



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000485
First-tier Tribunal No:
HU/59658/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

NKK (Afghanistan)
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D. Bazini, counsel, instructed by AA Immigration Lawyers
For the Respondent: Mr M. Parvar, Senior Home Office Presenting Officer

Heard at Field House on 17 April 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Appellant is an Afghan national currently in Pakistan. He appeals against the decision of First-tier Tribunal Joshi (“the Judge”) dated 27 November 2023 refusing his appeal on human rights grounds (“the FTT Decision”) against the refusal by the Respondent of leave to enter on Article 8 grounds.
2. Given the potential risk of the Appellant being returned to Afghanistan by the Pakistani authorities and the harm that might then ensue to him as someone who fled the Taliban, I continue the anonymity order made by the Judge.
3. Before turning to the appeal, I note that the Appellant has not complied with the Tribunal’s directions sent to his solicitors on 21 February 2024. No bundle has been compiled, still less one that complies with the requirements of those directions in terms of the contents and the need for a hyperlinked index and bookmarks of significant documents. No explanation was provided for this.

The FTT Decision

4. Having summarised the refusal, the nature of the appeal, the documentary evidence, what took place at the hearing and various propositions of law, the Judge turned to his findings at para. 39.
5. At para. 40, the Judge noted that he had credibility concerns regarding the Appellant’s current position and found that he had not provided an accurate picture. He went on to explain what those concerns were at paras. 41-46 and then, at para.47, concluded that he was, for those reasons, unable to find that Article 8 is engaged between the Appellant and his sister, the sponsor, although he did accept the DNA evidence showing that they were related as claimed.
6. The reasons given at paras. 41-46 can be summarised as follows:
 - a. There was a contradiction in relation to whether the Appellant’s visa in Pakistan could be extended, between what the sponsor stated in her oral evidence (that the Appellant had applied to extend his visa) and what the Appellant stated in his witness statement he had been told by his agent (that he could not do so).
 - b. The Appellant’s two visas were multi-entry visas for a maximum stay of 60 days at any time. The first was from February 2022 to February 2023 and the second was granted from May 2023 to July 2023. It is said to be unclear what leave the Appellant had during “this time” and if he applied for the second visa before the first one expired. It was also said to be unclear whether the Pakistani authorities would have checked whether he had left and returned within the 60 days before the second visa was issued.
 - c. There was a contradiction between the sister’s witness statement (that his house had been seized by the Taliban) and her oral evidence (she was unsure if it had been rented out or destroyed). The Judge considered this to be a clear inconsistency on a material point and at odds with her claim to be very close to her brother.
 - d. When considered with the other evidence, the Appellant having obtained a visa for Pakistan whilst in hiding in Afghanistan and leaving by paying

someone to help him to avoid being found at checkpoints cast doubt on his claim. In particular, the sister claimed to have paid for the visa but did not know how long he had to wait in Afghanistan before it was issued.

- e. There was limited evidence regarding the Appellant's life in Pakistan and the money that the sister sends him there. In particular, there was no evidence beyond the sister's witness statement of the Appellant having been registered as a refugee in Pakistan and no evidence of money having been given to a distant relative by the sister who then passes it on to the Appellant.
 - f. The photos relied upon do not give a clear picture of what the Appellant did for the Afghan government.
7. In case the Judge was wrong as to whether Article 8 was engaged, he considered that the Respondent's decision was proportionate, as the public interest outweighed the consequences to the Appellant of refusing his appeal. No reasons are given for coming to this conclusion.

Appeal to the Upper Tribunal

8. The grounds of appeal are somewhat prolix, but there are two key points that are made therein. First, that the reasons for the Judge's credibility concerns are perverse and/or not supported by the evidence. Second, that the Judge was required to conduct a proportionality assessment (and/or give reasons for his conclusion that the refusal was proportionate).
9. The application for permission was late as a result of the Appellant's solicitors not having uploaded the grounds to MyHMCTS when it was lodged. Nonetheless, time was extended by First-tier Tribunal Judge Monaghan, who also went on to grant permission on 7 February 2024. She considered that it was arguably an error of law to carry out an Article 8 assessment, the Judge had arguably made inadequate findings on the question as to whether family life existed and there had arguably been no application of the balancing exercise on the issue of whether it was disproportionate to refuse entry clearance in this case.
10. On 26 February 2024, the Respondent filed a response to the appeal under rule 24 of the Tribunal's Procedure Rules. In summary, it submitted that the Judge was entitled to find that the Appellant's poor credibility meant that the Judge could not assess the true circumstance around dependency and exceptional circumstances; that the Judge approached the appeal correctly and correctly applied the law; and that the other issues identified were mere disagreements with the findings which the Judge was entitled to make. Finally, it was suggested that, even if the Judge had erred, any such error was not material because the Appellant could not meet the financial requirements.
11. At the hearing Mr Bazini and Mr Parvar expanded orally upon the Grounds of Appeal and rule 24 response respectively. I am grateful to both of them for their assistance.
12. I deal first with the Respondent's materiality point (that any error of law could make no difference because the Appellant does not meet the financial requirements). I struggle to understand this point (which I note Mr Parvar did not pursue orally) as it was accepted by the Appellant that the appeal was under Article 8 outside the immigration rules (see para.27 of the FTT Decision). Outside the rules, the fact that someone does not meet the financial requirements of the

Rules may be relevant but is not dispositive. It does not render the alleged errors in relation to the Judge's credibility assessment immaterial.

13. Mr Bazini suggested at the outset of his submissions that there were two 'big concerns' regarding the decision: first, that in assessment the evidence of the Appellant's situation in Pakistan, there was no reference to any background material, which was important to assessing credibility and risk; second, that no point was taken by the Respondent that Article 8 was not engaged and it was therefore a surprise that this was taken by the Judge of his own volition. However, as Mr Parvar submitted neither of these issues formed part of the Grounds of Appeal before me. In relation to the second of these, Mr Bazini suggested that permission to amend should be granted because the point was Robinson obvious. I do not accept this. The issue of whether there was family life between the Appellant and his sister within the meaning of Article 8 was an issue that was plainly before the First-tier Tribunal. The fact that the Respondent did not accept that they were related, as a result of the inconclusive first DNA test, did not mean that if he was wrong about that it was somehow to be assumed that there was family life between two adult relatives. I do not therefore consider that the ground meets the 'strong' prospects requirement of a Robinson obvious point. In any event, the Appellant has been professionally represented throughout and it is not in accordance with the overriding objective, having regard to the need for procedural rigour, to grant the amendment application so late in the day, when the Respondent has come to the Tribunal to defend the Judge's decision on the basis of the grounds as pleaded. I therefore refuse Mr Bazini's application to amend the grounds of appeal.
14. Turning to the points contained in the grounds themselves, Mr Bazini submitted in summary as follows:
- a. There was no contradiction as to whether the Appellant's visa could be extended. The visa had been extended. The fact that an agent had apparently told the Appellant that this could not happen did not undermine his and his sister's credibility because it was obviously wrong.
 - b. The Appellant's visas, addressed at para. 42 of the FTT Decision (summarised at para. 6(b) above) appear to have been relied on by the Judge in support of his finding that the Appellant and his sister lack credibility, but they do not rationally support such a finding. The reasoning is also unclear in this respect.
 - c. As to the Appellant's house, there was no inconsistency. This was said to be for two reasons. First, the witness statement to which the Judge refers is not the sister's but her husbands. There was therefore no inconsistency between her oral and written evidence. Second, there is in any event no inconsistency between the fact of the house having been seized and a lack of knowledge about what has then happened to it. It is not clear why the Judge expected the Appellant's sister to know what had happened to a house that had been seized by the Taliban.
 - d. There was only one day between the application for and grant of the Appellant's Pakistani visa so the premise of the Judge's concern about the Appellant's sister's lack of knowledge about the time it took to be issued falls away.
 - e. The reference to the Appellant being granted refugee status is not in the sister's witness statement, as the Judge states, but in a statutory declaration from 2022. In the witness statements however, it was made clear that the Appellant had visas, not refugee status.

- f. If one looks at the documents accompanying the photos referred to by the Judge, it is clear that the Appellant was doing mechanical work for the Afghan government before the Taliban takeover. The Judge appears to have left this wholly out of account.
15. Mr Parvar submitted in short that the Judge was entitled to reach the conclusions he did for the reasons he gave. The Judge's assessment of credibility was multifactorial and cannot said to have been perverse.
16. In my judgment, Mr Bazini, on behalf of the Appellant, has the better of the argument. There are a number of aspects of the FTT Decision which are logically (and therefore legally) flawed. In particular, I agree with Mr Bazini that there is in truth nothing inconsistent in what the Judge suggests to be inconsistencies as to whether the Appellant's visa could be extended and as to what had happened to the Appellant's house. I also agree that it is wholly unclear why the matters in para.42 are thought by the Judge to be adverse to the Appellant's and/or his sister's credibility.
17. As these are matters that go to credibility, it follows that the decision as a whole should be set aside.
18. Mr Parvar accepted that if there was an error the appeal should go back to the First-tier Tribunal for redetermination *de novo*. I agree that remittal is the appropriate course given the extent of the fact-finding now required. I note that the scope of the appeal is Article 8 outside of the Rules (as it was before the Judge).

Notice of Decision

The decision of First-tier Tribunal Judge Joshi dated 27 November 2023 involved the making of an error on a point of law and is set aside. The appeal is remitted to the First-tier Tribunal for remaking on whether the refusal breaches Article 8 ECHR 'outside the rules'.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 May 2024