Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45697/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 29 May 2014	**On 2nd June 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

BESHAR AHMED BHARAM (previously recorded as Begar Ahmed)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate instructed by Maguire, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant is a citizen of Iraq, born on 4 May 2012. He appeals against a determination by First-tier Tribunal Judge Wallace, dated 3 February 2014.

2) The appellant's grounds are as follows:

The appellant's case focused on Article 8, ECHR. He is living with a British national. She has an 8 year old son from a previous relationship. She is pregnant with the appellant's child. The Judge accepted that there was a genuine and subsisting relationship at paragraphs 48 and 51 of the determination. The Judge refused the appeal on the basis that as the appellant's immigration status was precarious this emphasised a distinctly weak basis for any claim to family life sufficient to overcome the public interest in maintaining proper immigration control (see paragraph 49) and the Judge found that there cannot be a foundation for family life as the appellant's immigration status has, from the outset of the relationship been precarious (see paragraph 52). It appears the Judge found it proportionate for the appellant to return to apply for entry clearance. There was no suggestion by the Judge that it would be reasonable for the appellant's wife and child to relocate. It is respectfully submitted that the Judge has erred in law:

(i) by failing to identify or apply the correct legal principles in the correct manner as enunciated in *Secretary of State for the Home Department v Hayat and Treebhowan [2013] Imm AR 15, [2012] EWCA Civ 1054* at paragraph 30. In particular the Judge failed to identify the correct question by asking whether there was a sensible reason for requiring the appellant to return to apply for entry clearance. The Judge failed to identify relevant factors in assessing whether it was sensible for the appellant to return to apply for entry clearance. Such factors include the prospective length and degree of disruption and whether other family members are in the UK. Had the Judge identified these, it would have been found that the appellant's partner is in the UK and is British and that under the Immigration Rules the separation between the appellant and his partner is likely to be longer than 6 months in light of the fact that 6 months wage slips are required under the Immigration Rules. There would then be further time needed to make the entry clearance application and for that to be decided. Such a time limit has been found to be a factor in making return to apply for entry clearance disproportionate (see *Kotecha v Secretary of State for the Home Department [2011] EWHC 2070 Admin* at paragraph 59 per Mr Justice Burnett.) The appellant would not be able to support his partner who is pregnant with his child whilst outside of the UK. Further other relevant factors include whether the appellant's ties with the UK are strong such as the appellant's partner's nationality as a British national, as is her 8 year old son, and it is not being suggested that marriage between the appellant and his partner would not give the appellant the right to remain in the UK (see *Kotecha* at paragraph 60.) As per *Kotecha*, the foregoing factors are demonstrative of exceptional circumstances and there would be unjustifiably harsh consequences in terms of the length and degree of separation between the appellant and his partner. If it is said that the Judge did take account of these factors, the Judge has erred by failing to explain how these factors have been assessed in reaching the decision. If it is said the Judge has given adequate explanation, the Judge erred by reaching an irrational decision;

(ii) on the hypothesis that the Judge's decision is to be read as also finding that it would be reasonable for the appellant's partner and child to relocate to Iraq, it is respectfully submitted that the Judge erred in law. The Judge has failed to assess the best interests of the child as a primary consideration in examining whether relocation would be reasonable in light of various case law. The Judge has also failed to assess the weight to be given to the appellant's partner's nationality and length of residence in the UK. Such factors are weighty factors and the Judge ought to have taken those into account in assessing whether relocation

would be reasonable. Failure to take these relevant factors into account is an error of law. Had the Judge taken these factors into account she would not have reached the decision she did.

3) On 24 February 2014 First-tier Tribunal Judge Saffer granted permission to appeal, observing as follows:

> The grounds are arguable as it is unclear what finding was made regarding whether from the appellant's point of view the relationship was genuine, as there appears to be have been no consideration given to the best interest of Laura's child, and as the judge appears to have found the "precarious" nature of his immigration status when entering the relationship to be determinative as opposed to a factor.

4) The SSHD responded to the grounds of appeal under Rule 24 in the following terms:

> 3 … these grounds disclose no material arguable errors of law capable of having a material impact upon the outcome of the appeal.
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> 4 The grounds advanced are in mere disagreement with the negative outcome of the appeal. Although it is arguable that the FTT Judge did [not?] give express consideration to the best interests of the sponsor's 8 year old child, he also considered the best interests of the sponsor's unborn child. (Paragraph 44 determination). At paragraph 43 of the determination the FTT Judge considered how the sponsor's son would be affected if the appellant were removed as the appellant was one of two father figures in the child's life (along with the sponsor's father) but made the reasonable sustainable finding that the appellant's mother, aunts, cousins and grandparents will still remain in his life.
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> 5 Moreover, it is submitted that given the facts:
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> (a) the appellant had only met the sponsor 10 months ago (paragraph 35 determination);
> (b) there was limited evidence of a relationship and no joint utility bills (paragraph 40);
> (c) that the appellant knows little English (paragraph 42)
>
> … that any omission by the FTT Judge in this regard is not a material error capable of having a material impact upon the outcome of the appeal.

5) Mr Mullen submitted that the judge made findings which were adequate to support the conclusion reached. He argued that the grounds were framed on the assumption that the judge decided the case on the basis that the appellant could seek entry clearance from Iraq, but that was not a fair reflection of the determination. The judge said at paragraph 39 that it was common ground that the appellant could not meet the requirements of the Immigration Rules. The only other reference was at paragraph 50, where the judge said that the appellant's partner would support an application for him to return as her spouse. If he could not meet the Rules in any event, that was neither here nor there. The findings might be brief, but the judge had reached the only conclusion properly open to her.

6) I advised parties of my finding that the determination errs in law, and would have to be set aside. There is a no clear finding on whether this is a genuine relationship on the part of the appellant. The judge says at

paragraph 52 that there can be no foundation for family life because the appellant's immigration status has been precarious from the outset. A precarious immigration status will always be a significant factor in the proportionality balance, but that (i) does not mean that family life cannot exist for Article 8 purposes and (ii) is not determinative. (There is also an absence of explicit consideration of the best interests of the 8 year old child, the son of the appellant's partner, although that by itself might not require the determination to be set aside.) Thus there is deficiency in findings on the primary facts, and error of legal approach, such that the determination cannot stand.

7) The hearing proceeded with the view to reaching a fresh decision. Circumstances have changed significantly since the First-tier Tribunal hearing.

8) The appellant and his partner, Laura Urquhart, have a daughter, Marley Beshar Bharam, born on 1 May 2014. His partner also has an 8 year old son from a previous relationship. Those 3 parties are all UK citizens. The appellant and Ms Urquhart intend to marry, but no date has yet been fixed. The appellant could not succeed on an application based on family life within the Immigration Rules, due to inability to meet the financial requirements. This is not a *Chikwamba* case – there is no prospect of an entry clearance application from abroad succeeding within the Rules, and any Article 8 consideration outside the Rules may be carried out at least as readily in the UK as by an Entry Clearance officer. Those matters are all common ground.

9) Mr Mullen suggested that the appellant could reasonably be expected to make further representations to the respondent, which would lead to a fresh decision based on his up-to-date circumstances. Mr Winter submitted that the Upper Tribunal should resolve the Article 8 issue on its merits, there being no need for further factual investigation by the respondent or by a Tribunal. I prefer Mr Winter's submission. There is no good reason for the Upper Tribunal not to resolve the Article 8 ground of appeal before it, based on a factual position which is essentially agreed.

10) The appellant's partner and child, and the older child, cannot be expected to leave the UK. The alternative of family life in Iraq does not arise for consideration. The consequences of removal would be to sever present family relationships. Those are arguably good grounds for granting leave to remain outside the Rules and the question becomes whether they constitute compelling circumstances not sufficiently recognised under the Rules – in other words, the case arrives at the proportionality assessment in terms of question 5 in *Razgar*.

11) The factors against the appellant are his adverse immigration history, which is poor but far from the worst; inability to meet the financial requirements of the Immigration Rules; the fact that relationships were

formed while status was precarious; and the general public interest in enforcing the Rules.

12) Section 19 of the Immigration Act 2014 regarding Article 8 of the ECHR and public interest considerations has not yet been brought into force. If and when it is, the 2002 Act will be amended by insertion of section 117B(6):

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
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> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

13) Although not yet in force, I think that is a valid reference for where the public interest lies, and it reinforces my conclusion on where the proportionality balance should be struck.

14) The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appellant's appeal, as originally brought to the First-tier Tribunal, is **allowed under Article 8 of the ECHR**.

30 May 2014
Judge of the Upper Tribunal