Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33243/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 3rd March 2014	**On 28th March 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL KABIR NASSERI

Respondent

Representation:

For the Appellant: Mr M Diwnycz
For the Respondent: Mrs R Frantzis, Counsel, instructed by Howells Solicitors LLP

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Shimmin made following a hearing at Bradford on 7th January 2014.

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Background

2. The claimant is a citizen of Afghanistan, born on 20th October 1975. He applied for leave to remain in the UK on the basis that he was in a relationship with an unmarried partner of a British national, Ruth Elizabeth Wood, since January 2013 and had been residing with her since February 2013, but was refused on the following grounds. As the couple had only been residing together for five months at the date of decision the claimant did not meet the requirements of paragraph GEN.1.2 of Appendix FM. He claimed to live with his partner and stepdaughter but did not have parental responsibility for her and failed to fulfil paragraph E-LTRPT.2.3. He also failed to meet the eligibility requirements and therefore could not benefit from the criteria as set out in EX1 and failed to meet the requirements in respect of private life under Article 8 under paragraph 276ADE.

3. The judge set out the law and the oral evidence. Since the date of decision the claimant had married at the Sheffield Registry Office on 23rd October 2013 and as at the date of hearing they had been living together for eleven months.

4. The judge recorded that the claimant had had a complex immigration history, including a claim on the basis of a previous British partner. He found that the claimant's marriage to his previous partner was not valid under UK law and there is no challenge to that aspect of his decision.

5. The judge accepted that he was in a genuine and subsisting relationship with his present wife and again his findings are not challenged.

6. He then wrote as follows:

> "32. I find that the Appellant does not have to meet the financial requirements under E-LTRP because he meets the requirements of EX.1 (E-LTRP.3.1(c). Namely, he is in is genuine and subsisting relationship with a British citizen. Miss Birtles accepts that Fauzia (formerly Ruth Wood) a British citizen with British citizen children. She would not be expected to leave the UK and did not argue that no insurmountable obstacles exist. After considering all the evidence before me, and the absence of submissions from the Respondent, I find that there are insurmountable obstacles to family life with the Appellant continuing outside the UK."

He allowed the appeal under the Immigration Rules and on general Article 8 principles.

The Grounds of Application

7. The Secretary of State sought permission to appeal in the following terms:

> "It is respectfully submitted that the Tribunal has failed to provide adequate reasons for the finding that the Appellant is in a genuine and subsisting relationship in accordance with the Immigration Rules and why he does not

need to meet the financial requirements under the Rules. It is submitted that at the date of his application he and his wife were not married and had not been in a relationship akin to marriage as they had only resided together for five months at the date of decision and still have only resided together for a total of eleven months at the date of decision. It is submitted that the Appellant did not meet the requirement of the Immigration Rules at the date of decision and the Tribunal has failed to provide adequate reasons why it would be disproportionate to require him to return to Afghanistan to seek entry clearance to return given that he does not meet the Rules, has been able to return to Afghanistan for an extended period without any difficulties and his wife would be able to continue to care for her child as she was able to do before her relationship with the Appellant."

8. Permission to appeal was granted by Judge Kimnell for the reasons stated in the grounds on 28th January 2014.

Submissions

9. Mr Diwnycz relied on his grounds and on the case of Sabir (Appendix FM - EX1 not freestanding) [2014] UKUT 00063. He did not seek to argue that the judge's findings with respect to the relationship were not open to him.

10. Miss Frantzis submitted that the claimant could successfully navigate through the relevant Rules and rely on the exception as set out in EX1.

Findings and Conclusions

11. Under the definitions section of Appendix FM - Family members GEN.1.2 for the purpose of this appendix partner means –

"(i) the applicant's spouse;

(ii) the applicant's civil partner;

(iii) the applicant's fiancé or proposed civil partner; or

(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless the context otherwise requires."

12. As at the date of the hearing, the couple had married. Miss Frantzis initially sought to argue that, in reliance on Section 85.4 of the Nationality, Immigration and Asylum Act 2002, on an appeal under Section 82.1, 83.2 or 83.A2 against a decision, the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision including evidence which concerns a matter arising after the date of decision. She submitted that since the claimant was now a spouse, he met the definition of Family member.

13. However Section 85.4 does not avail the claimant. The fact of the marriage is a factor which could be taken into account as evidence of a genuine and subsisting relationship but the decision before Judge Shimmin was whether the Secretary of State had made a decision in accordance with the law and the Immigration Rules. An applicant does not succeed by showing that he now meets the requirements of the Rules. He can only succeed by showing that he met the requirements of the Rules at the time that the decision was taken.

14. As at that time the claimant did not meet the requirements for limited leave to remain as a partner as defined and therefore could not benefit from paragraph EX1 which is not a freestanding requirement in the Rules and is accessible only to those who have "successfully navigated their way through the second of the alternative routes through R-LTRP" (Sabir)

15. Since EX1 is parasitic on a Rule within Appendix FM and the claimant could not meet the substantive requirements in relation to partner of Appendix FM, the judge erred in his conclusion that the appeal should have been allowed under the Immigration Rules.

16. His decision is set aside.

17. However Mr Diwnycz did not seek to argue that it would be proportionate for the claimant to be removed. On the undisturbed findings of the judge he was in a genuine marriage and living with a British citizen spouse and British citizen stepchild. It was not argued by the Presenting Officer below or by him that there were not insurmountable obstacles to the mother and child relocating to live in Afghanistan, given that the claimant met the substantive requirements of paragraph EX1. He accepted that the appeal ought to be allowed on Article 8 grounds.

Decision

18. The judge erred in law. His decision is set aside. It is remade as follows. The appeal is dismissed under the Immigration Rules. It is allowed with respect to Article 8.

Signed Date

Upper Tribunal Judge Taylor