Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02574/2011

THE IMMIGRATION ACTS

Heard at Field House	**Date Sent**
On 7 June 2013	**On 9 July 2013**
Prepared	.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR J M
(ANONYMITY ORDER MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Loughton, Counsel instructed by Howe & Co
For the Respondent: Mr Tarlow, Presenting Office

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan born on 16 August 1991. He arrived in the United Kingdom on 19 November 2006 and claimed asylum the following day. That claim was refused but he was granted discretionary leave to remain on the basis that he was an unaccompanied

minor. On 29 July 2009 he applied for further leave to remain but that application too was refused. His appeal against that decision was dismissed on asylum and human rights grounds by First-tier Tribunal Judge Youngerwood.

2. On 4 May 2011 First-tier Tribunal Judge (as he then was) Kopieczek granted the appellant permission to appeal against the decision of FtTJ Youngerwood promulgated on 18 July 2012 but on grounds limited to the issue of asylum. Subsequent to that, the appeal came before DUTJ Digney who concluded that permission to appeal had not been granted on article 8 grounds. He did, however, proceed to consider the grounds on which permission had been granted. He found an error of law, and remade the determination by dismissing it.

3. The appellant then sought permission to appeal to the Court of Appeal. That matter came before me and, for the reasons set out in the decision annexed to this, I considered that it was appropriate to set aside in part the decision of DUTJ Digney.

4. I gave the following directions as to how this matter was to proceed:

1. Further to a determination of 23 May 2013, the determination of Deputy Upper Tribunal Judge Digney dated 12 March 2013 is set aside in part.
2. That part which is set aside is listed for hearing on 7 June 2013 at 2pm before Upper Tribunal Judge Rintoul to consider:

    a. Whether the decision of FtTJ Youngerwood involved the making of an error of law in respect of article 8 of the Human Rights Convention
    b. Whether the decision of FtTJ Youngerwood involved the making of an error of law in failing to address the appeal against the decision made by the respondent pursuant to section 47 of the 2006 Act.

5. The parties to proceed on the basis that if an error of law is found that the Upper Tribunal will proceed to remake the decision.

6. In his determination, Judge Youngerwood found:-

(i) that Article 8 of the European Convention is engaged [24];

(ii) that there was a considerable amount of documentation confirming the appellant's educational achievements in the United Kingdom and the extent of his other voluntary and sporting activities; that he has succeeded admirably in his education and that there are extremely positive assessments of his character provided [24];

(iii) that there was no merit in the argument that the appellant had a legitimate expectation of being granted further leave to remain [24] as an appellant granted discretionary leave on the basis of being an unaccompanied minor is not the recipient of any promise or undertaking that he would be granted further leave [24];

(iv) that the appellant's progress and good character was not unusual in the past he was a "useful member of society", no more [25] and that there was nothing whereby significant weight could be given to the appellant's contribution to society set against the imperatives of immigration control [25];

(v) that the appellant's relationship with his girlfriend may possibly attract significant weight as a factor in itself and cumulatively [26] but that the relationship had commenced when both the appellant was young and they were aware that the appellant's status was nothing other than precarious [26]; that there was no evidence that she as distinct from her parents would be at risk of persecution on return although she had referred to the danger her family faced in Afghanistan [26] but that she claimed that it would be unreasonable for her to relocate and she would be perceived as a Westernised woman [26] but he was not satisfied that in Kabul as distinct from a rural area there would be any real problem in a woman who has spent her first fifteen years of life in Afghanistan returning well educated [26];

(vi) that he did not accept the appellant's account that he did not know where his family were; and, he was not satisfied by the evidence before him that it would be unreasonable for the girlfriend if she remained sincere about the relationship to live with the appellant in Kabul or indeed in another suitable country [26] and he concluded finally [28] that it was proportionate to expect the appellant to leave the United Kingdom.

7. The appellant sought permission to appeal against that decision on the grounds (1) that it was accepted that the appellant has a family and private life in the United Kingdom [18] including with his girlfriend with whom he had been in a relationship for three years [17]; that the judge had erred when considering the issue of proportionality by taking into account irrelevant considerations in assessing whether it was reasonable for the girlfriend to relocate to Kabul [22] and had failed to assess why the appellant and/or his girlfriend could live in a third country [23].

8. Miss Loughton submitted that it appears the judge had found that the appellant had established a family life with his partner in the United Kingdom and much of her case is predicated on that.

9. Contrary to what is submitted in the grounds of appeal, it is not evident that the judge did find that there was identified a family life existing between the appellant and his girlfriend. That he did not make such a finding is consistent with the evidence that they had not yet formed a family unit themselves. The parties did not cohabit. The girlfriend continued to live with and was supported by her family. It was open to the judge on the material before him not to conclude that this was a relationship which was not yet akin to marriage.

10. While it the references [26] to the possibility that the girlfriend may wish to relocate are indicative of a finding that there is family life, these references are in the context of maintaining a relationship. It does not follow that every romantic relationship between a young woman and a young man constitutes family life. I do not consider that it can properly be inferred that because the judge made reference to the possibility of relocation that he was making a finding that there exists a family relationship between the appellant and his girlfriend which is unsupported by the evidence of how their relationship is now conducted [13 to 14], I note in particular that whilst they planned to get married, rather than there having been any formal engagement.

11. Whilst it is correct that the judge found that the relationship was a strong one, I do not consider that his references to the girlfriend relocating are anything other than an illustration as to how a private life relationship could continue. It is inevitable that such private life relationships, whilst strong, do not accept the same level of protection as those which have a sufficient strength to constitute family life; consequently, less weight is to be attached to them as the judge did here and whilst it may be argued that a family life requires substantial justification by way of public interest, the same cannot be said for a private life. For a private life to be interfered with, substantially greater interference must exist.

12. Further support for the indication that the judge considered this was not a private life can be gleaned from his determination

> "An appellant cannot simply form a relationship, however sincere, during the currency of discretionary leave and then automatically expect the authorities to accept that, as a result, further leave should be granted. As indicated above, I take special note of the fact the relationship was formed when the appellant was extremely young and that no sufficient evidence has been put before me to establish that it would be unreasonable for his girlfriend, if she remains sincere about the relationship, to live with the appellant in Kabul, or indeed in another suitable country."

This is consistent with the judge considering that what is involved here is a private life, not family life. Clearly, a considerably greater degree of hardship would be necessary to justify why a private life relationship could not be interfered with. I consider that had the judge considered it was a family life, his consideration of the obstacles facing the appellant's girlfriend would have been subject to greater analysis.

13. For these reasons, I consider that the judge reached a conclusion on proportionality which was open to him and that this did not involve the making of an error of law.

14. I therefore go on to consider the position in relation to **Kizhakudan v SSHD [2012] EWCA Civ 566**. The factual situation here is different. Here, the Article 8 case was considered by the judge in the First-tier

Tribunal whereas it was not considered in **Kizhakudan**. In that case, unlike here, it was common ground that the First-tier Judge had erred. That is not so here.

15. Further, although an error in respect of the asylum appeal has been found, there was for the reasons set out above, no error of law in the separate issue of article 8. I am satisfied that the issues are severable. While there has been a substantial lapse of time since the initial decisions, I am not satisfied that it would be a proper exercise of discretion to reopen the article 8 issue.

Section 47

16. At the hearing before me Mr Tarlow withdrew the decision pursuant to Section 47 of the 2006 Act. I am satisfied that it would be proper for the Upper Tribunal to accept this. It is therefore unnecessary for me to consider this matter further.

SUMMARY OF DECISISONS

1. The determination of the Upper Tier in respect of the asylum issue is preserved.

2. The decision made pursuant to section 47 of the 2009 Act is withdrawn.

3. The determination of the Upper Tier in respect of the article 8 issue is to be remade.

4. I remake the determination by dismissing the appeal on the basis that the determination of the First-tier Tribunal did not involve the making of an error of law in respect of the decision that removing the appellant to Afghanistan would be in breach of article 8 of the Human Rights Convention.

Signed Date: 9 July 2013

Upper Tribunal Judge Rintoul

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/02574/2011

THE IMMIGRATION ACTS

Determined at Field House	**Determination Promulgated**
On 23 May 2013	.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

J M
(ANONYMITY ORDER MADE)

Claimants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION TO SET ASIDE
under para 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. On 29 April 2013 I had the following memorandum and directions issued:

    1. On 4 May 2011 First-tier Tribunal Judge (as he then was) Kopieczek granted the appellant permission to appeal against the decision of FtTJ Youngerwood promulgated on 18 July 2012. Subsequent to that, the

appeal came before DUTJ Digney who concluded that permission to appeal had not been granted on article 8 grounds.

2. It is, however, evident from the court file that, contrary to Ferrer limited appeal grounds; *Alvi*) [2012] UKUT 00304(IAC) , the grant of permission by FtTJ Kopieczek was not accompanied by a form IA86 notifying the appellant that permission had been issued on limited grounds, but rather form 102A. It appears the DUTJ Digney was not made aware of this, and there is accordingly a procedural error. There appears also to have been a procedural irregularity in failing to deal with the appeal against the decision to remove the appellant pursuant to section 47 of the 2006 Act

3. It is my preliminary view that it would be in the interests of justice to set aside that part of DUTJ Digney's determination which relates to article 8. Accordingly, unless within **five working days** of the issue of these directions, I receive submissions to the contrary supported by cogent and detailed reasons, I will make a decision pursuant to rule 43 (1) to set aside DUTJ Digney's determination insofar as it relates to article 8 and section 47 on the basis that there have been procedural irregularities in the proceedings.

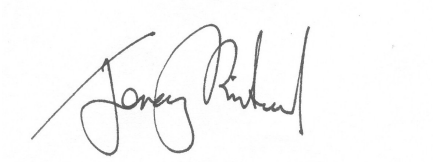
2. The respondent has not replied to the directions. The appellant has indicated by a letter from his solicitors dated 9 May 2013 that he is content for the proposed course of action to be taken. They do, however, request that a decision be taken in respect of the application for leave to appeal on asylum grounds.

3. Accordingly, for the reasons set out above, I consider that the determination should be set aside in part, in the interests of justice, as the requirements of rules 43(1) are met. The application for leave to appeal to the Court of Appeal in respect of the part not set aside is stayed pending a fresh decision.

Summary of Conclusions & Directions

1. The determination of Deputy Upper Tribunal Judge Digney dated 12 March 2013 is set aside.
2. I direct that the appeal be listed before me in order that that determination may be remade in part.

Signed: Date: 23 May 2013



Upper Tribunal Judge Rintoul