Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08328/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 July 2017	**On 01 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUJEEB [P]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr S. Kotas, Home Office Presenting Officer
For the Respondent: Ms. M. Vidal instructed by Haris Ali Solicitors

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of Afghanistan who was born on [ ] 1975. He entered the UK in March 2002 and claimed asylum. His application was unsuccessful and he has remained unlawfully in the UK for many years. In 2010 he met, and began a relationship with, a British Citizen (hereinafter referred to as "Ms S"). Ms S is originally from Afghanistan and was granted asylum in the UK in 2003. She

subsequently became a British citizen. Ms S and the claimant married on 10 September 2015.

2. On 6 July 2015 the claimant applied for leave to remain in the UK on the basis of his private and family life. On 30 September 2015 the application was refused on the grounds that he was not able to satisfy the requirements of the Immigration Rules and there were not exceptional circumstances to warrant allowing the application under Article 8 ECHR outside the Rules. The Secretary of State accepted that the claimant and Ms S were in a genuine and subsisting relationship but reached the view that there were not insurmountable obstacles to the relationship continuing in Afghanistan. It was also not accepted that the claimant would face very significant obstacles integrating into Afghanistan.

3. The claimant appealed to the First-tier Tribunal where his appeal was heard by Judge Farmer. In a decision promulgated on 17 November 2016, Judge Farmer allowed the appeal. The judge stated that it was agreed that the claimant and Ms S were in a genuine and subsisting relationship. He also stated that it was agreed that the only issue in respect of Appendix FM to the Immigration Rules was whether there would be "very significant obstacles" to the claimant and Ms S continuing their family life in Afghanistan.

4. At paragraph 10 the judge stated that he found there to be "very significant obstacles" to the claimant and Ms S enjoying family life in Afghanistan. After stating this finding, the judge set out his reasons. These included that:

    a) The claimant has lived for 14.5 years in the UK and has attempted to live here lawfully (paragraph 11).
    b) The claimant is a qualified doctor in Afghanistan and is intelligent and educated with excellent English (paragraph 12).
    c) Ms S is highly educated and intelligent, and works as a dental nurse (paragraph 12).
    d) Ms S has a subjective fear of returning to Afghanistan which is reasonably held. The judge observed that she was successful in her asylum claim in 2003, which was based on fear due to her father's position, her ethnicity, her education in Russia, and her involvement in the Woman's Organisation of Afghanistan (paragraphs 13 and 14).
    e) Neither the claimant nor Ms S have family in Afghanistan that could support them.
    f) Ms S returned to Afghanistan for about 6 weeks in 2012 to try and locate her family but this does not undermine her claim to fear returning to Afghanistan (paragraph 17 -19)
    g) Ms S is a celiac. The judge stated that this was a minor issue.

5. The grounds of appeal make two arguments. Firstly, they argue that the judge applied the wrong test in considering the claimant's family life. The test under Appendix FM is

whether there would be "insurmountable obstacles" to family life continuing in Afghanistan, not whether there would be "very significant obstacles".

6. Secondly, the grounds argue that the judge took into account irrelevant factors in assessing the obstacles the claimant and Ms S would face in returning to Afghanistan.

Error of Law

7. There are two clear errors of law in the decision.

8. The first error is that the judge mis-stated the legal test. The claimant sought to show that he met the requirements of EX.1(b) of Appendix FM. Under this paragraph of the Immigration Rules, an applicant must show there are "insurmountable obstacles to family life" with their partner continuing outside the UK. In the decision, the judge has asked herself whether there are "very significant obstacles" rather than whether there are "insurmountable obstacles". It may be that the judge's analysis would have been identical had she stated the correct test and therefore this error is not material. However, the second error, as explained below, was material.

9. The second error is that the judge has taken into consideration irrelevant and immaterial factors when assessing the obstacles the claimant and Ms S would face in Afghanistan, such as the claimant and Ms S's English ability, education, length of time in the UK and qualifications/work experience in the UK. Although these factors are relevant to an overall evaluation of their private and family life in the UK, they are of marginal, if any, significance to the issue of whether they would face insurmountable obstacles moving to Afghanistan. Indeed, if anything, several of these factors (such as speaking English, and work experience in the UK) might reduce obstacles in Afghanistan. The judge has also fallen into error by finding that Ms S has a reasonably held fear of returning to Afghanistan as someone granted refugee status in 2003 without explaining why the factors that made her eligible for asylum 14 years ago are still relevant today, given the huge changes in Afghanistan in the intervening period.

Remade Decision

10. After delivering my error of law decision I advised the parties that I would proceed to remake the decision.

11. I heard evidence (in English) from Ms S.

12. In response to questioning from Ms Vidal, Ms S gave several reasons why she feared returning to Afghanistan. Firstly, she feared being recognised. She stated that her father was considered a communist and that she would be in danger if people recognised her as his daughter. She said that the culture in Afghanistan is such that people are held responsible for the actions of their parents and she would always be known as her father's daughter and at risk because of this. She said that when she went back to Afghanistan in 2012 she became very fearful that she would be recognised. She

also commented that the culture in Afghanistan is that people drop in unannounced to other people's homes. She found this put her at risk as if she was in the home of someone she felt safe with there was no way of knowing that someone could visit and recognise her.

13. Secondly, she found it distressing to wear a burka. She stated that when she visited Afghanistan in 2012 she felt compelled to wear a burka when travelling outside or between homes. As well as finding this physically unpleasant, she found it went against her values as an independent educated woman who does not cover her face (or hair) when in the UK. Connected to this, Ms S found it difficult to be in a society where she was unable to express herself or indeed "be herself", given her values as a woman who believes in women having independence and personal rights and freedoms. She did not want to be in a society where women were expected to merely sit at home.

14. Thirdly, she was concerned about being affected by the violence and lack of security generally – even if not targeted at her specifically.

15. Fourthly, she did not think she would be able to work in Afghanistan, as she would not be safe. She expressed concern that her background would come to light when she looked for a job and that this would put her in danger.

16. In cross-examination, Mr Kotas focused on Ms S's trip to Afghanistan in 2012. Ms S stated that she went to Afghanistan despite the claimant advising against it because she was desperate to try and find her family, who she had not seen or been in touch with since 1991. She stated that at the time she went to Afghanistan the security position was considered to be better than it is now and she thought this was an opportunity to see if she could locate her family. She said that she felt fearful whilst in Afghanistan and had to move around to avoid detection. In response to Mr Kotas's questioning, Ms S stated that she did not pre-arrange where she would stay before travelling to Kabul and just took a taxi to her old house – which was no longer there. She then went to a neighbour's house, where she stayed.

17. After Ms S gave evidence, Mr Kotas and Ms Vidal made submissions.

18. Mr Kotas stated that he had difficulty accepting Ms S's account of just turning up as a lone female in Kabul. He argued that whatever the reason and way Ms S returned to Kabul in 2012, the fact that she voluntarily travelled to Kabul demonstrates a lack of subjective and objective fear. He noted that the country guidance is clear that the level of indiscriminate violence in Kabul is not at such a high level as to mean that, within the meaning of Article 15(c) of the Qualification Directive, Ms S would face a real risk which threatens her life or person. AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC). He argued that Ms S would not be returning to Afghanistan as a lone female (as she had on her visit in 2012) but as the wife of an Afghan national, who was educated and would most likely be able to find employment. He maintained that although it would no doubt be challenging to move to Afghanistan, the claimant and Ms S have the skills and familiarity with Afghanistan to be able to manage, such that it

cannot be said that the high hurdle of showing "insurmountable obstacles" has been met.

19. Ms Vidal argued that Ms S's decision to travel to Afghanistan in 2012 does not show an absence of fear. Rather, it was a desperate attempt, taken against advice, to try and find her family, even though she was fearful (and had good reason to be fearful) of returning to Afghanistan. Ms Vidal highlighted Ms S's evidence about wearing the Burka, observing that Ms S would be compelled to wear a burka even though it went against her values and beliefs.

20. The claimant's appeal turns on whether paragraph EX.1(b) of Appendix FM, interpreted in accordance with EX.2, is satisfied. EX.1(b) and EX.2 state:

> *EX.1. This paragraph applies if*
>
> *(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen...and there are insurmountable obstacles to family life with that partner continuing outside the UK.*
>
> *EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.*

21. It was common ground that the claimant and Ms S are in a genuine and subsisting relationship and that Ms S is a British citizen. Accordingly, the only question to be resolved is whether there are insurmountable obstacles to family life between the claimant and Ms S continuing outside the UK.

22. Insurmountable obstacles is a stringent test. The fact that Ms S is a British citizen, has a profession in the UK, does not wish to move to Afghanistan and would find it difficult to move to Afghanistan is not enough to meet the threshold. See, for example, Agyarko [2015] EWCA Civ 440 at paragraph [25]:

> *"The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so."*

23. Ms S's evidence before me, which I found credible and accept, is that when she returned to Afghanistan in 2012 to see if she could locate her family she was so fearful of being recognised as her father's daughter that she had to move location and restrict her movements. The conclusion of the Immigration Appellate Authority in 2003, when considering Ms S's asylum appeal, was that her father was a high ranking military officer in the People's Democratic Part of Afghanistan ("PDPA").

24. I do not have sufficient evidence before me to reach a view on whether there is an objective basis for Ms S's fear today (in 2017) as opposed to 2003 when her appeal was allowed by the Immigration Appellate Authority. However, this is not an asylum appeal and it is not necessary for me to determine if Ms S's fear is well founded. The question for me is whether her subjective fear of return to Afghanistan (which I accept is genuine) creates an insurmountable obstacle to family life continuing in that country. I am satisfied that it does. Ms S, upon relocating to Afghanistan, would be fearful of being recognised. This would, more likely than not, prevent her applying for and undertaking work, as this could lead to her being recognised; and prevent her visiting homes of other people, given the culture of people "dropping in" announced, as she described in her oral evidence.

25. In my view, if Ms S relocates to Afghanistan she would face very serious hardship as a consequence of fearing persecution and having to adapt her lifestyle to avoid being seen by someone who she fears might recognise her as her father's daughter.

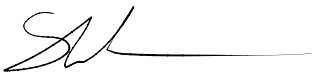
26. Taken together with other difficulties Ms S is likely to face in Afghanistan – such as having to wear a burka and feeling that she would need to refrain from expressing her views on issues that matter to her such as women's equality and education - I am satisfied that this is a case where the high threshold of "insurmountable obstacles" is met.

Decision

27. The First-tier Tribunal made a material error of law and the decision is set aside.

28. I remake the decision by allowing the appeal under Appendix FM of the Immigration Rules.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 30 July 2017