

JD

Heard at Field House on:
21 October 2003

MS (Article 8:family life –
Extended family) Afghanistan
[2003] UKIAT 00132

Prepared on:
21 October 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified: 6/11/2003

Before
e

MR H J E LATTER (CHAIRMAN)
MR RICHARD CHALKLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

*Ms T Hart, Senior Home Office Presenting Officer, appeared on behalf of the Appellant.
Mr J Patel, Counsel, instructed by Malik & Malik, Solicitors, appeared on behalf of the Respondent.*

DETERMINATION AND REASONS

1. The Appellant is the Secretary of State for the Home Department. The Respondent is a citizen of Afghanistan.
2. The Appellant, appeals, with leave from the Tribunal, against the decision of an Adjudicator, Mr John S Law, who in a determination promulgated on 2 May 2003, following a hearing at Walsall on 11 April 2003, allowed the Respondent's appeal against the decision of the Appellant taken on 25 January 2003, to refuse to grant leave to enter.

3. The Adjudicator dismissed the Respondent's appeal on asylum grounds and on the grounds that the Respondent's rights under Article 3 of the ECHR would be breached, but allowed the appeal under Article 8 of the ECHR. However, the Adjudicator was of the opinion that there would be a disproportionate interference with the Respondent's family life with members of his extended family. The grounds of appeal challenge the Adjudicator's findings that there would be a breach of the Respondent's family life within Article 8 (1) since the Respondent's immediate family, namely his wife and children, would be removed with him.
4. Ms Hart relied on the grounds of appeal and pointed out that in paragraph 19 of the Adjudicator's determination he found that there would be no breach of Article 3. However, in paragraph 21 (1) the Adjudicator finds that the majority, if not all of his family members are now within the United Kingdom and to remove him together with his wife and children from the Respondent's extended family would be an interference with his life. At paragraph 21(4) the Adjudicator said that within the extended family:-

'that appears in evidence in this case there has been a lack of proportionality in the individual members that have been dealt with by the immigration authorities.[sic] Whilst each case turns upon its own individual elements, it is clear that the fears that have been espoused by all family members relate to their ethnicity and to their religion. The family are bound together by such elements and in this case it would be wholly disproportionate for the United Kingdom to return the family group, in particular the [Respondent].'

What the Adjudicator did, was fail to recognise that the Respondent's family within the context of Article 8(1) comprised the Respondent, his wife and his two children. While there are family members within the United Kingdom, the Respondent does not enjoy a family life with them. She referred us to a decision of the Tribunal in **Pubanesparan [2002] UKIAT 04476** in which at paragraph 10, the Tribunal said:-

'In our view this was a decision properly open to the Adjudicator. When the relationship relied upon is not a close family relationship such as husband and wife or parent and child, but between adults such as brothers and sisters who are adults, there would have to be special circumstances before it was shown that there was a family life within Article 8 (1) as contemplated by the Treisberg jurisdiction or sufficient elements of private life to establish a protective right'.

5. She invited the Tribunal to dismiss the appeal.
6. Mr Patel acknowledged the question for the Adjudicator to ask was whether family life had been established. He acknowledged that mere blood relationship was not sufficient. In paragraphs 1 and 8 of the determination, the Adjudicator named several of the Respondent's family relatives in the United Kingdom. Four are

mentioned in paragraph 1 and two are mentioned in paragraph 8. The Adjudicator records that there is now an intimate family grouping of family members from the Respondent's extended family in the United Kingdom. He found the Respondent to be a credible witness and at paragraph 21(iv) demonstrates that he clearly considered the evidence before him. The Adjudicator was faced with a Respondent whose other individual family members have been allowed to remain in the United Kingdom, one of them as recently as January 2003. It is clear from paragraph 21(1) that the Appellant indicated that there would be no forcible return to Kabul if it is thought appropriate in the circumstances of the case and on the face of it the Adjudicator obviously felt that it was unfair that this family were being treated differently from other extended family members. The Tribunal pointed out to Mr Patel that it did not know the full circumstances of the other extended family members and were not, therefore, able to make any assessment on this point. Mr Patel indicated that the reasons why other family members were present in the United Kingdom were very similar to the Respondent's own reasons for coming here.

7. We indicated to Ms Hart that we did not need to trouble her to address us further. We reserved our determination.

8. We have decided that we must dismiss this appeal and now give our reasons for doing so.

9. Article 8 provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessarily in democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10. In **Navaratnam Kugathas [2003] EWCA Civ 31**, Lord Justice Sedley said, at paragraph 19:-

'Returning to the present case, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves, or together, in my judgement enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and the purpose of Article 8'.

11. In paragraph 20 of his determination the Adjudicator correctly said:-

'Under Article 8 I have to determine the following separate questions:-

- (i) Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?*
- (ii) Is that interference in accordance with the law?*
- (iii) Does that interference have legitimate aims?*
- (iv) Is the interference proportionate in a democratic society to the legitimate aim to be achieved?'*

12. He then went on in paragraph 21 (1) to say:-

'The [Appellant] has indicated that there will be forcible return to Kabul if it is thought appropriate in the circumstances of this case. With regard to the [Respondent] and his family, it has been stated that the majority, if not all of his family, are now within the United Kingdom and to remove him with his own family from the extended family would be an interference to his rights. Evidence has been brought by family members that there has been a system whereby extended and indefinite leave has been made available to other family members within the group whose position, therefore, is that they can remain within the United Kingdom for a definite or indefinite period of time.'

13. In paragraph 21 (2) he found that the United Kingdom's action, 'in seeking to remove the [Respondent]' is in accordance with the law and has a legitimate aim of maintaining immigration control and in paragraph 21 (3) found that the interference had legitimate aims, 'namely to prohibit illegal immigrants, but also to maintain immigration controls which are an accepted element required for the protection of disorder or crime'. He then said in paragraph 21(4):-

'With regard to the [Respondent's] claim the issue of proportionality must take centre stage in any assessment under Article 8. The United Kingdom is entitled to impose and interpret both conventions, but, more importantly, the 1951 convention in dealing with its valid and legal immigration controls. However, within the extended family that appears in evidence in this case, there has been a lack of proportionality in the individual members that have been dealt with by the immigration authority. Whilst each case turns upon its own individual elements, it is clear that the fears that have been espoused by all family members, relate to their ethnicity and to their religion. The family are bound together by such elements and in this case it would be wholly disproportionate for the United Kingdom to return the family group, in particular the [Respondent]. I can see no legitimate aim that would be achieved by such action.'

14. As the Tribunal have said on numerous occasions previously, the correct approach when considering a claim under Article 8, is to adopt that used by the European Court and to analyse the claim, using a logical step-by-step approach. The first question that must be asked is whether there is an existent or private or family life? This the Adjudicator did not do. Had he asked himself this question,

he could only have concluded that there was not. The Appellant does enjoy a family life with his wife and children, but the decision of the Appellant does not interfere with that. The relationship relied upon by this Respondent is not a close family relationship but one between adults. There were no special circumstances before this Adjudicator that demonstrate that there was a family life within Article 8 (1) as contemplated by the Strasbourg jurisdiction or sufficient elements of private life to establish a protected right. This Appellant arrived in the United Kingdom on 26 July 2002.

15. For all these reasons we find that the Adjudicator was wrong to allow the Respondent's appeal and we therefore allow the appeal of the Secretary of State.

Richard Chalkley
Vice President