Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12933/2019

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 3rd March 2020	**On 23rd March 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

SHAH MUHAMMED SAFI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Thathall, Immigration Law Chambers
For the Respondent: Mrs Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of the First-tier Tribunal (Judge Butler) promulgated on 17th October 2019, dismissing the Appellant's appeal against the Respondent's decision refusing to grant him leave to remain in the UK on family/private life grounds.

Background

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2. The Appellant is a national of Afghanistan born 1st January 1992. He states he left Afghanistan in around 2011 and travelled to Italy where he applied for, and was granted, subsidiary protection status. This status was valid, following an extension being granted, until December 2019. The Appellant did not remain in Italy; he travelled to the UK entering illegally, he claims in April 2015. He did not declare himself to the authorities on entry, but lived initially in the Manchester area with friends.

3. In June 2016 he met his partner Miss [Q] via an online dating site. Miss [Q] is a Pakistani national who was granted refugee status as a dependant of her mother. Her mother was granted asylum on 20th October 2017 on account of her Christian faith. Miss [Q], together with her mother and siblings, moved to the London area. The Appellant visited her regularly there, but according to their accounts kept their relationship secret as it was not approved of by Miss [Q]'s mother because the Appellant is a Muslim.

4. Miss [Q] moved to Derby in September 2018 to continue her education and the Appellant moved in with her in October 2018. They married in an Islamic ceremony on 6th November 2018. On 1st February 2019 the Appellant applied for leave to remain on family and private life grounds.

<u>The Secretary of State's Decision to Refuse</u>

5. The Respondent refused the application because the Appellant could not meet the requirements of the Immigration Rules for the following reasons:

   (a) On the eligibility requirements an Islamic marriage is not recognised under English law

   (b) The requirement that he and his partner live together for a period of two years prior to the application for leave to remain being made was not met

   (c) He entered and is residing in the UK unlawfully

   (d) He had not shown that there were significant obstacles to his integration into Afghanistan or Italy, if required to leave the UK.

6. The Respondent also found after further consideration, that there were no exceptional circumstances justifying a consideration of Article 8 outside the Rules. The Appellant appealed the Respondent's decision to the FtT.

<u>FtT Hearing</u>

7. The appeal came before Judge Butler. The judge heard evidence from both the Appellant and Miss [Q]. He noted that the Grounds of Appeal claimed that to refuse the Appellant's application violated Articles 3 and 8 of the ECHR. It was also claimed that the Respondent's failure to recognise that returning the Appellant to Afghanistan or Italy would be in breach of the Refugee Convention and was disproportionate. The grounds

also claimed that "Dublin Regulation III" applied to the Appellant's circumstances. So far as the appeal before me is concerned the Article 3 claim does not feature because permission was granted on one ground only.

8. In a full and reasoned decision, the judge found that the Appellant did not meet the requirements of the Immigration Rules for leave to remain in relation to either private or family life. After directing himself on the **Razgar** principles he found that the claim outside the Rules pursuant to Article 8 ECHR also failed. The appeal was accordingly dismissed.

Onward Appeal

9. The Appellant sought and was granted permission to appeal to the Upper Tribunal. There were originally three grounds in the handwritten application, but permission was granted on one ground only (Ground 3) which says as follows:

> "That the IJ erred under the Article 8 considerations in failing to consider the specific circumstances of the appellant and sponsor as raised in a skeleton argument and especially the young age of the sponsor, their inability to return to their own countries as they are both with Refugee status and the respective difficulties faced by the sponsor in resuming *(?)* her education and career as too great a price, hence the cumulative effect disproportionate to both parties."

10. Permission was granted in the following terms, the relevant part of which is reproduced here:

> "1. The application is in time. I turn first to the ground that asserts the Judge erred in failing to consider the specific circumstances of the appellant and his partner, and in particular their inability to live elsewhere.
>
> 2. While the Judge was plainly correct to find that the appellant's partner did not meet the definition at GEN.1.2, and EX.1 was therefore not engaged, it is arguable that the assessment of proportionality nonetheless required engagement with the appellant's submission (recorded at [29]) that the couple faced literally insurmountable obstacles. The appellant had been granted subsidiary protection in Italy, so could not return to Pakistan. His partner had leave to remain in the UK as a refugee, which gave her no right to be admitted to Italy. The Judge nonetheless, at [32], approached proportionality on the basis that it was "a matter for them whether they choose to continue their relationship outside the UK."
>
> 3. While engagement with, and indeed acceptance of, that submission might still have led to the Judge concluding that removal was

proportionate, it cannot be said that this was inevitable. The legal error argued is therefore, if established, potentially material."

11. Thus, the matter comes before me to determine whether the decision of the FtTJ contains such error that it must be set aside and remade.

Error of Law Hearing

12. Before me Mr Thathall appeared on behalf of the Appellant and Mrs Aboni on behalf of the Respondent. Mr Thathall's submissions relied upon the written ground upon which permission was granted. He handed up a skeleton argument together with an excerpt from the guidance published by the Respondent relating to EX.1 of the Rules and dated 10th December 2019 (post dating the date of decision) and a copy of the judgment in **Agyarko [2017] UKSC 11**.

13. In addition, he said that he wished to emphasise that the Appellant is the dependant of Miss [Q] who is a refugee. In his decision the FtTJ did not properly factor this into the balancing exercise. Miss [Q] cannot freely travel to Italy to continue the relationship there. As these matters were not dealt with properly by the judge the decision should be set aside for a re-hearing in the First-tier Tribunal. He added that the Appellant's partner, Miss [Q] has now gained a place to read medicine at Nottingham University.

14. Mrs Aboni on behalf of the Respondent submitted that the judge had directed himself properly. The Appellant cannot satisfy the Rules. This was a relationship which had been started and continued in the full knowledge of the Appellant's precarious immigration status. By the time the Appellant moved in with Miss [Q] he had already lived in the UK unlawfully for 3 years without declaring himself to the authorities. There was no evidence produced to show that there would be insurmountable obstacles to the relationship between the Appellant and Miss [Q] continuing in Italy, a country where the Appellant had status.

15. Developing that point, Mrs Aboni continued that there was no evidence to show that Miss [Q] would be unable to join the Appellant in Italy and continue the relationship there. The submission made to the FtT on behalf of the Appellant asserted that Miss [Q] could not enter Italy without valid leave [29]. However there was nothing put before the judge to show why there would be difficulty in obtaining a visa. The fact was she did not wish to go to Italy because she wanted to remain in the UK so that she could continue her studies. The evidence put forward did not amount to an insurmountable obstacle. The judge had looked at all the material evidence which had been placed before him. The findings made by the judge were ones open to him on that evidence. The decision was sustainable and the appeal should be dismissed.

Consideration

16. At the end of submissions, I reserved my decision which I now give with reasons. I find, after considering and taking into account the written and oral submissions, that there is no material error of law in the decision of the First-tier Tribunal. It is clear in what is a well-constructed decision, the judge has carefully considered all the evidence and taken into account all relevant factors.

17. Firstly, I am satisfied that the FtTJ's assessment at [19 - 20] that the Appellant could not rely on family reunion provisions was entirely correct. On the Appellant's own account, he left Italy where he had subsidiary protection and entered the UK unlawfully in or around April 2015. He made no effort and took no steps to declare himself to the authorities in the UK nor did he take steps to regularise his position here. He claimed at some point that he could not remain in Italy because he was badly treated there. However there was no evidence put before the FtTJ to support that claim, such as having sought to report any ill-treatment to the authorities in Italy.

18. The Appellant did not meet his partner until June 2016. It is self-evident therefore that he could not be said to have entered the UK on the basis of a family reunion with someone he had yet to meet.

19. The FtTJ then considered the relationship of the Appellant with Miss [Q] and made a finding at [22] that the Appellant could not meet the partner requirements under Appendix FM of the Rules. That finding is correct in that the evidence before him showed that at the date of application, the Appellant had not lived with Miss [Q] for two years. The Islamic marriage to Miss [Q] is not one which is recognised under UK law. Accordingly, the FtTJ was correct to find that EX.1 did not apply since the definition of partner within the Rules could not be satisfied.

20. The judge then turned his attention to the Article 8 claim outside the Rules [23]. He kept in mind the five-stage test in **Razgar**. The judge looked as he was obliged to do at Section 117B public interest considerations in Article 8 cases [24]. He noted that the Appellant had entered the UK illegally, could not show financial independence and nor could he speak English. He and Miss [Q] communicate in Urdu. The judge reminded himself that leave can be granted outside the Rules only where exceptional circumstances apply. This, as he correctly said, means "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal would not be proportionate" [27]. The FtTJ was fully aware of the position of the Appellant and of Miss [Q]. He looked at the evidence before him and noted that the objection which Miss [Q] put forward to furthering her relationship with the Appellant outside the UK was on the basis that it would disrupt her education and she did not speak Italian. He found that those considerations did not amount to exceptional circumstances.

21. The judge noted Mr Thathall's submission at [29] asserting that Miss [Q] would be unable to enter Italy without valid leave. Mr Thathall criticised

the judge for not properly factoring into the balancing exercise, the fact that Miss [Q] has refugee status and thus cannot travel to Italy. That criticism is, I find, unfounded. There was a lack of evidence detailing what difficulties there would be in accessing a visa to travel to Italy. In these circumstances it is hard to see what error the judge has fallen into.

22. I find that on reading the decision as a whole, it is clear that the judge has had regard to all the material information that was before him and has not omitted any material information from his assessment of the proportionality of the Appellant's claim. Properly balancing those relevant considerations against the public interest in maintaining immigration control, I find that the judge was entitled to reach the conclusion he did that the Respondent's decision to refuse the Appellant's application for leave to remain in the UK was a proportionate one. It follows therefore that I find no error of law in the FtT's decision and this appeal is accordingly dismissed.

Notice of Decision

This appeal is dismissed. The decision of the First-tier tribunal promulgated on 17th October 2019 does not contain an error of law and stands.

No anonymity direction is made.

Signed **C E Roberts** Date 18 March 2020

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed **C E Roberts** Date 18 March 2020

Deputy Upper Tribunal Judge Roberts