Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18124/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 September 2018	**On 12 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ABDUL [A]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs Z Kiss, HOPO
For the Respondent: Mr V Makol

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge M R Oliver allowing the appeal of the respondent on family and private life grounds under Article 8, ECHR.

2. The respondent will from now on be referred to as the applicant for ease of reference.

3. The applicant is a national of Afghanistan born on 1 January 1975. He claimed asylum on arrival in the UK on 19 September 2002; after his appeal against the refusal was dismissed his appeal rights were exhausted on 9 December 2003. On 13 December 2011 he applied for leave to remain under Article 8 on the basis of his family and private life. His application was initially refused on 23 November 2012 but after protracted litigation in the judicial review application, a consent order was agreed on 29 March 2016, which resulted in a further refusal of 8 July 2016.

4. In the refusal letter of 8 July 2016, the Secretary of State considered the application under Appendix FM in respect of the appellant's family life. He had no children and there were no insurmountable obstacles to his family life with his partner continuing in Afghanistan. In respect of his private life under paragraph 276ADE of the Rules, it was again argued that there would be no insurmountable obstacles to his integration back into Afghanistan. There were no exceptional circumstances.

5. The applicant's evidence can be summarised as follows – he had left Afghanistan after his father had been brutally killed. His father worked for the Government and the appellant's family was at serious risk of being killed themselves. His uncle arranged for him to leave Afghanistan. He accepted that his appeal rights had been exhausted in 2003. He was scared to return because he knew that he would be killed.

6. In 2009 he met his wife, [HK], a British citizen. He disclosed his lack of immigration status before entering into a serious relationship with her. They married on 16 December 2011. After their marriage they had been living together at her rented accommodation with her son from a previous relationship. Because he did not work, his wife supported him from her full-time employment. She also had another son and her whole family were in the United Kingdom. He claimed that she could not relocate to Afghanistan and had never been there. She was now being treated for the stress she was suffering from.

7. He stated that before leaving Afghanistan he had lived all his life in Kabul. Although he still had family there, he was not in contact with them. His mother and brothers had been living there but moved to stay with the uncle who had helped him when he left. Before he left Afghanistan, he worked as a tailor, making clothes for women. His wife was not Afghani but Bengali by origin.

8. He stated that his stepsons were now about 23 and 30 years old. The 30-year old child was married.

9. The applicant's wife [HK] gave evidence. In her witness statement she had said that her previous relationship ended in an Islamic divorce in 2009, followed by a civil divorce in 2010. She corroborated his account of the development of their relationship and the efforts they had made to regularise his immigration status. She was scared for his safety if he had to return to Afghanistan to make an application

but was confident that they could meet the requirements for his settlement under the Rules. She was earning more than £18,600 per month. In oral evidence, she stated that her sons were both British citizens. The younger son would live with her and the applicant until he got married. He had an online business, while the older son was a minicab driver. Their father was a Bangladeshi man but did not live in the UK. Her brothers and sisters lived here. She did not speak Farsi. If her husband had to return to Afghanistan temporarily in order to apply for settlement, she would not accompany him.

10. The judge said that under Appendix FM, the respondent has not suggested that the applicant did not satisfy the suitability criteria. Under the eligibility criteria, however, the appellant is present in the UK without leave in breach of immigration law. Furthermore, although his wife is British and her pay slips show that she has, since September 2017, been earning at an annual income of £18,600, only three pay slips have been provided and her employer's letter does not state her salary, the appellant has therefore not provided the documentary evidence required under Appendix FM-SE.

11. The judge accepted the genuineness and subsistence of the relationship. The question that he had to consider therefore is whether there are insurmountable obstacles to the applicant returning to Afghanistan, either to continue his relationship with his wife there, as the respondent has suggested, or make an application while there.

12. The judge held that the applicant's wife is culturally of Bengali, not Afghan, background, but has in fact lived all of her life in the UK, where she was born. The judge accepted that she does not speak Farsi or Dari. She has no family or friends in Afghanistan. If there were no other reasons why she should not be expected to continue the relationship in Afghanistan, these would in his judgment suffice and would amount to insurmountable obstacles in her case to the relationship continuing there.

13. The judge held that if the applicant had to return to Afghanistan to make his application for settlement, he will be returned to Kabul, but he has no family there and he has been absent from the country for sixteen years. Both the British and United States Government have warned against travelling to Afghanistan because of the risks usefully highlighted in the respondent's Country Policy and Information Note in August 2017 with Kabul the location of most of the killings.

14. The judge held that whether the applicant could meet the financial requirements of settlement remains moot, so that the situation is not comparable with **Chikwamba v SSHD [2008] UKHL 40**, but Appendix FM has now been revised to reflect the judgment in **R (Agyarko) v SSHD [2017] UKSC 11** so that the application would not be defeated if there were "unjustifiably harsh consequences for the applicant, the partner or a relevant child". While the judge accepted that the family life rights of the applicant's wife despite being British and of force (**Beoku-Betts v SSHD [2008]**

UKHL 39), are qualified by her knowledge of the applicant's immigration status when she entered into a relationship, he nevertheless found that there would be insurmountable obstacles in all the circumstances to the applicant having to return to make his application.

15. The judge held that the consideration given by the Secretary of State to the exceptional circumstances of the case has been cursory and the respondent's suggestion that the respondent's wife could return with him to Kabul is unsustainable. Although it is not necessarily the fault of the respondent that the application made in 2011 has taken so long to resolve, it necessarily follows that the relationship which the appellant has with a British citizen has inevitably grown stronger during that period and the consideration to be given to her family rights have grown stronger.

16. In all the circumstances the judge found that there are exceptional circumstances requiring consideration outside the Rules. Despite his adverse immigration history, the judge held that the applicant has a genuine and subsisting family life with his British partner, with which the refusal, which would necessitate his return to Kabul, would be an interference disproportionate to the public interest in the maintenance of a fair but firm immigration control. In coming to this conclusion, the judge took into account that there has been no suggestion that the applicant has not in fact been adequately maintained by his wife.

17. The grounds of appeal lodged on behalf of the Secretary of State submitted that the judge has materially erred in law by allowing the applicant's appeal without regard to the public interest factors outlined in Section 117B of the Nationality, Immigration and Asylum Act 2002. The grounds listed all the public interest considerations applicable in all Article 8 cases. Reliance was placed on **Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)** which held that judges are duty bound to have regard to the specific considerations at Section 117A-117D. **Dube** also held that it is not an error of law to fail to refer to ss.117A-117D considerations if the judge applied the test he or she was supposed to apply according to its terms; what matters is substance, not form. The grounds asserted that the judge has not applied the test he was supposed to apply when allowing the applicant's appeal either in substance or form.

18. Permission was granted to the Secretary of State to appeal the judge's decision by First-tier Tribunal Judge Holmes. He said as follows at paragraph 3 of his grant of permission

> 3. The grounds complain that the Judge failed to make any reference to ss117A-177D of the 2002 Act. There is no express reference to these provisions, and it is certainly arguable that the Judge has possibly confused the position of a relationship with a qualifying child under s117B(6) with a relationship with a qualifying partner. Here there was no qualifying child. The Appellant did not meet the requirements of Appendix FM or FM-SE at the date of the hearing. It was not impossible that he would be able to do so in the future, since it was

claimed the sponsor had now obtained employment with the requisite salary, but it could not be said that a hypothetical application for entry clearance made at the date of the hearing would be bound to succeed. Thus it is well arguable that the Judge's approach to the Chikwamba principle was confused, and wrong, in the light of MM [2017] UKSC10, and Agyarko [2017] UKSC 11 and the Appellant's immigration history; even if he accepted the sponsor's evidence that she would not travel to Kabul. Moreover, his approach to the ability of the Appellant to travel to Kabul in safety arguably failed to take account of either **AS** (safety of Kabul) Afghanistan CG [2018] UKUT 118, or indeed earlier country guidance on that issue.

19. Mrs Kiss was given a copy of the Rule 24 response submitted by Mr Makol on behalf of the applicant.

20. Mrs Kiss said she was relying on **Agyarko [2017] UKSC 11**. She said that at paragraph 43 the Supreme Court applied a stringent test to the words "insurmountable obstacles", that is obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. At paragraph 54 it was held "where confronted with a fait accompli the removal of the non-national family member by the Authorities would be incompatible with Article 8 only in exceptional circumstances" "(**Jeunesse**, paragraph 114)". At paragraph 60 it was held that … "the word exceptional" as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". At paragraph 68 the Supreme Court held that the entitlement conferred by Section 1(1) of the 1971 Act does not entitle the British citizen to insist that his or her non-national partner should also be entitled to live in the UK, when that partner may lawfully be refused leave to enter or remain.

21. Mrs Kiss submitted that in the Rule 24 response it was argued that the judge did cover Section 117B in essence. Mrs Kiss said when the couple met the appellant was here illegally having failed to obtain leave to remain. The judge had a copy of the First-tier Judge's decision but did not refer to it at all. The applicant had absconded for a number of years and his status was precarious and the wife knew that he was without status. The judge failed to consider 117B(iv) which says that little weight should be given to a private life or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.

22. Mrs Kiss said the judge gave weight to the fact that the applicant's spouse is not able to speak his language. She submitted that this is not an insurmountable obstacle.

23. Mrs Kiss submitted that with regard to return to Kabul, the grant of permission stated that the judge failed to mention **AS**. She said that the appellant is fit and well. He has been in the UK illegally for sixteen years and was not a child when he came

here. He spent his formative years in Afghanistan and has been quite resourceful in finding his way to the UK.

24. Mrs Kiss said the judge looked briefly at **Chikwamba** and **Agyarko** and found that the appellant's removal would have unjustifiably harsh consequences. She said there was no relevant child in this case. Both stepsons are adults.

25. She said the judge noted that the delay in this case was not solely due to the Secretary of State but due to protracted judicial review proceedings.

26. Responding to the Rule 24 response that there are no facilities in Afghanistan for the applicant to obtain entry clearance, Mrs Kiss said the appellant can go to Islamabad to obtain entry clearance in light of his resourcefulness in coming to the UK illegally. Therefore, the assertion that the judge has looked at all matters in Section 117B does not apply.

27. With regard to the application of **Chikwamba**, Mrs Kiss submitted that in the evidence submitted by the applicant, it was said that the wife's gross salary on 31 March 2017 was £11,932 for the tax year. It has been asserted that her salary has increased, yet at page 68 it said that she was earning £1,550 on 30 September 2017 but in the corresponding bank balance only £950 was paid into the bank account. Mrs Kiss said this throws doubt on the financial evidence.

28. She said that the applicant's knowledge of the English language is a neutral factor and not a positive factor.

29. Mr Makol's submitted that the Secretary of State's grounds raised only one argument and it was that the judge failed to apply Section 117B. Permission was granted on that point. Mr Makol accepted that there was no mention of Section 117B by the judge. Mr. Makol relied on **Dube** - also relied on by the Secretary of State – to submit that it is not an error of law to fail to refer to Section 117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms, what matters is substance, not form.

30. I find that the judge's failure to mention Section 117B did give rise to an error of law. I find that the judge failed to properly consider that little weight should be given to the applicant's private life and the relationship he had formed with his wife, who is a qualifying partner, at a time when his immigration status was precarious. I find that the judge gave cursory consideration to these matters; rather he placed more weight on his finding that the marriage was genuine and subsisting and the difficulties they would face if they had to return to Afghanistan together.

31. I accept the assertion in the grant of permission that the judge confused the position of a relationship with a qualifying child under Section 117B(6) with a relationship with a qualifying partner. Here, there is no qualifying child. The applicant did not meet the requirements of Appendix FM or FMSE at the date of the hearing. It was

not impossible that he would be able to do so in the future, since it was claimed that the sponsor had now obtained employment with the requisite salary, but it could not be said that a hypothetical application for entry clearance made at the date of the hearing would be bound to succeed. Especially, in view of the anomaly highlighted by Mrs Kiss between the spouse's salary and the amount paid into her bank account.

32. I also find that the judge's approach to the **Chikwamba** principle was confused, and wrong, in the light of **MM [2017] UKSC 10**, and **Agyarko** and the applicant's immigration history, even if he accepted the sponsor's evidence that she would not travel to Kabul.

33. Mr Makol sought to argue that Judge Holmes relied on **AS (Safety of Kabul)** about travelling to Afghanistan. He said in the context of an entry clearance application this was an incorrect consideration. Instead, Judge Holmes should have reminded himself of the case of **SM and others (Entry Clearance – proportionality) Afghanistan CG [2007] UKAIT 00010** which despite being a decade old still holds true. He said **SM** found that

> *"There are no facilities for Afghan nationals to obtain entry clearance from Afghanistan or elsewhere. Where an application meets all the relevant requirements under the Immigration Rule and but for the absence of entry clearance he would qualify and the respondent cannot show that it is practicable for him to obtain entry clearance, the claim may succeed under Article 8 if the applicant shows, or (as in this case), the respondent conceded, that entry clearance cannot in practice be obtained because of the lack of accessible facilities".*

34. Mr Makol submitted that this should have been considered, rather than relocation to Kabul because there are no entry clearance facilities in Kabul and therefore the separation will not be quick as the Immigration Judge seems to think. He said Judge Holmes failed to consider that in the balancing exercise there has been a delay of five years whereby the private and family life of the couple has grown, which the judge considered as a relevant factor.

35. I was not persuaded by Mr Makol's arguments. The applicant has been in the UK illegally for sixteen years. He formed his relationship at a time when he was here illegally. The five-year delay formed part of the illegal stay. **AS** is about travelling to Afghanistan and safety in Kabuul. **SM** is about making an entry clearance application to join a spouse in the UK. In this case it is the Secretary of State's case that the applicant can relocate with his wife to Afghanistan or alternatively return to Afghanistan to make an entry clearance application. There was no concession by the respondent that the applicant's entry clearance application was bound to succeed.

36. For the above reasons I find that the judge erred in law and that the judge's decision cannot stand.

37. I find that in the light of the evidence before me, I am able to determine this appeal.

38. Mr Makol in his Rule 24 response did not challenge Judge Holmes assertion in the grant of permission that the applicant did not meet the requirements of Appendix FM or FM-SE at the date of the hearing. Therefore, this case requires consideration of the Article 8 public interest considerations in s117B when carrying out the proportionality balance.

39. I accept that the applicant speaks English, having given his evidence in English. I find that this is a neutral factor in the balancing exercise. He is financially dependent on his wife and therefore not financially independent himself.

40. The applicant has no evidence of legal entry in the UK. Following dismissal of his asylum claim, his appeal rights became exhausted in December 2003. The applicant absconded and re-surfaced in 2011 to make an application for leave to remain following his marriage to his wife. He therefore entered into the relationship with his wife at a time when his immigration status was precarious. His wife was aware of his immigration status at the time of their relationship. It follows that there was no expectation that he would be granted leave to remain in the UK. The five years that it took for the case to be resolved was found by the judge not to be the respondent's fault.

41. I find that in this case the applicant has presented the Secretary of State with a fait accompli by virtue of his marriage to an English national. I accept that his wife cannot speak his language. He gave his evidence in English and so did she. English is therefore a common language between them. Her inability to speak Farsi is not an exceptional circumstance as they are able to communicate with each other in English.

42. There are no young children in this case. The two stepsons of the applicant are adults. The son who is 23 years old and living at home is not dependent on the applicant in any way. This case does not come within the scope of **Chikwamba.**

43. The applicant told the judge that before leaving Afghanistan he had lived all his life in Kabul. He still had family therefore, though he was not in contact with them. His mothers and brothers moved to stay with the uncle who had helped him when he left. He worked in Afghanistan as a tailor making clothes for women. I find on this evidence that the applicant should not have difficulty relocating his family and re-integrating into life in Afghanistan.

44. Applying the stringent test in **Agyarko,** I do not find on the evidence that the applicant's return to Afghanistan would lead to unjustifiably harsh consequences. His wife has a choice whether to accompany him to Afghanistan or to remain in the UK whilst he makes an application to join her here.

45. She has expressed the wish to remain in the UK whilst the applicant returns to make an entry clearance application. In his submissions, Mr Makol placed reliance on **SM and others** that there are no facilities for Afghan nationals to obtain entry clearance

from Afghanistan. I accept Mrs Kiss's submission that as the applicant has been resourceful in finding his way to the UK, he can go to Islamabad to obtain entry clearance from there.

46. I find that the maintenance of effective immigration control is in the public interest. The applicant's behaviour in remaining in the UK illegally for sixteen years has to be seen in that context. I do not find that the evidence reveals that there would be any unjustifiably harsh consequences should he be required to leave the UK and return to Afghanistan to live or alternatively return to Afghanistan and then make his way to Islamabad in Pakistan to make an application for entry clearance to join his wife in the UK.

47. I am not satisfied on balance that the appellant's Article 8 rights outweigh the public interest in immigration control. I find that the Secretary of State's decision is proportionate on public interest grounds.

48. The applicant's appeal is dismissed.

Notice of Decision

The applicant's appeal is dismissed on article 8 human rights grounds.

No anonymity direction is made.

Signed Date: 8 October 2018

Deputy Upper Tribunal Judge Eshun