Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06142/2019

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 February 2020	**On 4 March 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ
UPPER TRIBUNAL JUDGE SHERIDAN

Between

Y A
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Smyth, Kesar and Co. Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before us following the grant of permission to appeal to the appellant by First-tier Tribunal Judge Bristow on 18 December 2019 against the determination of First-tier Tribunal Judge Froom, promulgated on 29 October 2019 following a hearing at Hatton Cross on 22 October 2019.

Issues

2. The issues in this appeal are: (1) whether it was an error for the judge to fail to assess the human rights of the appellant's foster carer when making his article 8 findings; (2) whether he erred in his approach to a "durable solution" following JS (former unaccompanied child – durable solution) Afghanistan [2013] UKUT 568 (IAC); and (3) whether the judge failed to assess the circumstances of the article 8 claim as at the date of the hearing.

Background

3. The appellant is a Bangladeshi national born on 15 June 2001; he was 18 at the date of the hearing before the First-tier Tribunal. He entered the UK as a visitor on 19 June 2013 accompanied by his mother and older brother, H, following a successful hearing against the refusal of entry clearance. They were sponsored by the appellant's maternal uncle who gave evidence at the entry clearance hearing and confirmed that the family would return after a month's visit. In August 2013, the appellant's mother returned to Bangladesh and left the children behind. On 9 September 2013, they were found in the back of a lorry heading for France and taken into the care of the local authority. Subsequently, they claimed asylum. Both were placed into foster care with SJ although H moved away when he reached his majority and has lived independently since then. He visits SJ and has regular contact with the appellant.

4. The asylum applications were refused but the appellant was granted discretionary leave until February 2017 as an unaccompanied asylum-seeking child. His appeal against the decision to refuse asylum was heard and dismissed in November 2014. His brother's appeal was dismissed on asylum and humanitarian protection grounds in March 2018 but allowed on human rights grounds to the extent that he should be given leave to remain until the appellant had reached his majority at which point both could be expected to return to Bangladesh together. H was then granted 12 months' leave. The appellant re-instated his asylum application before the expiry of his discretionary leave, but it was refused once again. He was, however, granted a further period of discretionary leave until December 2018. A subsequent in-time application gave rise to the decision of 4 June 2019, now under challenge.

5. The appellant claimed that he would be at risk of persecution on return to Bangladesh because of his imputed political opinion. He also maintained that he had established a family life with his foster carer, SJ.

The First-tier Tribunal decision

6. First-tier Tribunal Judge Froom heard oral evidence from the appellant and from SJ. H was not called as a witness. The asylum claim was not pursued and the judge found that it had been "*a fiction from the outset*" (at 20) and that there were no reasons to go behind the determination of the judge who had made adverse findings and dismissed it in 2014. He also found that the appellant had lied when he had claimed his parents had died but found that the appellant did not wish to contact his family because he felt he had been abandoned (at 20-21).

7. Judge Froom accepted that the appellant's placement with SJ was successful, that he got on well with the family and the other foster children, that he had integrated well and had commenced a university foundation year, that he worked in a local restaurant, undertook voluntary work for the Bangladeshi community, played sports and has passed his driving test. It was conceded for the appellant that he could not meet the requirements of paragraph 276ADE(1) in that there were no very significant obstacles to his reintegration into Bangladesh (at 31-33). He properly directed himself as to the task at hand noting that if the rules could not be met, "*it should only be in genuinely exceptional circumstances that there would be a breach of article 8*" (at 34).

8. The judge accepted that the appellant had a private life through his academic progress, social ties and through SJ and her family (at 35). He also found that there was family life between the appellant and SJ (at 40). He accepted that the appellant's removal would result in significant disruption to his private and family life and that although SJ would stay in touch with him, it was unlikely that she would visit him (at 45). The judge considered the issue of proportionality at 47-63 and concluded that the decision was not disproportionate. In assessing proportionality, he also considered the matter of whether the case required a durable solution for the appellant to be found in the UK. He found that the appellant would be returning with his older brother to a country where it was accepted that he would be able to re-integrate without very significant difficulties. Accordingly, the appeal was dismissed.

9. Permission was granted on the basis that it *was* "*at least arguable that the judge had failed to assess SJ's family rights*" and "*that the judge erred in the approach to a durable solution*". Although the third ground, that of whether the matter was assessed at the date of hearing or at a future point in time, was not referred to, argument was permitted on all grounds.

The Hearing before us

10. The appellant and SJ were present for the hearing at Field House. In his oral submissions before us, Mr Smyth, who also represented the appellant before

the First-tier Tribunal, relied on his written grounds. He submitted that there had been a failure to assess the impact of the appellant's removal upon SJ. Having found that family life existed between them, it was incumbent upon the judge to consider the rights of all parties. He admitted that there was nothing explicit in the evidence about how SJ would be affected, this was still a failing by the judge as the appeal was so finely balanced. There had been many positive factors and the only countervailing matter was immigration control. He submitted that the s.117B factors "*did not bite*" as the appellant had a family life. There were no public interest factors as the appellant could not be blamed for his mode of entry. He argued that despite the absence of this as a full argument in the skeleton argument, it was a "*Robinson obvious*" point.

11. On the second ground, Mr Smyth argued that the appellant's youth on arrival and his inability to make contact with family members meant that he fell within the categories set out in JS (Afghanistan). He submitted that the judge had been wrong to distinguish the appellant's case on the basis that he would not be returning unaccompanied. He submitted that was not relevant. What had to be considered were the positive factors. Again, as this was a finely balanced case, small margins were material and the judge had erred in his approach.

12. On the third and final point, Mr Smyth submitted that the judge had speculated about family life tailing off as the appellant grew older and more independent. He submitted that those matters were irrelevant and that the judge was required to undertake a full assessment on the basis of current family life.

13. Ms Fijiwala replied. She submitted that there was no error in respect of the first ground and that the findings on SJ's rights were implicit in the determination; she referred to paragraph 45 where there had been specific consideration of SJ despite the fact that no evidence of any specific impact on SJ had been placed before the judge. She pointed out that there had been no particularization of the impact of the appellant's removal on SJ. She submitted that this was a fostering relationship for which SJ was paid and that it was always known to both that the arrangement would end. H, who had also been fostered by SJ, now lived independently. She submitted that SJ also fostered other children and that was a relevant factor.

14. On the matter of a durable solution, Ms Fijiwala submitted that the facts of this case differed to those of JS. The appellant would be returning with a family member. The relevant matters for consideration, where the appellant was no longer a minor, were set out in head note (4) : "*age, background, length of residence in the UK, family and general circumstances including any particular vulnerability and whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs*". She submitted that all these factors had been considered in the proportionality assessment. She

also submitted that there was nothing in that head note to suggest that the durable solution had to be found in the UK. The appellant had not been here for at least seven years and he would be able to return with his brother.

15. On the final ground, Ms Fijiwala submitted that there had been no speculation. There was evidence before the judge that the appellant wanted to leave foster care and to live with his brother.

16. In his response, Mr Smyth repeated the submission that the judge had found there was family life between the appellant and SJ. It was not open to the respondent to seek to undermine that by arguing that it was a fostering relationship. The fact that the appellant had not been in the UK for seven years did not heighten the public interest in removal; it was a neutral factor and none of the sub sections applied in this case.

17. That completed the submissions. Both parties agreed that were an error of law to be found, the matter should be re-made in the Upper Tribunal; oral evidence from SJ would be called.

18. At the conclusion of the hearing, I reserved my decision which I now give with reasons.

Discussion and Conclusions

19. Having considered all the evidence and the submissions made, we conclude that there are no material errors of law in Judge Froom's determination. We consider it to have been thorough, clear, well reasoned and carefully prepared. It is plain that Judge Froom approached the case with sympathy for the appellant's situation and that he was impressed by both the appellant and SJ. Several positive findings were made. Nevertheless the judge concluded that removal was appropriate and his findings and reasoning are, in our view, entirely sustainable.

20. All three grounds amount to a challenge to the judge's approach to article 8. Taking each as it was argued, we make the following observations.

21. It is for the appellant to present his case and not for the Tribunal to make it for him. In this case, the appellant has been legally represented by experienced solicitors throughout the proceedings. He and SJ were called to give oral evidence and it was for them and the appellant's representatives to decide what matters were relevant and what evidence should be put to the judge both by way of written evidence and in oral testimony. Given the fact that the judge's alleged failure to have regard to SJ's rights was relied on as a primary ground of appeal, it is surprising to say the least that this was never argued

before the judge. We accept that there is a brief sentence at paragraph 11 of the skeleton argument which maintains that "*where family life exists…the rights under article 8 of each individual must be taken into account*", however nothing further is said and there is no expansion whatsoever in the skeleton argument of what SJ's rights are or of how the appellant's removal would impact upon her. Nor was this question put to her in examination in chief. It was not amplified or touched on in her witness statement other than her expression of fondness and love for the appellant. In the circumstances, it is very difficult to see what the judge could have done. It is always easy for advocates to criticize judges for failing to consider something even when it is not argued before them and when there is no evidence to assist, but they and their clients must accept the responsibility for this, given where the burden of proof falls.

22. The judge noted SJ's fondness for the appellant. He noted the closeness between them, found that they would stay in touch even after the appellant's removal and that SJ would be unlikely to visit him due to the expense. Whilst it would have been preferable if the judge had clearly spelt out that he had had regard to SJ's position, we find that in the absence of any evidence as to how she would be affected, there was no error in his failure to do so. Moreover, we find that given the judge's findings on the proportionality of the appellant's removal in the context of his circumstances, it is difficult to see how the impact on SJ could swing the balance in the appellant's favour.

23. We have had regard to JS and to Mr Smyth's submissions on the issue of a durable solution. He relied on head notes 3 and 4. We set these out below:

> (3) *For an unaccompanied asylum seeking child, the best durable solution is to be reunited with his own family unless there are good reasons to the contrary. Where reunification is not possible and there are no adequate reception facilities in the home country, an appropriate durable solution may be to grant discretionary leave during the remaining years of minority and then arrange a return to the country of origin. Where the child is of a young age on arrival, cannot be reunited with his family and will spend many years in the host state during his minority a durable solution may need to be found in the host state.*
>
> *(4) Where the appellant is no longer a minor, the duty on the Secretary of State under s.55 of the Borders, Immigration and Citizenship Act 1999 no longer arises but when making the assessment of whether removal would lead to a breach of article 8 all relevant factors must be taken into account including age, background, length of residence in the UK, family and general circumstances including any particular vulnerability and whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs.*

24. We note firstly that the search for a durable solution for an unaccompanied asylum seeking child "*may*" need to be found in the UK. Plainly it is not

envisaged that it should always be necessary to find it here. Secondly, we note that the appellant's asylum claim has always been held to be fictitious. Two judges have found it so. Third, the appellant is not a minor and, fourth, as he has an older brother, he is no longer unaccompanied. Head note 4 (expanded on at paragraph 35) is more relevant to his situation and, as pointed out by Ms Fijiwala, that makes no mention of a solution having to be found in the UK. Also, as she submitted, the factors referred to therein were considered by the judge. He had regard to the appellant's age, length of residence and general circumstances when assessing the issue of proportionality. No arguments about any specific vulnerability were made and indeed it was conceded that he would be able to re-integrate. It is accepted by Mr Smyth that there is no issue about any risk on return and of course as Judge Froom found the appellant would be returning with his older brother so he would have adult support on return.

25. We also note that the appellant is returning to Bangladesh and not to a war-torn country such as Afghanistan. However, even in the circumstances of a return to Afghanistan, JS, also a minor on arrival, was found to be returnable. The Upper Tribunal held that an earlier classification of vulnerability did not mean he could never return (at 43). On the issue of foster care, the court held: "*No doubt such a relationship is capable of producing strong ties, but the foster care was always intended as temporary and this would doubtless have been well known to both carer and the cared for*" (at 47). The court found that a situation where the respondent was unable to return any young male after residence here as a child because there was no satisfactory evidence of a family awaiting him there or similar satisfactory reception arrangements "*would have very significant impact on the respondent's practice and successive policies in dealing with unaccompanied children by way of limited leave and assessing the circumstances after age 18*" (at 48).

26. In the present case, having assessed all the circumstances and factors put forward, Judge Froom gave weight to the fact that the appellant would be returning with an adult family member and that there was no need in his circumstances for a durable solution to be found in the UK particularly as the appellant's ability to re-integrate into life in Bangladesh was not in doubt.

27. The last point is an argument that the judge speculated about a future point in time and did not reach his decision on the situation as at the date of hearing. This submission has no merit. Judge Froom was very clear as to what he was required to assess, and this is clear at paragraph 18 where he specifically acknowledges that he is required to "*look at the position as at today's date*". In paragraphs 20-52 he does exactly that. He reminds himself that he must not speculate (at 59). His reference to the appellant's age and growing independence and the inevitable consequences of that (at 53) was not speculation as Mr Smyth argued, but drawn from the appellant's and SJ's own

evidence (at 28 and 57), oral and written. In all the circumstances, he was entitled to find as he did and there is no error in his approach.

28. For all these reasons, we conclude that there are no errors in the decision of First-tier Tribunal Judge Froom.

Decision

29. The appeal is dismissed.

Anonymity

30. We continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge
Date: 20 February 2020