Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25341/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th October 2017	**On 27th October 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

NK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Saleem, instructed on behalf of Malik and Malik Solicitors
For the Respondent: Mr Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of the First-tier Tribunal who, in a determination promulgated on the 20th January 2017 dismissed his appeal against the decision of the Secretary of State to refuse his application for leave to remain in the UK as the spouse of a British Citizen.

2. **Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

3. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity as at the hearing before the FTT, reference was made to the Appellant's circumstances as a vulnerable witness. 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.

4. The factual background of the Appellant is set out in the papers. The appellant claims to have entered the United Kingdom in February 2002 and made a claim for asylum. It was refused on 6 August 2002 and it was not accepted that at the time he made the application he was a minor. He was subsequently removed to Germany where a claim for asylum was made by the appellant. It is recorded that they accepted his age within that application. On 15 February 2008 he re-entered the UK illegally and made a further asylum claim on 8 October 2008. On 24 January 2009 the second asylum claim was refused. The papers make reference to the appeal being successful before the First-tier Tribunal but that on appeal to the Upper Tribunal the decision was set aside and on a rehearing of the appeal on 18 January 2010 the appellant's appeal was dismissed.

5. On 29 October 2013 the appellant married and on 9 January 2015 an application was made for leave to remain on the basis of marriage.

6. In a decision letter dated 5 June 2015 that application was refused. The appellant's immigration history as set out above was summarised and his application was considered under the partner route. The Secretary of State considered whether EX1 applied and noted that he could not meet the requirements of EX 1(a) as there were no children of the relationship. As to the requirements of EX1(b), it was acknowledged that he had a genuine and subsisting relationship with a settled partner who was in employment in the United Kingdom but that it did not mean that they were unable to live together in Afghanistan. The Secretary of State considered that whilst relocation there may cause a degree of hardship for the appellant's British partner, there was no evidence that there were insurmountable obstacles in accordance with EX2 preventing the appellant from continuing his relationship in Afghanistan. Thus he failed to fulfil EX1(b) of Appendix FM of the Immigration Rules and thus did not meet the requirements of R-LTRP1.1. and the application was refused under D-LTRP 1.3.

7. The decision under private life was considered under paragraph 276 ADE (1) taking into account his claim that he last entered the United Kingdom in February 2008 and thus had lived in the UK for six years. He therefore could not satisfy paragraph 276 ADE (1) (iii). As he was over the age of 18 years and has not spent at least half of his life living continuously in the

UK he could not meet the requirements of paragraph 276 ADE (1) (iv) or (v).

8. As to paragraph 276 ADE (1)(vi) and the requirement for there to be very significant obstacles to his integration into Afghanistan, it was not accepted that there would be such significant obstacles because he had spent the majority of his life there, including his formative years. It was noted that he spoke Pashto, the language of Afghanistan and thus it was not accepted that he had lost all cultural, social and family ties to Afghanistan.

9. The Secretary of State also considered whether there were any circumstances that would give rise to a grant of leave outside of the rules and took into account his claim that he had immediate family members present and settled in the UK including his brother, sister and other relatives who provided financial assistance. The respondent also took into account his claim that he had integrated closely with the local community and established friendships whilst in the UK. However the Secretary of State considered the relations with adult siblings did not fall within the definition of "family life" and that there was nothing to prevent the relatives or friends from continuing the relationship outside of the UK by visits or through forms of long-distance communication that was available. Any financial assistance provided by relatives could be sent abroad.

10. As to his relationship with his partner, the secretary of state took into account his claim that it would be unreasonable to ask her to leave the United Kingdom as she was progressing well in her employment and that she would not be able to enter employment in Afghanistan without hardship. It was further claimed that his partner would be unable to support him in Afghanistan and that they would have to "start from scratch". However it was noted by the respondent that his partner was a national of Afghanistan and had spent her formative years there and thus had some experience of the culture. Furthermore, as she was in employment in the UK it was not accepted that she would be unable to transfer those skills to finding suitable employment in Afghanistan should she choose to accompany the appellant back to his home country. It was noted that his partner was in the UK with indefinite leave to remain and that she was under no obligation to leave the UK and could remain in employment should she choose to do so. Thus it was decided that there were no "exceptional circumstances" in his case and did not therefore fall for a grant of leave outside of the rules.

11. The appellant appealed that decision and it came before the First-tier Tribunal in January 2017. In a determination promulgated on 20 January 2017, the appellant's appeal against that decision was dismissed. The judge's conclusions are set out at paragraphs 62 – 79. As to the provisions of EX1 (b) and the issue of insurmountable obstacles as defined in EX2, he concluded that there were no insurmountable obstacles to the appellant and his spouse maintaining family life in Afghanistan. He further concluded at [71] that there were not "very significant obstacles" to the reintegration

of the appellant Afghanistan. Furthermore at paragraphs 74 onwards the judge considered the claim outside of the immigration rules and reached the conclusion that the balance of proportionality was in favour of dismissing the appeal.

12. The appellant sought permission to appeal that decision and on 3 August 2017 First-tier Tribunal Judge Pickup granted permission. There was no response in the form of a Rule 24 notice from the respondent.

13. Thus the appeal came before the Upper Tribunal. Mr Saleem appeared on behalf of the appellant. He relied upon the written grounds for permission and the grant of permission by Judge Pickup. He submitted that in terms of the facts found at paragraphs 56 – 61, there were no serious concerns with those save that at [56] the judge made reference to there being no difficulties in her returning to Afghanistan. In this context he submitted that the factual background of the appellant's spouse was that she had entered the United Kingdom as a dependent of a father who had been recognised as a refugee seven years ago and the issue of safety of return had not been considered by the Tribunal.

14. He submitted that the conclusions drawn from the evidence were challenged and in particular paragraphs [62]–[65]. In this context he submitted that whilst it was accepted that the appellant's spouse was a Muslim who had previously lived in Afghanistan, the judges assessment at [64] that both the appellant and his spouse are "almost wholly un-assimilated into the UK, to the extent that their lack of assimilation into the UK means that they are both more familiar with Afghanistan" was an immaterial consideration. He submitted that it was not known what the judge had meant or what the appellant's spouse was required to demonstrate to show that she was assimilated in the United Kingdom. Furthermore, he submitted that at [65] the judge repeated this consideration stating that the appellant's spouse "is not able to speak English, and is of the religion followed in Afghanistan, speaks the language of that country, and chooses in the UK to wear a full burkha. She moves in almost exclusively Afghan expatriates circles. She is not assimilated into the UK in any meaningful sense." He submitted that the judge's notion of a British citizen is one who does not wear a burkha and suggests that if such a person speaks the language of another country that is wrong. He further submitted that the practice of faith is fundamental and that in any event she was a British citizen and to obtain citizenship she had been required to pass the "life in the UK test".

15. By reference to paragraph [65] he submitted that the judge was inconsistent as to the issue of language because earlier at [62] he had found that she had an understanding of English, although he described it as "very limited. At [69] he submitted that the judges analysis was wrong and that as the appellant's spouse was a British citizen she was entitled to receive treatment via the NHS.

16. He directed the Tribunal to the assessment made by the judge "outside of the rules" and the "balance sheet" containing the factors taken into account in the proportionality balance. In this context he submitted that whilst the judge was entitled to take into account the appellant's precarious immigration history, the judge fell into error by considering the appellant spouse as being "culturally Afghan and not assimilated in the UK" and the reference again to the fertility treatment "as not a matter of human rights " when the appellant spouse was a British citizen and thus entitled to NHS treatment. Thus he submitted that when looking at the considerations, both under EX 1(b) and outside of the rules in the proportionality balance, the judge had taken into account irrelevant considerations which was wrong in law.

17. Mr Saleem also confirmed in his submissions that he was not advancing the issue of bias as a freestanding ground of appeal as the written grounds appeared to state, but that the judge had taken into account irrelevant considerations which were an error of law.

18. As to other issues, he submitted there was an argument as to whether the appellant could be returned to Afghanistan in order to apply for entry clearance. He relied upon a decision of the Upper Tribunal SM and others (entry clearance – proportionality) Afghanistan CG [2007] UKAIT 00010. He did not have a copy of that decision but I was able to furnish the parties with a copy myself. By reference to that decision he submitted that the case was still good law and that there were no entry clearance facilities in Afghanistan and that an appellant would have to travel to Pakistan to make such an application. He submitted that by reference to paragraph 57 that the dangers were faced by all and not just by those with British nationality.

19. He further submitted that at [66] where the judge had found that the appellant and his spouse depended entirely on the financial and other support of the appellant's brother and other family members, that in the light of the decision in MM (Lebanon) that third-party support can now be taken into account and thus the analysis was wrong. Consequently he submitted that the decision should be set aside and should be remitted for a further hearing.

20. Mr Kotas on behalf of the respondent confirmed that there had been no Rule 24 response filed with the Tribunal. He reminded the Tribunal of the grounds of permission as set out in the written application and that there was no suggestion that the Article 8 assessment was deficient and that the issue relating to MM (Lebanon) was a new issue raised but in any event was misconceived as there had been no application under Appendix FM in this regard. Furthermore, the reference to the decision in SM and others was misconceived because the judge had not reached a conclusion that the appellant could return to Afghanistan and then seek entry clearance. He had found that the couple could return together as a family unit.

21. As to any issue of bias, he submitted that the grounds did not make any allegation in the way that the case was conducted. Indeed at [39] he submitted that he invited the appellant's spouse to resume wearing her burkha and was alive to any matters of cultural sensitivity.

22. In response to the submissions relating to the conclusions at paragraphs [62] onwards, he submitted that the judge had considered how the appellant had integrated in the UK, what were her ties and the nature of her private life. The judge was undertaking a "contextualisation" of the issues.

23. He further submitted that the issue of the basis of her father's grant of refugee status was not argued at the appeal therefore could not give rise to an error of law.

24. In terms of the Article 8 analysis, the judge conducted a balancing exercise and took into account the relevant factors. The submission made on behalf of the appellant as to the tension between [62] and (65] and the issue of language was essentially "splitting hairs" and the judge was entitled to reach that conclusion overall.

25. By way of reply, Mr Saleem submitted that the written grounds were not intended to set out the whole of the submissions and that the issues raised at this hearing could not have taken the presenting officer by surprise when the decision in SM and others was a country guidance decision. He submitted that the issues had been raised in the grounds including that the judge did not assess the cultural norms in Afghanistan relating to the ability of women to work and the patriarchal system in Afghanistan and had not taken into account the appellant's learning difficulties in obtaining any employment thus paragraph 4 of the written grounds did raise issues relating to the objective material and return to Afghanistan.

26. At the conclusion of the hearing I reserved my decision which I now give.

27. I have given careful consideration to the submissions of each of the advocates as summarised above. I have to consider whether it has been demonstrated that the First-tier Tribunal erred in law when reaching its overall decision. Whilst Mr Saleem submits that the judge erred by not considering the country guidance case of SM and others (as cited), I do not find that this had any relevance to the issues before this particular First-tier Tribunal. As Mr Kotas submitted the judge made no finding adverse to the appellant on the basis that he could be expected to return to Afghanistan alone and make an application for entry clearance out of country. The decision letter does not raise such an issue and the judge did not consider the appeal on this basis. The issue that the Tribunal had to decide related to whether the appellant could return to Afghanistan accompanied by his wife and whether there were "insurmountable obstacles" to family life being exercised in Afghanistan under EX1(b) or when considering the issue of family life outside of the rules (see the decision in Agyarko [2017] UKSC 11).

28. I also do not consider that there was any error of law in the conclusion reached at [66]. The judge was not undertaking an assessment of the family's finances under Appendix FM as to whether they could meet the maintenance requirements but was considering the issue of family support being maintained in order to support the appellant and his spouse if they returned to Afghanistan. That, in my judgement was a completely different issue.

29. That said, I am satisfied that the decision does demonstrate the making of an error on a point of law in the assessment of whether there were "insurmountable obstacles" to family life in Afghanistan either under EX1 (b) or when considering the parties return to Afghanistan outside of the rules. In this context the error relates to the proportionality balancing exercise conducted by the judge.

30. In this context I have considered the written grounds and in particular paragraph 3 in which the error of law is articulated in the following way: –

> "3. The appellant submits that the First-tier judge erred when stating that since the appellant's wife wears a burkha, she has not assimilated in the UK. This is a serious error as the appellant's wife would have to pass a life in the UK test to become British. The First-tier Tribunal judge was biased as what an assimilation is the circumstances of the appellant's wife."

31. The grounds were not accompanied by any other evidence in the form of witness statements from the parties present or from the advocates (see decisions of the Tribunal in BW (witness statements by advocates) Afghanistan [2014] UKUT 568 and Wagner (advocates conduct – fair hearing) [2015] UKUT 655 and the Court of Appeal decision in Singh v SSHD [2016] EWCA Civ 492). Nor was there any further elucidation provided prior to the hearing as to the basis of any allegation of bias.

32. The grant of permission by Judge Pickup interpreted the written grounds in the following way:-

> "2. In essence, the primary ground of application is that the judge was biased in assessing the appellant British citizen wife was not assimilated in the UK, because she wears a burkha. That is a very serious allegation.
>
> 3. In assessing the proportionality of returning the appellant to Afghanistan, at [62] of the decision the judge noted that she is of Afghani origin birth, is a Muslim who wears a burkha, with limited understanding of English in the six years that she has been in the UK, and speaking the language of Afghanistan. At [65] the judge again referred to the Burka, stating she "chooses in the UK to wear a full burkha. She moves in almost exclusively Afghan expatriates circles. She is not assimilated into the UK in any meaningful sense."

> 4. That the appellant's British citizen wife wears a full back is irrelevant to the consideration of assimilation or integration. It is thus arguable that the judge allowed irrelevant considerations to affect the proper determination of the appeal."

33. Mr Saleem in his submissions did not seek to rely on the issue of bias in advancing his submissions as set out above. He based his submissions on those particular paragraphs identified asserting that the judge had taken into account irrelevant considerations and therefore the assessment of insurmountable obstacles, whether under the rules or outside the rules, was flawed.

34. The issue of whether there were insurmountable obstacles or in the alternative, whether there were there were any "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see decision in Agyarko at [48]) both involve a consideration of whether family life could continue in all its essential respects in Afghanistan, the appellant's country of nationality. As Mr Saleem conceded, it could not be an error of law to take into account that the appellant's spouse had formerly lived in that country and was thus familiar with the customs, social norms and language. However in taking as his standpoint some point of significance drawn from the appellant's spouse wearing a Burka, the judge had taken into account a consideration that was immaterial. I agree with Judge Pickup when granting permission. The the fact that she wears a Burka is not relevant to the consideration of assimilation and/or integration and in any event, the issue of assimilation was not the issue under consideration but that of "insurmountable obstacles" or whether there are any "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see Agyarko at [48]).

35. I am therefore satisfied that the balancing exercise in which this factor was considered (as set out at paragraph 77) was therefore flawed and cannot stand.

36. It also seems to me that the position of the appellant's spouse and basis of her status derived from her father was a relevant consideration when considering joint return to Afghanistan and/or the issue of insurmountable obstacles. There does not appear to be any factual assessment of this issue and the safety of any return to Afghanistan although there is reference at [50] where the appellant's counsel submissions are summarised. It is unclear to me why this was not evidenced at the hearing.

37. Furthermore, the judge recorded at [75] that "much was made on behalf the appellant on how bad life is in Afghanistan but this was not an asylum appeal." Mr Saleem made reference to the written grounds at paragraph 4 where it was asserted that the cultural norms in Afghanistan were not assessed and in particular in the context of the finding made that the

appellant's wife would be able to obtain employment. The country conditions in Afghanistan seem to me to be a relevant consideration and provide the backdrop against which return, even though this is not an asylum claim, should be assessed. Again it is unclear to me why no objective evidence was put before the judge in this regard. The Tribunal cannot be at fault in not taking into account material if it is not provided. However in view of the conclusion reached that the balancing exercise was flawed for the reasons I have given, the decision reached shall be set aside.

38. As to the remaking of the decision, Mr Saleem invited me to remit the appeal to the First-tier Tribunal for a fresh hearing which would consider the issues further. I am satisfied that that is the correct course to adopt for a number of reasons. Whilst the decision on proportionality will require further consideration, it is likely that this will entail further oral evidence from the parties and documentary evidence as to the circumstances in Afghanistan. As set out earlier in the determination, the issue relates to whether there are insurmountable obstacles to family life in Afghanistan and this will require consideration of the objective material relating to conditions in that country. I observe that neither party produced any evidence before the First-tier Tribunal in this regard and whilst it was not asserted that this was an error of law made by the judge, on the remaking of the decision, it is likely to be of relevance when reaching an overall decision. At the present time, the Upper Tribunal is hearing a country guidance case concerning the most recent objective material relating to Afghanistan and therefore when it is promulgated it will be relevant to the decision under appeal. Thus the appeal should be listed before the First-tier Tribunal after promulgation of the country guidance decision.

39. At this hearing the parties should ensure that all the documentary evidence that is relied upon is filed and served on the other party and the Tribunal.

40. The original decision made reference to the vulnerability of the appellant (see paragraph 29). Mr Saleem was not able to provide any further details or any evidence concerning the appellant circumstances. It will be for those who are instructed by the appellant to consider this issue further and in light of the decision of the Senior President of Tribunals in AM (Afghanistan) and Secretary of State for the Home Department and Lord Chancellor [2017] EWCA Civ 1123. In the light of those circumstances I have made in anonymity direction, however, when the matter returns to the First-tier Tribunal for further hearing that issue may be revisited upon receiving further submissions from the parties and in the light of any available evidence.

DECISION:

The decision of the First-tier Tribunal is set aside; the decision is remitted to the First-tier Tribunal for a further hearing in accordance with the Practice Direction.

Signed Date

Upper Tribunal Judge Reeds