Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00334/2016**

HU/00339/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 20 December 2017	**On 22 December 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

NOORULLAH NOORI
YUSUF NOORI
(ANONYMITY ORDER NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Harding, Counsel, instructed by J McCarthy Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, a father and minor son of Afghan nationality, appeal the decision of judge of the First-tier Tribunal Maka (FtJ), promulgated on 20 March 2017, dismissing their appeals against the respondent's refusal, dated 4 September 2015, of their human rights claims for leave to remain under article 8.

Background

2. The 1st appellant was born on 1 January 1987 (the FtJ wrongly stated that his date of birth was 1 January 1970, but nothing turns on this mistake). He entered the UK illegally in March 2007 and an asylum claim was refused on 4 April 2007. Following the refusal of his asylum claim (it is not apparent from his statement whether he ever appealed the decision) the 1st appellant remained in the UK without lawful leave.

3. Mariam Ahmadi, a national of Afghanistan, entered the UK with her mother and sisters in July 2008 to join her father, who had been recognised as a refugee. It appears that she entered the UK pursuant to the provisions of the immigration rules governing Refugee Family Reunion. A residence permit contained in the respondent's bundle indicates that it was issued on 4 October 2010, valid until 13 October 2013. Ms Isherwood confirmed at the 'error of law' hearing, and it was not challenged, that in 2014 Ms Ahmadi applied for leave to remain outside the immigration rules, and she was granted Discretionary Leave (DL) valid until 29 October 2017.

4. The appellant and Ms Ahmadi underwent a religious ceremony on 16 September 2013, and they were legally married on 20 December 2013. Their first child, the 2nd appellant, was born on 2 March 2015 in the UK. The 1st appellant has another child with Ms Ahmadi, born on 4 March 2016.

5. On 12 June 2015 the appellants made human rights applications for leave to remain in the UK based on family and private life rights. The respondent concluded that the appellants could not meet the requirements of the immigration rules under Appendix FM as Ms Ahmadi was not British, or settled, or in the UK with refugee leave. The respondent additionally doubted the genuineness of the relationship between the 1st appellant and Ms Ahmadi. The 2nd appellant could not meet the requirements of the immigration rules as a result of his mother's immigration status, and because he has not resided in the UK for at least 7 years. The respondent concluded that, applying paragraph 276ADE(vi), there were no 'very significant obstacles' to the 1st appellant returning to Afghanistan, and that the 2nd appellant could not meet the requirements of paragraph 276ADE(iv) as he had not lived here for 7 years. The respondent concluded that the 1st appellant could maintain his child in Afghanistan and could ensure his safety and welfare, and that Ms Ahmadi would be able to travel to Afghanistan as well to ensure the family unit was maintained.

Decision of the First-tier Judge

6. The FtJ was satisfied that the relationship between the 1st appellant and Ms Ahmadi was genuine and subsisting, and that they had two children. The FtJ noted that counsel for the appellants (Mr Harding, who again represented the appellants before the Upper Tribunal) stated that he was only relying on article 8 8 outside the immigration rules as the immigration rules could not be satisfied in light of Ms Ahmadi's

immigration status, and that it could not be said that the 1st appellant had no ties to Afghanistan given that he lived there for 28 years. The FtJ took account of the 1st appellant's immigration history, noting that he resided illegally in the UK from 2007, and rejected his claim not to have worked in the period 2007 to 2013. The FtJ additionally rejected the 1st appellant's claim to have no family members in Afghanistan and found that he remained in contact with them.

7. In determining whether the refusals of the human rights claims constituted a disproportionate breach of article 8 the FtJ noted that the appellant's partner was not British or settled, and that her only reason for being in the UK was "… because she claimed to be part of her father's family unit and was therefore granted family reunion with him." The FtJ noted that the relationship was formed in the knowledge that the 1st appellant's immigration status was precarious, and that Ms Ahmadi had not expressed a fear of persecution in her own right. The FtJ attached 'due weight' to the fact that the immigration rules were not satisfied, and once again noted the 1st appellant's immigration history. At [51] the FtJ accepted that "things will not be easy" for the appellants, but that the children were of an age where they could easily adapt to life in Afghanistan, and, at [52], he found the children's best interests were for the family unit to remain together and that this would be achieved if the children's parents both returned to Afghanistan. The FtJ did not accept that the children's best interest overrode the competing public interest factors given their young age, their unsettled immigration status, and the fact that both their parents were Afghani nationals with no permanent or settled right to remain in the UK. the FtJ specifically considered that the 1st appellant would be able to rely on his own family in Afghanistan to settle down and that the skills he obtained in the UK could be utilised to find employment, and that Ms Ahmadi's family could help financially for a limited period. Having weighed the competing factors the FtJ dismissed the appeals concluding that it would not be disproportionate to expect the family to relocate to Afghanistan.

The grounds of appeal, the grant of appeal and the Upper Tribunal hearing

8. The grounds contend that the FtJ was not entitled to conclude there were no 'insurmountable obstacles' to the family life being enjoyed in Afghanistan, and that the FtJ failed to consider that the 1st appellant's partner had status under 'family reunion'. The grounds note that, as of the date of the First-tier Tribunal hearing, neither Ms Ahmadi nor her youngest child were removable. It is claimed that the FtJ fundamentally erred in assessing the degree of interference and likely impact, and that the assessment of the children's best interest was inadequate. It was pointed put that the FtJ directed himself throughout with respect *to Hesham Ali* [2016] UKSC 60, which was a deportation case where different principles applied.

9. In granting permission Deputy Upper Tribunal Judge Chapman noted that, as the child of a refugee who was admitted to the UK under family reunion provisions, the 1st appellant's wife had refugee leave and fell within E-LTRP.1.2(c) of Appendix-FM. It was consequently arguable that the FtJ erred in finding that the entire family could return to Afghanistan and in his consideration of the best interests of the children given that the wife could not be required to leave the UK.

10. At the Upper Tribunal hearing Ms Isherwood confirmed that Ms Ahmadi made an application outside the immigration rules in 2014 for leave to remain, and that she was granted DL until October 2017. She had not been in receipt of refugee leave when the respondent's appealed decision was made. Mr Harding helpfully drew my attention to paragraph 6 of the immigration rules which defined 'refugee leave' by reference to a grant of leave pursuant to paragraph 334 or 335 of the immigration rules.

11. Mr Harding expanded upon his grounds, submitted that the FtJ failed to properly consider Ms Ahmadi's circumstances, her length of lawful residence, the best interests of the children, or to consider the claim that the family would not be safe in Afghanistan. Ms Isherwood responded to these submissions and submitted there were no compelling reasons preventing the family relocating to Afghanistan.

Discussion

12. I deal first with the assertion, in the grant of permission that the 1st appellant's partner was, at the date of the First-tier Tribunal hearing, present with 'refugee leave'. The 1st appellant's partner entered the UK under the refugee family reunion provisions. Although the FtJ stated that Ms Ahmadi "… claimed to be part of her father's family unit", it does not appear from reading the decision as a whole that the FtJ doubted Ms Ahmadi's claim in this regard. I find that nothing turns on this admittedly peculiar phrase. I take judicial notice of the fact that, while the 1st appellant's partner may have been granted refugee status when she joined her father, she was never recognised as a refugee in her own right, and was never granted asylum under paragraph 334 or 335 of the immigration rules. According to Ms Isherwood Ms Ahmadi applied for further leave to remain in 2014 outside the immigration rules. Mr Harding did not challenge this assertion. Ms Ahmadi was granted DL until October 2017. She was not therefore granted further leave to remain in pursuance of the refugee family reunion provisions. In any event, as pointed out by Mr Harding in his oral submissions, the definition of 'refugee leave' in paragraph 6 of the Immigration rules refers to limited leave granted pursuant to paragraphs 334 or 335 of the immigration rules. It was not in dispute that the appellant's partner had not been granted leave in pursuance of either paragraph 334 or 335. She did not therefore meet the definition of 'refugee leave' under Appendix FM.

13. Mr Harding contended that the FtJ failed to consider, in determining whether the 1st appellant's partner could relocate to Afghanistan, that she entered the UK pursuant to the refugee family reunion provisions as a 15-year-old, and that she had enjoyed status under family reunion. I am not persuaded that the FtJ failed to take into account Ms Ahmadi's immigration history or circumstances. It is apparent from a holistic reading of the decision that the FtJ was fully aware that the 1st appellant's partner was granted leave to enter on the basis of family reunion, and that she has lawfully resided in the UK since the age of 15 (see [27], [28], [38] and [39]). Although she entered the UK as a 15-year-old, at the date of the First-tier Tribunal hearing she was 24 years old and was living independently from her family. There was nothing in her statement or her oral evidence, as recorded in the decision, suggesting that her relationship with her family in the UK contained anything beyond the normal bonds of affection (*Singh v SSHD* [2015] EWCA Civ 630), or that there would be any particular impediment to her relocating to Afghanistan. While it is quite true that she is not removable, the fact that she is lawfully resident in the UK, and the possibility that she may be granted settlement in the near future, does not prevent her from choosing to relocate to Afghanistan in order to maintain her immediate family unit, a point properly made by the FtJ at [52]. It is a trite proposition of law that article 8 rights do not entitle a family to choose where to live.

14. I reject the submission that the FtJ's assessment of the best interests of the children was inadequate. At the date of the First-tier Tribunal hearing the 2nd appellant was 2 years old, and his sibling was only 8 months old. They clearly would not have developed any significant relationships outside their immediate family unit. There was limited independent evidence relating to the children, and no suggestion that they were not in good health or had any other particular needs. The 1st appellant's statement indicated that the children had a lot of extended family in the UK including grandparents and aunts, but there was no particularised evidence of the nature of these relationships. Other than to assert that "Afghanistan is not a safe place for us", there was no specified reason advanced as to why their safety and welfare would be jeopardised if they went to Afghanistan. The FtJ's overall assessment of the children's best interest at [51] and [52] must be considered in the context of his other factual findings. The 1st appellant's asylum claim was previously rejected and the FtJ found that he had no well-founded fear of persecution. The FtJ additionally found that the 1st appellant remained in contact with his family members in Afghanistan, and that his partner's family would be able to help financially, albeit for a limited period. These factual findings were not challenged and the FtJ was unarguably entitled to make these findings for the reasons given. While the limited background country evidence provided by the appellants (the US State Department Report, issued on 3 March 2017, and a two-page report Qantara (Germany) 'Deportations to Afghanistan: No safe country of origin', also dated 3 March 2017) indicated that there was widespread violence, including

indiscriminate attacks on civilians, there was nothing in that evidence capable of entitling the FtJ to conclude that the mere presence of the children in Afghanistan would expose them to a real risk of ill-treatment.

15. Nor is it arguable that the FtJ erred in law by failing to adequately consider whether the family as a whole would be safe in Afghanistan. I note again that the 1st appellant's asylum claim was refused in 2007 and he did not advance any protection claim before the First-tier Tribunal, and the FtJ found as a fact that he was in contact with his family and would therefore have their support in re-integrating. The 1st appellant and his partner only asserted in the most general of terms that the family would not be safe in Afghanistan. Although limited background country evidence was provided, which I have considered *supra*, the FtJ's attention does not appear to have been drawn to any specific passage in that evidence, and the background evidence does not, in any event, establish that the family would face a serious and individual threat to their lives by reason of indiscriminate violence.

16. While the FtJ did refer at length to *Hesham Ali* [2016] UKSC 60, there is nothing on the face of the decision to suggest that he applied the wrong legal principles or that he otherwise misdirected himself in law.

17. There does not appear to have been any submission made on the appellants' behalf at the First-tier Tribunal hearing, or indeed before the Upper Tribunal, that the 1st appellant's partner could not reasonably be expected to relocate to Afghanistan as a result of any restrictions she may face as a woman. Certainly, there is no reference to this in either the skeleton argument before the First-tier Tribunal or on the face of the First-tier Tribunal decision.

18. The FtJ carefully weighted up the competing factors before him when assessing proportionality, including the best interests of the children, but was rationally entitled to conclude that there were no compelling reasons why the family could not relocate to Afghanistan. The decision discloses no material legal error.

Decision:

The appeal is dismissed

Signed: Date: 21 December 2017
Upper Tribunal Judge Blum