Neutral Citation Number: [2019] EWCA Civ 53

Case No: C5/2016/1886

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Immigration and Asylum Chamber)
AA/04979/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2019

Before:

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE SIMON
and
LORD JUSTICE BAKER

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Between:

SA (Afghanistan)	**Appellant**
and	
Secretary of State for the Home Department	**Respondent**

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Ms Nathalie Lieven QC and **Ms Tamara Jaber** (instructed by Sutovic & Hartigan, solicitors) for the Appellant
Ms Julie Anderson (instructed by **Government Legal Service**) for the Respondent

Hearing date: 18 December 2018

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Approved Judgment

Lord Justice Simon:

Introduction

1. This is the appellant's appeal from the decision of First-tier Tribunal Judge Archer ('the FtT') promulgated on 24 August 2015, in which he dismissed the appellant's appeal against the decision of the respondent ('the Secretary of State') to refuse his claim under article 1A(2) of the 1951 Refugee Convention, a claim for humanitarian protection and claims under Articles 2, 3 and 8 of the European Convention on Human Rights (the 'ECHR').

2. That judgment was upheld by Deputy Upper Tribunal Judge MacDonald on 9 March 2016 and, after initial refusal by the Upper Tribunal and the Court of Appeal, permission to appeal was granted at an oral renewal on 11 July 2017. The delays in this process are more than regrettable.

3. The appellant is an Afghan national who arrived in this country as a child, aged 14, in August 2009 and has remained here since then.

The grounds of appeal

4. The grounds of appeal focussed on three aspects of the relevant statutory and regulatory framework for the decision; and it is convenient to set these out in the order in which they were advanced by Ms Lieven QC on the appellant's behalf, and to provide a short summary of the nature of the argument.

Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended)

5. Part 5A of the amended 2002 Act deals with the public interest considerations which may apply when considering claims under Article 8 of the ECHR.

6. Section 117A provides:

> …
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
>
> (a) in all cases, to the considerations listed in section 117B
> …
>
> (3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

7. Section 117B, which is entitled 'article 8: public interest considerations applicable in all cases', provides (among other things):

> (1) The maintenance of effective immigration control is in the public interest.

> …
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

8. The criticism is that FtT failed properly to consider the weight that was to be given to the appellant's private life, which developed while he was a child in this country, and that, in effect, no (or no sufficient) weight was given to that private life.

Paragraph 276ADE(vi) of the Immigration Rules

9. This provision of the Rules sets out the requirements to be met by an applicant relying on the development of a private life under Article 8:

> 276ADE(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are at the date of application, the applicant:
>
> …
>
> (vi) subject to sub-paragraph (2), is under the age of 18 years or above, has lived continuously in the UK for less than 20 years … but 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.

10. The appellant's complaint is that the FtT failed to consider all the factors relevant to his integration in Afghanistan. These included the difficulty in sustaining a private and family life, in particular, in relation to his employment and educational prospects, as well as his physical and psychological integrity, against a background of growing up in this country since the age of 14.

Directive 2011/95/EU of the European Parliament and Council dated 13 December 2011 ('The Qualification Directive')

11. The Qualification Directive sets out standards for the qualification of third-country nationals eligible for subsidiary protection.

12. Article 2(f) defines 'persons eligible for subsidiary protection' as:

> A third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin … would face a real risk of suffering serious harm as defined in Article 15 …

13. The definition of serious harm in Article 15, so far as material, includes:

> …

> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

14. The criticism is that the FtT failed to address the serious threat to the appellant's life from indiscriminate violence in the prevailing situation in Kabul as a result of internal armed conflict.

The findings of the FtT

15. Before considering the appellant's developed arguments and those of Ms Anderson on behalf of the Secretary of State, it is necessary to summarise the findings of the FtT.

16. First, the appellant had given an untruthful account of the circumstances in which he had left Afghanistan. He continued to be 'a wholly unreliable witness because of his continued reliance on a fabricated account' (§30). Materially, he was not at risk of violence from those whom he had identified nor from the Afghan government (§32).

17. Second, during his time in the United Kingdom he had settled well into the community and had developed close relationships with a reliable group of friends from varying backgrounds with whom he socialises from time to time (§33). He remained involved with social services, requesting assistance when he needed it (§34).

18. Third, the appellant was aged 20 and was not obviously vulnerable. 'He appears to be a physically robust and healthy adult male'. He was 'confident and personable' with 'good social skills' (§36).

19. Fourth, the failure to trace family members had greatly contributed to his sense of isolation, and he feared being sent back to Afghanistan (§33). It was 'reasonably likely' that the appellant would return to Afghanistan as a young adult with no adult support (§31). He would face harsher conditions there. However, he had the 'personality, capacity and intelligence' to manage independently in Afghanistan (§37).

20. Fifth, the FtT rejected the submission that accelerating violence in Afghanistan and the appellant's personal circumstances meant that he could qualify for international protection under Article 15(c) of the Qualification Directive. He was from Kabul province and could live independently in Kabul (§37).

21. Sixth, although he could not succeed under the relevant Immigration Rules (paragraph 276ADE or Appendix FM), the FtT had to consider whether there were circumstances outside the Rules which entitled the appellant to succeed in a claim under article 8 of the ECHR. Judge Archer identified the necessary questions that arose: whether the appellant's removal involved an interference with his private life, whether it was sufficiently serious to engage article 8(1), whether it was in accordance with the law and pursuant to legitimate aims, and whether the interference with private life was proportionate (§38).

22. Seventh, by reference to the findings set out in §§33 and 34, the FtT found that there was evidence of a private life in the United Kingdom in terms of friendship and

engagement with the community; but that there was 'no great depth or breadth to the appellant's life' in the United Kingdom (§39). Having considered article 8, the FtT found that 'the appellant had developed a limited degree of private life in the UK' and that his removal would interfere with that private life; but that it would be in accordance with the law, because the appellant no longer had a right to remain in the country (§40).

23. Eighth, the FtT then considered s.117B of the Nationality, Immigration and Asylum Act 2002, and said this (§42):

> To his credit, the appellant has developed good English language skills. However, all other relevant factors count against him. He has developed private life in the UK whilst his immigration status has been precarious, and he is not financially independent …

24. Ninth, having considered the question of delay, the FtT concluded (at §43):

> The appellant is capable of living independently within his own culture and society. Removal is not disproportionate.

The argument

Section 117B of the 2002 Act

25. Ms Lieven submitted that the appellant's private life had developed as a child in this country. Such private life had a special and compelling character, which qualitatively distinguished it from private life developed by an adult. It was irrelevant therefore that the appellant was now an adult. The Secretary of State's approach would disadvantage looked after young people who had long residence in this country. It was wrong and unlawful to 'blame' a child for the development of a private life in circumstances where that child would have no awareness of the precariousness of his or her immigration status. The appellant had developed a private life which was of particular importance since he had no family in this country nor, so far as this could be ascertained, in Afghanistan.

26. The starting point for considering the application of s.117B of the 2002 Act is now the decision of the Supreme Court in *Rhuppiah v. Secretary of State for the Home Department* [2018] UKSC 58, [2018] 1 WLR 5536; and the Court of Appeal's decision in *Rhuppiah*, reported at [2016] EWCA Civ 803, [2016] 1 WLR 4203.

27. The judgment of the Supreme Court settled two questions material to the present appeal. The first issue was the ambit of the word 'precarious' in the expression 'when the person's immigration status is precarious'.

28. At [44] Lord Wilson (giving the judgment of the court) concluded:

> … everyone who, not being a United Kingdom citizen, is present in the United Kingdom and who has leave to reside other than to do so indefinitely has a precarious immigration status for the purpose of section 117B(5).

29. The second issue related to the effect of the expression 'little weight' in the context of s.117B(5). The criticism was made that the expression had the effect of unlawfully confining the approach of the courts and tribunals to the consideration of article 8 rights. The point was addressed by Lord Wilson at [49]:

> … the effect of section 117A(2)(a) is clear. It recognises that the provisions of s.117B cannot put decision-makers in a straight-jacket which constrains them to determine article 8 claims inconsistently with the article itself. Inbuilt is the concept of 'little weight' itself is a small degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:
>
> > 53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …

30. It is clear from the decision on the first issue that the appellant fell into the category of those whose immigration status was precarious; and this was not disputed on his behalf.

31. It is also clear from the quotation from Lord Wilson's judgment on the second issue that there will be cases, notwithstanding the limited weight that can be attached to the private life of those whose immigration status is precarious, which have 'particularly strong features of the private life' that will outweigh 'the normative guidance' in s.117A(2)(a) and s.117B(5). It is perhaps unhelpful to talk in terms of a children being 'blamed' for a developed private life in this country during formative years, while their immigration status is precarious. There is no question of 'blame'. However, once an assessment is made that article 8 is engaged, and a further assessment must be made as to whether removal will interfere with the private life, the weight attached to the private life is to be weighed in accordance with the statutory criteria.

32. The FtT considered these statutory provisions in the eighth of the identified passages in the decision (§42). This part of the decision is short, but it must be read in the light of the preceding findings. The FtT did not of course have the benefit of the decision of either the Court of Appeal or the Supreme Court in *Rhuppiah*; but Judge Archer specifically addressed the argument based on s.117B(5) and concluded that the appellant's private life was not of such a quality as to weigh heavily in the deciding 'the public interest question'. Despite Ms Lieven's submissions, I am not persuaded that the facts of this case, as found by the FtT, demonstrate particularly strong features

of a private life which outweigh the normative guidance in s.117A and s.117B, rather the contrary. Accordingly, I would reject this ground of appeal.

Paragraph 276ADE(vi) of the Immigration Rules

33. There was an issue as to whether it was open to the appellant to argue this ground on the appeal. However, Ms Anderson sensibly dealt with the argument on its merits, and I propose to do the same.

34. Ms Lieven submitted that the FtT failed to consider whether there were 'very significant obstacles' to the appellant's integration in Afghanistan, and that either no reasons were given for the conclusion in the sixth passage identified above (§38), or such reasoning was inadequate.

35. It seems to me that the difficulty with this argument is that it is essentially a complaint that focuses on one part of the decision without proper regard to what preceded it.

36. As Sales LJ made clear in *Kamara v. Secretary of State for the Home Department* [2016] EWCA Civ 813; [2016] 4 WLR 152 at [14]:

> The idea of 'integration' calls for a broad evaluative judgment to be as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individuals private of family life.

Later in the judgment, at [18], he added this:

> [The tribunal's] decision is to be read looking at the substance of the reasoning and not with a fine-tooth comb or like a statute in an effort to identify errors. In giving its reasons, a tribunal is entitled to focus on the principle issues in dispute between the parties, whilst also making it clear that it has considered other matters set out in the legislative regime being applied.

37. Judge Archer was careful to set out those factors which bore on the issue of how the appellant would fare if he returned to Afghanistan, see the first to the fifth identified passages. The factors did not all point one way: he had settled well in the United Kingdom since the age of 14 and had developed a private life while here. However, there was very little in his personal circumstances to suggest that he would face 'very significant obstacles' to his integration in Kabul: he was a physically robust, healthy and personable adult, with good social skills who would be returning to Kabul from whence he had originally come.

38. Ms Lieven deployed a further argument that, to the extent that the FtT relied on the general level of indiscriminate violence (a matter that was relevant to the issue under article 15(c) of the Qualification Directive), it had failed properly to address the quite distinct issue that arose under Paragraph 276ADE(vi). She referred in this context to

two decisions of the Outer House of the Court of Session which highlighted the distinction: *MC v. Secretary of State for the Home Department* [2016] CSOH 7 (Lord Burns) and *HAA v. Secretary of State for the Home Department* [2017] CSOH 11 (Lord Bannatyne). In the latter case, at [25], the judge made clear that the issues that arose under article 15(c) and under Paragraph 276ADE were separate:

> … because there is no breach of Article 15(c) in returning an applicant to a particular area in Iraq, it does not automatically follow that the petitioner returning to such an area (in this case IKR or Baghdad) would not face very significant obstacles to integration.

39. I agree that they are separate issues and must be addressed separately. Nevertheless, a decision on Article 15(c) may be relevant. As Lord Bannatyne recognised:

> Thus, in considering whether there are very significant obstacles to integration in the circumstances of this case, it is proper to take as a starting point the position as regards Article 15(c).

40. In the present case, the FtT started with the considerations which arose under Article 15(c), see the fifth identified passages in the decision (§37), and then went on to consider separately the issue that arose under Paragraph 276ADE in the sixth identified passage (§38). I would accept that the reasoning might be regarded as conclusory, but that may have been due to the way in which the case was argued at that stage.

41. It appears that in fact the issue under Paragraph 276ADE was raised by Judge Archer, and that the appellant's case had been argued primarily by reference to the Qualification Directive. In any event, in my view, the arguments that were available to the appellant under Paragraph 276ADE were properly and sufficiently addressed by the FtT; and I would reject this ground of appeal.

Articles 2(f) and 15(c) of the Qualification Directive

42. The appellant referred to a number of decisions in support of this ground: *AA (unattended children Afghanistan CG)* [2012] UKUT 00016 (IAC); *KA (Afghanistan) v. Secretary of State for the Home Department* [2012] EWCA Civ 1104; *JS (Afghanistan*) [2013] UKUT 00568 (IAC) and *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 118 (IAC).

43. *KA (Afghanistan)* established the proposition that, in the light of risks which included forced recruitment and sexual exploitation of vulnerable young males, persecution was not respectful of birthdays, and that assumed age was more important than chronological age. In *JS (Afghanistan)* the Upper Tribunal noted that, although JS was no longer a minor, consideration had to be given to whether he would have family or other adult support on return to his home country appropriate to his particular needs, and in the context of the risks to unattached children and the fact that such risk did not disappear on an eighteenth birthday.

44. In the light of these cases, Ms Lieven submitted that the FtT was bound to consider a number of material factors: the appellant's apparent or assumed age; his exposure to risks from violence, forced recruitment, sexual violence, IEDs, abduction and trafficking; evidence of accelerating violence in Afghanistan; the lack of adequate reception arrangements and specific difficulties he would face in Afghanistan without support (he had left Afghanistan when young, had lived in the UK during his formative teenager years and had never had to manage independently in a conflict ridden country); the humanitarian situation as an Internally Displaced Person; and the additional dangers faced by returnees from Europe. She further relied on the passages in *AS (Safety of Kabul) Afghanistan CG* which showed that factors such as age of departure and age at date of return are relevant to the question of whether such a return would be 'unduly harsh.' She argued that the FtT finding that the appellant had the 'personality, capacity and intelligence to manage independently in Afghanistan' did not meet his case about his age at the time of the decision, the fact that he had not lived in Afghanistan since he was 14 and had no relations living there now, and there had been no assessment of his employability. The FtT assessment had amounted to little more than the view that, since he could manage in this country, he would be able to manage in Afghanistan.

45. Ms Anderson's answer was that the FtT had seen and heard the appellant give evidence; and had reached unimpeachable conclusions that he was not a child or someone who was vulnerable and that, although he would face harsher conditions, he had 'the personality, capacity and intelligence to manage independently in Afghanistan', see the third and fourth identified passages above.

46. As the Upper Tribunal noted in *AA (unattended children) Afghanistan CG* at [35], the starting point in considering a claim for humanitarian protection under Article 15(c) is the decision of the ECJ in *Elgafaji* (Case C-465/07), [2009] 1 WLR 2100. After reviewing the three types of 'serious harm' defined in Article 15, the judgment of the ECJ in *Elgafaji* continued:

> 35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place assessed by … the courts of a member state to which a decision refusing … an application [for subsidiary protection] is referred, reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence … face a real risk of being subject to the serious threat referred to in Article 15(c) of the Directive.

47. The personal circumstances of an individual were also addressed by the Court:

> 39. In that regard the more the applicant is able to show that he is specifically affected by reason of fact as particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

48. This is not a case in which the appellant is able to show that his personal circumstances (apart from his relative youth) render him specifically liable to indiscriminate violence. It follows that he would have had to show that he would 'solely on account of his presence' face a real risk of being subject to the serious threat of violence referred to in Article 15(c). In my view, the FtT was entitled to find that he had failed to meet that test on the evidence that it heard and for the reasons it gave. As the FtT found, whilst the appellant would undoubtedly face harsher conditions if returned to Kabul than he enjoyed in the United Kingdom, he could not bring himself within the clearly defined protections afforded to those who could bring themselves within the Qualification Directive. Accordingly, I would also reject this ground of appeal.

Conclusion

49. For the reasons set out above, I have concluded that the appeal should be dismissed.

Lord Justice Baker:

50. I agree.

Lord Justice Underhill:

51. I also agree.