IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02427/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 December 2014	**On 15 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR SORAN ESSA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Easty (Counsel instructed by BHT Immigration Legal Services)
For the Respondent: Ms A Holmes (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against a decision made by First-tier Tribunal (Judge Del Fabbro) in which he dismissed the appellant's appeal on asylum and humanitarian protection grounds but allowed it on Article 8 ECHR grounds. The Decision was promulgated on 28 October 2014.

2. For ease of reference I have referred to the parties following the First-tier Tribunal proceedings. However the appellant and the respondent have

both applied in time for leave to appeal on the basis that there are arguable errors of law and both have been granted permission.

3. The appellant whose date of birth is 25 January 1989 and he is a citizen of Iran.

Background

4. The appellant claimed to have arrived in the UK in February 2005 and first claimed asylum on 29 March 2005. This was refused on 28 April 2005 and no appeal was lodged against the decision. The appellant was granted discretionary leave until 24 January 2007. He subsequently made an application for further leave on 12 January 2007 which was withdrawn when he left the UK for Belgium in October 2012. He was returned to the UK from Belgium on 9 November 2012 when he made further submissions at port and cited the same reasons from his original asylum claim in 2005. Further information was provided on 21 January 2013 and 12 September 2013 which was subsequently considered by the respondent.

5. The Secretary of State in a Reasons for Refusal Letter dated 31 March 2014 refused the appellant's claim for asylum. The respondent did not find the appellant's account of persecution to be credible. The respondent considered that the appellant had provided no further material evidence to add any weight to his original claim in 2005 which was refused.

6. The respondent refused the claim with reference to the Articles 2, 3 and 8 ECHR. With regard to Article 8 the respondent applied Appendix FM and Rule 276ADE which was refused.

7. The appellant's claim was that he was a single male unaccompanied minor seeking asylum in the UK in 2005 when he was aged 14 years. He claimed that he had been involved in illegal smuggling between the Iran and Iraq border. His family were farmers. In 2004, he was approached by two men who offered him work smuggling. During the course of this work he became acquainted with a teacher who asked him to deliver packages to a person named Mr R in Iraq. He agreed to do so. In or about February 2005 he learned that Mr R had been arrested and documents seized from his house. It was discovered that the papers delivered were from the Kurdish Democratic Party of Iran (KDPI). Because he was a Kurd the appellant was in fear and did not return home but travelled to a neighbouring village where he remained with his cousin until he was able to travel to Turkey and then on to the UK.

First-tier Tribunal Determination

8. In a Decision the Tribunal refused the appellant's claim for asylum because it found it to be lacking in credibility. The Tribunal had in mind the appellant's age (15 or 16 years) on arrival in the UK and that he was not formally interviewed in any detail because of his age. It was accepted

that he may have been involved in cross-border smuggling of goods which was well-documented in background evidence. However in light of the fact that neither the appellant nor his family were involved in the KDPI the Tribunal found it unlikely he would have been entrusted to smuggle KDPI literature and found his account implausible. The Tribunal found that "any political activist conducting a campaign against the authorities as the KDPI were involved in at the time would have selected and indeed trusted a youth who was not a member or even affiliated through his family to the movement" was implausible [29]. The Tribunal considered the appellant's claim in light of the fact that he was a child and as a consequence had in particular considered objective indications of risk.

9. The Tribunal considered risk on return [31] and took into account the expert report of Sherry Laizer whose evidence it found to be insignificant. The Tribunal found no basis that the appellant would be of interest to the authorities or as an ethnic Kurd of Iranian nationality. It was accepted that returning from the UK after ten years may result in questions being asked of him at the airport but that in itself was unlikely to lead to a risk of serious harm of detention at the airport.

10. In considering Article 8 the Tribunal acknowledged that (as was common ground) the appellant did not qualify under Appendix FM nor under paragraph 276ADE. Exceptional circumstances were found to justify consideration outside of the Rules in accordance with the human rights jurisprudence. The exceptional circumstances were that a "decision" dated 26 August 2010 was made by the respondent to grant the appellant indefinite leave to remain. This was in line with guidance at the time applying paragraph 395C on the basis that the appellant had accrued over five years' residency in the UK and that there had been a delay of three years and seven months in considering his application for leave to remain. The Tribunal found that the appellant was not formally notified of the decision because the respondent was unable to confirm his address or that of his legal representatives.

11. In considering Article 8 the Tribunal relied on the reasoning behind the respondent's decision in September 2010 that there would be no significant adverse effect on the need to maintain immigration control since the appellant fell within the respondent's then policy and there were no countervailing circumstances. The Tribunal found that the appellant established a private life having regard to this unique set of circumstances together with the length of residence in the UK, the fact that he had grown into adult from his teens, had the benefit of a UK education and matured into a young man who had strong emotional support from friends and former foster parents. Consideration was given also to public interest factors under Section 117B(4) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). It was accepted by the Tribunal that the appellant's decision to leave the UK for Belgium in October 2012 and subsequent return one month later rendered his immigration status precarious. However, the Tribunal found reasons in the form of a strong

Article 8 interest established by the appellant such that it was not necessary to ascribe little weight to the private life established during a period where his status was precarious. The Tribunal considered the step-by-step process propounded in the judgment of **Razgar** and concluded that there would be disproportionate interference to remove the appellant from the United Kingdom.

Grounds of Application

The Appellant's Grounds

Ground 1

12. The Tribunal failed to take into account/give reasons for rejecting the background evidence for the purposes of assessing credibility. In particular the Tribunal failed to assess the expert report for the purposes of assessing the credibility of his claim and only considered the report for the purposes of assessing risk.

Ground 2

13. The Tribunal made contradictory findings as to whether or not the appellant would be stopped at the airport on return at [31] and [32]. Further the Tribunal failed to take into account relevant factors and failed to give adequate reasons in conducting a risk assessment. The Tribunal did not take into account the fact that the appellant was a failed asylum seeker who came from a Kurdish area and was a Kurd.

Respondent's Grounds

Ground 1

14. The Tribunal made a material misdirection of law having regard to public interest considerations outlined in Section 117B of the 2002 Act. It is submitted that the requirements outlined in Section 117 are mandatory and that the Tribunal erred by deciding what weight was to be attached to the appellant's private life having regard to Section 117B(4). In addition the Tribunal failed to take into account other factors listed in Sections 117A and 117B.

Ground 2

15. The Tribunal failed to take into account that the appellant left the UK in 2012 of his own volition and travelled to Belgium. Accordingly his previous application was abandoned when he left the UK and further the appellant was never provided with any documentation confirming his status in the UK in 2010.

Ground 3

16. The Tribunal made a mistake of fact in [33 - 36] in relation to the perceived grant of leave. The Tribunal relied on a case worker's internal note and treated it as a grant of leave when the decision was never implemented and the appellant not served with any papers confirming that leave. The Tribunal was wrong to find that the appellant was granted indefinite leave to remain at paragraph 36 of the determination and as a result led to incorrect findings assessed under the Article 8 claim that impacted on the outcome of the decision.

Permission

17. Permission to appeal was granted to both parties by Upper Tribunal Judge Renton on 13 November 2014. The terms were as follows;

> Appellant's application
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> "The judge dismissed the appeal on asylum and humanitarian protection grounds because he found the appellant's account incredible and implausible, and that therefore the appellant was not at risk of return to Iran. In particular, the judge found implausible that a person of only 15 years of age such as the appellant would be used to smuggle KDPI literature across the border. However, the judge failed to deal with the contents of an expert report from Sherry Laizer stating that it was practice of the KDPI to use underage Kurds as runners or couriers. The judge did refer to Sherry Laizer's report at paragraph 31 of the determination but only in the context of a general risk on return. The failure is an arguable error of law. The remaining grounds may be argued."
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> Respondent's Application
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> "The judge allowed the appeal on Article 8 ECHR grounds because he found that there were exceptional circumstances allowing him to consider the appellant's Article 8 rights outside the Immigration Rules, and that the respondent's decision was disproportionate. This was because little weight was to be attached to the public interest as inter alia the respondent had earlier decided to grant the appellant indefinite leave to return (sic) remain. However the respondent had not made such a grant. This amounts to an error of fact resulting in an arguable error of law. The other grounds may be argued."

Appellant's Rule 24 Response

18. The appellant's representatives relied on a written response. In summary the response submitted that provisions in Section 117B were not mandatory factors but matters to be taken into account in determining the public interest question.

19. There was no error in the quantification of the appellant's private life which was continuous and lawful from February/April 2005 to October/November 2012 when he left for Belgium and following his return he remained in the UK unlawfully. The Tribunal did acknowledge that the appellant's status was precarious since that date [35].

20. The Tribunal's finding attaching little weight to the period of unlawful leave was open to it given that the appellant had established nine and a half years' residence in total seven and a half of years of which was lawful.

21. It is submitted that the Tribunal did not find that the appellant was "granted" any kind of leave. The Tribunal found that the respondent decided to grant indefinite leave to remain but that the decision was never implemented because the appellant could not be contacted. The Tribunal concluded that the unimplemented decision to grant indefinite leave to remain in 2010 diminished the weight to be accorded to the legitimate aim of maintenance of effective immigration control now. The respondent did not deal with this point.

22. The Tribunal did not fail to take into account the appellant's departure from the UK in October 2012. This was considered in the determination and referred to repeatedly.

23. It was submitted that the Tribunal had taken into account the various public interest factors set out in Section 117B. Effective immigration control was taken into account specifically. The question of the economic impact was taken into account having regard to the previous decision in September 2010 and the situation remained unchanged. It was acknowledged that the Tribunal did not specifically take account of the English language but this is not material given the weight accorded to the Tribunal's findings on the significance of the 2010 unimplemented decision to grant indefinite leave to remain.

Submissions

24. At the hearing before me I heard submissions from Miss Holmes and Miss Easty. The details of the submissions are set out in the record of proceedings and have been taken into account by me.

Discussion and decision
Expert evidence

25. It was common ground that the Tribunal's approach to the expert report disclosed an error of law. It was conceded by Miss Holmes that the Tribunal ought to have engaged with the report of the expert when considering the credibility of the claim. The report was material to the appellant's claim and indeed to the reasons given for placing little weight on the appellant's claim, namely the plausibility of a young man being asked to deliver KDPI material across the border. Accordingly I find that

there was a material error of law as the Tribunal did not properly assess the appellant's expert report when considering evidence as to the credibility of his claim. The Tribunal must consider all of the evidence as a totality when assessing credibility. The Tribunal erred therefore by considering the expert report only after having made a finding that the appellant's claim lacked in credibility and took it into account only as regards risk on return. The appellant's ground of appeal is made out.

Article 8

26. Section 117B NIAA 2002 was intended to provide a focus for the Tribunal of factors to take into consideration when making decisions as to the public interest under Article 8 ECHR. These are not mandatory requirements but are phrased as matters which the Tribunal "must have regard to". I am satisfied that in this detailed and considered determination the Tribunal had appropriate regard to the relevant factors in Section 117B and in particular took into account the period of unlawful residence in the UK from 2012. This was in the context of a total period of nine and a half years' residence in the UK of which seven and a half years' residence was lawful. The question of weight is a matter for the Tribunal and it is clear that the Tribunal took into account this factor and gave it weight accordingly.

27. The second ground asserts that the Tribunal proceeded on an erroneous basis by treating the appellant as if he had been granted indefinite leave to remain. Again it is clear from this determination that the Tribunal proceeded on the basis that the respondent made a decision in August/September 2010 to grant the appellant indefinite leave to remain and that the decision was not implemented because the appellant could not be contacted. I am satisfied that the Tribunal did not make any factual error by dealing with the decision as a grant but correctly referred to it as a decision that was made and subsequently confirmed in an internal memo and were it not for the fact that the appellant could not be contacted the decision would have been served and formalised. The Tribunal did take into account that the appellant of his own volition left the UK travelling to Belgium where he was returned one month later but it was entirely open to it to find that in the context of the long lawful residence and delay by the respondent in reaching a decision that little weight be placed on the appellant's conduct and responsibility in that regard. Furthermore I am of the view that the Tribunal's approach in considering the weight to be attached to public interest was open to it and to have regard to the decision taken by the respondent in 2010 to grant indefinite leave to remain, is of significance when considering the weight to be attached to public interest. Aside from the short period when the appellant went to Belgium and failed to maintain contact with the respondent and period of unlawful leave from 2012 (all of which the Tribunal took into account) the Tribunal found that such factors were insufficient to outweigh the appellant's private life in the UK. The Tribunal assessed private life having regard to the fact that the appellant had in

particular spent his formative years in the UK and had the benefit of a UK education and established strong emotional support from friends and former foster parents. The Tribunal found no real argument to reach a conclusion that the view taken as to public interest in 2010 should be altered.

28. Accordingly I find no material error of law in the Tribunal's decision having regard to the Article 8 issue and I therefore dismiss the respondent's appeal against the decision.

Further Proceedings

29. The upshot of my decisions are that the appellant remains to have his appeal allowed under Article 8 ECHR. It is a matter for the Secretary of State to determine the terms of an appropriate period of leave.

30. However, as I have found a material error of law in the determination of the asylum appeal, this remains to be rectified. Both representatives indicated that in the event that my decision resulted in the appellant having some form of leave, there was no basis upon which to pursue the outstanding asylum claim. I can find no legal provision which accords with this approach and so I conclude that the asylum appeal must be re heard. In view of the fact that the error of law made effectively tainted the Tribunal's findings and conclusion in the asylum appeal, I have decided to remit the asylum appeal to the First-tier Tribunal (excluding First-tier Tribunal Judge O. Del Fabbro) for rehearing at Taylor House on 17th June 2015.

31. **Decision**
The determination of Article 8 shall stand.
The determination of the asylum appeal is set aside and shall be reheard at Taylor House on 17th June 2015.

Signed Date 13.1.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

There is no fee award.

Signed Date 13.1.2015

Deputy Upper Tribunal Judge G A Black