Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: AA/03739/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On 7th March 2016

Decision & Reasons Promulgated
On 11th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SARDAR WALI JABARKHEI

Claimant

Representation:

For the Secretary of State (Appellant in the Upper Tribunal): Ms Brocklesby-Weller

For the Claimant: Miss Fisher (Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge James promulgated on the 19th July 2015, following a hearing on the 29th May 2015, in which he allowed the appeal against a refusal to extend the Appellant's discretionary leave, on Article 3 and Article 8 grounds.

2. Permission to appeal has been granted by First-tier Tribunal Judge Grant-Hutchinson

on the 14th July 2015, in which she noted that the Secretary of State was only seeking to challenge the Article 8 findings, but that it was arguable the Judge had erred in law by failing to consider the requirements of Appendix FM and had failed to properly consider the public interest in conducting the balancing exercise by virtue of Article 1F (a) and (c) and by failing to give little weight to the Appellant's private life in terms of Section 117 B (5).

3. Within the Grounds of Appeal it is argued by the Secretary of State that the Appellant is excluded from the refugee Convention by virtue of Article 1F (a) and that the Appellant's appeal was allowed on Article 8 grounds, but that the Secretary of State only sought to challenge the findings in respect of Article 8. It is further argued that the Judge had failed to consider the requirements of Appendix FM and further that the Judge's assessment of Article 8 is therefore flawed as no consideration has been given or weight attached to the fact that the Appellant failed to meet the suitability requirements of Appendix FM by virtue of his exclusion from the Refugee Convention. It was further argued that the Judge has incorrectly considered the public interest grounds of Section 117B of Part 5 of the Nationality, Immigration and Asylum Act 2002 in that he failed to attach little weight to the Appellant's private life established with precarious status and that the Judge had failed to take into account the fact the Appellant was excluded from the Refugee Convention when determining whether or not the Appellant's removal from the UK would be disproportionate and had overlooked the public interest in removing those excluded from the Refugee Convention under Article 1F (a).

4. Within the Rule 24 Reply, which was filed and served on the 29th July 2015, but which was not contained within the file, to which I am grateful to Miss Fisher for providing me with another copy of the same, it is argued that Section 117 B (5) did not mean that the Judge should attach little weight to the Claimant's family life with his partner and that the subsection only applies to private life not family life. It is further argued that even if Section 117B militated against the Claimant in the assessment of proportionality, the Judge was entitled to balance such matters against the lengthy delay of 7 ½ years on the part of the Appellant considering the application for further leave. It is further argued that in respect of the argument that the Judge failed to attach weight to the public interest in removing those who have

been excluded from the Refugee Convention, no authority had been submitted in support thereof, but that the decision in respect thereof could not alter the outcome of the lawful proportionality exercise in circumstances where in respect of the Claimant whose claim that if returned he would be subjected to treatment contrary to Article 3 ECHR upon return had been accepted.

5. It is further argued within the Rule 24 reply that the Judge failed to consider the Claimant's entitlement to protection under the Refugee Convention and that although the Judge directed himself that he was not pursuing an appeal against refusal to grant asylum, he had not considered the submissions about exclusion which are recorded at [51 to 53] of the determination and that the very first Tribunal Judge, Immigration Judge Hawden-Beal who had considered the Claimant's first appeal in 2006 had erred in finding that the Claimant had committed a crime against peace and so fell for exclusion under Article 1F (a) of the Convention. It was argued that although Judge Hawden-Beal's determination of the facts was the starting point for the assessment, the Tribunal was not stopped *per rem judicatam* from considering the 1951 Convention following the case of Mubu [2000] UKUT 398 and that the Judge should had properly considered the Claimant's appeal on asylum grounds.

6. Although after having taken instructions, this Ms Brocklesby-Weller's primary position on behalf of the Secretary of State was that the Rule 24 notice should not be used as a means of conducting a cross-appeal and reliance was placed upon the Upper Tribunal decision of e.g. EG and NG (UT Rule 17;withdrawal; Rule 24:scope Ethiopia) [2013] UKUT 00143 she argued that the Upper Tribunal in that case had found specifically that "a party that seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties needs permission to appeal. The Upper Tribunal cannot entertain an application purporting to be under Rule 24 for permission to appeal unless the First-tier Tribunal has been asked in writing for permission to appeal and has either refused it or declined to admit the application". In reply, Miss Fisher sought to initially argue that the point made in respect of Article 1F was a Robinson obvious point, such that it could be argued before the Upper Tribunal.

7. However, upon reflection, Miss Fisher on behalf of the Claimant conceded that the

decision of First-tier Tribunal Judge James did contain a material error of law in terms of his failure to consider the effect, if any, of Article 1F in the Article 8 proportionality assessment. It was agreed between the parties that the First-tier Tribunal Judge's findings in respect of the genuineness of the Claimant and his partner's relationship and the nature and extent of their relationship should be preserved, as also should the First-tier Tribunal Judge's findings in respect of Article 3, but that it was in the interests of justice for the matter to be remitted back to the First-tier Tribunal for a rehearing of the proportionality issue, in light of the issue in respect of Article 1F.

8. It was further agreed between the parties that as First-tier Tribunal Judge James had not actually made any findings in respect of Article 1F, that the First-tier Tribunal upon considering the case at the remitted hearing, would have to deal with the Appellant's arguments that the Claimant was not in fact excluded from being able to claim asylum under the Refugee Convention by the virtue of Article 1F and that the questions as to the extent to which the First-tier Tribunal should accept the findings of First-tier Tribunal Judge Hawden-Beal from 2006 and as to the extent to which Article 1F actually was engaged, would have to be considered. It was also agreed between the parties that if the First-tier Tribunal found that Article 1F was not engaged having considered the Appellant's submissions in this regard, then in affect the Claimant's asylum appeal should also be dealt with at that First-tier Tribunal rehearing.

9. However, it was further agreed between the parties that this would not affect the Claimant's entitlement under Article 3, or the findings in respect of the extent and nature of his relationship with his partner for the purpose of Article 8. It was, however, agreed between the parties that the Article 1F consideration should be dealt with by the First-tier Tribunal upon the rehearing, and this could make a material outcome to the decision, given that if the Claimant is excluded from claiming under the Convention as a result of Article 1F, he would only ever be given 6 months leave at any one time.

Notice of Decision

The decision of First-tier Tribunal Judge James, as has been agreed between the parties, does contain a material error of law and is set aside, save that the First-tier Tribunal Judge's findings and decision on Article 3, and his findings in respect of the genuineness and nature of the relationship between the Claimant and his partner are preserved;

The matter is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge James.

Signed Dated 7th March 2016

R McGinty

Deputy Judge of the Upper Tribunal McGinty