had not been put to the appellant nor was this a point that had been taken up by the Secretary of State in the letter of refusal. It was therefore an error of law for the judge to have based her findings on that conclusion.

12. With regard to the issue of the rights of the appellant under Article 8 it was argued that the judge had erred by placing no weight on the evidence which showed visits of at least two per month made by appellant to Cardiff let alone the evidence of the appellant and his partner. It was also argued that the judge had not properly considered the issue of the rights of the

appellant's child under Section 55 as she had not considered the child's best interests which were to continue his relationship with his father. The judge had erred in stating that the appellant could continue his relationship with his son via Skype and Facetime.

13. Permission to appeal was granted by Judge of the First-tier Tribunal Landes. Principally Judge Landes considered the judge may have erred in not considering the rights of the appellant and of his son under Article 8 correctly and furthermore that the judge had erred by finding that the appellant had not been to Nangahar when that had not been put to the appellant. Judge Landes went on to say that the judge had erred by making no finding that the appellant would not be at risk in Kabul or even being targeted by the Taliban.

14. At the hearing before me Mr Slatter stated there was no finding on whether the appellant had a genuine and subsisting relationship with [RT]. With regard to the issue of the appellant's fear of persecution he accepted that not all documents were before the judge but asked me to take the view that the judge's conclusions thereon had been unreasonable.

15. I am concerned that the judge did not properly consider the provisions of Section 117B(6) of the 2002 Act. That reads as follows:

> "6. In the case of a person who is not liable to deportation the public interest does not require the person's removal where –
>
> (a) the person has a genuine subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

16. In this case the reality is that the appellant's child is a qualifying child – he is British. Moreover the child could hardly reasonably be expected to live in Kabul or in Afghanistan particularly given that he has his mother and five siblings here. These are very strong factors in the appellant's favour. While it is the case that the judge did very carefully go through the terms of the Immigration Rules the Statute is of course paramount. I consider that it is a clear error of law for the judge not to have reached findings and conclusions on the application of Section 117B(6) to the appellant's particular circumstances and the issue of whether or not the appellant has a genuine and subsisting parental relationship with his son.

17. With regard to the appellant's right to asylum I consider that the conclusions of the judge are also in error – the judge has not dealt with the issue of internal relocation. It appears to be what she has said is that the appellant would be safe in Nangahar but that is not a clear conclusion as in fact it is the judge's conclusion that he did not visit Nangahar. It may be the judge's conclusion is that there is nowhere in Afghanistan that the appellant would not be safe but that does not appear to be her decision. Moreover, with regard to the evidence produced by the appellant the judge appears to have dismissed it out of hand. The reality is that she has

not given clear reasons for stating why she did so. If she did not believe that the appellant had been in Nangahar then she was entitled to state that she did not believe that the letters from the NGO stating that he had been employed there for a period of time were not genuine but she did not do so. In all I consider that there is a lack of clarity about the findings of the judge which mean that her findings on the appellant's asylum claim cannot be upheld.

18. Having found material errors of law in the determination of the judge I set aside her decision and direct the appeal proceed to hearing afresh in the First-tier.

Notice of Decision

The appeal is remitted to the First-tier tribunal for a hearing afresh on all issues.

No anonymity direction is made.

Signed Date: 4 April 2018

Deputy Upper Tribunal Judge McGeachy