Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13369/2017

THE IMMIGRATION ACTS

Heard at Manchester, Piccadilly	**Decision & Reasons Promulgated**
On 16th November 2018	**On 23rd November 2018**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HEMIN [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Tan (Senior Home Office Presenting Officer)
For the Respondent: Ms A B Faryl (instructed by VAS UK)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State in relation to a decision of Judge Evans in the First-tier Tribunal promulgated on 9th February 2018. For the sake of continuity and clarity I will continue to refer to Mr [M] as the Appellant and the Secretary of State as the Respondent in this judgment.

2. Judge Evans was hearing the appeal of an Iraqi citizen born on 1st September 1984 against the Secretary of State's decision, taken on 1st December 2017, to refuse his protection claim.

3. It is clear that at the hearing before Judge Evans, when the Appellant was represented by Counsel, he pursued only his Article 8 claim.

4. The Appellant arrived in the United Kingdom in March 2009 and his asylum claim was refused that same month. His appeal against that decision was dismissed on 11th May 2009 and he became appeal rights exhausted in June 2009.

5. He made further submissions on 7th May 2015 which led to the decision appealed against.

6. The Appellant relied on his relationship with Ms [P], a British citizen with whom he had been in a relationship since 2013. They had only cohabited from October 2014 and the application was made in May 2015.

7. The issue before the First-tier Tribunal was whether the Appellant could satisfy the requirements of Ex.1(b) of Appendix FM of the Immigration Rules.

8. The matter first came before me on 30th July when I found that the First-tier Tribunal had fallen into error in finding that the Appellant met the requirements of Ex.1(b). In an error of law decision signed on 30th July 2018 but for some reason sent out only on 5th October 2018 I said this:-

   (a) "In his Decision and Reasons the judge did not find the Appellant to be a credible witness for several reasons. He also did not find Ms [P] a credible witness for several reasons. With regard to the Appellant the Judge noted that his answers were evasive when asked about the contact he had with his family since leaving Iraq in 2009 and that he appeared unwilling to give a straight answer to the questions asked. She found his evidence that they had lost contact implausible and that he had given a wholly unsatisfactory account of how he had spent the four years between 2009 and 2013 in the United Kingdom.

   (b) With regard to Ms [P] the Judge found she had given contradictory evidence about her working, her provision of daily care and assistance to her mother and regarding her own medical issues.

   (c) Notwithstanding those adverse credibility findings, together with his finding that Ms [P]'s medical conditions had been exaggerated, he noted that there was in any event no evidence suggesting medical treatment for her conditions would not be available in the IKR. The Judge found that although Ms [P] may wish to remain in the UK, there were no very significant difficulties which could not be overcome or which would entail very serious hardship if she were to live in the IKR. He found that she would be able to overcome any linguistic or cultural difficulties there.

   (d) At paragraph 59 the Judge turned to the article 8 balancing exercise noting that he was required to take into account those matters referred to in section 117B of the Immigration and Asylum Act 2002. In particular he found the Appellant could not speak English with any

fluency, that he was not financially independent and that the family life he had built up with Ms [P] was established while he was in the UK unlawfully.

(e) However, at paragraph 60 the Judge stated: - "on the other side of the balance, there is the fact that the Appellant can comply with the requirements for limited leave to remain as a partner contained in Appendix FM because he meets the requirement of section Ex .1 set out above.

(f) He said: - "because the Appellant can comply with the requirements of Appendix FM, I conclude, notwithstanding the importance of immigration control and the other factors set out above which count against him, the decision was a disproportionate interference with his article 8 rights and so the appeal must succeed.

(g) Unfortunately, the judge erred in finding that the Appellant met requirements of Ex.1. That is because the definition of "partner" contained in Gen 1.2 of Appendix FM requires them to have been living together in a relationship akin to a marriage or civil partnership for at least two years **prior to the date of application** (my emphasis). They had not been living together for two years prior to the date of application and therefore the Appellant could not meet the requirements of Ex.1 and thus the Judge was wrong to say that the Appellant met the requirements of Appendix FM.

(h) Mr Ell argued that the Judge was looking at the date of hearing, as he was obliged to do when considering article 8. The judge is of course required to look at the situation as at the date of hearing. However, that still does not mean the Appellant can meet the requirements of Appendix FM. Given that the Judge has clearly placed great reliance on his finding that the Appellant met the requirements of Appendix FM, his conclusions are tainted by error of law and that finding being determinative of the balancing exercise in this case the error is clearly material. On that basis, the Decision and Reasons must be set aside.

(i) As Mr Ell wished to call further evidence, particularly regarding Ms [P] going to live in Iraq, the case was adjourned to a resumed hearing at Manchester to deal with article 8."

9. Although this decision was not sent out until 5th October, I had announced the result at the hearing in July. It was because of Mr Ell's intention to adduce further evidence that the case was not redecided on that day.

10. Notwithstanding that no further evidence has in fact been lodged and no up-to date witness statements from either the Appellant or his partner, Ms [P], Ms Faryl did not seek an adjournment. She did indicate that she would call the Appellant and his partner to give evidence. I declined to accept oral evidence in the absence of any witness statements.

11. I heard Ms Faryl's submissions.

12. The findings regarding credibility were not challenged and not set aside by me.

13. Ms Faryl argued that Ms [P] could not reasonably be expected to live in Iraq with the Appellant. She had two adult children in the UK who live with her and she has elderly parents who she cares for. She is not an Iraqi national. She argued that the Appellant and Ms [P] have been in a relationship and living together for 4 years and to interfere with their family life would be disproportionate. Also, she argued that the Appellant has been in the UK for 9 years and has an established private life here.

14. She did acknowledge that the Appellant could not meet the requirements of the Immigration Rules and she submitted that he should succeed on the basis of Article 8 outside the Rules.

15. The first issue for me to decide, is the 5 questions posed by Razgar [2004] UKHL 27. Given that the threshold for engaging Article 8 is a low one and that the Appellant and Ms [P] have lived together for 4 years, they clearly have a family life together and the Appellant has inevitably built a private life in the UK. In truth, without going through each of the Razgar questions, this case is about proportionality.

16. In assessing proportionality, I am required to consider the matter set out in s.117B of the Immigration and Asylum Act 2002. Which provides as follows: -

> 117B Article8: public interest considerations applicable in all cases:
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English —
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) 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.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (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.

17. As found by the First-tier Tribunal the Appellant cannot speak English with any fluency; so much was demonstrated at the First-tier Tribunal hearing.

18. The Appellant is supported by his wife but it was accepted did not meet the financial requirements of Appendix FM.

19. The Appellant has built his private life while unlawfully in the UK. He was appeal rights exhausted in 2009. Thus, little weight can be given to his private life.

20. The Appellant started his relationship while unlawfully in the UK and thus little weight can be attached to it.

21. The First-tier Tribunal found that the Appellant and Sponsor had been less than honest in their claims about the abilities of Ms [P] and her need for care.

22. There is simply no basis on which to allow this appeal when the Appellant has at all relevant times been unlawfully in the UK and cannot meet the Immigration Rules. There is nothing about their situation to outweigh the public interest in the maintenance of immigration control.

23. Whether Ms [P] chooses to accompany the Appellant to Iraq or remain in the UK without him is a matter for her. If at some point in the future he can meet the Immigration Rules he can make an application. Ms Faryl acknowledged that at the present time he did not.

Notice of Decision

24. The First-tier Tribunal having made an error of law in its Decision and Reasons and having set it aside for the reasons given, in redeciding the appeal it is dismissed. Accordingly, the Secretary of State's appeal to the Upper Tribunal is allowed.

25. There having been no application for an anonymity direction and the First-tier Tribunal not having made one, I see no justification for directing anonymity and do not do so.

Signed Date 16th November 2018

Upper Tribunal Judge Martin