IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31931/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th January 2016	**On 25th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

NIRMOHAN SINGH KAANIJO
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss A Basharat, instructed by Malik & Malik Solicitors
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, who is a citizen of Afghanistan of Sikh origin, appeals with permission against the decision of Judge of the First-tier Tribunal R J N B Morris to dismiss his appeal against refusal by the Secretary of State of his application for leave to remain on the basis of his private and family life in this country. His brief history is that he arrived in this country in 2003 when he claimed asylum. His application was refused and an appeal dismissed in 2004. Further submissions were also refused. He has since married his wife Parmeet Kaur Arora, who also originates from Afghanistan

but is now a British citizen. The couple's son Japjit was born on 7th August 2014. He too is a British citizen.

2. It was accepted by the Secretary of State that the couple were in a subsisting and genuine relationship but it was considered that there were no insurmountable obstacles to the Appellant's family life with the Sponsor continuing outside the United Kingdom and that there would not be any very significant obstacles to his reintegration into life in Afghanistan. As at the date of the application and the decision to remove the Appellant to Afghanistan the couple's child had not been born.

3. In her decision, which was promulgated on 15th June 2015 following a hearing on 19th May 2015, Judge Morris considered the Appellant's case under Appendix FM of the Immigration Rules, under paragraph 276ADE and also under Article 8 ECHR outside the Rules. She reached the view that there were no insurmountable obstacles to the family as a whole going to Afghanistan or in the alternative to the Appellant's wife and son remaining in this country whilst he went overseas, possibly to Pakistan, to seek entry clearance.

4. In the grounds of application, which now stand as the Grounds of Appeal, it was contended that the judge had erred in failing to have regard to the comments of the Upper Tribunal in the reported decision of **DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 00148 (IAC)** in which it had been found that there had been no material error of law in the decision of the First-tier Tribunal then under review in which it was said that the generality of Afghan Sikhs and Hindus were at risk. Mention was made that further country guidance was at that time awaited and the Sikh community suffered harassment and discrimination. It was submitted that it was not open to the judge to find on the balance of probabilities that there were no insurmountable obstacles to the family relocating to Afghanistan. It was also said that the judge erred in finding that there were no significant obstacles to the Appellant reintegrating into life in Afghanistan and had erred in considering the welfare of the couple's child and the assessment of his best interests. Examples were given of how it was said that Sikhs, in particular women and children, faced discrimination and harassment.

5. Permission was granted by Judge of the First-tier Tribunal Colyer on 12th October 2015. He found the grounds arguable. In a response under Upper Tribunal Procedure Rule 24 it was submitted that the decision was sustainable and the First-tier Tribunal had properly taken into account the relevant circumstances of the Appellant and relevant case law. It was said that the conclusion reached in respect of the child's best interests had been open to the Tribunal.

6. At the hearing before me Miss Basharat relied upon the grounds. Miss Everett for her part referred to the Rule 24 response. She said that the judge had considered the assessment of conditions in Afghanistan set out in **DSG**. She had also looked at the then current Operational Guidance

Note. The Appellant was not a refugee and had not himself been persecuted in the past. The Sponsor had originated in Afghanistan and was familiar with the country and the Appellant had relatives there. The test of insurmountable obstacles was a stringent one. Although the child was a British citizen that in itself she said was not enough. The test was whether it was reasonable to expect the child to go to Afghanistan. The judge was aware of those criteria. Both parents were familiar with the culture in Afghanistan and the best interests of the child were to be with the parents. Because there were no insurmountable obstacles to the Appellant and his wife going to Afghanistan they could not come within the Immigration Rules. On the basis that the facts might merit Article 8 consideration the judge had proceeded to consider matters on that basis. She said the judge was entitled to consider whether it was disproportionate to expect the Appellant to go to another country to seek entry clearance in accordance with the Rules. I mentioned that at paragraph 41(1) of the decision the judge had referred to Section 117B of the Nationality, Immigration and Asylum Act 2002, notably sub-sections 117B(1), (4) and (5) but she had not referred to 117B(6). Having regard to the recent guidance given in **Treebhawon & Others (Section 117B(6)) [2015] UKUT 00674 (IAC)** sub-section 117B(6), if met, would override the earlier sub-sections. Miss Everett said it was harder to argue on that basis although that decision of the Upper Tribunal was likely to be subject to appeal.

7. In response Miss Basharat said that it would be unreasonable to expect the family to go back to Afghanistan having regard to **DSG** and the element of discrimination against Sikhs and Hindus. The Appellant was likely to have to adjust his dress in order to live there. She accepted that the couple had become married at a time that they must have known that the Appellant's status was precarious but the arrival of the child was a new factor. She said it was unreasonable to expect the child to go to Afghanistan in the light of the likely harassment, discrimination and lack of education and healthcare.

8. I have to say at the outset that the decision by Judge Morris is a very careful and detailed document. The core question she had to deal with was whether there were insurmountable obstacles to the Appellant's wife following him to Afghanistan and whether it was reasonable to expect his son to go there. These issues arise under EX.1 and EX.2 of Appendix FM to the Immigration Rules and, so far as the child is concerned, under Section 117B(6) of the 2002 Act which comes into play in consideration of Article 8 outside the Rules. Tied in with these questions is the issue which arises in respect of the Appellant under paragraph 276ADE(1)(vi) as to whether if returned there would be very significant obstacles to the Appellant's reintegration into the society in Afghanistan. In considering the interests of the child, both the Secretary of State and the Tribunal were required to have regard to Section 55 of the Borders, Citizenship and Immigration Act 2009 which sets out the duty to safeguard and promote the welfare of children in the United Kingdom. That has been interpreted as regarding a

child's best interests as a primary consideration in the making of any decision.

9. The judge had various elements of background material before her. She stated (at paragraph 15) that she had paid regard to the Secretary of State's Operational Guidance Note of June 2013, reissued in February 2015, and to the case of **DSG**. It is important to note that both **DSG** and the country guidance case of **SL & Others (Afghanistan) CG (Returning Sikhs and Hindus) [2005] UKIAT 00137** addressed the matter of persecution and asylum and the judge noted that neither the Appellant nor his wife had been recognised as refugees. The judge did refer (in the first paragraph of numbered paragraph 23 and also at subparagraph (iii)) that Sikhs are in a minority in Afghanistan and have faced discrimination and harassment, a matter not in issue between the parties. On the basis of that evidence she found it had not been shown that there would be insurmountable obstacles to the wife joining the Appellant in Afghanistan although she accepted (at paragraph 26(ii)) that:

> "Undoubtedly there would be a change in the Sponsor's and Japjit's quality of life and they might also experience some hardship were they to relocate to Afghanistan. This would include a change in the type of accommodation they would live in and the Sponsor's level of income. These factors are specifically addressed in the IDIs and it is concluded that they would not usually amount to an insurmountable obstacle."

10. The IDIs are not of course legal precedent which a judge is required to follow but on the basis of the background information before her I find no legal error in the judge's view that the Sponsor would not face an insurmountable obstacle in going with the Appellant to Afghanistan, difficult though that might be.

11. So far as the child is concerned however the test was not whether there were insurmountable obstacles but whether it was reasonable to expect the child to go to Afghanistan. The judge accepted at paragraph 26(ii) that with his mother he might experience some hardship. Although she did not expressly quote it in the Operational Guidance Note which was before the judge it is noted (at paragraph 3.15.10):

> "Whilst there is no evidence that Sikhs or Hindus are at real risk of persecution at the hands of the Afghan authorities solely because of their ethnicity, nor are there indicators of a government able to provide effective protection to the Sikh/Hindu community. Sikhs and Hindus can be subject to societal harassment and discrimination. …"

Whilst the judge found that such problems would not amount to insurmountable obstacles for the wife, the context of considering matters for the child are different having regard to Section 55 of the 2009 Act.

12. The judge expressly considered the child's best interests of paragraph 27 in which she stated:

> "In coming to my conclusions I have borne in mind that the best interests of Japjit, the Appellant's and the Sponsor's young son are a primary consideration which should be considered first. However the Appellant's and the Sponsor's circumstances are a material consideration in assessing Japjit's best interests, because any decision on his parents' case will have an impact on him. Since I have concluded that there are no insurmountable obstacles facing the Appellant and the Sponsor (should she so wish) to relocate to Afghanistan, I find that it would be reasonable for Japjit to relocate with them on the basis that it is usually in a child's best interests to remain with his parents. I revert to the question of Japjit's best interests below in my discussion on the question of proportionality under the 1950 Convention."

13. The judge referred again to Japjit's best interests at paragraph 40 when she stated "although Japjit's best interests are a primary consideration the primacy of his interests fall to be considered in the context of his particular family circumstances as well as the need to maintain immigration control".

14. The judge was clearly aware of the conundrum as to whether one considers the child's best interests in isolation or in the context of what is to happen to his parents. This dilemma was considered by the Supreme Court in **Zoumbas v SSHD [2013] UKSC 74** and by the Court of Appeal in **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874**. Lord Justice Lewison stated at paragraph 58 of **EV (Philippines)**:

> "In my judgment therefore the assessment of the best interests of the children must be made on the basis of the facts as they are in the real world. If one parent has no right to remain but the other parent does that is the background against which the assessment is conducted. If neither parent has the right to remain then that is the background against which the assessment is conducted. Thus the ultimate question will be 'is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

15. In both **Zoumbas** and **EV (Philippines)** the children in question were not British citizens and nor were their parents. In both cases it was acknowledged that British citizenship was a significant factor as was established by the Supreme Court judgment in **ZH (Tanzania) v SSHD [2011] UKSC 4**. Lord Hope stated at paragraph 41 of that judgment:

> "… The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood."

16. Judge Morris accepted again (at paragraph 43 of her decision) that "the parties might face some significant difficulties in continuing their family life in Afghanistan". In reaching her conclusion with regard to the child she was required to factor in the very significant element of his British citizenship and also the background evidence which indicated the risk of facing harassment and discrimination in Afghanistan. She accepted (at

paragraph 45(ii)) that he would not enjoy the same level of healthcare as in this country yet she found (at the beginning of that paragraph) that "Japjit's welfare would not be undermined if the Sponsor were to decide to relocate to Afghanistan with the Appellant". She had to decide whether it was reasonable to expect the child to go to Afghanistan (with one or both of his parents). Given that the best interests of a child were involved it was legitimate for the judge to consider matters under Article 8 ECHR outside the Immigration Rules. The judge expressly referred to Section 117B of the 2002 Act in her consideration of Article 8 outside the Rules. At paragraph 41(ii) and (iii) the judge referred to elements of Section 117 namely sub-sections (3), (4) and (5). She did not however refer expressly to sub-section (6), although she had earlier set this out when reciting the whole of that Section. Sub-section (6) reads as follows:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

17. It is clear from the decision in **Treebhawon** that sub-section 117B(6) prevails over the public interests identified earlier in the Section. The sub-section includes no requirement for an applicant to return to a home country to seek entry clearance. All that is necessary is the parental relationship and a finding that it would be unreasonable for the child to relocate to the applicant's home country.

18. With some reluctance, in the light of the quality of the determination as a whole, I have come to the view that the judge did err in law in assessing the child's best interests and whether it would be reasonable to expect him to go to Afghanistan without expressly factoring in the risk of discrimination and harassment for Sikhs in Afghanistan and the very significant benefits of his British citizenship. She also erred (and I accept that **Treebhawon** had not been promulgated when she made her decision) in failing to realise that subparagraph (6) of Section 117B of the 2002 Act could override the earlier sub-sections. For these reasons I set aside her decision.

19. I did canvass with the representatives what should follow if, after detailed consideration, I set the decision aside and both were of the view that the appeal should be reheard in the First-tier Tribunal as there would need to be an up-to-date finding of facts. Although on the evidence before her I found that the judge was justified in her view that the Appellant's wife could be expected to go to Afghanistan with him, I do not preserve that finding as I am aware that there has been a further country guidance case concerning Sikhs in Afghanistan which may be of relevance to a further assessment.

Notice of Decisions

The making of the decision by the First-tier Tribunal involved the making of an error on a point of law and I set aside that decision. In the light of Statement 7(2)(b) of the Tribunals Judiciary Practice Statements I remit this case to be heard in the First-tier Tribunal under Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007, in accordance with the directions set out below.

There was no request for an anonymity order and none is made.

Signed Date 22 January 2016

Deputy Upper Tribunal Judge French

Directions for Rehearing (Sections 12(3)(a) and 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007

(1) The decision of Judge of the First-tier Tribunal Morris is set aside with no findings preserved and the appeal is to be heard afresh.

(2) The appropriate hearing centre is Hatton Cross. The time estimate is three hours. No interpreter is requested.

(3) Each party shall serve upon the other and upon the Tribunal at least seven days before the hearing, copies of any witness statements or other documents sought to be relied upon.

Signed Date 22 January 2016

Deputy Upper Tribunal Judge French