Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16698/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2014	**On 18 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR MOHAMMAD IDREES KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Khan, Solicitor
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING NO ERROR OF LAW

Introduction

1. The appellant appeals against the decision of the First-tier Tribunal to dismiss his appeal against the respondent's decision to refuse leave to remain in the UK on the grounds of his marriage to a British citizen.

Background

2. The appellant is a citizen of Pakistan. He was born on 15 January 1979. On 29 March 2011 he was given limited leave to remain in the UK until 29 March 2013 as a Tier 1 (Post-Study Work) permit holder. On 28 March 2013 he applied for a variation of his leave to remain on the basis that he had formed a relationship with Ms Hussain, a British citizen. That was the application which was refused by the respondent on 29 April 2013 who gave notice of her intention to remove the appellant from the UK by directions under Section 47 (Removal: Person with Statutorily Extended Leave) of the Immigration, Asylum and Nationality Act 2006.

3. The appellant appealed that refusal to the First-tier Tribunal and an oral hearing took place on 12 March 2014 before First-tier Tribunal Judge K F Walters (the Immigration Judge). The Immigration Judge dismissed the appeal concluding that the requirements of the Immigration Rules were not met and that the UK would not be in breach of its obligations under the European Convention on Human Rights 1950 (ECHR).

Proceedings Before the Upper Tribunal

4. By an application for permission to appeal received on 19 May 2014 the appellant sought to appeal the decision of the First-tier Tribunal, which had been promulgated on 17 March 2014, on the grounds that it revealed errors of law which merited a review. The appellant, it was contended in the grounds, in fact met the requirements of Section E.LTRP3.1 and E.LTRP1.7 (financial threshold and subsistence of marriage). The Immigration Judge erred in law by failing to take into account material documentary evidence submitted in the appellant's bundle which confirmed that the evidential requirements of Appendix FM and FMSE, in which the above Sections were contained, were met in respect of the appellant's income from employment and/or shares. The Immigration Judge had misdirected himself. The grounds also state that the finding that the parties were not living in a genuine and subsisting relationship in paragraph 20 of the determination was contrary to the weight of the evidence, both oral and written, and therefore erroneous. The Immigration Judge ought to have concluded that the relationship was genuine and subsisting.

5. The appellant applied for permission for permission to appeal the decision of the First-tier Tribunal. First-tier Tribunal Judge Lambert thought that there may have been an error of law as to the dates the Immigration Judge made his assessment of whether the financial requirements of the Rules were met but he did not consider that this was material to the outcome of the appeal.

6. The appellant renewed his application for permission to appeal the decision of the First-tier Tribunal to the Upper Tribunal. On 3 June 2014 Upper Tribunal Judge Allen decided that the application contained arguable merits which made it appropriate to grant permission.

7. The respondent subsequently submitted a Rule 24 response, indicating that she opposed the appeal because the Judge of the First-tier Tribunal had reached a decision which was open to him. Although the Immigration Judge had, arguably, looked at the evidence on the wrong date, this did not affect the fundamental conclusion that the marriage was not genuine and subsisting. Accordingly, permission to appeal was given.

8. Standard directions were sent out on 10 July 2014 indicating that the Upper Tribunal would not consider evidence which was not before the First-tier Tribunal unless it specifically decided to admit that evidence.

The Hearing

9. Mr Khan placed reliance on the guidance for permission to appeal and in particular paragraphs 9 and 10 of that guidance. Where points are "obvious" the Tribunal considering an application for permission to appeal should consider granting permission on those grounds, even if they were not raised. It was pointed out that the sponsor had been in receipt of disability living allowance ("DLA") and I was invited to consider "new evidence" from the Department of Work and Pensions. It was also suggested that there may be a need to amend the grounds of appeal. In the event I were to find a material error of law Mr Khan indicated that he would apply to put forward new evidence which would include details of the DLA position.

10. Turning to the substantive grounds, it was pointed out that the Immigration Judge had wrongly applied Section 85(4) and (5) of the Nationality, Immigration and Asylum Act 2002 and regarded the evidence for the appellant as being "restricted" to that available at the date of the decision. This was incorrect. This was an "in-country" application and not "out of country" application.

11. Secondly, it was submitted by Mr Khan that all the evidential requirements in Appendix FMSE were met. Paragraph 9 of that appendix detailed the documents that are required. It does not require audited accounts. It was submitted that the bank statements, dividend certificates and other documents submitted were sufficient to discharge the requirements of the Rule. In any event, it was questionable whether the rigorous requirements of Appendix FMSE applied in circumstances where a sponsor is in receipt of a DLA. At this point I was referred to paragraph 5 of the supplemental witness statement.

12. As far as the materiality of the omissions in the determination are concerned, this depended on the finding of the First-tier Tribunal in relation to the subsistence of the relationship. It was submitted that the First-tier Tribunal had fallen into error in its decision in relation to the subsistence of the relationship. Under this head it was pointed out that the evidence of how the parties had met and married under Islamic law on

2 February 2013 was given. It was pointed out before the First-tier Tribunal that they started living together in London in June 2013. Thereafter, for about eleven weeks, they would each travel backwards and forwards between London and Birmingham. They married in March 2013 under a civil ceremony but could not move in to live with each other until June 2013. It was contended by Mr Khan that his client wished to obtain a positive decision for leave to remain before he moved to Birmingham. However, this had to be seen in the context of earlier periods of cohabitation, for example, in 2012. By the date of the hearing in March 2014 the parties had been living together since June 2013.

13. Mr Khan then turned to other issues.

14. Finally, it was submitted that the evidence overwhelmingly showed a degree of love and affection between the sponsor and appellant. It was a material error of law for the Immigration judge not to so find. This was an in-country application which should succeed on the grounds that there was a genuine and subsisting relationship. However, that had been established.

15. The respondent submitted that the documentary evidence provided was copied. I was invited not to allow any additional evidence relating to DLA which undermined the suggestion that the sponsor was working. It would require a fresh application to adduce such new evidence which had not been considered by the First-tier Tribunal.

16. Mr Avery then went on to deal with the subsistence of the relationship between the appellant and the sponsor in the UK. He submitted that the judge had looked at the evidence as a whole but made an adverse credibility finding because the appellant and the sponsor had apparently taken many months to begin cohabitation. It was described as a "fundamental point" that the sponsor appears not to have disclosed that she was living off DLA, nor was the appellant aware of that fact. If they had a close relationship this was a surprising omission. The conclusion in relation to the subsistence of the relationship was one the Immigration Judge was entitled to come to on the evidence.

17. Finally, Mr Khan submitted that there was a lack of analysis as to what evidence was considered by the judge and what weight should attach to it.

18. At the end of the hearing I reserved my decision as to whether or not there was a material error of law and, if there was, whether it was appropriate to allow additional evidence to be adduced in support of the appellant's case.

Discussion and conclusions

19. The appellant originally entered the UK on 29 March 2011 as a Tier 1 (Post-Study Work) permit holder but the present application was for further leave to remain on the basis of his relationship with Sofia Hussain, the

sponsor. The respondent decided on 28 March 2013 to refuse further leave to remain and to make directions for his removal from the UK under Section 47 of the Immigration, Asylum and Nationality Act 2006. A right of appeal against those decisions was under Section 82(1) as the decision notice stated.

20. It is not clear how the reference to Section 85(4) and (5) in the determination promulgated on 17 March 2014 came to appear in the determination. However, the Immigration Judge plainly erred in law in so far as he limited his consideration of the evidence to that in existence at the date of decision or that which pertained at that date. That did not mean that the date of decision was irrelevant. It was still incumbent upon the appellant to submit all relevant evidence in support of his application for further leave to remain and the absence of such evidence may well give rise to issues of credibility. The decision was not made under the points-based scheme but under Appendix FM of the Immigration Rules in the form which they took at the date of the decision.

21. The decision of the respondent was to refuse further leave to remain because she was not satisfied that the appellant had established a genuine and subsisting relationship with the sponsor, nor was she satisfied that the appellant met the financial requirements of Appendix FM. The Immigration Judge agreed with these conclusions.

22. Given the error contained in paragraphs 9 and 10 of the determination, where the Immigration Judge erroneously refers to the limitation on consideration of post-decision evidence, the question before the Upper Tribunal is whether this had a material effect on the Immigration Judge's conclusions under both these heads? In other words, does the Immigration Judge's erroneous conclusion that he was unable to consider post-decision evidence mean that his conclusions both that the marriage was not "genuine and subsisting" and that the financial requirements of the Rules were not met cannot stand?

23. I consider the question of subsistence of the relationship first. It seems that the Immigration Judge heard evidence from the appellant and the sponsor and found that the sponsor's oral evidence corroborated her statement and that of the appellant (see paragraph 18 of the determination). The Immigration Judge applied the correct standard of proof in paragraph 7 of his decision. The Immigration Judge considered the period of cohabitation since June 2013 but was sceptical as to the manner in which the relationship was formed and considered a number of answers to questions that were raised during the hearing to be unsatisfactory. It does not seem from the determination that the perceived limitation on post-decision evidence dictated any part of the Immigration Judge's conclusions in this respect. He clearly reached an adverse view on the credibility of the relationship for three reasons:

(1) the Immigration Judge thought that the parties would have made attempts to cohabit before they did;

(2) the appellant would have a greater degree of knowledge about the sponsor's finances than was demonstrated and in particular the fact that she was claiming benefits;

(3) they would have discussed with each other the consequences of the appeal failing.

24. The grounds suggest that these conclusions were "contrary to the weight of the evidence" and if all the documents in the bundle submitted were properly weighed up the Immigration Judge would have reached a different conclusion.

25. I am afraid I do not agree with this analysis. This amounts to no more than a disagreement with the decision. The Immigration Judge plainly did weigh up the evidence in a sufficiently careful way for this part of his decision to be sustainable. He heard the oral evidence and made an assessment of that evidence. It is not for this Tribunal to second guess it.

26. I have therefore reached the conclusion that the First-tier Tribunal was entitled to reach the decision it came to in relation to the subsistence of the relationship. That conclusion was fatal to the appellant establishing that he met the financial requirements of Appendix FM. Were the Immigration Judge's decisions solely based on a failure to satisfy the financial requirements of the Rules I would undoubtedly have set it aside and the decision would fall to be remade by this Tribunal. However, for the reasons given above, the Immigration Judge's conclusions in relation to the genuineness and subsisting nature of the relationship are fatal to such an argument succeeding.

27. For these reasons I do not find a material error of law in the decision of the First-tier Tribunal.

My Decision

The decision of the First-tier Tribunal does not contain a material error of law. Accordingly the decision to dismiss the appeal both on immigration grounds and on grounds that the appellant should be granted further leave to remain on the basis that his protected human rights would be interfered with stand.

Signed Date

Deputy Upper Tribunal Judge Hanbury