Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04186/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th April 2017	**On 3rd May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JAMIL TOKHI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Ms H Masood of Counsel instructed by Law Dale Solicitors

DECISION AND REASONS

1. I shall refer to Mr Jamil Tokhi as the Claimant. He was the Appellant when he was successful in his appeal before Judge Trevaskis who promulgated his decision on 19th August 2016.

2. I summarise the Secretary of State's grounds in the following way. The judge misdirected himself in finding that the Claimant met the terms of GEN1.2 in Appendix FM. The parties had not been living together for at least two years prior to the date of the application. Furthermore, the

judge erred in finding that there existed "insurmountable obstacles" to such family life continuing in Afghanistan.

3. Permission to appeal was initially granted in a limited way by First-tier Tribunal Judge Gibb but Upper Tribunal Judge Kopieczek concluded that there was no limit to the presented grounds that might be argued as set out by the Secretary of State. No formal Rule 24 notice was lodged on behalf of the Claimant although I was referred to two bundles, one relating to the documentation that was before the judge and the second bundle supplying supplementary documents in the event that an error was found and the decision had to be set aside and remade.

4. For the Secretary of State Mr Bramble relied on his grounds.

5. The judge had been wrong to find that there were insurmountable obstacles for the Claimant if he were to be returned to Afghanistan. Wholly inadequate reasons had been given to support a finding that the threshold of EX.1 was met. What the judge should have done was to engage with an Article 8 assessment outside the Rules but he had failed to do that. The decision should be set aside and sent back to the First-tier Tribunal for a rehearing.

6. In response to submissions from Counsel for the Claimant and to an observation from me he said that the judge had not decided the case under Article 3 ECHR. The judge had only said that it was "likely" to amount to a breach of Article 3 ECHR in paragraph 36. The test of insurmountable obstacles had not been satisfied.

7. For the Claimant Ms Masood accepted that the judge had not been entitled to find that the Claimant and Mrs Said had been living together in a relationship akin to marriage for at least two years prior to the date of application – that was simply wrong. However it was not a material error because at the date of hearing the parties had been living together for two years, and as such the judge could have simply gone on to allow the appeal under Article 8 ECHR. Furthermore, for reasons given by the judge, there were insurmountable obstacles to the Claimant and his partner returning to Afghanistan. Perhaps the judge had been quite generous in his findings that there was a breach of Article 3 ECHR but that was a long way from concluding he had made a material error of law and he had given his reasons. There was no material error of law and the decision should stand.

Conclusions

8. It can readily be said that the decision of the judge is not an ideal one. For example, in paragraphs 24 to 29 he refers to various jurisprudence without indicating its significance to this particular appeal; the decision does not benefit from copious citation of authority. He found that they qualified under Appendix FM because he concluded that the relationship began with their first face to face contact (paragraph 32) but, as both parties pointed out, the wording of the Rules is that they had to be *living together* for at least two years prior to the date of application which plainly they had not

been. The reference to "Bangladesh" in paragraph 36 is unfortunate and was plainly an error. Similarly, his findings on a private life were that the Claimant satisfied the requirements of 276ADE but it is difficult to conclude that the judge was correct to find that there were obstacles to his integration given he had spent most of his life in Afghanistan.

9. The Secretary of State challenges the findings that the claimant succeeds under the Immigration rules but it seems to me to be important to look at what the judge actually stated. What he said in his conclusion was that he was allowing the appeal on human rights grounds (paragraph 40). This does not refer to Article 8 as the judge said he had not gone on to consider whether the Claimant qualified for leave under Article 8 ECHR (paragraph 38).

10. It seems to me that there is confusion in the grounds of application lodged by the Secretary of State. It is acknowledged that the judge allowed the Claimant's appeal on human rights grounds but the grounds go on to say "namely that the appellant succeeded on EX.1 to Appendix FM". If the judge had intended that then he would, presumably, have said that he was allowing the appeal under the Immigration Rules but it seems to me that he was relying on what he said at paragraph 36. Ignoring the misplaced reference to Bangladesh he said that "there would be very serious hardship for the appellant and Mrs Said if returned to Afghanistan which is likely to amount to a breach of Article 3 ECHR". The judge gave reasons for that and referred to the Amnesty International Report and a report 2015/2016 at page 72 of the Claimant's bundle. The passage under that page notes that there are nearly three million Afghans who are refugees, the majority of whom were living in Iran and Pakistan. Nearly one million Afghans were internally displaced in Afghanistan. Many thousands of people were still living in camps and makeshift shelters where overcrowding, poor hygiene and harsh weather conditions increased the prevalence of communicable and chronic diseases such as malaria and hepatitis. The judge concluded that Mrs Said would not be able to find work which would provide the same level of income as in the United Kingdom. I might say that there was a discussion before me as to whether any other relative might provide support to the Claimant and Mrs Said but it appears from the judge's decision that there was no direct evidence on that.

11. Importantly, when the judge said that the conditions the Claimant would have to live in were "likely" to amount to a breach of Article 3 ECHR I infer that the judge was applying the reasonable degree of likelihood or real risk test which is what he was bound to do. While Ms Masood did not hesitate to describe these findings as possibly generous to the Claimant (with which I agree) it seems to me that the judge gave clear reasons for allowing the appeal under Article 3 ECHR. Moreover the grounds of application are silent on Article 3 focusing on the issue of the Immigration Rules and whether there existed insurmountable obstacles for family life continuing in Afghanistan. It seems to me that when a judge says that he is allowing the appeal under Article 3 ECHR it is incumbent upon the

Secretary of State to specifically challenge such a finding. The Secretary of State has elected to go down a different route.

12. On these findings I conclude that while there are errors in the judge's decision, taking them either individually or cumulatively they are not enough to amount to a material error in law. The judge's findings on Article 3 are clear in their terms and as has been said elsewhere an unusually generous view of the facts does not necessarily translate to an error of law.

13. It follows that the judge's decision that there would be a breach of Article 3 ECHR if the Claimant was returned to Afghanistan must stand.

Notice of Decision

14. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

15. I do not set aside the decision.

16. No anonymity direction was requested or is made.

Signed JG Macdonald Date 2nd May 2017

Deputy Upper Tribunal Judge J G Macdonald