



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11942/2016

THE IMMIGRATION ACTS

Heard at Liverpool
on 13 March 2018

Decision promulgated
on 16 May 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SANGER NASERY
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes instructed by Broudie Jackson and Canter, Solicitors

For the Respondent: Mr Harrison - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge V A Cox ('the Judge'), promulgated on 31 August 2017, in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant is a male citizen of Afghanistan born on 2 March 1994.
3. At [18] of the decision under appeal the Judge notes it was accepted by the legal representatives that the issues subject to the appeal will limited it to the appellants claim to Humanitarian Protection and his appeal on human rights grounds. The appellant's earlier asylum claim had been rejected and was not before the Judge.
4. The appellant sought permission to appeal the decision of the Judge to the Upper Tribunal which was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal on 8 January 2018, the operative part of the grant being in the following terms:

In *TN and MA (Afghanistan)* [2015] UKSC 40 the Supreme Court found that before the family of the child were traced a best interests assessment should be conducted. This did not occur in the Appellant's case and, therefore, adverse credibility findings should not have been reached in the light of an inconsistent information he may have provided about his family. These findings then had an adverse effect on his application for asylum and Humanitarian Protection.

As a consequence, it is that First-tier Tribunal Judge Cox's decision contained arguable errors of law and it is appropriate to grant permission to appeal.

Grounds and submissions

5. Mr Holmes, on behalf of the appellant, submitted there were two areas of error; relating to Article 15(c) and article 8 ECHR.
6. In respect of the first matter the appellant asserts three errors have been made at [8] of the grounds seeking permission to appeal being (i) failing to consider the country material in respect of the current country situation in respect of Afghanistan and particularly Kabul, (ii) failing to give any or proper reasons as to why the previous country guidance case of *AK (Afghanistan)* decided in 2012 was still good law in light of the country evidence before her and (iii) that the Judge failed to properly analyse the appellant's case under article 15(c) principles, legally and factually, in the same vein as the approach by the Upper Tribunal in the recent country guidance case of *ZMM (Libya)*.
7. The second ground of challenge, relating to the article 8 claim, asserts the decision is infected by arguable legal error. This is an appeal in which the appellant has been in the UK for more than 7 years and in which it was found that the respondent had delayed in dealing with the appellant's case for at least 6 years to date, since 2011. The grounds assert the Judge did not find that either delay or historic injustice were capable of amounting to factors that entitled the appellant to succeed which the appellant claims is not a properly reasoned conclusion and one made not having proper regard to case law or the respondent's policy.
8. The appellant asserts he was a minor on arrival and should have been granted discretionary leave to remain until he was 18, in accordance with the respondent's policy at that time, which would have enabled him to apply to extend that leave for another three years thereafter, and to apply for indefinite leave to remain. The

- appellant asserts an historic injustice leading to him being denied that opportunity which he argues makes his article 8 case compelling and exceptional.
9. In relation to delay; the appellant claims his case is worse than that for the appellant in *EB(Kosovo) [2008] UKHL 41* and that the First-tier accepted there had been inordinate delay since 2011 but fails to consider whether the delay reduces the weight to be accorded to the interests of immigration control.
 10. Mr Holmes referred to the chronology and the fact the case has been in the appeal system for a number of years. The Judge's finding at [111] that although none of the delay has been attributable to the appellant it was not found either the historic injustice nor delay are capable of amounting to factors that entitled the appellant to succeed whether together or alone, it is submitted is not right as the respondent is responsible for all the delay.
 11. When asked to confirm exactly what period the appellant is asserting the respondent is responsible for Mr Holmes stated it was for the period 2009 - 2016.
 12. Mr Holmes submitted that if there had been no error regarding the appellant's age he would have been able to extend his leave to the age of 18 and may have been able to obtain discretionary leave.
 13. Mr Holmes sought to rely on a third ground, namely that relating to section 55 and the obligation to undertake a 'best interests' assessment prior to undertaking tracing. It was submitted that no tracing had been undertaken by the Secretary of State and so no 'best interests' assessment had been undertaken which it was argued needs to have been properly undertaken by the respondent.
 14. Mr Holmes accepted that it would be a risk if tracing occurred later on, but that the section 55 assessment should be undertaken to establish whether tracing was appropriate which it was stated was relevant to credibility. It is argued this demonstrates a failure of the respondent to follow the proper process.
 15. Mr Harrison made submissions in relation to article 15(c) which need not be noted in light of further developments referred to below.
 16. Mr Harrison accepted that there was delay in the case and that the respondent had accepted the same earlier due to reasons that it was submitted were evident i.e. an age assessment issue and numerous appeals that were outside the control of the Secretary of State which meant that she was not responsible for all or an inordinate period of delay. Mr Harrison referred to the period 2013 to 2016 which in light of the history did not make the decision wrong.
 17. In relation to the best interests/tracing argument, Mr Harrison submitted the Judge refers to difficulties due to the information and evidence provided by the appellant. The respondent accepts that an appellant should be involved to ascertain whether they want tracing, or anything else, but in this case the appellant did not want to trace his parents and asked the respondent not to do so.
 18. It was submitted the Judge considered this issue at the point of decision and provides a full account of all the evidence. It was submitted the decision may not be acceptable to the appellant but that is an issue of mere disagreement.
 19. In rely, Mr Holmes responded to the article 15(c) point by submitting that the Judge had not given enough reasoning and should have done more in relation to his decision on this point.

Discussion

20. The challenge to the findings under article 15(c) of the Qualification Directive has not been shown to have arguable merit. The Upper Tribunal has published an updated country guidance case relating to Afghanistan, *AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)*, the headnote of which reads:

“Risk on return to Kabul from the Taliban

1. *A person who is of lower-level interest for the Taliban (i.e. not a senior government or security services official, or a spy) is not at real risk of persecution from the Taliban in Kabul.*

Internal relocation to Kabul

2. *Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout many other parts of Afghanistan); it will not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul.*
3. *However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within the general position set out above.*
4. *A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return.*
5. *Although Kabul suffered the highest number of civilian casualties (in the latest UNAMA figures from 2017) and the number of security incidents is increasing, the proportion of the population directly affected by the security situation is tiny. The current security situation in Kabul is not at such a level as to render internal relocation unreasonable or unduly harsh.*

Previous Country Guidance

6. *The country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) in relation to Article 15(c) of the Qualification Directive remains unaffected by this decision.*
7. *The country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) in relation to the (un)reasonableness of internal relocation to Kabul (and other potential places of internal relocation) for certain categories of women remains unaffected by this decision.*
8. *The country guidance in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) also remains unaffected by this decision.”*

21. Although this decision was handed down in April 2018 the material considered by the Upper Tribunal was similar to that considered by the Judge. The Judge

relied upon the decision in *AK* and no arguable material legal error sufficient to warrant the Upper Tribunal interfering with the conclusions relating to article 15(c) have been made out. It was not established that the applicant's personal demeanour or presentation was such to enable him to succeed on this basis.

22. Whilst it was claimed by Mr Holmes the appellant has a subjective fear, such fear is not objectively well-founded.
23. So far as the tracing issue is concerned, in *TN and MA (Afghanistan: AA (Afghanistan) [2015] UKSC 40* the Supreme Court found at [68 and 69] relied upon by Mr Holmes:

“68. I begin with section 55 of the 2009 Act and the statutory guidance issued in Every Child Matters. Officials who discharge the respondent's functions in relation to immigration and asylum must take into account the best interests of a child as a primary consideration when making decisions which affect them. Protection of the child's best interests provides the rationale for the respondent's tracing obligation, as regulation 6(1) of the Asylum Seekers (Reception Conditions) Regulations 2005 explicitly recognises.

69. The OCC rightly emphasised that before any tracing process is embarked upon the child must be properly consulted about his or her wishes. This is a necessary part of considering the child's best interests. There may be all sorts of reasons why the child may not want any such process to be carried out, or may be concerned about the way in which it is carried out, because of potential consequences for the child, members of their family or others. Article 19.4 of the Reception Directive requires that those working with unaccompanied minors shall have had appropriate training.”

24. There was, however, no best interest consideration exercise undertaken in relation to the question of tracing as tracing is not possible by a representative of the respondent or similar organisations in Afghanistan as a result of the risk those undertaking tracing may face and hands of the Taliban or other insurgent groups. As indicated by Mr Harrison in his submissions, it is not disputed that the appellant should be involved but the difficulties regarding information and evidence provided and the fact the appellant did not want to trace his parents and did not want respondent to do so is very relevant. As there was no tracing undertaken it could not be suggested that the respondent's actions impacted adversely upon the best interests of the appellant in this regard. The section 55 assessment of this context is to ascertain whether it is in the child's best interests before embarking upon the tracing process. There is therefore a direct causal relationship between the need to consider the best interests of a child and the act of tracing. In this appeal, where no tracing was to occur, it is arguable that no legal error occurs in the respondent not undertaking what would have been an academic exercise to ascertain whether tracing would or would not be in the child's best interests. The submission by Mr Holmes that if the exercise had been undertaken it may have been relevant to the credibility assessment, such as to have lost the appellant an advantage if the section 55 exercise was not undertaken, has no arguable merit as the appellant was always able to advance all the material he was seeking to rely upon to prove his case, which would have included that

- relevant to any section 55 assessment. The burden of proof lay upon the appellant and not upon the Secretary of State.
25. The appellant has not made out that the respondent's failure to comply with her statutory duty to endeavour to trace the family of an unaccompanied minor, when he claimed asylum upon his arrival in the UK from Afghanistan or at the later stage when the age assessment issue was resolved, had caused him such prejudice that it would be unfair now to remove him to Afghanistan, such as to justify a finding of arguable legal error on this basis.
 26. The Judge also finds at [87] that the appellant has not lost contact with his family or could contact them if he chose to do so. At [115] the Judge finds there is evidence before him that the appellant has traced his family.
 27. In relation to the issue of delay, there is arguable merit in the claim by Mr Harrison that the respondent is not responsible for all the delay. There have been a number of previous applications, refusal of asylum decisions, and earlier appeals dismissed by the First-tier Tribunal on 13 May 2010 and 23 December 2011. Delays within the appeal process are not, arguably, the fault of the respondent. Although there has been some delay the appellant fails to make out that any period of delay has been unlawful or excessive such as to warrant a finding of arguable material error by the Judge. Mr Harrison refers to the period 2013 to 2016 which is not, in the context of the vast number of claims handled by the Home Office, appear excessive.
 28. In any event, delay was an issue considered by the Judge who concluded that the delay in the process from the outset combined with the historic injustice argument were not capable of amounting to factors that entitled the appellant to succeed, whether alone or together. The appellant's challenge is effectively a disagreement with this finding.
 29. In *KA v Secretary of State for the Home Department* [2012] EWCA Civ 1014 the Court of Appeal found that whether one is considering asylum, humanitarian protection or corrective relief, there is a burden of proof on an applicant not just to establish the failure to discharge the duty to endeavour to trace but also that he is entitled to what he is seeking. A past lack of cooperation on the part of the application may not always defeat his claim – it did not in DS or HK – but it may lead to the drawing of an adverse inference.
 30. In this appeal the Judge did not find the appellant had discharged the burden upon him. On the basis of the available evidence, content of the impugned decision, application for permission to appeal, grant of permission and arguments put today, I do not find the appellant has discharged the burden of proof upon him to the required standard to establish arguable material legal error sufficient to warrant the Upper Tribunal interfering in the conclusions relating to the article 8 ECHR aspect of this appeal either - *EB (Kosovo)* [2008] UK HL 41 considered.
 31. No arguable legal error material to the decision is made out. The determination shall stand.

Decision

32. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

33. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 10 May 2018