



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/37119/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26 January 2015

Decision & Reasons Promulgated  
On 9 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A. A.  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr S Jaisri, Counsel instructed by Crown & Mehria Solicitors

For the Respondent: Ms L Kenny, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Afghanistan born on 1 January 1995. He came to the UK as a boy of 14 or so and claimed asylum. The asylum claim was made on or about arrival and it was ultimately refused by the Respondent on 9 April 2010. The Respondent made no removal decision at that stage however. Instead, in line with then policy, she granted him a period of discretionary leave to remain until 30 June 2012. Within time, the Appellant applied for an extension of that leave, or rather a variation of it, on the basis of his asylum claim. There were then further immigration

decisions made by the Respondent in relation to the Appellant on 28 August 2013. The decisions were twofold. A decision to refuse to vary leave to remain, and a decision to remove to Afghanistan. Both of those decisions were immigration decisions and as such the Appellant appealed against them both.

2. His appeal hearing was heard by Judge Clapham on 23 September 2014. In the course of the decision promulgated on 14 October 2014 the Tribunal dismissed the asylum claim and dismissed the appeal under the Immigration Rules. There is no challenge by the Appellant to the judge's decision in relation to the asylum claim or the Article 3 claim.
3. The judge did, however, allow the appeal on Article 8 grounds and it is that decision which was challenged by the Respondent in an application for permission to appeal which was granted by Judge T R P Hollingworth on 5 December 2014. So the matter comes before me today.
4. It is accepted now (although it was not accepted before the Tribunal below) that the Appellant could not and cannot succeed under either paragraph 276ADE or Appendix FM. The Appellant's Article 8 claim is limited to his private life. It was based on friendships that he had made since his arrival in the UK and the studies that he had undertaken and in particular the relationship that he had formed with a young woman who was described as his girlfriend. It was not suggested that the young couple cohabited, or that they were formally engaged.
5. The decision of the judge made no formal reference to Section 117A or Section 117B of the 2002 Act, although his decision post dated 28 July 2014. It is possible, however, in paragraph 50 to see that there was reference to the public interest in the maintenance of effective immigration controls and although there is no express reference to Section 117B(1) in my judgment that is a complaint of no substance, because it is plain that the judge had in mind the operative part of that Section.
6. Where the judge does appear to have gone badly wrong in my judgment is his failure to consider sub-Sections (4) and (5) and the distinction that must exist between them. In my judgment the Appellant's status as one with a grant of discretionary leave to remain was a "precarious" immigration status. Therefore sub-section (5) was operative and little weight should have been given to the private life he had established during that time. The judge appears to have equated "precarious" with "unlawful" from the comments that he made in paragraph 51 of the decision and in doing so I am satisfied he made an error of law.
7. I am also satisfied that that error of law is material because it infects the whole of the context in which the judge considered the proportionality of the removal decision, considering as he was an Article 8 appeal outside the Immigration Rules under Razgar principles. What he had before him was the not uncommon situation where a young man with the benefit of a period of leave had gained qualifications, had gained a fluency in English of some degree, (the judge described it as reasonable proficiency in English) and had formed a relationship with a girl. That relationship was not, however, of the quality of an engagement to be married, still less was it a

marriage. The judge made no findings even as to its length, although that was no doubt dealt with in the witness statements before him.

8. The position is in my judgment, applying the guidance to be found in MM (Lebanon) [2014] EWCA Civ 985 that his Article 8 appeal fell to be considered in the context of his inability to satisfy the Immigration Rules at the date of the hearing (or today) for a grant of leave to remain as a fiancée, or as an unmarried partner. He was plainly able to make an application for entry clearance from Afghanistan, if so advised, with the support of his girlfriend. That was a matter for another day if indeed he ever made that application from outside the country. It was not suggested before the judge, and therefore it was not open for him to find, and he did not find, that no such application for entry clearance could ever succeed. Accordingly, taking everything in the round, in my judgment the decision on the Article 8 appeal has to be set aside and remade so as to dismiss the human rights appeal.

#### Notice of decision

The Determination did contain an error of law in the decision to allow the Article 8 appeal, which requires that decision to be set aside and remade. I remake that decision so as to dismiss the Article 8 appeal.

#### Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge J M Holmes

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge J M Holmes