Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24353/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 May 2017	**On 9 June 2017**

Before

UPPER TRIBUNAL JUDGE A L McGEACHY
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

RAHMATULLAH KHOGHYANIWAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Saeed, Counsel, instructed by Aman Solicitors Advocates (London) Ltd
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Abebrese (the judge), promulgated on 24 October 2016, in which he dismissed the Appellant's appeal on all grounds. That appeal had been against the Respondent's decision of 18 June 2015, refusing a human rights application which was itself made

on 9 February 2015. That application was based upon the Appellant's relationship with a British national, a relationship that it was said had been ongoing since 2013, with cohabitation beginning in the spring of 2014. The Respondent's decision was based primarily on a consideration of Appendix FM to the Immigration Rules. It was said that the Appellant's partner was not, in fact, a "partner" as defined under GEN.1.2. of Appendix FM. This was because the Respondent took the view that there had not been two years of cohabitation prior to the making of the application. In light of this, EX.1 could not be relied on. At the time of the decision the couple did not have any children. It was also said that paragraph 276ADE could not be satisfied in this particular case.

The judge's decision

2. The judge accepted that at the date of decision before him (that being 23 September 2016) the Appellant's partner was pregnant with a due date in November or December of that year. At paragraph 34 he finds that the Appellant and his partner had not in fact been cohabiting as claimed. This, said the judge, was due to the lack of evidence provided by the couple on this particular issue. As a result of this finding the judge concludes that the Appellant could not rely on Appendix FM.

3. In respect of the partner's pregnancy the judge concluded that since the baby was not yet born this had no relevance to the Article 8 assessment within, or indeed, without the context of the Rules. Paragraph 276ADE is considered, but the judge finds that this did not assist the Appellant in any way.

4. In turning to the assessment of Article 8 outside the context of the Rules the judge accepted that the Appellant and his partner were indeed in a genuine relationship, but at paragraphs 43 and 48 he reiterates his conclusion that they had not been cohabiting as claimed. In addition, the judge considers particular factors relevant to section 117B of the Nationality, Immigration and Asylum Act 2002. He finds that the Appellant was not financially independent, there was a lack of evidence as to his ability to speak English, and that little weight was to be given to both his private life and the family life enjoyed with his partner, given the precariousness of his status in the United Kingdom.

5. Overall, the judge concludes that it would be reasonable for the Appellant to be removed from the United Kingdom and on this basis he dismissed the appeal.

The grounds of appeal and the grant of permission

6. The grounds assert that in concluding that there had not been cohabitation, the judge overlooked documentary evidence and indeed the evidence of the Appellant and the sponsor. It is said that this evidence went to show that there had in fact been cohabitation from March 2014 onwards. The grounds assert that the error is material

because it led the judge to conclude that the Appellant could not rely on EX.1 under Appendix FM. The grounds also assert in more general terms that the error relating to cohabitation had an impact on the overall proportionality assessment as well.

7. Permission to appeal was granted by Upper Tribunal Judge Jackson on 13 April 2017.

The hearing before us

8. Mr Saeed accepted that the error made in respect of the cohabitation issue was not material to the satisfaction of Appendix FM. This was because, even on the Appellant's case, the cohabitation had not been for two years preceding a date of application. However, Mr Saeed submitted that the fact of cohabitation went to the quality and nature of the couple's relationship and this, he said, was relevant to the overall assessment of proportionality outside the context of the Rules.

9. Mr Whitwell accepted that the length and duration of a relationship was a relevant factor, but he asked us to consider the judge's decision as a whole. In essence he submitted that any error was not material.

Decision on error of law

10. As we announced to the parties at the hearing, we conclude that the judge did materially err in law.

11. Having considered the papers that were before the judge for ourselves, we are satisfied that there was evidence in the form of documents contained in the Appellant's bundle (for example utility bills and Council Tax bills) and the contents of the witness statements of both the Appellant and his partner, all of which supported the claimed cohabitation from March 2014 onwards. It is clear from the face of the judge's decision that he has overlooked this evidence and/or failed to make any findings in respect of it. There is no suggestion on the judge's part that he deemed the evidence as a whole to be unreliable and thus we cannot conclude that he was simply rejecting all of the evidence without specific mention of that pertaining to the cohabitation issue. Indeed, the judge accepted that there was a genuine and subsisting relationship between the Appellant and his partner and thus, at least on that core issue, he was accepting their evidence.

12. In light of what we have said above, the judge erred in failing to consider and/or make findings on evidence that was before him.

13. It is right that this error cannot be material in respect of the application of Appendix FM. This is because, as Mr Saeed accepted and as is set out in the Respondent's rule 24 notice, the period of two years cohabitation for the purposes of GEN.1.2.(iv) must precede the making of the application. On the Appellant's own evidence the

cohabitation began only in March of 2014: clearly not a two-year period prior to the making of the application in February of 2015.

14. However, we find that the failure to deal with the evidence on cohabitation has infected the judge's assessment of Article 8 outside the context of the Rules. The importance of the lack of cohabitation is restated in paragraphs 43 and 48 of his decision. We are satisfied that it clearly played a material role in his assessment of the Article 8 claim.

15. We fully acknowledge that the judge went through a number of the mandatory factors set out in section 117B of the 2002 Act. However, we remind ourselves that these factors are not exhaustive and that all relevant circumstances must be weighed in the balance. The fact of a significant period of cohabitation in our view went to the nature and quality of the Appellant's relationship with his partner and this is a factor it was incumbent on the judge to consider on a correct factual basis. This he failed to do, given his error on the issue of cohabitation.

16. In light of our conclusions the judge's decision is set aside.

Remaking the decision

17. Both representatives were agreed that we could remake the decision in light of the evidence now before us. This includes the Appellant's bundle that was before the First-tier Tribunal, and importantly, a supplementary bundle submitted in preparation for the hearing before us. An application under rule 15(2A) of the Upper Tribunal Procedure Rules was made, and we have admitted the supplementary bundle into evidence without opposition from Mr Whitwell.

18. By way of submissions Mr Whitwell made no challenge to any of the evidence (including, significantly, the fact of the birth of the couple's child on 11 November 2016), the fact that that child is a British citizen, and the updated documentary evidence relating to continuing cohabitation. He submitted that public interest factors were still in play, although he acknowledged that it may be difficult to argue that it would be reasonable for a British national baby and a British national partner to go and live in Afghanistan.

19. Mr Saeed, not surprisingly, relied heavily on the fact of the child's birth and nationality. He referred us in particular to section 117B(6) of the 2002 Act.

20. We reserved our decision on the remaking decision.

21. We have concluded that the Appellant's appeal should be allowed. We now set out the findings and reasons upon which this conclusion is based.

22. We have no hesitation in finding that the Appellant has been in a genuine and subsisting relationship with his British citizen partner since 2013. This aspect of the

evidence has been accepted by the judge and has at no stage been challenged before us. We also find that the Appellant and his partner have in fact cohabited since March of 2014. The claim, as mentioned earlier, is fully supported by the witness statements of both, plus the various items of documentary evidence contained in the Appellant's original bundle (see for example C92 to C93, C94 to C115 and D47 to D50 of that bundle). In addition, the supplementary bundle contains updated utility bills, a Council Tax bill and medical correspondence, all showing the appropriate address and linking both the Appellant and his partner to that property.

23. We find that the Appellant is a father of a British child, J, born on 11 November 2016. Her birth certificate is contained in the supplementary bundle at page 13. The Appellant is named as the father, and his partner as the mother. The child's nationality would, we find, be derived from that of her mother.

24. We now assess the Article 8 claim outside the context of the Rules. There is clearly a family life as between the Appellant, his partner and his daughter. The Appellant's removal from the United Kingdom would clearly constitute a sufficiently serious interference with his family life as to engage Article 8. The Respondent's decision pursues a legitimate aim and is in accordance with the law.

25. We move on to the core issue of proportionality. We take into account all relevant factors. The core focus for us is section 117B(6) of the 2002 Act. It is quite clear that the Appellant has a genuine parental relationship with his British daughter. The essential question is whether it is reasonable for his daughter to leave the United Kingdom. In assessing the issue of reasonableness we have regard to the decisions of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 and AM (Pakistan) [2017] EWCA Civ 180.

26. The child's nationality is clearly a very significant factor. We assess her best interests as very firmly lying in the United Kingdom. It is the country of her nationality and the place in which she would enjoy the rights and privileges pertaining to its citizens. By contrast, Afghanistan is an unstable place of relocation, to say the very least. Neither the child nor the Appellant's partner has any connection to that country other than the fact of the Appellant's own nationality. We have regard to the Foreign and Commonwealth Office travel advice contained in the Appellant's supplementary bundle which is clear; advising against all but essential travel to that country, and advising against any travel whatsoever to a number of areas therein.

27. We have regard, of course, to the importance of the public interest in maintaining effective immigration control; that is a powerful factor, on any view. The Appellant himself does not appear to be financially independent, being reliant upon his partner, and there is, it seems, a lack of evidence in respect of his ability to speak a reasonable standard of English. Those matters would therefore count against him.

28. We also have regard to the lack of status on the Appellant's part and the fact that his relationship with his partner was established and has been ongoing in light of a lack of status. This clearly reduces the weight to be attached to the relationship.

29. We take into account our evaluation that it would not be reasonable for the Appellant's partner as a British citizen to relocate and live permanently in Afghanistan. She has no connection to that country, cannot speak any of the languages, and will in our view stand out as someone who may well face particular problems if attempting to live there.

30. We also take account of, and place significant weight on, the Respondent's own policy guidance as contained in paragraph 11.2.3 of Appendix FM 1.0b. The relevant passage states:

> "Would it be unreasonable to expect a British Citizen child to leave the UK?
>
> Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.
>
> The decision maker must consult the following guidance when assessing cases involving criminality:
> • Criminality Guidance in ECHR Cases (internal)
> • Criminality Guidance in ECHR Cases (external)
>
> <u>Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.</u>
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU. The circumstances envisaged could cover amongst others:
> • criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
> • a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."
>
> (underlining added)

31. This guidance, in our view, states the Respondent's clear position as being that it is, in absence of criminality or a particularly poor immigration history (none of which apply in the present case), unreasonable to expect a British child to leave the United Kingdom/EU. We note that the same guidance was before the Tribunal in the recent decision of SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120 (IAC). Mr Whitwell has not sought to resile from the contents of the passage quoted above. We conclude that we are entitled to place significant weight upon this, representing as it does the considered view of the Secretary of State, she being the executive arbiter of where the balance lies as between the public interest and the rights of individuals through not only the making of the Immigration Rules (which of course includes the concept of reasonableness), but also in introducing legislation such as Part 5A to the 2002 Act.

32. Having regard to all of the above, we conclude that it would not be reasonable for the Appellant's daughter to leave the United Kingdom.

33. In light of that conclusion and what is said at paragraphs 17 to 21 of MA (Pakistan), as reaffirmed in AM (Pakistan), the Appellant is therefore entitled to succeed in his appeal on Article 8 grounds.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law.

The decision of the First-tier Tribunal is therefore set aside.

We remake the decision by allowing the appeal. The Appellant's removal from the United Kingdom would breach his rights under Article 8 ECHR, and would therefore be unlawful under section 6 of the Human Rights Act 1998.

No anonymity direction is made.

Signed Date: 5 June 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a full award of £140.00. The

Appellant has succeeded in his appeal. Although his circumstances have changed during the course of the appellate process, the Respondent has maintained her position in the appeal throughout.

Signed Date: 5 June 2017

Deputy Upper Tribunal Judge Norton-Taylor