Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20920/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2019	**On 8 November 2019**
Extempore Decision	

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SONYA BIBI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms R Bassi, Senior Home Office Presenting Officer
For the Respondent: Ms E Daykin, Counsel instructed by Abbott solicitors

DECISION AND REASONS

1. For convenience, I will refer to the parties as they were referred to in the First-tier Tribunal.

2. The appellant is a citizen of Afghanistan born on 12 March 1990. She is married to a British citizen. She entered the UK in June 2012 as the spouse of a British citizen with leave until 28 August 2014. Her leave was extended until 16 September 2016. Her subsequent application to extend

leave was refused because she failed to pay the immigration health surcharge as required by the Immigration Rules.

3. She appealed to the First-tier Tribunal where her appeal was heard by Judge Cas O'Garro ("the judge") at Hatton Cross on 15 April 2019. In a decision promulgated on 26 April 2019 the appeal was allowed.

4. The judge considered whether the appellant satisfied the Immigration Rules either because there would be "very significant obstacles" under paragraph 276ADE or there would be "insurmountable obstacles" under paragraph EX.1 of Appendix FM. The judge was satisfied that there would not be such obstacles given that the appellant and her husband had visited Afghanistan in 2016, had close family members living in Kabul who could support and accommodate them, that her husband would be able to continue working in his current field as a taxi driver which is noted in *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 00118 as a common form of self-employment in Afghanistan, and that in *AS* it is confirmed that there are health facilities in Kabul which would be able to provide the further treatment the appellant may need in respect of her breast cancer treatment.

5. After finding that the appellant could not meet the requirements of the Immigration Rules the judge turned to consider Article 8 outside the Immigration Rules. The judge found that Article 8 is engaged by the relationship between the appellant and her husband. The judge then considered various factors weighing in favour of and against the appellant and reached the conclusion that removal would be disproportionate.

6. The Secretary of State appeals the decision on the basis that the judge failed to identify exceptional or sufficiently compelling circumstances to justify allowing the appeal outside the Immigration Rules given in particular that the appellant had not lost all ties or family connections to Afghanistan, would have family support in Kabul and her husband would be in a position to work and support her.

7. The grounds also submit that the judge erred in prejudging the outcome of an application for entry clearance and finding that any delay before the appellant could re-enter the UK would be disproportionate.

8. At the hearing Ms Bassi submitted that the judge gave inadequate reasons to allow the appeal under Article 8 given the finding that the appellant and her spouse would not face significant obstacles in Afghanistan. She argued that reading the decision as a whole it is apparent that the judge failed to recognise the significance of failing to meet the Immigration Rules and that there was deficient reasoning in this regard. She drew attention to the judgment of the Supreme Court in *Agyarko* [2017] UKSC 11 highlighting the need to find exceptional circumstances in a case such as this. She argued that the evidence simply did not support such a conclusion.

9. Ms Daykin's argument, in short, was that there were sufficient factors weighing in favour of the appellant to justify the conclusion that the judge reached on the proportionality of removal under article 8. In particular, she noted that when the appellant entered the UK she did so under the Immigration Rules prevailing prior to 2012 when the financial eligibility requirements were not applicable. She maintained that the judge was entitled to take this into account. She also pointed out that the appellant had not been required to pay the immigration surcharge on previous applications and this was a single failure. She argued that the judge was entitled to give weight to this also. A further factor relied upon by the judge was that the appellant was undergoing fertility and breast cancer treatment and, argued Ms Daykin, the judge was entitled to give weight to this as well.

10. I am satisfied that the decision does not contain an error of law.

11. It is clear that the judge accurately identified the relevant law and adopted the correct approach by firstly considering the relevant criteria under the Immigration Rules and then, having found that these were not satisfied, turning to consider article 8 outside the Rules. When considering article 8 outside the Rules, the judge directed herself to the correct legal questions and in particular noted the relevant issues identified by the Supreme Court in *Agyarko*. At paragraph 38 of the decision the judge stated:

> I bear in mind what the court said in *Agyarko* which is that Appendix FM is said to reflect how the balance will be struck under Article 8 between the right to respect for private and family life and the legitimate aims listed in Article 8(2) so that if an applicant fails to meet the requirements of the Rules it should only be in genuinely exceptional circumstances that refusing them leave to enter or remain would breach Article 8. The court said that exceptional does not mean unusual or unique but means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.

12. This is an accurate summary of the law and I am in no doubt that the judge had in mind the correct legal issues when considering the appeal under Article 8 outside the Rules.

13. Reading the decision as a whole it is clear that the judge has had regard to all of the material information that was before her and has not omitted any material information from her assessment of the proportionality of the appellant's removal from the UK. The judge has taken into consideration the immigration status of the appellant, the public interest in the maintenance of immigration control, the reason why the appellant did not succeed in her application under the Rules, the circumstances prevailing in Afghanistan, the difficulties the appellant would have returning to Afghanistan, that those difficulties would not arise to the level of very significant or insurmountable obstacles, that she is undergoing health and fertility treatment in the UK, that she entered the UK under the pre-2012 Rules where there was no financial eligibility requirement and that she would face difficulties re-entering the UK from Afghanistan given the

financial circumstances of her husband which, based on the date when she entered the UK, were not a factor preventing entry in the first place. These are all relevant considerations. It was for the judge to balance them against each other before reaching a conclusion on whether removal of the appellant would be disproportionate.

14. Other judges may well have weighed the evidence differently and reached a different conclusion, but this does not mean that the judge made an error of law. The judge had regard to all the relevant considerations and reached a conclusion, based on those considerations, that was not irrational or perverse, and was open to her based on the evidence. The decision of the First-Tier Tribunal therefore stands, as it does not contain an error of law.

Notice of Decision

15. The appeal is dismissed. The decision of the First-tier Tribunal does not contain an error of law and stands.

16. No anonymity direction is made.

Signed

Upper Tribunal Judge Sheridan

Dated: 7 November 2019