Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11360/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 July 2019	**On 07 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

JL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. D. Berg, the Sponsor
For the Respondent: Ms. J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Andonian, promulgated on 16 April 2019, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse leave to enter under the family reunion provisions.
2. I make an anonymity direction, continuing that made in the First-tier Tribunal.

3. Permission to appeal was granted as follows:-

> "The grounds argue that the Judge erred in the approach to the Appellant being in a family with the Sponsor and wrongly rejected the Appellant from pre-flight family reunion given he had left Iran when he was not seeking asylum and had married before making the claim. On the basis of the cases submitted with the grounds they are arguable and permission is granted."

4. I heard submissions from Mr. Berg and Ms. Isherwood following which I reserved my decision.

Error of Law Decision

5. The Judge finds that the Appellant does not meet the requirements of part 11 of the immigration rules as the Sponsor had not fled Iran to seek asylum ([35] and [36]). Paragraph 352A(ii) provides that the marriage must not have taken place "after the person granted refugee status left the country of their former habitual residence in order to seek asylum". There is no dispute that the marriage took place after the Sponsor left Iran. He did not leave Iran seeking asylum, but left to join his then wife in the United Kingdom. He made a sur place application for asylum in the United Kingdom, which was granted after his marriage to the Appellant.

6. I find that the Appellant cannot meet the requirements of paragraph 352A. I find that there is no error in the Judge's assessment of the immigration rules at [35] and [36].

7. At [38] the Judge turns to consider the appeal under Article 8 outside the immigration rules, having found that the Appellant cannot meet the requirements of Appendix FM. He states at [42], with reference to the policy:

> "I have considered the policy document in the appellant's bundle. The fact remains that the policy is effective to assist the appellant in his article 8 claim provided that the family unit was formed **BEFORE** (the Judge's emphasis) the claim of asylum. I regret to say that there was no family unit formed in China."

8. At [2.4] of the policy guidance it states:

> "Individuals who are granted refugee status or humanitarian protection or humanitarian protection on sur place grounds are eligible for family reunion. For such individuals as long as the family unit was formed before the claim of asylum, it will be treated as pre-flight."

9. This is correctly quoted by the Judge at [40], albeit that this paragraph is rather confused, and it is difficult to tell which parts are quoted from the policy guidance. I note that, although Ms. Isherwood provided me with a copy of the new guidance, which is referred to in the Rule 24 response, she made no reference to it in submissions. She accepted that this new guidance was not in place until March 2019, after the application and decision had been made. It was therefore not the relevant guidance in place at the time of the Respondent's decision. Ms. Isherwood agreed that the correct guidance was that quoted, which was provided in the Appellant's bundle (page 52).

10. I find that the policy is not reflected in the immigration rules themselves, but nevertheless is a clear statement of the Respondent's policy in force at the time the decision was made. It is clearly relevant for any Article 8 assessment.

11. Although the Judge states that "the policy is effective to assist the appellant in his article 8 claim provided that the family unit was formed **BEFORE** the claim of asylum", which is what occurred in the Appellant's case, he then places an extra requirement on the Appellant, which is that the family unit must have been formed in China. There is no dispute that the Sponsor had been granted asylum after his marriage to the Appellant. There is no issue that he is a "sur place" refugee. The policy in place at the time stated that as long as the family unit was formed before the claim of asylum, it will be treated as pre-flight. I asked Ms. Isherwood whether there was any authority for the proposition that a married couple was not a family unit. She was unable to point to any authority which indicated that the Judge's approach to "family unit" at [42] was correct.

12. At [44] the Judge repeats the error stating that the Appellant does not qualify as a pre-flight spouse "*because no family unit was formed in China before the claim of asylum based Sur Place considerations*" (the Judge's italics). The Appellant and Sponsor have not lived together in China, but that it is not what is required by the policy at [2.4]. There is nothing in [2.4] which stipulates that the family unit has to have been formed in any particular country. The Judge has added this requirement, but it is not what the policy requires. Essentially the finding at [42] is that the Appellant and Sponsor's marriage does not involve the formation of a family unit due to the fact that they did not live together in China. I find that this is an error of law.

13. I find that the decision involves the making of an error of law as the Judge has placed an extra requirement on the Appellant which is not found in the Respondent's policy. I find that this error is material as it affects the Judge's consideration under Article 8.

14. I find that the Judge has further erred in his consideration of Article 8. He has found that the Sponsor can speak Mandarin, but the evidence of the Sponsor was that, although he had worked in China, he was not able to speak Mandarin, and that he had not told the Judge this. Further, the Judge has erred in failing properly to consider that the Sponsor has refugee status and that China is not a signatory to the 1951 Refugee Convention. The Sponsor provided evidence of the difficulties he had encountered trying to obtain visas to visit the Appellant due to his status. Evidence was provided of email contact between the Sponsor and the Chinese Embassy regarding his inability to travel to China on a Travel Document, and the fact that his Iranian passport had been handed in to the Respondent. He was in a different position when he was working in China, as he was an Iranian national using his Iranian passport. He is now a refugee, not in possession of his Iranian passport. I find that this is relevant to the finding at [52] that the Sponsor could go and live in

China. I find that the Judge has failed to give proper consideration to the Sponsor's circumstances.

15. I find that the decision involves the making of a material error of law. I set the decision aside.

Remaking

16. I have found above that, under a correct interpretation of the Respondent's policy in place at the time, the Appellant should have been treated as a pre-flight spouse. I find that the other requirements of paragraph 352A of the immigration rules are met. The application was not refused by the Respondent on the basis that the Appellant did not meet the other requirements of paragraph 352A. Going through this paragraph, there is no dispute that the Appellant and Sponsor are married (352A(i)). 352A(ii) and 352A(iii) are covered by the policy, which indicates that the family unit should be treated as pre-flight as it was formed before the claim of asylum.

17. There has been no suggestion that the Appellant would be excluded from protection if she were to seek asylum in her own right (352A(iv)). The Appellant and Sponsor intend to live permanently with the other and their relationship is genuine and subsisting (352A(v)). They are not within the prohibited degree of relationship (352A (vi)).

18. I have considered the Appellant's appeal under Article 8 outside the immigration rules in accordance with the steps set out in Razgar [2004] UKHL 27. The application was not refused on the basis of the relationship requirements. I find that the Appellant and Sponsor have a family life between them. I find that that Article 8(1) is engaged.

19. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

20. With reference to the factors set out in section 117B of the 2002 Act, insofar as they are relevant, section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. While the Appellant does not meet the requirements of the immigration rules, by reference to the Respondent's policy in place at the time, she is to be treated as if she met the immigration rules. I therefore

find that there will be no compromise to the maintenance of effective immigration controls by allowing her appeal.

21. In relation to section 117B(2), there are no English language requirements under paragraph 352A.

22. In relation to financial independence, again there are no financial requirements to be satisfied under paragraph 352A (117B(3)). I find that the Sponsor is employed, although he gave evidence that he has found it difficult to find permanent employment due to his status, and the fact that he travels to China to see the Appellant for three months every year, which is the maximum period that he can be absent from the United Kingdom. He gave evidence that his status has prevented him from getting employment with the Home Office and also HMRC. The visa that he has managed to obtain to visit China does not allow him to work.

23. Sections 117B(4) to (6) are not relevant.

24. In assessing proportionality, I give particular weight to the fact that the Respondent's policy in place at the time that the decision was made provides that the Appellant should have been treated as meeting the requirements of the immigration rules as the family unit formed with the Sponsor should have been treated as pre-flight. The circumstances of the case are not straightforward, given the nationalities of the Appellant and Sponsor, the fact that the Sponsor is a sur place refugee, and the fact that China is not a signatory to the Refugee Convention and therefore does not recognise the Travel Document issued by the Respondent to the Sponsor. Although the Sponsor has spent some time in China, which is where he met the Appellant, that was when he was working for an Iranian company and travelling on an Iranian passport, something he can no longer do. The first application was made over five years ago. There is evidence of the mental health problems which the delay in resolving the situation has caused for the Sponsor.

25. Taking into account all of the above, and giving particular weight to the fact that the Respondent's policy in place at the time indicates that the family unit should have been treated as pre-flight, and therefore the Appellant should have been treated as meeting the requirements of the immigration rules, I find that the Appellant has shown on the balance of probabilities that the Respondent's decision is a breach of her rights, and those of the Sponsor, to a family life under Article 8 ECHR.

Notice of decision

26. The decision of the First-tier Tribunal involves the making of a material error of law and I set it aside.

27. I remake the Appellant's appeal allowing it on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 5 August 2019

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. Had the Respondent applied her policy correctly, the Appellant should have been treated as a pre-flight spouse. In the circumstances I make a fee award for the entire fee paid.

Signed Date 5 August 2019

Deputy Upper Tribunal Judge Chamberlain