



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

Appeal Number: AA/05075/2014

THE IMMIGRATION ACTS

**Heard at Columbus House, Decision & Reasons Promulgated
Newport On 26 November 2015 On 6 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E H

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Paxton, Counsel

For the Respondent: Mr Richards, Home Office Presenting Officer

DECISION AND REASONS

1. I refer to the Appellant in this appeal as the Secretary of State and the Respondent as the Claimant. The Claimant is a national of Afghanistan. On 6 August 2012 he made an application for further leave to remain in the UK. The Secretary of State concluded that he was not a refugee and that his removal from the United Kingdom would not breach the United Kingdom's obligations under the European Convention on Human Rights (ECHR). A decision was made on 3 July 2014 to refuse to vary his leave to remain and remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Claimant appealed against that decision and the appeal was heard on 13 July 2015 by First-tier Tribunal Judge Boylan-Kemp. The First-tier Tribunal dismissed the Claimant's asylum appeal but allowed the appeal on human rights grounds. The First-tier Tribunal Judge concluded that had she to determine the matter, she would allow the appeal under Article 8 ECHR.
3. The Secretary of State sought permission to appeal to the Upper Tribunal. Permission was granted by First-tier Tribunal Judge Foudy. He found that it was not clear from the determination whether the First-tier Tribunal allowed the appeal under Articles 3, 8 or both. If the First-tier Tribunal allowed it under Article 3 there was an arguable error of law in that the Judge failed to apply established case law on health cases under that Article. If the First-tier Tribunal allowed the appeal under Article 8, it was not clear what factors weighed in the Judge's mind when he decided that there were exceptional features of the Appellant's case that justified allowing the appeal. The lack of reasoning was an arguable error of law.

The Grounds

4. The Secretary of State argues that the First-tier Tribunal made a material error of law in allowing the appeals under Articles 3 and 8 due to the impact on the Appellant's mental health condition whilst rejecting the claimed factual basis for the PTSD. The First-tier Tribunal was not satisfied by the Claimant's evidence including whether his parents were deceased and whether he left the village under the claimed circumstances or that his brother died as claimed. The Judge also found that his pre-arranged trip to the UK was probably paid for by his family.
5. The Judge had accepted that the Claimant was suffering from significant mental health problems which appeared to be linked more to his immigration status than to his previous family history. The Judge concluded that whatever the nature of his mental health condition, the inability of the Claimant to access adequate psychiatric care in Afghanistan would mean that his removal would breach Article 3. The Judge is said not to have given consideration to the fact that based on the Claimant's lack of credibility there was no reason to accept that his family would not be able to assist him on return in accessing the modest facilities referred to at paragraph 86 of the determination.
6. Furthermore, the threshold in mental health cases as set out in **KH (Afghanistan) v SSHD** [2009] EWCA Civ 1354 was a particularly high one and the Judge had failed to identify why the Claimant's case was so exceptional as to breach the UK's obligations under Article 3 ECHR. Further, the Claimant was found to have no family life in the UK and it was not open to the Judge to find that the limited private life enjoyed by the Claimant in the UK was sufficient to find a right of residence under Article 8 where Article 3 was not breached.

The Hearing

7. Mr Richards submitted that the Judge allowed the appeals under both Article 3 and Article 8. The Judge noted the Claimant's mental health issues but failed to explain adequately why those issues caused a breach of Article 3 in relation to mental health factors. The grounds of appeal rightly drew attention to **KH (Afghanistan) v SSHD** [2009] EWCA Civ 1354. This was a Claimant who had been found not credible as to the account that he had given but significantly in paragraph 57 the Judge found that his transit was likely to have been rearranged and probably paid for by his family. What the Judge unfortunately seemed to have done was compartmentalise matters and fail to carry over adverse findings in relation to the asylum issue into consideration of human rights issues. The fact that the Claimant had not told the truth about what had happened before leaving and in particular what family he had there was a significant error. Once the Judge made the finding that his family had paid for his travel to the UK with the consequent result that he had family in Afghanistan that completely changed the situation from the scenario envisaged by the Judge. That was relevant to his private life generally. Clearly his mental health issues would be different if he was being sent back to Afghanistan with no support available than if he was returned to the bosom of his family. In relation to his private life generally, he had a private life here and had established relationships with his foster carer and others and he had clearly progressed in school. Nonetheless the appropriate balancing act could not be properly undertaken unless one factored in the existence of his family in Afghanistan. The error by the Judge in coming to that strong adverse credibility finding and dealing with human right matters discretely was wrong. The judge should have kept in mind that factual matrix and her failure to do so was a material error of law without which she should have gone on to dismiss this appeal generally. The decision should be set aside and re-determined.
8. Mr Paxton submitted that there was no clue in the grounds that the private life findings entirely were being challenged. The notice of appeal related to First-tier Tribunal's mental health findings. It was unfair to say that the Article 8 decision was now entirely at large. It was not in the original grounds and it was an ambush to make those submissions now. Dealing with the errors of law and the ones that were set out in the grounds, he conceded that there was no transition from the findings made about the fact that parents were not deceased but the Judge did, at paragraph 16, consider the evidence that was before her in the determination and did hear compelling evidence. Regardless whether the PTSD had come into being because of the journey there was a professional diagnosis of PTSD and that was contained in documents at pages 106 to 113 of the bundle before the First-tier Tribunal. The Tribunal also heard oral evidence from a number of witnesses that he was suffering a mental health issue. The Judge said the transit was probably paid for and arranged for in advance. That was not a concrete finding in his submission as the Secretary of State tried to characterise it. There was no reference to authorities on Article 3 but the failure to list the authorities, particularly **N v UK** (Application ECHR 26565/05),

was not fatal as long as the Judge showed she was satisfied there was a high threshold. Paragraph 18 of the skeleton argument set out the reasons and factors she was party to when she heard to evidence not least the numerous suicide attempts and lack of proper facilities. The fact that the Claimant would be going back to the bosom of his family did not deal with his PTSD. What had made a material difference to the Claimant was help from psychiatrists. That ensured that his mental health was catered for. The facilities were described as modest in the First-tier Tribunal's decision. Kabul was characterised as having 60 places for mental health patients. It had 30 million inhabitants.

9. The author of notice of appeal suggested that where the Judge had only found private life, arguments that the absence of medical treatment in a country of return could not be made whereas they could be if family life were engaged. That was not how the court intended **GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana)** and **KK (DRC) v SSHD** [2015] EWCA Civ 40 to be interpreted. It was not the ratio of the case. In appropriate cases the absence of medical treatment may be an additional fact that could bolster an Article 8 case. It could not be the case that Article 8 applied only where family life existed. I was asked to preserve the findings in relation to Articles 3 and 8 even if the Judge had erred in relation to the mental health aspect. I was invited to find that the stand alone private life element dealt with everything comprehensively and was not affected by any part of the decision.
10. Mr Richards submitted that the Judge dealt with private life in paragraphs 92 to 94. Paragraph 93 dealt with Article 8 and the Judge had that in mind. The challenge was to the findings under Article 3 and under Article 8.
11. Mr Paxton submitted that the consideration of Article 8 was brief and if I were to find an error of law it may be prudent for matter to reheard but restricted to those topics. The Judge did not go in great detail into the oral evidence.
12. Mr Richards said that he was content with either remittal or rehearing in the Upper Tribunal depending on the findings.

Discussion and Findings

13. In coming to my conclusions I have taken account of all the evidence before the First-tier Tribunal, the grounds for permission to appeal, the submissions of both representatives and the Claimant's skeleton argument.
14. The First-tier Tribunal found, at paragraph 88 of the determination that there were substantial grounds for believing that requiring the Claimant to return to Afghanistan would mean that he would face a risk of serious harm by way of inhumane or degrading treatment by way of his inability to access appropriate medical treatment. At paragraph 89 the Judge states that consequently the Claimant has proved to the low standard that he should be afforded humanitarian protection based on his mental

health condition and the lack of appropriate care available to him if he were to return to Afghanistan.

15. Paragraph 339C of the Immigration Rules states:

“A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
- (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
- (iv) he is not excluded from a grant of humanitarian protection.

Serious harm consists of:

- (i) the death penalty or execution;
- (ii) unlawful killing;
- (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
- (iv) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

16. At paragraph 90 the First-tier Tribunal also finds, based on the reasoning in paragraphs 88 and 89, that “his article 3 rights are engaged due to the impact of his mental condition and the lack of appropriate available care in Afghanistan, as is reasoned in respect of the issue of humanitarian protection”.

17. It is clear from the First-tier Tribunal’s conclusions cited above that she concluded that the Appellant satisfied the requirements of paragraph 339 (c) (iii) of the Immigration Rules which transposes Article 15 (b) of the Qualification Directive (Council Directive 2004/83/EC) and that the threshold of ill-treatment was reached to engage Article 3 ECHR. In coming to these conclusions the First-tier Tribunal made no reference to the applicable case law in relation to health and failed to direct herself appropriately.

18. In **N v UK** (Application ECHR 26565/05) the Grand Chamber upheld the decision of the House of Lords and held that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. Further, the fact that the person’s circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. The same principles applied in relation to the expulsion of any person afflicted

with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost.

19. At paragraph 86, the First-tier Tribunal directs herself that “what needs to be considered is whether or not the appellant’s mental health condition can be appropriately managed upon his return to Afghanistan”. She then considers the availability of treatment. The First-tier Tribunal found, at paragraph 87, that the provisions for mental health treatment were very poor in Afghanistan and he would not be able to access appropriate medical facilities and care for his condition if he were to return there. The First-tier Tribunal Judge does not direct herself that very exceptional circumstances must exist. The absence of such a direction and the absence of a clear finding in this regard which shows that she was mindful of the threshold required amount to a material error of law as it cannot be said that she would have come to the same conclusion had she directed herself properly.
20. The Secretary of State also impugns the First-tier Tribunal’s findings in relation to Article 8 ECHR. The First-tier Tribunal found, at paragraph 93, that the Claimant had developed a private life in the UK and that she satisfied the requirements of paragraph 276 ADE (1) (vi) because, due to “his well-documented mental health condition and the lack of appropriate care in Afghanistan” he would face significant obstacles if he were to return. At paragraphs 95 and 96 she states that if she were to address the questions required to be answered in an assessment outside the Immigration Rules she would find that his removal would breach Article 8 ECHR.
21. It is clear that she treats the Claimant’s health issues as determinative of his claim under paragraph 276 ADE of the Immigration Rules. The Secretary of State’s grounds cite the First-tier Tribunal’s failure to consider her prior credibility findings and argue that there is no reason to accept that the Appellant’s family would not be able to assist him on return in accessing the facilities available in Afghanistan.
22. The First-tier Tribunal dismissed the Claimant’s asylum appeal and there is no cross-appeal. The First-tier Tribunal found the Claimant’s account not to be credible and did not accept that his father was killed by unknown assailants (paragraph 43). The First-tier Tribunal further found that the Claimant did not provide sufficient evidence to show that both his parents were deceased (paragraph 45). At paragraph 55, the First-tier Tribunal did not accept that the Claimant left his village due to a fire at his home or that his brother died. At paragraph 57 the First-tier Tribunal found that the Claimant’s transit to the UK was paid for in advance, probably by his family.
23. The First-tier Tribunal did not import these clear credibility findings in relation to the Claimant’s family into her consideration of Article 8 under the Rules but treated the medical health issues as determinative of

“significant obstacles”. I find that this was a material error of law as the continued existence of his family in Afghanistan was clearly a relevant consideration under the Rules. The absence of any reference to this consideration meant the First-tier Tribunal provided inadequate reasons for allowing the appeal under paragraph 276 ADE.

24. The First-tier Tribunal did not allow the appeal on Article 8 grounds outside the Rules but expressed a conclusion that were she to have gone on to make such an assessment, she would have allowed the appeal. It is clear from the decision that the relevant case law in relation to medical cases under Article 8 has not been considered. In **GS (India); EO (Ghana); GM (India); PL (Jamaica); BA (Ghana) and KK (DRC) v SSHD [2015] EWCA Civ 40** the Court of Appeal held that if the Article 3 claim failed, Article 8 could not prosper without some separate or additional factual element which brought the case within the Article 8 paradigm: the core value protected being the quality of life, not its continuance. The rigour of the **D v United Kingdom [1997] 24 EHRR 423** exception for the purpose of Article 3 in such cases as these applied with no less force when the claim was put under Article 8. Although the UK courts had declined to state that Article 8 could never be engaged by the health consequences of removal from the UK, the circumstances would have to be truly exceptional before such a breach could be established (paras 45, 85 - 87 and 106 - 111).
25. In so far as the First-tier Tribunal can be said to have allowed the appeal under Article 8, the decision amounted to a material error of law as the First-tier Tribunal Judge failed to direct herself appropriately or make any findings that would be sustainable against the backdrop of the relevant case law.
26. The decision of the First-tier Tribunal contained material errors of law in relation to the assessment of the Claimant’s human rights under Articles 3 and 8 ECHR and I set it aside. There was no cross-appeal in relation to the asylum appeal and the First-tier Tribunal’s decision stands. In view of the extent of judicial fact-finding required in relation to the assessment of Article 3 and Article 8 both within and outside the Rules the appeal is remitted to the First-tier Tribunal. The Judge’s findings in relation to the asylum appeal stand and will be relevant to the First-tier Tribunal’s assessment of the Claimant’s human rights claim.

Notice of Decision

27. For the above reasons, the decision of the First-tier Tribunal to allow the Claimant’s appeal involved the making of an error of law. That decision cannot stand and is set aside.
28. The appeal is remitted to the First-tier Tribunal for a rehearing before a judge other than Judge Boylan-Kemp.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge L J Murray