Upper Tribunal
(Immigration and Asylum Chamber)
AA/06672/2013

Appeal Number:

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 23rd February 2014	**On 25th April 2014**

Before

UPPER TRIBUNAL JUDGE ROBERTS
UPPER TRIBUNAL JUDGE CLIVE LANE
Between

BARAKTULLAH SAHAG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Schwenk, of Counsel
For the Respondent: Mr S Spence, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant Baraktullah Sahag was born on 25th March 1993 and is a citizen of Afghanistan. By a decision dated 5th December 2013, we found that the First-tier Tribunal had erred in law and we set aside its determination. Our determination of 5th December 2013 is set out below: -

    1. "The Appellant is a citizen of Afghanistan born 25th March 1993. On 30th July 2013 a decision was made to refuse him asylum and issue directions for his removal as an illegal entrant from the UK. The Appellant appealed against that decision to the First-tier Tribunal (Judge V McDade), which in a

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determination dated 5th September 2013, dismissed the appeal on asylum/Humanitarian Protection and under Article 8 ECHR. The Appellant now appeals, with permission, to the Upper Tribunal.

Background

2. There is a history to this application which it is necessary to recite. The Appellant entered the UK in February 2009 and claimed asylum, based upon a fear of the Taliban. He claimed that his father was a farmer but was also someone who worked for about five years as a prosecutor in a Court in Jalalabad, dealing with people who had problems or land disputes or accusations of theft made against them.

3. In 2008 the Appellant's father received a letter from the Taliban demanding that he ensure the release of two of their members who had been arrested. The letter was accompanied by threats. The Appellant's father took the letter to the authorities but they took no action on it.

4. His father received two more letters and, in August 2008, was killed by the Taliban. Following that, the Appellant, apparently because he was the eldest son, received a similar letter; informing him that he should go to the authorities and "beg" for the release of the two Taliban members. Three months after his father's death, his mother died in childbirth and the Appellant and his sisters moved to an uncle's house in the Kama district of Jalalabad.

5. His uncle informed him that his life was in danger. His uncle made the necessary arrangements and the Appellant left Afghanistan arriving in the UK. He claimed asylum and his appeal came before Judge Irvine. At the hearing before Judge Irvine in addition to the asylum claim, an age assessment dispute was raised.

6. The Appellant claimed to be 16 years of age and not 18 years as assessed by the Secretary of State. Judge Irvine after hearing evidence and made a factual finding that the Appellant had attained the age of 18 years and therefore fell to be treated as an adult. He went on to dismiss the appeal on all grounds and made findings that he comprehensively disbelieved the core of the Appellant's claim.

7. The next significant factor in the history is that, despite Judge Irvine's findings, the Respondent granted the Appellant limited leave to remain in the United Kingdom until his 18th birthday. His birth date was now recorded as 25th March 1993.

8. Following from that, the Appellant made a further application for asylum based on the same grounds as those put before Judge Irvine. The claim was refused once again and his subsequent appeal came before Judge Batiste. Following the principles of *Devaseelan* [2002] UKIAT 00702 (Starred*),* Judge Batiste used Judge Irvine's determination as his starting point; but even so he commented, "I do however make it clear that for the reasons set out in the remainder of this determination, I would not have found the appellant to be a credible witness even if I was hearing the evidence afresh." Judge Batiste went on to dismiss the Appellant's appeal on all grounds.

9. The Appellant sought to appeal that decision, but, significantly, only on Article 8 ECHR grounds. Permission was refused by Upper Tribunal Judge Latter on 8th April 2011. At that point the Appellant's appeal rights became exhausted.

10. The appellant then made a fresh application for asylum on 17th October 2011. Whilst that application remained outstanding the Appellant was detained. In detention, he made further submissions to the Respondent. Those submissions are dated 19th July 2013. The Respondent issued with a notice of immigration decision, refusing the submissions but gave the Appellant a further right of appeal. That appeal came before Judge McDade who, in a decision promulgated on 5th September 2013, dismissed the appeal on asylum/Humanitarian Protection and Article 8 ECHR grounds. It is against that decision that the Appellant sought and was granted permission to appeal to us.

The Upper Tribunal Hearing

11. It is appropriate that we mention at this point that two grounds only were put forward in the application seeking permission. Those grounds are,

    i. A legally flawed approach to the Article 8 ECHR consideration.

    ii. Failure to engage with *SM & Anor v SSHD [2013] EWHC 1144 (Admin).*

    The grant of permission to appeal specifically outlines that "*the grounds do not challenge the asylum, Humanitarian Protection or Articles 2 and 3 determination".* It continues, *"Despite the merry-go-round of appeals, it is arguable that inadequate reasons were given for the rejection of the Article 8 claim for the reasons given in the application. All grounds may be argued".*

12. In opening his submissions before us Mr Schwenk said he was seeking to amend the grounds. First, he conceded that ground 2 (the *SM* point) no longer had any force. We accept this concession and that disposes of that matter.

13. His application to amend the grounds is on this basis. The Appellant at the hearing before Judge Irvine was incorrectly found to be an adult. Judge Irvine therefore HAD treated the Appellant as an adult and did not approach the Appellant's evidence with the appropriate caution which is due to a minor. Both Judge Batiste and Judge McDade when dealing with the Appellant's claim, had applied *Devaseelan* and relied upon the adverse credibility findings of Judge Irvine. Relying on the *Devaseelan* principle, those two Judges had made findings that the Appellant's account comprehensively lacked credibility. The Appellant, therefore had never had the benefit of his case being judged as it ought to have been, as a minor applicant. The evidence of his interview, for example, had never been evaluated appropriately. This had led all three Judges to make adverse credibility findings to the prejudice of the Appellant. He sought leave to amend the grounds to include a reconsideration of the Appellant's asylum claim/Humanitarian Protection on this basis.

14. So far as the remaining Article 8 ground is concerned, Mr Schwenk relied in the main on the grounds seeking permission. He expanded on those grounds saying that Judge McDade's reasoning is defective. The Judge had appeared to find evidence of family life between the Appellant and his partner, but having found that appeared to omit steps 2, 3 and 4 of the familiar *Razgar* test. Further there was inadequate reasoning as regards proportionality coupled with a lack of any finding why it would not be unreasonable to expect a British citizen to relocate to Afghanistan with the Appellant.

15. He submitted that if we allowed his application to amend the grounds and we found that the Article 8 issue should be set aside, then the whole matter should be remitted to the First-tier Tribunal for a fresh re-hearing.

16. Mr Diwnycz on behalf of the Respondent opposed both applications. He referred us to paragraph 24 of Judge Batiste's determination in that Judge Batiste said,

> Preliminary Matters
>
> Two issues arose as preliminary matters. Firstly Mr Fuller gave an undertaking that the Appellant would not be returned to Afghanistan as an unaccompanied minor until he reaches his 18th birthday next month. Throughout the hearing I gave careful consideration to the fact that he remained a child. Equally I made due allowance for that fact in assessing his evidence.

17. Mr Diwnycz submitted that, so far as the Article 8 issue which was before Judge McDade is concerned, there was adequate analysis of the evidence. There is only one finding of fact which is that the Appellant has now entered into a relationship of not long duration. He submitted that the Judge could hardly have gone into great detail, because there simply was not detailed evidence before him. The analysis of what evidence there was and the reasons given for dismissing the appeal were adequate. The decision should stand.

Discussion and Consideration

18. We deal firstly with the application to amend the grounds of appeal. We refuse that application for the following reasons. When Judge Irvine made his finding that the Appellant was 18 years of age he nevertheless conducted a full oral hearing and importantly took evidence from the Appellant.

19. Whatever the age of the Appellant (and we bear in mind that relatively there cannot be said to be such a deal of difference in age between a 16 year old and an 18 year old) Judge Irvine was in the best position to determine the relative weight to be given to the Appellant's story and interview record. It is clear to us that he took great care in evaluating the evidence before him. Having taken that care we are satisfied that the Judge's findings are reflective of a proper weight being given to the Appellant's evidence. We are satisfied therefore that the Judge's findings on the credibility of the Appellant would have been the same whether or not the Appellant had been found at that point to be 16 years of age or 18 years of age.

20. We are reinforced in our view on this by the fact that this point was never raised when permission to appeal was sought against Judge Irvine's determination.

21. We are further reinforced in our decision not to allow Mr Schwenk's application, because the appellant had a further appeal before Judge Batiste. That determination shows, as Mr Diwnycz rightly pointed out, that Judge Batiste kept in mind this point when assessing the Appellant's evidence when he said ''throughout the hearing I gave careful consideration to the fact that he remained a child. Equally I made due allowance for that that fact in assessing his evidence.''

22. Having succinctly set out matters in paragraph 26 of his determination, Judge Batiste kept this point at the forefront of his mind when he states in paragraph 26,

> As such at no stage was there any attempt to overturn the findings on the substantive asylum claim to be found at paragraphs 29 to 38 (of Judge Ervine's determination).

Following on from that Judge Batiste states,

> I would not have found the Appellant to be a credible witness even if I was hearing the evidence afresh.

23. We re-emphasise, that in the unsuccessful application for permission to appeal Judge Batiste's determination, the only ground put forward was an Article 8 ECHR one. We conclude therefore there is no basis for permitting an amendment to the grounds of appeal. This disposes of that aspect of the matter.

24. Even if we had granted the proposed amendment, we are not persuaded that the First-tier Tribunal erred in law. Whilst Mr Schwenk is entitled to submit that the Secretary of State only granted leave to remain to the appellant because she accepted the age assessment of a local authority social worker (see [7] above), there is no evidence at all that the Secretary of State expressly agreed with the proposition that the appellant was, as he had claimed, a minor. What is clear is that the appellant has never sought to challenge the determination of Judge Irvine. We simply do not accept that a local authority age assessment, even taken together with the grant to the appellant of leave to remain, should completely and retrospectively undermine Judge Irvine's fact finding for the reasons advanced by Mr Schwenk.

25. What remains is Ground 1. We consider there is merit in the argument advanced by Mr Schwenk on this ground. Whilst Judge McDade properly sets out the five stage test in *Razgar*, we find that the Judge has fallen into error in his inadequate assessment of the evidence of the relationship between the Appellant and his partner. We are mindful that the Appellant's partner submitted a witness statement and we understand attended the hearing. We are hard pressed to find any clear reasoning to show that this evidence has been fully considered. The Judge took note of the witness statement but does not appear to factor it into his reasoning when dismissing the Article 8 claim. For example, the Appellant's partner is a British citizen. The Judge reaches the conclusion that it would not be unreasonable for her to relocate to

Afghanistan. We cannot see the route by which the Judge reached this conclusion. This leads us to the view that the Appellant's case has not been properly tested on the Article 8 issue.

26. We set aside the determination of the First-tier Tribunal. The findings in respect of asylum/Article 3 ECHR/Humanitarian Protection are preserved. The Upper Tribunal shall remake the decision in respect of Article 8 ECHR only at a resumed hearing at Bradford on a date to be fixed."

The Resumed Hearing

2. At the resumed hearing on 24th February 2014, we reminded ourselves that what we are deciding is the 5th question in Razgar namely whether removal of the Appellant to Afghanistan would amount to a disproportionate interference with his Article 8 ECHR family/private life. The Appellant's claim to his Article 8 rights is based solely on his relationship with Tayyaba Sajar. The Appellant attended the hearing and gave evidence before us in the presence of a Pushtu interpreter. We also heard from Tayyaba Sajar.

3. The Appellant's evidence is contained in a witness statement signed and dated 20th February 2014. In that statement he makes reference to two further statements which were submitted as part of his previous asylum application. Those statements are dated 13th October 2011 (K34 to K37) and 29th August 2013.

4. The Appellant claims that since his last appearance before us on 18th November 2013, his relationship with Tayyaba has become stronger. Tayyaba's family have now found out about the relationship and as expected do not approve. He told us that as a result of this, Tayyaba has been beaten up by her brother and has effectively left home. She stays with various friends in the Manchester area, on a temporary basis.

5. He said that added to all this, Tayyaba's younger brother Kamram was fatally stabbed and died on 18th December 2013. Despite all she has been through, Tayyaba has not walked away from him and this shows that she truly loves him.

6. In cross-examination however, a different aspect to the claimed strength of the relationship emerged. When questioned by Mr Spence the Appellant told us that Tayyaba does not work, but that she attends college on Tuesdays and Fridays. He reconfirmed that Tayyaba is living at friends' homes, but did not know the name of the friend with whom she was presently living, nor the address, other than to say it was somewhere in Manchester.

7. He said that he did not visit Tayyaba at her friend's house, because he did not want to create problems. He then said (and we make particular note of this) that he and Tayyaba saw each other "only on Monday nights".

8. The Appellant was then asked by Mr Spence to look at his patient record notes which had been exhibited at an earlier hearing. In those notes at page 13 of 51 date of 22nd June 2011, the Appellant is reported as saying to the Community Nurse that he had "moved in with his girlfriend who is providing for him whilst he waits for asylum" He was asked, is this correct? He responded that it was not true he had not moved in with his girlfriend. He was then referred to page 61 of the notes where he is reported as saying, "he tells me that he was going out with a girl - wanted to marry her so he could get permanent stay in this country (as been advised by his friends)- have recently found out that she has gone back home to get married" was this correct? He responded by saying that his girlfriend had not got married and that he didn't remember any friends advising him in those terms. That concluded his evidence.

9. We next heard from Tayyaba Sajar. Tayyaba told us that she now lives in Manchester but could not remember the address of the property where she is staying. She exhibited a witness statement which she relied upon save for the fact that she lists her family home in Huddersfield as her address. That is no longer correct.

10. She told us that she would describe the Appellant as "her future husband". She said that she felt that he had been there for her against her family. So far as her plans for the future are concerned she said that she needed to find a job, sort everything out and marry the Appellant. She recounted that her family had cut her out of their lives, because of her relationship with the Appellant. She confirmed that her brother Ejaz had beaten her but that she had not made any complaint to the police because it would end up being the worse for her.

11. She was tearful when she told us that her brother Kamran had been fatally stabbed. She said that if the Appellant had not been around, she would have killed herself.

12. Mr Spence asked Tayyaba how often she and the Appellant met. Her response, which we duly noted, amounted to this. She saw the Appellant once a month, although she had seen him on Monday of "last week". She was further pressed on this and was asked to say how often she and the Appellant had met since the last hearing which had taken place on 18th November 2013. Her unequivocal response was "once only".

13. She did say that before the last hearing she and the Appellant used to see one another every Monday evening. They would 'risk' staying at his hostel. This was no longer the case. That completed her evidence.

14. The Appellant's claim is that to require him to remove him to Afghanistan would amount to a breach of his Article 8 ECHR family and private life rights. The central core of his claim is based on his relationship with Tayyaba Sajar.

15. In our assessment, this is a claim where the evidence of the strength of the relationship between the Appellant and Tayyaba, is inconsistent. Firstly the Appellant would have us believe that he and Tayyaba meet regularly on a Monday evening. She would stay with him at the hostel where he lives. When asked by Mr Spence, on this point he gave the clear impression that he and Tayyaba were still meeting one another on Monday nights. Tayyaba on the other hand told us that since the date of the last hearing in November 2013, she had seen the Appellant only once. We accept that according to her evidence she and the Appellant did meet on Monday evenings regularly, before her family interfered with this arrangement. However, this arrangement has now stopped. We accept Tayyaba's evidence that she wishes to continue her relationship with the Appellant; what we are not satisfied about is that the strength of the Appellant's feelings equals those of Tayyaba.

16. Tayyaba is living in Manchester and the Appellant in Huddersfield. Those two places are not a world apart. The train journey between Huddersfield and Manchester takes about 30 to 40 minutes. Yet they have met only once, in the last three months. We heard of no good reason why they should not meet up, even if Tayyaba could not stay the night.

17. The Appellant portrays himself as a man who is much in love and wishes to marry Tayyaba. His actions (or rather lack of them) do nothing to satisfy us of the strength of his claimed feelings. He does not even know of the address where Tayyaba is staying. There was little evidence of contact between them.

18. We take into account the evidence contained in his personal medical notes and whilst we accept that Tayyaba genuinely believes that she and the Appellant have a future together, we are not drawn to the same conclusion about the Appellant's feelings or commitment to the relationship. It strikes us as a one sided one.

19. We conclude therefore that the strength of the claimed relationship does not assist the Appellant in the proportionality assessment. No other evidence was put forward to show an interference with his private /family life other than the fact that he has been in the UK since February 2009. That we discount as there was nothing exceptional put forward about that period of time.

20. For the foregoing reasons we are not satisfied that the appellant has shown that his removal to Afghanistan would amount to a disproportionate interference with his Article 8 ECHR rights.

21. The findings in respect of the Appellant's asylum/Article 3/humanitarian protection claims were preserved at an earlier hearing before us. We confirm that his claims on those grounds remain dismissed.

Decision

22. We set aside the decision of the First–tier Tribunal. We remake the decision, dismissing the Appellant's appeal on asylum/Article 3/humanitarian protection and Article 8 ECHR.

    Appeal dismissed

No anonymity direction is made.

Signature **Dated**
Judge of the Upper Tribunal