Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02255/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams (hybrid)	**Decision & Reasons Promulgated**
On 11 November 2021	**On 22 November 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

TAMIM NICKYAR

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel instructed by Sky Solicitors Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Courtney promulgated on 20 April 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 28 January 2020, refusing the Appellant's human rights claim founded on Article 8 ECHR. In broad terms, the Appellant's claim is based on his length of residence in the UK since January 2010 and the circumstances which he would face on return to Afghanistan.

2. The Appellant is a national of Afghanistan. He came to the UK as a student in 2010. His leave was extended to November 2014 but then curtailed to September 2012. He made an in-time application based on his human rights which he subsequently withdrew in favour of an application (made in July 2013) to remain as the spouse of a British citizen. He was granted leave in that capacity to 22 April 2016, but the marriage broke down very shortly thereafter and on 6 June 2014 the Appellant was granted leave to remain outside the Immigration Rules ("the Rules") valid to 5 September 2014 based on the domestic violence concession. His in-time application for indefinite leave in that capacity was refused on 25 November 2015 and again following reconsideration on 19 April 2017. He appealed that decision, but the appeal was dismissed. I do not know why that was so as I do not have a copy of either the decision refusing leave or the appeal decision. It was accepted that the Appellant had been the victim of domestic violence. The Appellant became appeal rights exhausted on 12 September 2019.

3. Judge Courtney accepted that the Appellant had enjoyed four months short of ten years lawfully resident in the UK (although much of that period was on the basis of statutorily extended leave) ([32]). It was accepted that the Appellant could not succeed under paragraph 276B of the Rules based on the Court of Appeal's decision in Hoque v Secretary of State for the Home Department [2020] EWCA Civ 1357. The Appellant claimed that there were very significant obstacles to his integration so that he could succeed under paragraph 276ADE(1)(vi) of the Rules ("Paragraph 276ADE(1)(vi)"). The Judge rejected that claim. She considered the Article 8 claim outside the Rules but concluded that removal would not be disproportionate.

4. The Appellant appeals on two grounds. Ground one concerns the Judge's finding that Paragraph 276ADE(1)(vi) is not met. Ground two concerns the Judge's assessment of the claim outside the Rules.

5. Permission to appeal was granted in a lengthy decision by First-tier Tribunal Judge Scott-Baker on 23 July 2021. Since Mr Fripp relied on what was there said, I set out the relevant part of the decision as follows:

> "... 3. The judge recorded at [11] of the decision that it had been conceded that the appellant could not meet the long residence requirements and considered the appeal with reference to paragraph 276ADE and Article 8 only.
> 4. The risk to the appellant returning as a victim of domestic violence was considered at [19] to [22]. It was noted that there was no background material (or expert evidence) to corroborate those assertions.
> 5. The security situation was referred to at [23] and [24]. No findings of fact were made but by inference the judge relied on the country guidance case of **AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC)**. The judge set out her findings at [27] and concluded that the appellant was enough of an insider and could not meet the very significant obstacles test on his evidence. On the evidence the findings were arguably open to her.
> 6. The findings on proportionality are brief and there is scant consideration of the statutory requirements of s117B of the Nationality, Immigration and Asylum Act 2002 (as

amended) in full which has led to a deficit in the fact finding. The judge made reference to the fact that the appellant was only short by four months in accruing ten years continuous lawful residence in September 2019 when he became appeal rights exhausted. However, there is merit in the assertion that the judge failed to consider this lawful residence in the balancing act and failed to give it sufficient weight in the light of s117B(4). Arguably the judge failed to give the lawful residence any weight in the consideration of the proportionality issue.

7. Arguably therefore there may be an error of law in the assessment of proportionality and even if the ultimate decision remains unchanged the appellant is entitled to a full and thorough assessment of his claim.

8. Permission is granted."

The grant of permission was not expressly limited in spite of the comments at [4] and [5] of the decision and Mr Melvin rightly did not therefore suggest that the Appellant could not argue those grounds.

6. The appeal came before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. Mr Fripp attended in person with the permission of the Tribunal even though this was listed as a remote hearing. Mr Melvin attended via Microsoft Teams. There were no technical issues affecting the conduct of the hearing.

7. I had before me a core bundle of documents including the Respondent's bundle, the Appellant's bundle before the First-tier Tribunal (referred to hereafter as [AB/xx]) which included Mr Fripp's skeleton argument for the First-tier Tribunal hearing dated 15 April 2020, the Respondent's Rule 24 Reply and Mr Fripp's skeleton argument for the hearing before me (produced without objection from Mr Melvin immediately prior to the hearing).

8. Having heard submissions from Mr Fripp and Mr Melvin, I indicated that I found there to be no error of law in the Decision and that I would provide my reasons in writing which I now turn to do. I deal with each of the grounds in turn.

GROUND ONE: PARAGRAPH 276ADE(1)(vi)

9. This ground is formed of two component parts. At [5] to [9] of the grounds, the Appellant relies on his status as a victim of domestic violence as reason why he would be unable to integrate on return to Afghanistan. In broad terms, he says that Afghanistan is a macho, misogynistic society which would not be accepting of a man who had suffered violence at the hands of a woman. There is reference at [5] of the grounds to a Country Policy and Information Note in relation to Afghanistan but that concerns women facing domestic violence (and is in any event not in the Appellant's bundle nor referred to so far as I can see in the skeleton argument before the First-tier Tribunal). Mr Fripp accepted that there was no background evidence in relation to the assertions made in this regard. He said that was likely to be either because females in Afghanistan would be deterred from exercising such violence due to the nature of society or because it would not be reported for fear of stigmatisation. He could not point to any more general evidence from which it could even be inferred that this was

the position. The Appellant merely asserts a position that there would be such stigma without any detail ([41] of his statement at [AB/20]). As Judge Scott-Baker observed in her grant of permission there is no expert report dealing with the issue (as might be expected if the issue is not covered by background material).

10. I am of course here concerned with whether the Judge has erred in her consideration of this issue. The Judge dealt with it at [19] to [22] of the Decision as follows:

> "19. The Appellant contends that for a male Afghan to have been the victim of domestic violence amounts to a '*social stigma*' because in that male-dominated society it is considered dishonourable [WS §41]. In examination-in-chief he said that Afghan culture 'does not accept that a woman should be the perpetrator and a man should be the victim'. Mr Fripp submitted that 'strong macho norms' emphasise the importance of 'a strong male role and submissive female role'. Mr Nickyar was likely to be seen as someone who has 'failed to fulfil the role of an Afghan man, who has been lessened by domestic violence'. In his skeleton argument he suggests that the Appellant's situation will '*attract derision and contempt*'.
> 20. In his application form the Appellant claimed that he had 'gradually lost connections with friends' in Afghanistan. In oral evidence he said that this had happened because 'they disapprove because they know I'm the victim of domestic violence'. He said that his UK-based Afghan friends still associated with him because they had adopted 'a higher mindset' after living in this country for extensive periods. Mr Nickyar gave evidence that he had last spoken to his parents approximately three months ago, and said they were aware of the domestic violence he had endured. He claims that he will be rejected by his family, including his mother and father, because of the stigma. Asked by Mr Fripp how anyone else would come to know about it he said that his parents 'told the people around them'. Asked why they would do that he said that his mother would talk to her sister and 'the rumours would spread'.
> 21. In examination-in-chief Mr Tiah Arrian was asked what relationship the Appellant had with his parents and he replied 'normal, not bad'. Mr Fripp asked 'How do they feel about his domestic violence?' and the witness said that they were 'not happy' because 'it's against our culture'. When asked if there had been any change in the relationship between Mr Nickyar and his parents over the years Mr Arrian said 'No, I don't think so'. Mr Khorami said that the personal relationship between the Appellant and his father was 'very good'. Asked why Mr Nickyar's connection with his friends and family in Afghanistan had '*gradually diminished*', as he put it in his statement, the witness replied that this was due to 'the security situation, exposed to danger back home'. When Mr Baluch was asked the same question he said that this was 'because of his lifestyle in the UK, he's been living here over 10 years'. They did not ascribe it to the stigma of domestic violence having attached itself to the Appellant.
> 22. The evidence of the witnesses suggests that Mr Nickyar has not been – and will not be – rejected by his parents on account of the domestic violence perpetrated by his ex-wife. No background country material has been supplied which indicates that he will be abused or discriminated against because of what happened in his marriage. In my view any 'derision' or 'contempt' that he may encounter does not rise above the level of a '*mere difficulty*'."

11. The Judge could only assess the Appellant's case on the evidence he put forward. She considered the evidence of the witnesses which was inconsistent with the Appellant's account about his relationship with his parents who are aware of the domestic

violence. They did not themselves say that there would be any stigmatisation from society in Afghanistan. There was no background evidence to back up that assertion. The Appellant did not adduce expert evidence to support it. As Mr Melvin also pointed out, it is difficult to see why the Appellant would need to mention this on return nor why anyone in Afghanistan would be aware of it, particularly since the events took place about seven years ago.

12. The Judge was of course considering this factor as one of many put forward as reason why there would be very significant obstacles to integration. On the evidence she had and heard, the Judge was entitled to reach the conclusion she did that any problems would be only "a mere difficulty".

13. I turn then to the second factor which it is asserted that the Judge did not consider. This is raised at [10] of the grounds. It concerns the security situation in Afghanistan. It is there accepted that the Judge has cited AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC) which was the relevant country guidance at that time (the appeal hearing pre-dates the fall of Kabul to the Taliban). The Appellant accepts that he would not be entitled to humanitarian protection applying that guidance.

14. The Appellant nonetheless asserts that he meets Paragraph 276ADE(1)(vi). He says that "[e]vidence which would not satisfy [the test for humanitarian protection] might well make good [the test under Paragraph 276ADE(1)(vi)]". Whilst I accept that the tests arise under different instruments, the issue for me is whether the Judge's consideration of this factor contains legal error when looking at the issue through the lens of the very significant obstacles to integration.

15. The Judge dealt with this at [23] and [24] of the Decision as follows:

> "23. In his skeleton argument Mr Fripp submits that '*it is well known that Afghanistan is enmeshed in conditions approaching civil war, with serious challenges of violence as well as imperative socio-economic difficulties. The Appellant will invite reference to the most recent versions of widely applied sources of evidence concerning country conditions in Afghanistan including reports of the United States State department and the Respondent's own Country Information and Policy Unit.*' He did not flag up any particular paragraphs in those documents, whether in his skeleton argument or in his oral submissions.
> 24. The headnote to the country guidance case of **AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC)** states: *There is widespread and persistent conflict-related violence in Kabul. However, the proportion of the population affected by indiscriminate violence is small and not at a level where the returnee, even one with no family or other network and who has no experience living in Kabul, would face a serious and individual threat to their life or person by reason of indiscriminate violence.* The CPIN *Afghanistan: security and humanitarian situation* was published in May 2020, the same month that the decision in **AS (Safety of Kabul)** was promulgated."

16. The Appellant does not develop in his grounds the assertion that the general security situation would have a particular impact on him which would give rise to a very significant obstacle to his integration there. The most that is said by him is at [42] of his statement as follows:

> "Law and order of Afghanistan as it is well known to everyone is bad. There is an open hatred toward the West and western values. There are cases of kidnapping for ransom as well as killing of those not following Islamic and Afghan tradition in their everyday life. The socio-economic circumstances of Afghanistan in itself is a threat especially to someone with western values and western lifestyle."

That evidence is based on generalised assertions rather than a statement of individual risk or obstacles. It does not identify any particular risk to this Appellant or, put more accurately, to any very significant obstacle to his own integration.

17. Insofar as the Appellant assert in that paragraph that he would be unable to integrate because of his westernisation, the Judge dealt with that at [18] as follows:

> "At paragraph §5.4.7 reference is made to the PRIO Policy Brief having noted that '*a small minority*' of research participants '*reportedly faced specific threats after returning, usually in the form of violent demands for money, because of the assumption, according to one interviewee, that returnees from Europe were wealthy. Another assumption returnees reportedly faced was that they had become 'westernised' or 'anti-Islamic' in Europe. One interviewee claimed he was threatened that he had to give money to an insurgency group to prove his 'non-Western' credentials'*. However, Western trends and influences are said to be increasingly popular among urban liberal elites and young professionals in Kabul [see section 5]. Given the low number of reported attacks compared to the thousands of young men who have been returned to Afghanistan, there appears to be a very low risk of violent attack or abduction. Furthermore, the CPIN asserts that *'in Kabul, and other districts, cities and towns controlled by the government, the authorities are generally willing and able to offer effective protection against any discrimination arising against perceived 'Westernised' returnees'* [§2.4.3]. Family members can provide guidance to returnees with regard to Afghan cultural norms."

18. The Judge considered the evidence which was put forward about the security situation in general terms and also the factor of westernisation identified by the Appellant as being one which would cause him a particular problem. Although I accept that humanitarian protection and very significant obstacles may not be the same test, the Judge was dealing with the same allegation that the general situation would prevent return. She was entitled to reject that on the evidence for the reasons she gave. I reiterate, particularly in relation to westernisation, that the hearing of this appeal pre-dated the takeover by the Taliban. Events arising after the Decision cannot be used to impugn it (as Mr Fripp accepted).

19. Having considered the above matters as well as the Appellant's length of residence in the UK and the Appellant's employment prospects and ability to survive in Kabul at [13] to [26] of the Decision, the Judge reached the following conclusion concerning Paragraph 276ADE(1)(vi) at [27] of the Decision:

> "I am satisfied that Mr Nickyar will be an 'insider' in the sense that he will have an understanding of how life is carried on in Kabul, and will be able, over time, to build relationships and participate in society. I do not consider that he will face any 'very

significant obstacles' to his reintegration into Afghanistan, and in consequence he cannot succeed under Paragraph 276ADE(1)(vi) of the Rules."

The Judge was entitled to reach the conclusion there drawn based on the evidence and for the reasons she gave in that section.

GROUND TWO: ARTICLE 8 ECHR

20. This is the ground which found favour with the Judge granting permission. For that reason, Mr Fripp relied on what was said in the permission grant (as set out at [5] above).

21. The Decision obviously has to be read as a whole. The section dealing with Article 8 outside the Rules therefore takes into account that the Appellant could not succeed within the Rules based on his length of residence, Paragraph 276ADE(1)(vi) or Appendix FM to the Rules (as he has no partner or child in the UK).

22. The Judge dealt with the claim outside the Rules at [29] to [33] of the Decision. Having noted the five-stage test set out in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 and recognising her statutory duty to have regard to the public interest provisions set out in section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"), the Judge continued as follows:

"30. The Article 8 right affected by the decision is the Appellant's right to respect for his private life, which consists of the circle of friends and relatives he has acquired whilst in the UK. In his witness statement of 20 April 2020 Mr Nickyar states: *'I confirm that I have been in the UK for over 10 years. I have studied and worked in accordance [with] conditions of leave through which I have established my private life in the UK* [§28]. *I have many relatives and friends in the UK who form my private life'* [§29]. I am satisfied that removal would constitute an interference with the Appellant's private life which crosses the minimum level of severity to engage Article 8. The Respondent's decision furthers a legitimate aim, namely economic wellbeing through the maintenance of proper and effective immigration control. The proportionality of the decision is therefore the key issue in this appeal.

31. The 2002 Act provides that little weight should be given to a private life that is established by a person at a time when their immigration status is unlawful [section 117B(4)] or precarious [section 117B(5)]. The Appellant's private life would be materially the same in Afghanistan as here, notwithstanding differences in his network of friendships and acquaintances.

32. The Appellant was only four months short of 10 years' continuous lawful residence when he became ARE on 12 September 2019. He only had formal LTR up until 5 September 2014, and for the next five years enjoyed only section 3C leave (up until 12 September 2019). Mr Fripp submitted that his client had been in the UK for a 'substantial period' and that up until the split decision in **Hoque** he 'may have had a very reasonable hope' that his period of overstaying would be disregarded under paragraph 39E and would therefore count towards his period of lawful residence. In that he was clearly mistaken. I cannot see that there is any feature of the Appellant's private life which might, exceptionally, have required the grant of ILR in his case. In the absence of material of that kind, the fact that his application was in some sense a 'near miss' cannot help him: see **SSHD v SS (Congo) [2015] EWCA Civ 397, [2016] 1 All ER 706,** at paras. 54-56.

> 33. I have taken into consideration the factors explored at paragraphs 15 to 27 above. In my judgment refusal of his application would not result in any unjustifiably harsh consequences for the Appellant. There are no exceptional circumstances in this case such that the interests of the state and the community in the maintenance of effective immigration control are not to be accorded their normally preponderant weight."

23. The first point made in the grounds is that the treatment of the claim outside the Rules is undermined by the matters raised in the first ground. Since I have found that the first ground does not demonstrate any error of law, it follows that this cannot impact on the Judge's reasoning.

24. It is then suggested that the Judge did not recognise that the Appellant's length of residence was relevant not only to the issue whether he should be granted indefinite leave to remain but also to proportionality. That assertion has no merit when the Decision is read as a whole. First, the Judge took into account length of residence when looking at Paragraph 276ADE(1)(vi) and the more general question whether the Appellant could meet the Rules. Her finding that he could not meet the Rules does not contain any error of law. That he could not meet the Rules was clearly relevant to the public interest as is recognised by what is said at [33] of the Decision which expressly incorporates the earlier paragraphs considering the appeal within the Rules.

25. Second, the relevant question for the Judge was the strength of the Appellant's private life and not simply the length of it. That is something which was considered in the earlier paragraphs and in what is said at [31] of the Decision. The Judge had regard to the quality of the Appellant's private life in the UK. She had already had regard to the situation which the Appellant would face in Afghanistan. By considering the status of the Appellant throughout his residence in the UK, she was also alive to the question of what weight should be given to that private life in the balance between interference and public interest. As she noted, much of the Appellant's residence was with statutorily extended leave rather than an express grant of leave. That was relevant.

26. The Judge when granting permission described the proportionality findings as "brief" and involving "scant consideration of the statutory requirements". Mr Fripp adopted that categorisation. I find it difficult to see what other parts of Section 117B were relevant. The maintenance of effective immigration control was clearly important and is taken into account. That is balanced against the weight of the Appellant's private life which fell to be given little weight as it was developed whilst he was here with precarious or unlawful status. The other factors which might be relevant (English language and financial independence) could only be neutral. There is no other part of Section 117B which was relevant to this case.

27. The brevity of the proportionality assessment also has to be considered against the limited nature of the evidence in this case and taking into account the Decision read as a whole. In any event, a proper proportionality assessment does not depend on length but on a consideration of all the relevant factors. Here, the Judge considered all the factors said to be relevant either expressly in that section or by incorporation of other

parts of her Decision. There is no error of law in the assessment or her conclusion which she was entitled to reach for the reasons she gave.

CONCLUSION

28. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed.

29. I note as I did at the hearing and have mentioned above that this appeal was heard before recent events in Afghanistan. As Mr Fripp accepted, those events could not impact on the error of law issue. They could only arise for consideration if I had found an error of law (although they would then amount to a new matter). Having found that there is no error of law, the course for the Appellant if he wishes to rely on those subsequent events as reason why he should not be removed is to make further submissions to the Respondent (or indeed to make an initial protection claim since he has not apparently claimed asylum in the past). Mr Melvin confirmed that a letter had been received from the Appellant's representatives indicating an intention to make further submissions but there was no record yet of receipt of such submissions. He confirmed however that if such submissions are made, no removal could take place until those are considered.

DECISION

The Decision of First-tier Tribunal Judge Courtney promulgated on 20 April 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 15 November 2021