Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50585/2013

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Determination Promulgated**
On 21 October 2014	**On 5 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Taj Shazad
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms F Anthony, instructed by French & Co
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Taj Shazad, date of birth 1.1.89, is a citizen of Afghanistan.

2. This is his appeal against the determination of First-tier Tribunal Judge North promulgated 9.7.14, dismissing his appeal against the decision of the respondent, dated 14.11.13 to refuse his application for leave to remain in the UK on the basis of human rights family life under Appendix FM of the Immigration Rules and article 8 ECHR, and to remove him from the UK by way of directions under section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 27.6.14.

3. First-tier Tribunal Judge Tiffen granted permission to appeal on 28.7.14.

4. Thus the matter came before me on 21.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge North should be set aside.

6. The relevant background to the appeal can be summarised briefly as follows. The appellant entered the UK illegally in either 2009 or 2011. He did not come to the attention of the authorities until he was detained on 9.7.13 and served with a notice of liability to removal. Only after that date did he make a claim for leave to remain. The refusal decision sets out in detail the long history of applications and representations, but it transpired from a scan of his fingerprints that he had claimed asylum on three separate occasions in 2010 in three different countries: Hungary, Austria, and France. It was then that he changed his claim to have entered the UK in 2009 to 2011. He was granted temporary release on 20.8.13 and information gathered as to his claims under Appendix FM and article 8. The appellant claims a relationship with Nabeela Kousar, a British national, with whom he entered an Islamic form of marriage ceremony on 25.5.13 and they have been residing together since August 2013. She has two British citizen children from a previous relationship. His application was refused and removal directions made on 14.11.13.

7. It is worth noting that not only did the refusal decision consider Appendix FM and paragraph 276ADE of the Immigration Rules, but from §46 onwards consideration was given to article 8 outside the Rules and in particular under the five-stage Razgar test. At that time the appellant had only been living with Ms Kousar a few months, from August 2013 to the date of decision of 14.11.13. Judge North, however, had to assess the situation prevailing at the time of the hearing before him.

8. Judge North was not satisfied that the appellant had the 'deep relationship' with Ms Kousar's children claimed by him. The judge was not satisfied that he and Ms Kousar met the relationship requirements and definition of a partner under E-LTRP 1.2 (GEN 1.2) and hence EX1 is not reached as a partner. Neither did the appellant meet the requirements of Appendix FM for leave to remain as a parent.

9. The First-tier Tribunal also considered paragraph 276ADE and private life, in respect of which the judge was satisfied he retained cultural links to Afghanistan.

10. The First-tier Tribunal Judge then proceeded from §13 of the determination to consider whether there were circumstances outside the Immigration Rules, in other words, consideration of a family life claim under article 8 ECHR as had been conducted by the Secretary of State. The judge was not satisfied as to the veracity of the evidence of family life between the appellant and his partner and her two children and did not accept the claim that he represents the 'only father figure' for those children, with the appellant and Ms Kousar downplaying what had been her earlier position – that she could not leave the UK because her children had a relationship with their natural father.

11. At §13 the judge stated, "I am not satisfied that the appellant has shown that he is engaged in a relationship with either Ms Kousar or the children of such substance that his removal from the United Kingdom would engage Article 8. Even if Article 8

were engaged to some extent, I am not satisfied that the interference caused by his removal is disproportionate to the UK's legitimate aim in enforcing fair and firm immigration control. For those reasons, I am not satisfied that there are any circumstances falling outside those specifically provided for in the Immigration Rules which require the appellant's appeal to be allowed under Article 8 of the ECHR." The appeal was thus dismissed.

12. The lengthy grounds of appeal assert that the First-tier Tribunal Judge failed to take account of material evidence and failed to give adequate reasons for his conclusions.

13. In granting permission to appeal, judge Tiffen noted that there is no reference in the determination to the evidence given in witness statements in the appellant's bundle or any consideration of the pregnancy of the appellant's partner when reaching his conclusions. "The Tribunal Judge has failed to consider evidence before him and to apply anxious scrutiny to the evidence and ultimate decision and as such I conclude that there is an arguable error of law."

14. Considering the outline of the determination, it is clear that the judge first considered Appendix FM and paragraph 276ADE of the Immigration Rules. In the light of Gulshan, Shahzad, and MF (Nigeria), he then considered whether there were compelling circumstances outside the Immigration Rules justifying allowing the appellant to remain under article 8 ECHR family on the basis that the decision would otherwise be unjustifiably harsh. Although no such compelling circumstances were found he went on in any event to consider article 8 ECHR family life. This he was required to do pursuant to section 86 of the 2002 Act, as it was a ground of appeal. Recent authority (Ganesabalan v SSHD [2014] EWHC 2712 (Admin)) has suggested that Appendix FM and 276ADE are not a 'complete code' for consideration of article 8 and there is always a second stage consideration of proportionality outside the Rules and a consideration as to whether the decision to remove would be unjustifiably harsh and thus disproportionate.

15. Ms Anthony explained that it was conceded at the First-tier Tribunal hearing that the appellant could not meet any of the requirements of the Immigration Rules for leave to remain and thus the claim is in relation to article 8 family life only. She complains, however, that no reference was made to the pregnancy and associated evidence. She also submitted that the fact of cohabitation since the Islamic marriage ceremony meant at least 1 year of relationship, with a child expected. She also pointed out that the judge made no reference to witness statements of neighbours (JI, J2, & A188), and Ms Kousar's sister (A184), and other documents tending to show a genuine relationship. I have carefully considered that material. There are short letters from neighbours stating that the appellant has been seen visiting Ms Kousar and going out with her and her children. Ms Kousar's sister states that the appellant shows kindness and a loving approach to Ms Kousar and her children, with whom he has formed a good relationship.

16. More significantly, Ms Anthony complained that if the judge rejected the contention of family life, he should have explained why he did not accept the evidence. Finally, she submitted that the judge gave no reasons for finding the decision proportionate

and thus the appellant does not know the factors that were weighed in the proportionality balancing exercise.

17. Ms Johnstone submitted that the judge had provided adequate reasons. The judge found no genuine family life between the appellant, Ms Kousar and her children. The fact of an unborn child had little relevance; and a fresh application could be made once the child was born. The appellant could not meet the Rules and there were insufficiently compelling circumstances to allow the appeal outside the Rules under article 8 ECHR family life on the basis that the decision is unjustifiably harsh.

18. As far as pregnancy is concerned, the Tribunal could not take account of the situation of an unborn child. That Ms Kousar was expecting another child had only limited relevance, but is potentially relevant to support the claim to a genuine and subsisting relationship with Ms Kousar.

19. It is correct that the judge did not mention the statements and letters of neighbours and Ms Kousar's sister. However, those witnesses did not attend to give evidence in support of the appellant and thus little weight could be attached to them, especially since there was no evidence that those persons existed or had written those letters and statements. In any event, I note that at §3 of the determination the judge stated that he had taken into consideration both the documents in the respondent's bundle and those in the appellant's bundle of 189 pages, together with the skeleton argument drafted on the appellant's behalf.

20. It is not necessary for the judge to recite all of the evidence in the determination, provided that it is clear that he has taken account of material evidence and disregarded immaterial matters. I am satisfied that the judge did take into account all of the evidence placed before him. There is no reason to doubt that when he said he had done so, he did. The matters now complained of were also raised in the skeleton argument and were, I understand from Ms Anthony, part of her oral submissions to the judge, and so would have been at the forefront of the evidence and issues put before him.

21. There is no doubt that family life could exist between parties to an Islamic ceremony of marriage, even though there was no civilly valid marriage, and even if the relationship was relatively short. At §6 the judge noted that, after being detained when stopped for driving with no insurance or licence, the appellant had been released from detention in August 2013 to live at Ms Kousar's home. Thus the judge did not challenge the fact of cohabitation.

22. However, throughout the determination the judge gave a number of reasons for doubting the appellant's credibility and the changing account of both the appellant and Ms Kousar as to her children's relationship with either their natural father or the appellant, as well as his relationship with Ms Kousar as a partner.

23. There was in fact no evidence that the children had any relationship with their natural father, as noted by the judge at §9 of the determination. In the same paragraph the judge found that both the appellant and Ms Kousar had been selective in the information they had provided as to the children's welfare. In the circumstances, taking the determination as a whole, I find that the judge has justified

with cogent reasons his conclusion set out at §9 as to the relationship of the appellant with the children.

24. Even if he had ignored or overlooked the evidence complained of, I cannot see that specific reference to the pregnancy and the letters from the neighbours and Ms Kousar's sister could have made any difference to the outcome of the appeal, given the limited weight to be attached. Whilst it is dealt with relatively briefly in §13, when the determination is read as a whole, I find that the judge did provide cogent reasons why he was not satisfied that there was genuine family life between the appellant and Ms Kousar sufficient to engage article 8.

25. In the alternative, the judge also considered that the decision was not disproportionate. The fact that the appellant could not meet the requirements of the Immigration Rules for leave to remain as a partner or parent was taken into account at §10. At §11 the judge also took into account the appellant's failure to make any claim to regularise his status in the UK until after he came to the attention of the authorities. The appellant had no valid private life claim. All of these matters, including the changing accounts, significantly undermined the credibility of the appellant and Ms Kousar. Although he does not spell in out in as many words, it is clear that the judge did not believe the appellant and Ms Kousar and did not believe that their relationship was genuine, whether it met the Immigration Rules or not.

26. I accept that it would have been better for the judge to set out what factors were taken into account in that balancing exercise. But in the light of the findings as to family life, the decision could hardly have been disproportionate. However, as it was an alternative consideration, the judge having already reached the conclusion that there was insufficient family life to engage article 8, there is in any event no material error of law in this regard. In the absence of a genuine family life so as to engage article 8 in the first place, the claim could not succeed.

Conclusion & Decision

27. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 3 November 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 3 November 2014

Deputy Upper Tribunal Judge Pickup