



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/03575/2014**

Appeal Number:

THE IMMIGRATION ACTS

Heard at: Birmingham
On: 17 November 2014
2015

Decision Promulgated:
On: 19 January

Before

Upper Tribunal Judge Pitt

Between

**SA
(Anonymity Order Made)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr M Blundell, instructed by Malik & Malik Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Afghanistan and was born in 1996.
2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper

Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I make the order so as to prevent a likelihood of serious harm arising from the facts of the appellant's protection claim.

3. This is an appeal by the appellant against the determination dated 10 July 2014 of First-tier Tribunal Judge Andrew which refused his protection and Article 8 appeals.
4. The challenge before me was restricted to the appellant's Article 8 claim. It remains expedient to set out here a summary of the appellant's protection claim as it is relevant to the Article 8 claim. The appellant's account was accepted as credible in its entirety by Judge Andrew; see [16] of her determination.
5. The appellant's father was a member of the Taliban. After his father's death the Taliban took steps to recruit the appellant as a suicide bomber. Although still very young, the appellant was taken to a Taliban camp but refused to assist them and was returned home after 3 days. His mother and uncle, fearing further adverse interest from the Taliban, arranged for the appellant to come to the UK. His date of entry to the UK is not known but he claimed asylum on 3 September 2009 when he was only 13 years old. On 2 December 2009 his protection claim was refused but he was granted discretionary leave to remain until 1 December 2012. On 30 November 2012 he applied in time for further leave. That application was refused on 14 May 2014 and the refusal gave rise to these proceedings.
6. The appellant brought three grounds of appeal against Judge Andrew's refusal of his Article 8 claim. In summary:
 - (i) Inadequate reasons for a finding that the appellant's family life with his foster carer and his family was only "akin" to family life and insufficiently strong to render removal disproportionate.
 - (ii) No clear finding on the appellant's contact with his family in Afghanistan
 - (iii) Absence of weight given to the respondent's failure to carry out her tracing duty
7. The first ground appeared to me, albeit stated to be a challenge to the adequacy of reasons, to be a disagreement with the decision of the First-tier Tribunal and one that could only succeed where the position taken by Judge Andrew was outside the range of responses

reasonably open to her.

8. The grounds contend that Judge Andrew's statement at [33] that the appellant's relationship was "almost akin to a family life in that he regards Mr S as a father figure" and at [34] that the relationship amounted only to "strong ties" were inadequate as they failed to deal with the clear evidence before her from the appellant and his foster carer that they had a relationship that was a family life.
9. The statements at [33] and [34] must be read in the context of the decision as whole, however. At [20] to [26] Judge Andrew considered the evidence before her concerning the appellant's maturity and ability to live as an independent adult. Part of that consideration specifically addressed the foster carer's evidence on his relationship with the appellant; see [22]. I accept that this part of the determination is concerned with the appellant's protection claim and whether the appellant could live as an independent adult in Kabul. It remains the case that the evidence contained in expert reports on the appellant was at odds with the view of the foster carer; see [23]. Judge Andrew concluded at [26] that "[t]he picture emerges of quite a capable young man with no particular physical or psychological vulnerability" and someone who could reasonably be expected to return to live alone in Kabul. In my view Judge Andrew's consideration of this evidence was relevant to her Article 8 consideration and to her finding that there the appellant, an adult at the time of the hearing before her, did not have a family life with his foster carer.
10. When the statements at [33] and [34] are read together with the consideration at [20] to [26] it is not my judgement that Judge Andrew can be said to have erred in failing to address the evidence of the appellant with his foster carer as to their having a family life. Further, given the evidence before her it cannot be said to have been perverse to conclude that the appellant did not have that family life.
11. Also, Judge Andrew did apportion weight in the appellant's favour arising from the relationship nevertheless, stating at [33] that the relationship with the foster carer formed "a significant part" of the appellant's private life and its strength being acknowledged at [33] and [34]. The force of this ground is further undermined where the relationship was given that weight, albeit characterised as part of a private life rather than a family life.
12. This ground also queries the comment of Judge Andrew at [34] that foster care "is always intended as temporary and this would doubtless have been well known to both carer and the care for" I accept that this comment is somewhat problematic. Even if foster

care is temporary this does not always preclude a relationship formed in a foster care situation from amounting to a family life for the purposes of Article 8. It remains the case that in the light of the evidence regarding the appellant's maturity and independence which Judge Andrew gave reasons for preferring, her finding that there was a strong relationship but not one amounting to a family life was open to her and is sustainable.

13. The findings at [26] that the appellant was "a capable young man with no particular physical or psychological vulnerability" and was someone who could reasonably be expected to return to relocate to Kabul also undermine the second ground of appeal concerning the absence of a clear finding of there being any contact with the appellant's family since he left Afghanistan. The appellant is now an adult and it is not disputed that he no longer faces harm on return to Kabul such that he requires any form of international protection. Would a positive finding that he has lost all contact with his family have made a material difference to the Judge Andrew's Article 8 proportionality consideration? Given her comments on the appellant's maturity and independence it did not appear to me that the outcome of the appeal would have been any different. That is so regardless of the comments made by Judge Andrew at [29] as to her scepticism concerning contact with the family after the appellant came to the UK.
14. The third ground seeks to introduce into the Article 8 proportionality assessment the principles arising from case law concerning the respondent's failure to comply with her tracing duty, that tracing duty arising from Regulation 6 (1) of the Asylum Seekers (Reception Conditions) Regulations 2005 (Regulation 6).
15. The relevant line of case law began with DS (Afghanistan) v SSHD (2011) EWCA Civ 305 and developed further in KA (Afghanistan) v SSHD [2012] EWCA Civ 1014 and EU (Afghanistan) v SSHD [2013] EWCA Civ 32. I note, in particular, the comment of the Court of Appeal at [7] of EU that "the failure to endeavour to trace may result in a failed asylum seeker, who may in consequence lose contact with his family, putting down roots here and establishing a valid Article 8 claim."
16. It is correct that when conducting her Article 8 proportionality assessment Judge Andrew did not address the respondent's failure to comply with her tracing duty as part of the December 2009 decision which refused the appellant's asylum claim but granted discretionary leave. The best that can be said is that Judge Andrew referred to that earlier failure at [27] to [30] only when considering the appellant's renewed asylum claim. There are a number of reasons why I do not

consider a material error arises, however.

17. Firstly, it was not the earlier decision from December 2009 that was before Judge Andrew. The appellant could have challenged the failure to trace at that time but did not. In the respondent's decision dated 14 May 2014 that was under appeal here, paragraphs 31 to 48 show that the respondent had, by then, endeavoured to trace the appellant's family. Even if there is force in the submission that the "failure to trace principle" set out in the cases listed above should be extended so as to afford positive weight for an applicant in an Article 8 assessment, it seems to me it must carry less weight where the specific decision under appeal shows the respondent has complied with her duty, albeit she did not do so in a previous decision.
18. Further, as above, it was clearly Judge Andrew's view that this appellant was mature, independent and sufficiently in touch with Afghan culture such that return to Kabul would not be disproportionate even when weighed against the "strong" relationship with his foster family and links built up since coming here at the age of 13 years old. As indicated by the Court of Appeal, a failure to trace may lead to a situation where an individual establishes a private and family life of sufficient strength to make return disproportionate. That was not the view of the First-tier Tribunal here and a fair reading of the decision does not indicate that this appellant, given the aspects of his profile found by the First-tier Tribunal, could have succeeded under Article 8, notwithstanding a positive application of the "failure to trace principle".

DECISION

19. The decision of the First-tier Tribunal does not contain an error on a point of law and shall stand.

Signed: 
Upper Tribunal Judge Pitt

Date: 18 December 2014