



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27208/2016

THE IMMIGRATION ACTS

Heard at Liverpool HMCTS Employment Tribunals
On 16th March 2018

Decision & Reasons Promulgated
On 16th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

KHATERAH [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr A McVeety (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Malik, promulgated on 5th June 2017, following a hearing at Manchester on 19th May 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Afghanistan, who was born on 29th September 1988. She appealed against the decision of the Respondent Secretary of State, dated 3rd November 2016, refusing her application for leave to remain in the UK on the basis of her family life. The Appellant had entered the UK on 28th September 2013 with entry clearance as the spouse of a person present and settled in the UK, with leave to remain from 3rd September 2013 to 3rd June 2016. She had made her application to remain on the basis of her family life with her husband on 16th May 2016, but this was refused because she did not meet the requirements of paragraph R-LTRP.1.1.(d)(iii). The Respondent considered that there were no insurmountable obstacles to family life with her partner continuing outside the UK and therefore the requirements of EX.1(b) were not met.

The Judge's Findings

3. At the hearing before Judge Malik, the Appellant and her husband, Mr Amanullah [B], gave evidence. There was an attempt to admit late evidence by way of a letter of 15th May 2017 from the Pennine Acute Hospitals NHS Trust, confirming that the Appellant was undergoing IVF treatment with a view to getting pregnant, with respect to which she had difficulties having miscarried previously, but still wished to continue undergoing treatment, which was not available to her in Afghanistan. It was accepted by the Appellant's representative that the refusal by the Secretary of State was justified on the basis that the Appellant could not meet the financial requirements such as to enable his partner, the Appellant, to remain here with her in the UK. The judge also heard evidence that "due to cultural beliefs it would be a big struggle to cope with the pressure from family regarding children" (paragraph 13).
4. The evidence before the judge also was that the Appellant was intent upon conceiving a child and that "she said she would take medication until the problem had been resolved" given that she had miscarried (paragraph 14). She was clear that the same treatment was not available in Afghanistan to her. Her husband was a British national settled in the UK. He had been here since 2002 having made an asylum claim. This was refused but he was considered under the Legacy Scheme and in 2000 he was granted indefinite leave to remain. He married the Appellant in Afghanistan in 2011 and sponsored her application to enter the UK in September 2013.
5. The judge heard the Appellant's husband ought to give evidence that, with respect to the inability of the Appellant's wife of not being able to conceive a child, "he says there are calls from family and a lot of pressure" and that, "he says it is not possible to relocate to Afghanistan to live with his wife as they are settled here and hoping to have a child". The husband went on to say that, "having children is their priority and treatment is not available in Afghanistan. He says due to cultural beliefs it would be a big struggle to cope with pressure from family regarding having children and he does not want a second wife or children from another woman" (paragraph 18).

6. The judge went on to decide the appeal could be allowed on the basis that there were “insurmountable obstacles for family life with the partner continuing outside the UK”. There were two reasons for this.
7. First, the evidence before the judge, which was accepted that “there are calls from family and a lot of pressure as well” and “that it would be a big struggle to cope with this pressure of having children”.
8. Second, that this evidence was consistent between the Appellant and her husband so that “the Appellant’s husband’s statement mirrors that of the Appellant in this regard” (paragraph 27). The judge then went on to apply the **Razgar** steps carefully (see paragraph 31).
9. The judge carefully concluded that whereas there were no insurmountable obstacles to the parties returning together to Afghanistan, or that they would face any insignificant obstacles through their integration in Afghanistan, it was nevertheless disproportionate for the parties to have to return to Afghanistan “when the Appellant is currently undergoing fertility treatment in the UK, as evidenced in the correspondence from the Pennine Acute Hospital Trust”. The judge also held that even if such treatment was available in Afghanistan, the same would be the case. Moreover, the husband could not be required to leave the UK as he was a British citizen and a temporary separation may interfere with the course of the treatment that the Appellant was now receiving. The judge fully took into account the requirements of Section 117, and making a balancing exercise, decided that the facts underpinning the Appellant and her husband’s family life “cumulatively does outweigh the legitimate purpose of immigration control” (paragraph 35).
10. The appeal was allowed.

The Grounds of Appeal

11. The Grounds of Appeal allege that the judge made an error in relation to Article 8 because she incorrectly found that the Appellant’s fertility treatment was an exceptional circumstance and failed to make finding as to whether treatment was available in Afghanistan. Although the judge had set out Section 117B at (paragraph 8) he did not refer to the substance of this Section when considering the case of **Razgar** on proportionality.
12. On 22nd November 2017 permission to appeal was granted.
13. On 8th January 2018, a Rule 24 response was entered by the Appellant.

Submissions

14. At the hearing before me on 16th March 2018, the Appellant was not in attendance, and neither was any legal representation available on her behalf, because the Tribunal had been earlier informed by way of a letter from the Appellant’s solicitors dated 15th March 2018, that they were under no instructions to attend the hearing and that the

Appellant was now pregnant and due to give birth in August 2018 (which was five months away from now).

15. For his part Mr McVeety relied upon the grounds of application. He submitted that the judge was quite clear (at paragraph 35) that there were “no insurmountable obstacles” preventing the Appellant and her husband from returning back to Afghanistan. This was a case where the Appellant could not demonstrate that her Sponsor husband could meet the financial threshold requirement of £18,600 in earnings. The question now was whether it was reasonable to expect the Appellant to return to Afghanistan.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. My reasons are as follows.
17. This is a case where the Appellant’s husband, Mr Amanullah [B], had come to the UK from Afghanistan as an asylum seeker. He was eventually granted a ILR, after his case had been put into the legacy system which is known for its protracted delays, and has now acquired British citizenship. The suggestion that he could return to Afghanistan in his circumstances, given his background, is fanciful.
18. Second, the judge properly found that there were “no insurmountable obstacles” but was equally entitled to take into account the fact that the Appellant was undergoing fertility treatment in this country, and was serious about conceiving a child, which she has now done, fortunately for her, and in applying Article 8, it was entirely proper for the judge to take all these matters into account, together with the conclusion that, “the Appellant’s husband cannot be required to leave the UK as a British citizen” because this is an attempt to “interfere with the course of the treatment the Appellant is receiving now” (paragraph 55). There is nothing irrational about this conclusion.
19. Ultimately, insofar as the judge was considering proportionality in relation to Article 8, this was a relevant fact, just as in the same way, it was relevant for her to state that, “the public interest considerations in Section 117 were applicable” but that, “in applying a balancing exercise, I find the facts underpinning the Appellant’s and husband’s family life, taken singularly and cumulatively does outweigh the legitimate aim for the purpose of immigration control” (paragraph 35). It is not the case that the judge has overlooked the public interest requirement in Section 117.
20. It is not the case that she has undertaken the balancing exercise in any rational manner, not taking into account matters that ought to have been taken into account, and giving undue weight to matters that she did take into account.
21. There was the issue as to whether IVF treatment was available in Afghanistan, and the judge accepted the evidence of the Appellant’s husband that, “he said no such thing existed there” (paragraph 19) and it is no stretch of imagination to say that this

conclusion was entirely well-founded in relation to Afghanistan. Accordingly, there is no error of law.

Decision

22. There is no material error of law in the original judge's decision. The determination shall stand.
23. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

14th May 2018