



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/05883/2014

THE IMMIGRATION ACTS

**Heard at Columbus House,
Newport
On 28th January 2015**

**Determination Promulgated
On 18th February 2015**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KM

(ANONYMITY DIRECTION MAINTAINED)

Respondent

Representation:

For the Appellant: Mr Irwin Richards, Home Office Presenting Officer

For the Respondent: Mrs R Head, Solicitor

DETERMINATION AND REASONS

1. In this document I will refer to the parties in the style in which they appeared before for the First-Tier Tribunal.
2. The appellant is a male citizen of Afghanistan, born 2 April 1995. He arrived in the United Kingdom in February 2010 and claimed asylum that same month. The claim was refused in July 2010, but he was granted discretionary leave until September 2010. A subsequent application for

further leave to remain was refused in November 2010 and an appeal against that decision was dismissed in January 2011. There was a question over the appellant's age. In June 2011, a further age assessment was undertaken and as a result further leave to remain on a discretionary basis was granted until October 2012. On 28 September 2012, the appellant made an application for further leave to remain which was refused in April 2014. The appellant appealed that decision.

3. That appeal came before Judge of the First-Tier Tribunal Cresswell sitting at Newport on 23 October 2014. Both parties were represented (the appellant by Mrs Head) and an oral hearing was held. The appellant and a witness gave evidence.
4. In a determination dated 27 October 2014, Judge Cresswell dismissed the appellant's appeal on asylum and humanitarian protection grounds, but allowed the appeal (via Article 8) on human rights grounds.
5. The respondent sought leave to appeal Judge Cresswell's decision in allowing the appeal under Article 8 ECHR. Judge Cresswell's decision and findings in respect of asylum and humanitarian protection remain unchallenged.
6. The grounds seeking leave allege the making of a misdirection of law on a material matter, in that the judge failed to properly direct himself with regard to the effect of Section 117B of the Nationality Immigration & Asylum Act 2002. In particular that he failed to correctly apply the public interest considerations. Paragraph 40 of the judge's determination is quoted wherein he states "...the appellant's claim scores badly...". The second allegation alleges perverse or irrational finding, again quoting from paragraph 40, suggesting the appellant had scored badly, but then finding that his removal would be disproportionate.
7. The application for leave came before First-Tier Tribunal Judge Saffer, who in granting leave set out in the first three paragraphs of his reasoning general aspects of dealing with such an application and in the concluding paragraph merely said that he was satisfied that it was arguable that conflicting findings had been made.
8. Thus the matter came before me sitting in the Upper Tribunal.
9. In his submission Mr Richards relied upon the two grounds set out in the leave application. He again quoted from the judge's paragraph 40 with regard to the use of the words "scores badly" and suggested this was irrational and inadequately argued when the judge had found that the appellant succeeded under Article 8. This amounted to a material error of law.
10. Mrs Head relied upon a Rule 24 reply, which I noted had contended that Judge Cresswell had not committed any material error of law and that a

judge's findings were entirely open to him. The judge had clearly set out Section 117B of 2002 Act and had conducted a proper balancing exercise. Mrs Head went onto argue there was no material error of law, in that the judge had considered all the evidence. She ended by saying that although the respondent may not agree with the decision, there was no error.

11. Mr Richards had no further response to make.
12. At the end of the hearing I indicated that I found no material of law and that the respondent's appeal was accordingly dismissed. I now give my reasons.
13. The issues before me are fairly restricted. Beyond the overall question of whether the determination of Judge Cresswell contained a material error of law, the material issues are whether the judge properly took into account the provisions of Section 117B in conducting a balancing act and/or whether his conclusions were perverse and irrational by reason of the wording used in paragraphs 40 and 41 of the determination.
14. The determination of Judge Cresswell runs to 23 pages. It is an impressive piece of work and clearly shows that the judge engaged quite fully with the issues before him. The matters of contention before the Upper Tribunal relate to the final paragraphs of that determination from paragraph 31 onwards. Those paragraphs set out in great detail the requirements of legislation (the 2002 Act) and upper court guidance and requirements. The various aspects of Section 117 of the 2002 Act are recited. The judge properly considers whether he could embark upon a stand alone consideration of Article 8 or whether the matter had been disposed of by way of the complete code set out in the Immigration Rules. The judge concludes that he can look at Article 8 because of the exceptional circumstances of the appellant's case and he then guides himself through the five step approach recommended by the then House of Lords in the case of **Razgar**. The judge then clearly undertakes a balancing act, which results in a decision in the appellant's favour.
15. I find that the judge properly dealt with the consideration of the effect of Section 117B in assessing proportionality, he did not misdirect himself. As set out in the Rule 24 response, the judge made findings that were open to him upon the evidence that was before him.
16. As to conflict and irrationality I note that paragraph 40 of the determination does say that the appellant's claim scored badly. However at paragraph 41, the judge goes onto look at the aspects in the appellant's favour before reaching his conclusion. Putting it bluntly, a participant can score badly yet still win the contest. This is clearly what has happened here and the arguments advanced by the respondent have no merit.

17. I find no material error of law contained in the determination and the respondent's appeal is accordingly dismissed. As indicated above the judge's decision in respect of human rights and humanitarian protection have not been challenged and therefore all aspects of Judge Cresswell's decision must stand.

Decision

18. The appeal of the respondent is dismissed.
19. An anonymity direction has been made in the past. No application was made before me and that direction accordingly continues.

Signed

Date: **28th January 2015**

Upper Tribunal Judge Poole