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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10145/2014

THE IMMIGRATION ACTS

At Field House
On 28th September 2015

Decision and Reasons Promulgated
On 21st December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR B S K
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A.Masood of Aden and Co, Solicitors.
For the Respondent: Mr.E.Tujan, Home Office Presenting Officer.

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

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Introduction

1. The proceedings before the First tier Tribunal were anonymised. No application has been made to change this and so this should be maintained. I am influenced by the fact that there are children affected by this decision.

2. Although it is the respondent who is appealing for convenience I will continue to refer to the parties as they were in the First-tier Tribunal.

Background

3. The appellant is a national of Afghanistan, born on 21st March 1973.

4. The background facts are uncontentious. He came to the United Kingdom in 1999 at the age of 22.He unsuccessfully claimed asylum in 1999 and in 2000 his appeal was dismissed by an Adjudicator. He then left the United Kingdom, travelled to India, and then returned to the United Kingdom. In October 2004 he was granted permission from what was then the Immigration Appeal Tribunal to appeal the Adjudicator's decision. This appeal was dismissed in a decision promulgated in January 2006. The appellant did not attend.

5. On the 15 July 2007 he married Mrs J K. She is a British national whose family originally came from Afghanistan and are now settled in the United Kingdom. She came here when she was 17 years of age. They have a daughter G, born in May 2008 and a son, S, born in January 2010. On the 16th July 2010 the appellant was granted indefinite leave to remain.

6. In November 2013 he was convicted in the Crown Court of conspiring to commit fraud. Another person took a driving test pretending to be him. He was sentenced to 12 months imprisonment. He had a previous conviction on 6 November 2002, driving with excess alcohol. He was again convicted on 15 April 2004 of driving with excess alcohol, driving whilst disqualified and driving with no insurance. On 23 April 2004 he was convicted of driving whilst disqualified and having no insurance.

7. Following his last conviction a deportation order was made. He appealed and in his grounds again raised the issue of asylum. The asylum claim was that he was at risk in Afghanistan because he is a Sikh. There were no features specific to the appellant which placed him at particular risk.

8. His appeal was heard by First-tier Judge Khan. In a decision promulgated on 30 January 2015 his appeal was dismissed on asylum grounds and under article 3. However the judge allowed his appeal under the immigration rules dealing with deportation and in the alternative under article 8.

9. In seeking permission to appeal the respondent contended that there was no provision in a deportation appeal to allow on article 8 grounds outside the rules. It was also contended that in dealing with the immigration rules

and deportation the immigration judge failed to give adequate reasons as to why the appellant met the exceptions under paragraph 399 and why it would be unduly harsh for his wife and children to either leave United Kingdom with him or the family to be split. It was also contended that the immigration judge failed to have adequate consideration to the public interest considerations.

10. Permission to appeal to the Upper Tribunal was granted by Deputy Upper Tribunal Judge Mandalia. No merit was seen in the first ground advanced and reference was made to the judge's comment at paragraph 39 of the decision that there was no need to go outside section 117 or paragraph 399 of the rules as the article 8 proportionality exercise was subsumed into these. Permission to appeal was granted on the adequacy of reasons and public interest grounds.

The Upper Tribunal hearing

11. Mr Tujan pointed out that at paragraph 33 of his decision Judge Khan stated that if he were dealing with the appellant alone he would have no hesitation whatsoever in dismissing his appeal and in concluding deportation was in the public interest. It was contended on behalf of the Secretary of State that the judge had failed to give adequate reasons as to why the appellant's deportation would be unduly harsh for his wife and children.

12. I was referred to the decision of MAB (paragraph 399; "unduly harsh") USA [2015] UKUT 00435 (IAC) where the Upper Tribunal gave guidance as to the meaning of "unduly harsh" in paragraph 399 and section 117C(5). The focus was to be on the impact on the individuals and not a balancing exercise between the public interest and the individuals.` Unduly harsh' was understood to impose a higher threshold then `uncomfortable', `inconvenient', `undesirable', `unwelcome', difficult' or `challenging'. The consequences would be harsh if they were severe or bleak and unduly meant they would be inordinately or `excessively' harsh, bearing in mind all the circumstances of the individual.

13. Mr Masood submitted that adequate reasons were given at paragraphs 36 through to 38. The judge had set out the circumstances applicable and the family life that existed and concluded it could not continue if the appellant were deported, particularly against the background of the difficult conditions in Afghanistan. He submitted that the respondent's appeal amounted solely to a disagreement with the outcome of the decision.

14. Mr Masood sought to reargue the appellant's asylum claim as raised in the rule 24 notice. In the event that I found an error of law Mr Masood submitted that the appellant should not be returned because he faced a risk of religious persecution in Afghanistan. He contended that the country guidance decision of SL could not be relied upon because it was based on inaccurate data about the situation of Sikhs. He referred me to the decision of DSG and Others (Afghan Sikhs: departure from CG) Afghanistan

[2013] UKUT 148 (IAC) mentioned in his skeleton argument. He said that was raised in the section 24 Notice

15. Mr Tujan submitted that this was procedurally incorrect and if the appellant sought to challenge the dismissal of his asylum claim by the First-tier Judge then he would have had to have permission to appeal on this. He submitted the matter could not be raised by way of a section 24 notice and cited the decision of EG and NG Ethiopia [2013] UKUT 143.

16. All parties agreed that if an error of law were found the appeal should be remitted to the First-tier Tribunal for a hearing de novo.

Consideration

17. EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC) stated that a party that seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties needs permission to appeal. The Upper Tribunal cannot entertain an application purporting to be made under rule 24 for permission to appeal until the First-tier Tribunal has been asked in writing for permission to appeal and has either refused it or declined to admit the application. Consequently, I agree with Mr. Tujan that the appellant's asylum claim cannot be considered in the present proceedings.

18. The challenge to the decision relates to the adequacy of the reasons given and the consideration of the public interest. The judge indicated (para 33) that the appeal would not have been allowed but for the effect of the decision upon the appellant's wife and children. It was accepted that the relationship between the appellant and his wife and children was genuine and subsisting. Furthermore, his wife and children were British citizens. The judge refers to the rules as being a complete code for considering article 8 and that the public interest is reflected in section 117 of the 2002 Act.

19. At paragraph 35 the judge found that at the time of the index offence the appellant had indefinite leave to remain and was in employment. He could speaks English. The judge then turned to the position of the children. At paragraph 36 his conclusion that it would be unduly harsh for them to live in Afghanistan and gave reasons. Firstly, they had never lived there having spent their entire lives in the United Kingdom. Their school reports indicated they were well settled. The judge concluded the appellant and his wife were devoted parents and that the children were very close to their parents. For the children to go to Afghanistan would be a major disruption in their lives and that simply because of their youth it did not mean they could easily adjust.

20. The judge considered the alternative situation of the family being broken up. He concluded they could not maintain a relationship by telephone, e-mail or Skype. He concluded it was unrealistic to suggest the relationship

could be maintained by visits to Afghanistan, pointing out the Foreign & Commonwealth Office advise against all but essential travel.

21. Similar considerations were referred to in relation to the appellant's wife. Her parents are in the United Kingdom with indefinite leave to remain. She is a British citizen. The relationship between her and the appellant is genuine and subsisting. At paragraph 37 the judge correctly states that the appellant did not have indefinite leave to remain at the time of marriage but pointed out he had leave from July 2010 until revoked because of the deportation order.

22. The judge stated the relationship between the appellant and his wife was formed at a time when he was in the United Kingdom lawfully. Factually this was not correct. It is not apparent how the judge reached this view given his acknowledgement that at that stage he did not have indefinitely leave to remain. There is nothing in the papers to suggest at that time he had a right to be here, his appeal to the asylum and immigration Tribunal having been dismissed in December 2005. He was not granted leave until five years later. I do note a letter from his then solicitors dated 16 November 2009 to the respondent indicating he would be attending to make further representations. It was seen this led in turn to the grant of indefinite leave to remain. However there is nothing to indicate he had any leave in the interval.

23. The fact the appellant did not have leave when the relationship with his wife was formed has statutory implications. Paragraph 399(b) applies only where the relationship with the partner was formed when the deportee was in the United Kingdom lawfully and their immigration status was not precarious. This was not the situation. However there is an overlap because the provision does apply because of the appellant's children where the same question arises, namely, whether it would be unduly harsh for them to live in Afghanistan or to live in the United Kingdom without the appellant.

24. At paragraph 39 the judge, having concluded the consequences of the decision would be unduly harsh for the appellant's wife, poses what appears to be the correct position: if the relationship between the appellant and his wife was formed when he was not United Kingdom lawfully. The judge said he would have reached the same conclusion outside the rules. However, applying article 8 directly he must have regard to Part 5 of the Nationality, Immigration and Asylum Act 2002. Section 117B states that llittle weight should be given to a relationship formed with a qualifying partner established when the person is in the United Kingdom unlawfully. Section 117 C (5) refers to exception 2 where an appellant has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child and the effect of deportation on the partner or child would be unduly harsh.

25. But for the children the challenge to the judge's decision would be significantly stronger. Whilst the judge was factually incorrect in proceeding on the basis the appellant was here lawfully the issues are duplicated in the consideration of the children .Consequently, I find this error made no material difference to the outcome.

26. Immigration Judge Khan has prepared his decision with considerable care and this had regard to the relevant statutory provisions and balanced the competing considerations. It is my conclusion that he has given more than adequate reasons for his conclusions in relation to the children. The children are affected no only by the country but by who is going with them. I believe there was a factual error by the judge in concluding the appellant was here lawfully when he began his relationship with his wife. In my view, the error made no material difference to the outcome.

27. The deportation decision could only result in two outcomes: the appellant's wife and children joining him in Afghanistan or the family being split up. Conditions in Afghanistan are difficult. This has been highlighted by the country guidance decision of TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC) promulgated subsequent to Judge Khan's decision. Whilst Sikhs do not face persecution *per se* they face considerable difficulties. Muslims are unlikely to employ them. There are difficulties accessing places of religious worship and issues of appropriate education for children in light of discrimination against Sikhs and the shortage of education facilities. It clearly is in the children's best interests for them to remain in the United Kingdom. Furthermore, it is clearly in their interest to be a family unit which consists of two loving parents to support them. Consequently, the alternative of the breakup of the family unit would be unduly harsh in the circumstance. The judge set out these factors out these factors and properly balanced them against the public interest.

Decision.

28. The decision of the First-tier Tribunal allowing the appeal did not involve a material error of law and shall stand.

Deputy Upper Tribunal Judge Farrelly

Anonymity.

29. The First-tier Tribunal made an order for anonymity which should be maintained until changed.

Deputy Upper Tribunal Judge Farrelly