IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25655/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th November 2015	**On 18th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR RAFIQULLAH FIDA MOHAMMAD
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Skinner (Counsel)
For the Respondent: Miss A Everett (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge K W Brown, promulgated on 2nd March 2015, following a hearing at Taylor House on 18th February 2015. In the determination, the judge dismissed the appeal of Rafiqullah Fida Mohammad, who 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 male, a citizen of Afghanistan, who was born on 20th June 1988. He appeals against the decision of the Respondent Secretary of State to refuse his application for leave to remain under the points-based system by a decision dated 5th June 2014.

The Appellant's Claim

3. The Appellant's claim is that there are insurmountable "obstacles" under paragraph EX.1 to family life with his partner continuing outside the UK, in that he is married to Ms Shameela Jan, a British citizen who has lived in the UK since the age of 2, and who has a mother, father and six younger siblings in this country. The judge heard that both the Appellant's family and his wife's family come from Jalalabad, which is the second city in Afghanistan. Although life for the Appellant's wife would be different in Jalalabad than it would in the UK, it is the case that,

> "Many marriages have to face difficult challenges. Both the Appellant and his wife are well-educated. They are able to face challenges together. There are no children. I have no doubt that they will receive the support of close and extended family members".

The judge went on to say that,

> "I accept that the culture and general way of life will be different for the Appellant's wife but that is something that she may have to come to terms with if the marriage is to continue in Afghanistan. It is the truth that she entered the marriage with her eyes wide open with knowledge of the Appellant's lack of immigration status as a student ...." (paragraph 32).

4. The judge considered that if the Appellant and his wife had to separate for a while until he made an application to re-enter again this would not amount to insurmountable obstacles because:

> "Living apart is a feature at some stages during many marriages. It may be that the Appellant would seek to make an application for entry clearance on the basis of his marriage to a British wife. In this, once again I am sure he would be supported not only by his wife but his own and wife's family ..." (paragraph 33).

5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge erred in considering that the Appellant would face no insurmountable obstacles, particularly in light of the fact that his wife as a woman would have no support provided for her in Afghanistan, and that family life there would indeed be unduly harsh for them to maintain.

7. On 7th July 2015, permission to appeal was granted on the basis that the judge may have had regard to immaterial considerations in reaching his decision.

8. On 13th August 2015, a Rule 24 response was entered by the Secretary of State to the effect that, the Appellant's application under Tier 4 (General) was bound to fail and the appeal was only pursued on Article 8 grounds on the basis of family life with the Appellant's new wife and the judge considered all the submissions and made a decision on the material facts. The judge did consider that family life could continue in Afghanistan with the support of the Appellant's family. There was no error.

The Hearing

9. At the hearing before me Mr Skinner, appearing as Counsel on behalf of the Appellant, made three broad submissions. First, the terms of EX.1 makes it quite clear that this applies if,

> "(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

10. In considering EX.1(b) the possibility of return is not relevant. The obstacles must plainly be considered on the basis that the family life is to continue outside the UK. Accordingly, the judge erred in taking into account the possibility of the Appellant's return to the UK as a spouse.

11. Second, the judge wrongly took into account, and gave undue weight to the fact that the Appellant and his wife had married knowing that the Appellant's immigration status was precarious. The question of insurmountable obstacles is a discrete question of fact and the immigration status of an Appellant is an entirely irrelevant to it.

12. Third, in considering whether there are insurmountable obstacles, the judge gave no consideration to the position of women in Afghanistan. This was important because the COI Report on Afghanistan dated 15th February 2013 (reissued on 8th May 2013), which refers to the position of women in Afghanistan as, "one of the worst in the world", and confirms that "sexual and gender based violence against women is endemic … and women cannot currently rely on protection from the Afghan authorities".

13. Mr Skinner submitted that, given that this was the case, it was incumbent upon the judge to consider whether or not these aspects of life in Afghanistan would present insurmountable obstacles to the continuation of the Appellant and his wife's family life there. The judge failed to do so. He fell into error. This is because the Appellant's wife, being a British citizen, and given that she had been living in this country from a very young age, was a western styled woman.

14. For her part, Miss Everett submitted that there is no material error of law. The judge had given proper consideration (at paragraph 32) to all the issues. He had taken the view that Jalalabad was a second city of Afghanistan and, with a population of 250,000 people, it had various styles

of life, in which the Appellant and his wife could easily have a subsisting and viable family life, with the support of close family members. Second, the Appellant's wife had ties with Afghanistan and had gone and lived there for three months previously. She had family support there.

15. In reply, Mr Skinner submitted that the facts were not in dispute. The only question was whether the proper consideration had been given to the test of "insurmountable obstacles" to get the Appellant over the threshold. The "insurmountable" test was an objective test. The question was not whether the Appellant and his wife would go to Afghanistan. The question was whether they could go to Afghanistan. The judge had confused the two.

Error of Law

16. I am satisfied that the making of the decision by the judge involved 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. My reasons are as follows. First, the judge should have considered whether the Appellant's wife could have gone to Afghanistan in the light of the circumstances that she would face as a westernised Afghan woman upon return there. These circumstances are well set out in Mr Skinner's skeleton argument (see paragraphs 7 to 8). It was incumbent upon the judge to consider whether these circumstances would present a "insurmountable obstacle" to the continuation of the couple's family life in Afghanistan. It is not enough to say that continuous support from family members would enable her to overcome such obstacles. This is a fact-sensitive exercise and should have been properly undertaken.

17. Second, the fact that the Appellant's immigration status was precarious is irrelevant to the question of whether there are "insurmountable obstacles" and the suggestion that the Appellant's wife went into the marriage with her eyes open obscures this fact. That leads correspondingly to an error of law. The "insurmountable obstacles" test must be objectively analysed in its own right. In short, it is insufficient answer to the Appellant's claim to say that, "I have no doubt that they will receive the support of close and extended family members" (paragraph 32).

18. Equally, it is insufficient to say that, "it may be that the Appellant will seek to make an application for entry clearance on the basis of his marriage to a British wife" and to proceed to assume that, "once again, I am sure he will be supported not only by his wife but by his own and his wife's family ..." (paragraph 32).

Re-Making the Decision

19. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I refer to today. I am allowing this appeal to the extent that it is remitted back to the First-tier Tribunal, to be decided by a judge other than Judge K W Brown

because under practice statement 7.2(b) the nature or extent of any fact-finding which is necessary in order for the decision in the appeal to be remade it such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. This is because "insurmountable obstacles," is a fact-sensitive issue on which evidence must further be heard in relation to the question of whether the Appellant's wife's return to Afghanistan is feasible given the risks that the COI highlights in the very recent report.

Notice of Decision

21. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This matter is remitted back to the First-tier Tribunal to be determined by a judge other than judge K W Brown at the earliest opportunity.

22. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th December 2015