Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03716/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th of December 2017	**On 22nd of December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MOHAMMAD ALAVI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ata, Solicitor
For the Respondent: Mr P Deller, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Afghanistan born on 5th of March 1989. He appeals against a decision of Judge of the First-tier Tribunal Moan sitting at Birmingham on 9th of March 2017 who dismissed the Appellant's appeal against a decision of the Respondent dated 2nd of February 2016. That decision was to refuse the Appellant's application for leave to remain on the basis of his relationship with his spouse M H a citizen of Afghanistan with refugee status in this country ("the Sponsor").

2. The Appellant arrived in this country illegally in 2000 and claimed asylum. His asylum claim was treated as abandoned after he absconded. He was

encountered in 2012 whereupon he made a further claim of asylum which was refused by the Respondent in 2014. His appeal against that refusal decision was dismissed by the First-tier Tribunal in 2015. The Sponsor came to the United Kingdom in April 2013 and was granted refugee status on 26th of January 2015 valid until January 2020. The Appellant states that he and the Sponsor met in October 2014 and began a relationship. They underwent an Islamic Nikkah ceremony on 16th of June 2015 and thereafter lived together as man and wife. They registered their marriage at the local Register Office on 13th of January 2016. Their first child was born on 23rd of March 2016 two months after the Appellant had made his application for leave to remain the refusal of which gave rise to these proceedings.

The Explanation for Refusal

3. The Respondent did not accept that the relationship between the Appellant and the Sponsor was genuine and subsisting. A home visit was conducted by the Respondent on 23rd of November 2015 and the couple were interviewed. Notes of the interviews were briefly recorded in the immigration officers' notebooks which were provided to the Judge at the hearing at first instance. It was deemed that the couple's answers to a series of questions were not credible due to several discrepancies which led the officers to believe the marriage was one of convenience. The Appellant's answers did not match up to the Sponsor's answers for example he did not know the Sponsor's date of birth. He claimed the couple had met in 2014 and could not say when they decided to get married but the Sponsor claimed they met in June 2015 and they had married two weeks after their first meeting. The Sponsor was 6 months pregnant at the time of the visit.

The Decision at First Instance

4. The Judge noted the inconsistencies in the interviews conducted at the time of the home visit. When the Appellant was asked in cross-examination why he had not been able to tell immigration officers his wife's date of birth he said that he had forgotten it. The Judge considered this was not an acceptable answer. The Sponsor said in her oral evidence that she had struggled to understand the questions put to her during the home visit because there was no interpreter present but the Judge did not except that explanation either. The Sponsor had confirmed at the time she was happy to be interviewed in English. The answers to the two questions that she had given about meeting the Appellant were consistent with each other but inconsistent with the Appellant's answers. The tenancy agreement produced by the Appellant was in the name of the Sponsor and her sister not the Appellant's name. He was not mentioned on that tenancy agreement or on the utility bills for the property. Bank statements were produced which showed the Appellant at the Sponsor's address but the Judge did not find this compelling in itself to confirm that there was a genuine and subsisting relationship.

5. The Judge pointed to the Appellant's poor immigration history noting that the Appellant had been working illegally in this country. The lack of evidence to demonstrate the subsistence of the relationship and the Appellant's poor immigration history led the Judge to conclude that the application was a contrived attempt by the Appellant to create a family life to enable the Appellant to remain in this country. The Judge was not clear about the relationship between the Appellant and his child although she was prepared to accept the Appellant was likely to have a relationship with the child. The child was very young and fully dependent upon his carers likely to be the Sponsor in the first instance. The best interests of the child would be served by having an ongoing relationship with both parents. The child was not a British citizen but was present here.

6. The Sponsor could not return to Afghanistan because she was a refugee. She had been born in Iran but it was not clear whether she would be able to return there. As the child was not born at the time of the Appellant's application in January 2016 the Appellant could not satisfy the parental relationship requirements under Appendix FM. Dealing with the application outside the immigration rules, the Appellant did not speak English, he was reliant on benefits although he had been working illegally. He was not financially independent. He had begun his relationship with the Sponsor when he had no leave to be here being unlawfully present. He could have had no legitimate expectation that he would be allowed to stay in the United Kingdom because of his family. The Sponsor knew of his immigration status and would equally have known there was no expectation he could stay.

7. The Appellant could return to Afghanistan and apply for entry clearance from there. The Appellant's objections to that referred to his asylum claim but those claims had been rejected. The public interest in this case was strong. The best interests of the child did not outweigh the compelling public interest in this case. Should the Appellant wish to apply for entry clearance on the basis of his relationship with his child he would be free to do so. The child was currently very young and less likely to be affected by separation. The appeal was dismissed.

The Onward Appeal

8. The Appellant appealed against that decision arguing that there was a significant amount of evidence to show the Appellant had a subsisting relationship with his wife and the appeal should have been allowed under EX.1(b) of Appendix FM. There were a small number of inconsistencies in the interviews which had been conducted during an unannounced visit by immigration officers to the parties' residence but by and large the interviews were consistent. The Appellant and Sponsor were legally married and had had a child together. The Appellant was the father as confirmed by DNA evidence. Both the Appellant and the Sponsor were at home when the visit was conducted early in the morning. The Appellant and Sponsor both attended the Tribunal and gave evidence which was consistent. The couple were both from Afghanistan and belonged to the

same ethnic group and were of a similar age. It was difficult for the Appellant to produce documentary evidence of the relationship as he had no meaningful immigration status to be able to rent the property in his name. He did produce bank statements which were found to be insufficient. The Judge must have applied a very high threshold for the Appellant to prove his claim which would be an error of law.

9. The 2nd ground of onward appeal argued that the Judge had failed to adequately consider the best interests of the Appellant's child. Those best interests were undervalued. There were concerns if the Appellant had to return to Afghanistan to apply for entry clearance from there. Not only was it unlikely that he would be able to successfully apply in the future in light of the Sponsor's financial circumstances but he faced return to a war-torn country where there were not even consulate services to enable him to apply for entry clearance. This could lead to the child being permanently separated from his father the Appellant. The 3rd ground was not relied upon before me.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Kimnell on 28th of September 2017. In granting permission to appeal he wrote: "the Judge gave reasons for finding the Appellant was not in a genuine and subsisting relationship with his wife, taking account of the existence of a child. The decision cannot be described as perverse. The Judge specifically considered the lack of an interpreter at the interview (paragraph 14). Nevertheless, at no point in the decision does the Judge record the standard of proof applied to the evidence and on that point alone permission is granted. The Judge accepted that it would be in a child's best interests to have a relationship with both parents but gave reasons why in this case the proportionality exercise was resolved in the Respondent's favour. It is striking that the Appellant's witness statement says almost nothing about his relationship with his child nor indeed does his wife. Whilst there may have been supporting witness statements, no one gave evidence apart from the Appellant and his wife".

The Hearing Before Me

11. At the hearing before me to decide whether there was an error of law in the decision at first instance the Appellant's solicitor maintained the grounds of appeal save for the 3rd point therein. It was argued that it was not open to the First-tier Tribunal Judge to find there was no substantive relationship as there was evidence that the couple were living together. There were nine factors not properly taken into account which were listed in the grounds. Immigration Officers found the couple in the same house probably the same bed; the Sponsor was pregnant at the time and the couple now had a child whose paternity had been proved by DNA evidence. The couple were similarly matched in terms of nationality and ethnicity.

12. The difference in the answers about when the relationship started given the absence of an interpreter was not sufficient in itself. Was it significant

that the Appellant did not know the Sponsor's date of birth? If the relationship was accepted the Appellant's appeal should be allowed. There were insurmountable obstacles to the relationship continuing elsewhere. The Sponsor was a refugee who could not go to Afghanistan. If there was a genuine relationship and there were insurmountable obstacles the appeal should have been allowed under the Rules.

13. The 2nd ground was the consideration (or lack of it) of the best interests of the child. There was no proper analysis of that in accordance with the guidelines. If the Appellant was removed he might never see the child again. The grant of permission referred to a lack of evidence but there was the witness evidence of the couple which was sufficient to indicate the best interests of the child.

14. In reply, the Presenting Officer indicated that the Tribunal was in something of an artificial position. Although Judge Kimnell had seen no merit in the substantive grounds of appeal they could be argued once permission had been granted. Having read through the determination the Presenting Officer agreed that the Judge had not referred to the standard of proof in terms. At paragraph 16 the Judge had not found the bank statements compelling in themselves to confirm the relationship. The use of the word compelling was potentially a worry. Having said that this was a perversity challenge against the Judge's finding that there was not a genuine relationship notwithstanding the child. Perversity had to be established before an error of law could be made out.

15. The child was a strong indicator of a subsisting relationship but there was very little said by the Appellant and the Sponsor about the Appellant's relationship with that child. The Judge had adequately considered the best interests at paragraph 19 of the determination which referred to the child being very young and fully dependent upon his carers in this case the Sponsor. Although one would expect to see more than that in a determination when fulfilling the duty under Section 55 of the Borders Citizenship and Immigration Act 2009 it was fair to point out that the Judge's treatment of the best interests of the child was short because of the very limited information she was given to make findings on. The Sponsor was a refugee with limited leave and the child was not a qualifying child under either Appendix FM or section 117B (6) of the Nationality Immigration and Asylum Act 2002. The Respondent had refused the application on the basis it was not a genuine and subsisting relationship and if the Judge had considered the best interests adequately there was no error of law in the determination.

16. In conclusion, the Appellant's solicitor said that even though the child was not a qualifying one it was still the case that the child mattered. The child's future was in the United Kingdom. It came as a shock that the evidence of relationship had not been accepted by the Judge. I queried with the Appellant's solicitor what the Appellant's response was to the finding that the Appellant could go back to Afghanistan and apply for entry clearance from there. The solicitor replied that submissions had been made to the Judge that Afghanistan was a war zone. The Appellant

came from a very insecure area, Wardak province. He was not an economic migrant. He had an expectation of international protection but his claim had failed. The Sponsor could not meet the financial requirements in the Immigration Rules. There was no entry clearance post in Afghanistan and there were a lot of uncertainties whether the Appellant would ever come back to United Kingdom. The Appellant met the requirements of section EX1 but that would not apply outside United Kingdom so once the Appellant was removed to Afghanistan he would be unable to take advantage of it to come back.

Findings

17. This is a perversity challenge to the Judge's findings of fact. The Judge accepted that the Appellant had been in a relationship of some sort with the Sponsor because they were married and had a child together. The Judge did not accept that the marriage was still genuine and subsisting because the couple had given inconsistent answers about their relationship and the Appellant could produce no documentary evidence to support the claim that he was living with the Sponsor. The Appellant's argument is that he should have succeeded under section EX .1 (b) because he was in a genuine and subsisting relationship with a partner who was in the United Kingdom with refugee leave and there were insurmountable obstacles to family life with that partner continuing outside the United Kingdom.

18. The Sponsor could not return to Afghanistan although there was a paucity of evidence as to whether the Sponsor could return to Iran. The Judge raised that point at paragraph 20 of the determination. The Sponsor was born on 6 June 1991 in Mashhad in Iran. Whilst the grant of refugee protection to her was sufficient to indicate that she could not reasonably be expected to return to Afghanistan, the burden of proof was on the Appellant to show why she could not return to Iran. EX.1 does not indicate that any particular country has to be appropriate only that there must be insurmountable obstacles to family life continuing outside the United Kingdom. As far as the Judge was concerned the case did not reach that far because she did not accept that the Appellant and Sponsor were in a genuine and subsisting relationship.

19. The issue is whether the Judge's reasons and findings on the relationship are perverse or were properly open to the Judge. That another Judge might have concluded differently, that there was a genuine and subsisting relationship notwithstanding the difficulties pointed out by the Judge is irrelevant. The issue is whether this Judge did enough in her determination to show the lack of a genuine relationship. The Judge was clearly influenced by what was perceived to be the Appellant's unreliability given his poor immigration history which included making an asylum claim that had no merit and working illegally while claiming benefits. The Appellant's bad character might not of itself be sufficient

for a Judge to be able to draw an adverse conclusion on the existence or otherwise of a relationship. The Appellant's immigration history could properly be a factor in the assessment of the Appellant's credibility generally. The Judge evidently felt it was a significant factor in this case. She had other evidence and had sight of the interviewing officers' notebooks and could thus gauge the tenor of the interviews and the answers given by the Appellant and the Sponsor.

20. Rather than explain the differences in the way it was put to me at the hearing, that they were insignificant, the Sponsor claimed that her answers were inconsistent with the Appellant's answers because of interpreting problems. The Judge found this implausible and it undermined the credibility of the claim. I accept that at the time of the home visit the Sponsor was 6 months pregnant with the Appellant's child indicating there was a relationship in the very recent past. In those circumstances, another Judge may have concluded that the relationship was genuine and subsisting. It is more difficult to say that this Judge was perverse in coming to the view that she did. The test for perversity is a very high one and I am not persuaded that it can be met in this case.

21. If the Judge is right that the relationship was not genuine and subsisting the claim under section EX.1 of Appendix FM fails. If the Judge is wrong and the relationship was genuine and subsisting the Appellant still cannot show that there are insurmountable obstacles to family life continuing outside United Kingdom since the issue of whether family life could continue in Iran was not disproved by the Appellant. There appears to be no evidence as to what was or was not the Sponsor's connection to Iran or indeed why it came about that she was born there but her family moved to Afghanistan.

22. The Appellant's 2nd ground is that even if he cannot succeed on the basis of a genuine and subsisting relationship with the Sponsor, nevertheless he is the father of a child living in this country and his claim should succeed on that basis. That would have to be a claim outside the Immigration Rules as the child is not a qualifying child being neither a British citizen nor having lived here for at least seven years. It would not succeed under section 117B of the 2002 Act for the same reason. As the child is here the child's best interests have to be considered outside the Rules and the child's interests have to be considered first as a primary though not the primary concern of the Tribunal. Did the Judge in her determination do that? As the Respondent submitted to me the Judge's consideration was hampered by the lack of evidence. The child is presumably now almost 2 years old. What are the arrangements for its care? If the Appellant is living with the Sponsor and the child it would be a relatively easy matter to explain what the domestic arrangements are. The absence of that evidence inevitably caused the Judge to be suspicious about whether there was a relationship of substance between the Appellant and his child. That in turn cause the Judge to doubt whether the Appellant still had a relationship of substance with the child's mother.

23. The argument is put that the Sponsor would find it difficult to manage in this country on her own whilst the Appellant returned to Afghanistan to make such arrangements as he could to apply for entry clearance from there. The difficulty with that argument is that it requires evidence to support it and again one comes back to the paucity of evidence put before the Judge. For a perversity challenge to succeed it must be shown that cogent evidence was provided to the Judge which was not properly taken into account. This appeal fails on the first point that there was a lack of cogent evidence.

24. The grant of permission was not made on the basis either that it was an arguable error that the Judge's findings were perverse or that it was arguable that the Judge had failed to consider the best interests of the child adequately. I would agree with the grantor of permission for the reasons I have given. The grant of permission was given because the Judge nowhere in the determination specifically stated in terms that she was applying the usual civil standard of balance of probabilities in arriving at her conclusions. I do not consider that there is merit in that argument. It is correct that the Judge does not refer to the standard of proof but reading the determination as a whole it is clear that the Judge is aware that matters have to be proved on the balance of probabilities. For example, if one looks at paragraph 18 of the determination the Judge states "I am prepared to accept that he is likely to have a relationship with his child". That is to say the Judge found it was more likely than not that the Appellant had a relationship with his child, even if it was not a significant one, which is the test of the balance of probabilities.

25. The Presenting Officer very fairly noted paragraph 16 of the determination in which the Judge indicated that the bank statements showing the Appellant to be at the same address as the Sponsor were not compelling in themselves to confirm the relationship. The expression compelling is an ambiguous one, it could perhaps mean the Judge was applying a higher standard than the balance of probabilities but it is more likely to be a reference to the quality of evidence as opposed to the standard of proof. There is an analogy with the test under Article 8 outside the immigration rules in an out of country appeal that very compelling circumstances have to be shown to succeed. This does not mean that the standard of proof is higher than the balance of probabilities it is a reference to the cogency of the evidence which has to be put forward.

26. The Appellant argued that he could not reasonably be expected to return to Afghanistan and apply for entry clearance from there. There are difficulties given the absence of an entry clearance post but the Appellant has shown he is able to leave Afghanistan and travel many thousands of miles. I see no reason why he would not be able to travel to Pakistan to make an application for entry clearance from there. The obstacle to a successful application would be the inability of the Sponsor to meet the financial requirements. That position may change in the future if for example the Sponsor obtained employment.

27. The case of **SM [2007] UKAIT 10** notes that there were no facilities for Afghan nationals to obtain entry clearance from Afghanistan or elsewhere. Where an Appellant met all the relevant requirements under the Immigration Rules and but for the absence of entry clearance would qualify and the Respondent cannot show that is practicable for an Appellant to obtain entry clearance the claim may succeed under Article 8 if the Appellant shows that entry clearance cannot in practice be obtained because of the lack of accessible facilities. The difficulty for the Appellant in this case is that it assumes that all things being equal the Appellant could meet the entry clearance requirements. In that case the rule in Chikwamba would apply and it would be a mere bureaucratic formality that the Appellant would have to return to Afghanistan to apply from there. Unfortunately for the Appellant all things are not equal and he cannot show that an application for entry clearance would succeed because of the Sponsor's inability to meet the financial requirements. The ratio in **SM** does not apply since the Appellant cannot show but for the absence of entry clearance he would qualify for admission to this country.

28. The Appellant seeks to rely on the effect of section EX.1 of Appendix FM but before he can do that he must show that it applies in this case. The Judge rejected the appeal partly because she found the Appellant did not meet the suitability requirements because of his poor immigration history. EX.1 is not a free-standing ground of application. The Appellant is unable to show that the decision at first instance was perverse and is unable to show that he could succeed inside or outside the Immigration Rules under Article 8. I dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 6th of December 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

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

Signed this 6th of December 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge