Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14370/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 September 2018	**On 11 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASHRAF NOOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant (Secretary of State):	Mr D Diwncyz, Senior Home Office Presenting Officer
For the Respondent (Mr Noor):	Ms A Chowdary, Counsel

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Shimmin ("the judge") who in a Decision and Reasons promulgated on 16 March 2018, allowed Mr Noor's appeal against the Secretary of State's decision refusing his application for leave to remain on human rights grounds. For ease of reference I shall throughout this decision refer to Mr Noor, who was the original appellant, as "the claimant" and to the Secretary of State, who was the original respondent, as "the Secretary of State".

2. The claimant, who was born on 12 August 1984, is a national of Pakistan. He entered this country on 28 July 2014 with entry clearance as a spouse of a British citizen, namely, Nadia Amreen Noor. He was granted leave to remain until 2 April 2017 and before this leave expired he applied for a further extension on 16 March 2017, but this was refused on 23 October 2017.

3. This application was founded upon the continuing relationship which the claimant had with his wife. The basis of the refusal was that the claimant did not qualify for leave to remain under the Immigration Rules ("the Rules") because he did not meet the financial requirements or the requirements of paragraph EX.1. of Appendix FM because it had not been shown that there were "insurmountable obstacles" (as defined within EX.2) preventing family life from continuing in Pakistan, and further that there were no exceptional circumstances in this case which could warrant a grant of leave to remain outside of the Rules. It was against this decision that the claimant appealed and, as already noted above, this appeal was allowed by the judge.

4. The Secretary of State now appeals against this decision, leave having been granted by Resident Judge of the First-tier Tribunal R C Campbell on 11 April 2018.

The Decision of the Judge

5. As he was obliged to, the judge first considered whether or not the requirements set out within Appendix FM and within EX.1. were satisfied and he did this at paragraphs 23 to 31. The judge noted that whilst the couple claimed a joint annual income of £23,073 from salaried employment, they could not meet the requirements of Appendix FM as the claimant did not deposit all of his cash earnings into his bank account and so his bank statements did not correspond with his wage slips as required. Three weeks before the application was refused however, the claimant's wife commenced new employment in a full-time position with an annual gross income of £24,000 (the judge incorrectly notes that she commenced employment following the refusal). There was no challenge to this employment and the judge accepted the employment was genuine. By the date of the hearing before the judge on 12 March 2018 the claimant's wife had not been with her new employer for the six-months required under Appendix FM (she was one month short) and so the claimant could not satisfy the requirements of Appendix FM-SE of the Rules.

6. At paragraph 26 the judge concluded:

> "On the basis of the evidence before me I am satisfied that if the appellant reapplies next month, when his wife has been with her new employer for six months, he will meet all the requirements of the Immigration Rules".

7. Next the judge considered the evidence relating to the claim that the couple were undergoing fertility treatment (IVF) in the UK which was argued stood as an insurmountable obstacle to family life continuing outside the UK. The situation regarding treatment before the judge was that IVF treatment was "about to commence". The judge then proceeded to consider the circumstances of the

claimant's wife. He noted that she was British born; most of her close family were in the UK; she had good employment and should not be expected to leave all of this behind to live in Pakistan where she would have difficulties in finding employment. Taking all of this into account, the judge found as follows:

> "26. On the basis of the evidence before me I am satisfied that if the appellant reapplies next month, when his wife has been with his new employer for six months, he will meet all the requirements of the Immigration Rules. I find that in the circumstances of this case, including those in relation to IVF treatment, which I consider below, it is not proportionate for the appellant to make a fresh application, particular a fresh application from Pakistan.
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> 27. I accept … IVF treatment is about to commence."
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> 28. The appellant's wife was born in the UK. She has studied here and most of her close family are in the Yorkshire and Teesside areas. She has good employment.
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> 29. I find that she should not be expected to leave all this to accompany her husband to Pakistan. I am satisfied that her husband would have to 'start at the bottom again' in respect of employment after three years absence from Pakistan. I accept the appellant's wife's evidence that she would have difficulty in obtaining employment in Pakistan. She is an independent and ambitious person and she would not be able to fulfil her employment wishes in that country.
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> 30. Taking into account the couple's problems in respect of IVF treatment and the difficulty the appellant and his wife would have in respect of employment in Pakistan I find this amounts to them facing very significant difficulties in continuing their family together outside the UK. Such difficulties could not be overcome and would entail very serious hardship for the couple.
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> 31. Accordingly, I find that the appellant should have been found to have been exempt from meeting the eligibility requirements because paragraph EX.1. applies."

8. The judge then proceeded to consider whether the claimant's removal would be disproportionate under Article 8 of the ECHR. At paragraph 35 the judge noted that Article 8 was engaged and at paragraphs 36 and 37 concluded that the Secretary of State's decision was not in accordance with the law because the claimant "satisfied the Immigration Rules at the date of decision" or "could now satisfy those Rules if a fresh application was made." At paragraph 37 the judge stated that he was satisfied that there was no public interest in removing the claimant because he satisfied the "Immigration Rules which the Secretary of State declares to be human rights compliant."

9. In his omnibus conclusion the judge, as he was obliged to do, gave consideration to section 117B of the NIAA 2002 and noted that the maintenance of effective immigration controls is in the public interest and that this indeed together with the claimant's precariousness immigration status weighed against him. The judge further noted neutral factors such as the claimant's ability to speak English and the fact that he was financially independent. Weighing all these matters into the balance the judge concluded that the respondent's refusal was a disproportionate interference with the

claimant's right to family life and accordingly allowed the appeal on human rights grounds on that basis.

10. The basis on which the Secretary of State seeks to challenge this decision is that the judge erred in his approach to the evidence and in finding that the requirements of the Rules might be met if an application were made shortly after the hearing of the appeal. Moreover, there was no documentary evidence supporting the assertion made by the claimant that IVF treatment was about to begin, and the judge failed to consider whether it was available in Pakistan. The judge further erred in concluding that it was not proportionate for a fresh application for leave to be made from Pakistan.

11. I have had regard to the brief submissions made by the representatives. I conclude that the judge materially erred in law.

12. The judge was required to consider the question of proportionality through the lens of the Rules. The judge did this but there is a fundamentally difficulty with the decision because of what I consider to be a dissonance between the evidence and the judge's conclusions.

13. The Secretary of State concluded that the Rules were not met because the financial threshold was not satisfied. It does not appear that this conclusion was challenged before the judge because clearly the claimant was not able to show that his income met the specific requirements of Appendix FM-SE. At the time of the hearing before the judge, the claimant's wife had changed employment and in consequence the judge found the financial threshold could be satisfied if he reapplied next month when the claimant's wife would have completed six months of employment with her new employer.

14. The difficulty with the judge's decision is that he was required to consider the appeal by reference to the circumstances at the date of hearing. At that date, the claimant did not satisfy the requirements of the Rules. The judge was incorrect to find that he did so at paragraph 37 and this finding contradicts his findings at paragraphs 24 and 26 namely that the Rules would be satisfied if the claimant "reapplies next month". There is further error at paragraph 36 where the judge concludes that the Rules were satisfied at the "date of decision" which is incorrect. I find that the judge's findings present a confused and inconsistent approach to the evidence and the issues thereby raised under the Rules, which in my view cannot be reconciled.

15. The fact that the claimant did not meet the requirements of the Rules at the date of hearing was a factor that should have carried forward into the proportionality assessment and given adverse weight rather than the determinative weight the judge attributed to it at paragraph 37.

16. I also agree with the Secretary of State's grounds that the judge's consideration of the IVF issue was inadequate. The issue of IVF is somewhat complex. Clearly, the ability to undertake or undergo fertility treatment is part of an individual's private life and it requires both parties to be present for some time in one place. That is relevant to

both the issue of whether the claimant's wife could be expected to live in Pakistan, or whether if she remained here, the effect on her would be unduly harsh. There was no documentary evidence before the judge that IVF treatment was about to commence and there was no consideration of whether the couple could access IVF treatment in Pakistan. These were all important considerations that should have been factored into the assessment in order for a balanced consideration of the competing factors to be struck. This task in my judgement was inadequately undertaken by the judge was relevant in deciding whether the exception under the Rules could apply and indeed whether removal was proportionate.

17. I am thus satisfied that the judge's approach is not consistent with the guidance given by the Supreme Court in **Agyarko [2017] UKSC 11** at 47:

> "47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in Hesham Ali at paras 44-46, 50 and 53."

18. I thus conclude that the decision is not one where an informed reader can, with confidence, conclude that the material issues for consideration were adequately addressed. For these reasons the decision must be set aside.

Decision

I set aside the decision of the First-tier Tribunal as containing a material error of law and remit the appeal to the First-tier Tribunal for rehearing (not before Judge Shimmin).

No anonymity direction is made.

Signed:

Deputy Upper Tribunal Judge Bagral Date: 27 January 2019