Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09121/2017

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 21 September 2018	**On 13 February 2019**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE CONWAY

Between

KAMEL [M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Lesley Irvine, Advocate instructed by Latta & Co Solicitors.
For the Respondent: Mr Govan, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant is a national of Egypt, born in November 2002, so still aged well under eighteen. He came to the United Kingdom sometime after 27 July 2016 (when he was fingerprinted in Italy). He claimed asylum on 3 October 2016. On 1 September 2017 the Secretary of State issued a letter determining his claim. The Secretary of State rejected the appellant's claim to refugee status or humanitarian protection. The decision-maker took the view that the country evidence did not establish that he would be at risk on return either in the sense of risk of persecution or in the sense of

a risk of serious harm justifying a grant of humanitarian protection. For similar reasons, the decision-maker concluded that there was no basis for thinking that the appellant's return to Egypt would expose him to risk of treatment contrary to article 2 or article 3 of the European Convention on Human Rights. The decision-maker then went on to consider article 8. There appeared to be no reason to think that the appellant met the requirements of the rules for a grant of leave under paragraph 276 ADE or under appendix FM to the Immigration Rules. The decision-maker went on to consider exceptional circumstances, but noted that the appellant had not suggested that there were any circumstances meriting a grant of leave to him under article 8 outside the Immigration Rules. Similarly, there did not appear to be any reasons justifying a grant of Discretionary Leave. The letter then goes on to consider family tracing. It includes the following sentences:

> "Your mother lives in Egypt, your country of origin and you have no contact with her since leaving Egypt and her whereabouts are unknown. As such as it is accepted [sic] there are no reception facilities available to you upon return to Egypt."

2. The letter concludes by indicating that the decision is that the appellant does not qualify for asylum, humanitarian protection, leave to remain on the basis of his family life or private life, or discretionary leave. However, because the appellant meets the requirements of paragraph 352ZC of the Immigration Rules applying to unaccompanied asylum-seeking children, the letter indicates that the appellant is being granted leave until 1 March 2020, a period of 30 months.

3. The appellant, who has been represented throughout by Latta & Co Solicitors, gave notice of appeal against that decision. The appeal came before Judge Sorrell in the First-tier Tribunal and was determined by him in a decision sent out on 6 April 2018. He dismissed the appeal. The crucial parts of his decision are as follows. First, he rejected the appellant's claim to be at risk of persecution as a result of his father's claimed perceived or actual involvement with the Muslim Brotherhood, escape from Egypt, and subsequent alleged activities of the police against the appellant's family. The judge did not accept the evidence supporting that claim. The judge then turned to the second element of the appellant's claim, which was that he has a well-founded fear of persecution if returned to Egypt because he is a separated child and would encounter difficulties there. On that, the judge rejected the main part of the appellant's evidence which was that he had had no contact with his mother or siblings. The judge also noted that there was no evidence that the appellant had attempted to trace his family. For these reasons the judge concluded that the appellant's claim to refugee status on this ground was also not made out. As there were no additional factors which might justify a grant of humanitarian protection, the judge rejected the claim to that status as well. The judge then said this:

> "As no evidence was adduced or submissions made in respect to article 8 of the ECHR, this has not been considered further."

4. Latta & Co on behalf of the appellant put in grounds of appeal. Those grounds addressed a number of topics. Paragraphs 2 – 3 challenge the judge's conclusions in relation to the credibility of the appellant's primary asylum claim. Paragraph 4 noted that in reaching his conclusions on the second basis of the appellant's claim, the judge had failed to observe that the respondent had conceded both that the appellant had not been in contact with this mother and that there were no adequate reception arrangements for the appellant in Egypt. Paragraph 5 provides further possible reasons for accepting the appellant's claim on this ground. Paragraph 6 reads as follows:

> "It is submitted that the FtT have erred in failing to make findings in relation to the submissions made on the final page of the skeleton argument with regards to paragraph 276 ADE of the Immigration Rules. "

5. Permission to appeal was granted in relation to the point about the concession, and the findings in relation to the appellant's situation on his return to Egypt, and the point about paragraph 276 ADE. Permission was refused on the ground challenging the judge's assessment of the credibility of the appellant's primary claim.

6. In preparation for the hearing before us, Ms Irvine prepared a note of argument summarising the argument she proposed to raise in the appeal. She did indeed direct her submissions to precisely those points. In her note she summarised her arguments as follows:

> "The Appellant appeals, further to the grant of permission, on the grounds that the First-tier Tribunal erred in law in (1) failing to address the Appellant's claim under article 8 ECHR; and (2) failing to take into account, in the context of the second ground on which the Appellant seeks international protection in the United Kingdom, the Respondent's concession as to the fact of the Appellant's lack of contact with this mother; the fact that the whereabouts of the Appellant's mother are unknown; and the fact that there are no adequate reception facilities available in Egypt where the Appellant is to be required to return."

7. In her oral submissions, she addressed the protection matter first. She argued that the Tribunal was wrong to go behind the concession in the decision-letter: the judge should have accepted what was conceded by the respondent and made his decisions on both the second basis of claim for international protection and in relation to the article 8 claim based on family life with those concessions of fact in mind. She submitted that there was evidence before the judge that a separated child in Egypt is at risk of persecution or serious harm. He was likely to become a street child, and there was evidence pointing to the treatment of street children as persecutory. Mr Govan reminded us that the appellant's story about the Muslim Brotherhood had been rejected. There was an unsigned statement from the appellant's father which was clearly not an independent and objective assessment of whether the appellant would be at risk if returned to Egypt. The other evidence submitted did not

establish that the appellant would be at risk of persecution or suffering serious harm even if returned in the circumstances that the respondent had accepted in the refusal letter.

8. On this issue, we have considered with care both the evidence and what we could discover about the way the matter was presented before the First-tier Tribunal. We have set out above the terms of the refusal letter. We did not understand Mr Govan to accept without qualification that there had been a concession about the whereabouts of the appellant's mother. We agree that it is not clear from the Reasons for Refusal letter whether what is said about the appellant's mother is a repetition of the appellant's account, or whether it is accepted by the decision-maker. We were not shown that there was any clear submission on this issue made to the First-tier Tribunal. In these circumstances it appears to us to be far from clear that the judge was not entitled to consider for himself whether he accepted this part of the appellant's account of his circumstances.

9. But, in our judgment, it makes no substantial difference, for the following reasons. If the appellant's account of his family circumstances is true, or if, in any event, it should have been accepted as true because the Secretary of State did not query it, but the position is that if returned to Egypt the appellant would be in his mid-teens, with no family members capable of supporting him. The question then is what is the evidence that he will be subject to persecution or serious harm within the meaning of the European Convention on Human Rights or the regulations relating to humanitarian protection.

10. The evidence relied on by Ms Irvine does not in our view begin to establish that he would be. There is a Human Rights Watch Report from as long ago as 2003: nothing that we were shown gives any indication that the authors of that report would claim that it reflects the present situation in Egypt. There were a number of press reports indicating some difficulties and ill-treatment to some children. There is what appears to be a student essay submitted to the University of Lund indicating the student's analysis of the perception of street children by members of the Egyptian public. There is no indication that the author's research methods, findings or conclusions have been accepted even by Lund University. There is a long letter by Dr Alan George, specifically prepared for the purposes of the appellant's appeal, in which he sets out some materials relating to street children in Egypt. Dr George's conclusions, at paragraph 95 of his letter and referred to again in his summary at paragraph 108 are as follows:

> "Mr [M] is now almost 15 years old. If returned to Egypt, where he states that he has no family other than his mother and siblings, whose whereabouts he does not know for sure, he would certainly face a wide range of serious challenges to his wellbeing – quite apart from any threat he might face from the authorities because of his father's political activities. Families and extended families form the basis of society in Egypt, and people look to their families for social, economic and even political support. Without such a support network Mr [M] would be severely disadvantaged. In addition homeless and

> uneducated, his prospects would be extremely bleak. In my firm opinion, he would be at very real risk of joining the country's armies of street children, existing on the margins of lawfulness, abused and exploited by adults, at risk from the authorities, and resorting to begging, prostitution and petty criminality to survive. These risks would apply, albeit perhaps to a slightly lesser extent, if he was returned to Egypt on completion of the period for which he has leave to remain, by which time he will be 17.5 years old."

11. The appellant, having travelled to the United Kingdom and had some experience of life and education in the United Kingdom, is, even without family, no doubt at somewhat lesser risk than those who have known nothing other than poverty and neglect in Egypt. Even if he were to become a street child, the risks of ill-treatment that would justify a claim to international protection either under the provisions of the European Convention on Human Rights or those of the Qualification Directive are, in our judgment, simply not made out. Whether or not the judge was wrong to go behind a concession, the claim on this ground fails.

12. We turn then to the assertion that the judge erred in failing to determine a claim under article 8. The way in which this matter has been presented by the solicitors and Ms Irvine is very troubling. As we have already noted, the material before the decision-maker was not seen by the latter as incorporating any material that would justify a grant of leave under article 8 whether within or outside the rules, or a grant of discretionary leave. The grounds of appeal against that decision, prepared by Latta & Co and signed by Laura Sclare, who also presented the appeal before the First-tier Tribunal are presented in the box headed "Human Rights Decision". Most of the contents of the box relate not to an article 8 matter but to the appellant's asylum claim. However, the grounds do include the following:

> "5. ECHR: Article 2, 3 and 8
>
> …
>
> 7. Other issues: see Witness Statement to follow."

13. There is no indication of what Witness Statement is meant, or from whom. We do not know whether it is said that any of the Witness Statements which did in due course emerge, some signed, some not, were intended to deal with article 8. What we do know is that, as asserted in the grounds of appeal against the First-tier Tribunal's decision, there was a reference to paragraph 276 ADE of the Immigration Rules in the skeleton argument before the First-tier Tribunal. In fact there are two skeleton arguments, which are different; Ms Irvine was not able to tell us which one was relied upon before the First-tier Tribunal. They do however, both include the following paragraph:

> "Immigration Rules
>
> The Immigration Rules include provision for leave to be granted on the basis of "private life" in the UK and paragraph 276 ADE (1)(vi) is

relied upon in this regard. This provides for leave to be granted if there are:

> "Very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

It is submitted that the absence of family, friends or any support network is a "very significant obstacle" to integration into Egypt for the Appellant. It is submitted that his appeal should be granted on this basis."

14. The skeleton argument contains no other reference to article 8. The first thing to say about the ground of appeal based on article 8 is that it is extremely difficult to see, in that context, how the judge could properly be criticised for saying, as he did, that "no evidence was adduced or submissions made in respect to article 8". But what is of much more concern is that a firm of solicitors, with purported immigration expertise, should raise an argument along the lines that we have set out. Paragraph 276 ADE (1)(vi) reads as follows:

> "(vi) subject to sub-paragraph (2) [which does not apply in this case] is aged 18 years or above, has lived continuously in the UK for less than 20- years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

15. The argument made to the First-tier Tribunal, which formed also the basis of the application for permission to appeal to this Tribunal and Ms Irvine's submissions, was wholly misleading. It is an essential part of the applicant's case that he is under the age of 18 years. On its face, paragraph 276 ADE (1)(vi) could not apply to him. It is, to say the least, extremely regrettable that a solicitor or an advocate should in these circumstances assert that there was a claim under that paragraph. That claim is obviously wholly without merit and should not have been pursued at either level.

16. There is, in reality, nothing that could have founded a claim that the appellant has an entitlement to remain in the United Kingdom despite not meeting the relevant requirement of the rules, with a possible exception of a letter from a school teacher, unauthenticated but dated 6 February 2018, largely based on hearsay and on the writer's opinion of the circumstances in Egypt. In reality it adds nothing to the appellant's case.

17. There is a further difficulty about this aspect of the case. Mr Govan's position was that the appellant is not entitled to raise human rights grounds at all. This is a matter of some difficulty. As we have said, the Secretary of State refused to grant the appellant leave under article 8 or as a matter of discretion but granted leave under paragraph 352ZC. Mr Govan's position was that as leave had been granted, the appeal had to be regarded purely as an "upgrade" appeal, with grounds limited to those based on the protection claim. The relevant statutory revisions are all in

the Nationality, Immigration and Asylum Act 2002 as amended and are as follows:

"82. (1) a person ("P") may appeal to the Tribunal where –

(a) the Secretary of State has decided to refuse a protection claim made by P, or

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

(c) the Secretary of State has decided to revoke P's protection status,

…

84. Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds –

(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

(b) the removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

…

104. Pending appeal

(1) An appeal under section 82(1) is pending during the period –

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

…

(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B)).

(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on a ground specified in section 84(1)(a) … (asylum or humanitarian protection) where the appellant –

…

(b) gives notice in accordance with Tribunal Procedure Rules that he wishes to pursue the appeal in so far as it is brought on that ground.

…

113. Interpretation

(1) In this Part, unless a contrary intention appears –

…

"human rights claim" –

(a) means a claim made by a person that to remove him from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998

… ."

18. Mr Govan's position appeared to be that the grant of leave to the appellant meant that his claim to remove him from the United Kingdom would breach the Convention had not been refused. He therefore had no right of appeal under s 82(1)(b). It does not appear to us that that can be right, because s 84(1) allows (in paragraph (c)) human rights grounds to be advanced in an appeal against the refusal of a protection claim. It is true that, if a human rights claim is refused and, whilst an appeal against that refusal is pending leave is granted, s 104(4A) and (4B) will apply, essentially preventing the appellant from continuing to raise human rights grounds under s 84(1)(c) or (2). That position does appear to be anomalous, but in our judgment the anomaly does not justify imposing any restriction on the grounds permitted to the appellant by statute under s 84(1). We therefore do not accept Mr Govan's submission that the grounds under article 8 cannot be considered. For the reasons we have given, however, there is no basis upon which the appeal could succeed under article 8.

19. We therefore dismiss this appeal. If the judge made any error in relation to any concession by the respondent, it was not such as to affect the outcome of the appeal; and the judge made no perceptible error in relation to article 8.

20. We have to say that we remain concerned about the conduct of this appeal by the solicitors, and not merely for the reason that we have already expressed. The appellant is no doubt vulnerable and depends on sound legal and practical advice in relation to his application and his appeal. We do not know why popper efforts were not made to obtain up-to-date evidence supporting the claim of risk as a street child if that risk genuinely exists. We do not know why there was no evidence supporting

the article 8 claim under other than the wholly unsatisfactory document to which we have already referred, if the article 8 claim has substance. Obviously, if either of those claims do not have substance they should not have been advanced at all. But if either of them does have substance, it is very regrettable that the appellant's legal representatives did not choose to substantiate it or them properly. As we explained at the close of the hearing, the appellant's status is that he has leave at the moment, and it does not appear to us that the leave he has is less advantageous than any leave he would obtain under any of the other heads under which his claim was made. But it is to be hoped that before that leave expires his position will be properly considered by somebody able to give him good advice as to whether he has a proper basis for claiming to remain in the United Kingdom.

21. For the reasons we have given, however, this appeal is dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 7 February 2019