



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49254/2014**

THE IMMIGRATION ACTS

**Heard at Field House
On 29th January 2016**

**Decision & Reasons
Promulgated
On 16th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AA

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer

For the Respondent: Ms F Shaw, Counsel instructed by Chhokar & Co Solicitors

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, an anonymity order is made in respect of each of the Appellants. Unless the Upper Tribunal or other competent Court orders otherwise, no report of any of the proceedings herein or any form of publication thereof shall, directly or indirectly, identify any of the Appellants. This prohibition applies to, amongst others, all parties.

DECISION AND REASONS

1. Mr AA is a citizen of Pakistan whose date of birth is recorded as 5th April 1989. He has been in the United Kingdom at least from March 2011 and has at all times been lawfully resident, having renewed and varied his status on a number of occasions.

2. On 11th August 2014 he married Mr K, a British citizen and on the basis of that marriage, on or about 22nd September 2014 made application for variation of his leave to remain in the United Kingdom. On 19th November 2014 a decision was made to refuse the application and Mr AA appealed. His appeal was heard by Judge of the First-tier Tribunal Clarke on 26th June 2015 when sitting at Hatton Cross. The appeal was brought on human rights grounds, having regard to Appendix FM, paragraph 276ADE and the wider application of Article 8 ECHR. For reasons which are not entirely clear the judge allowed the decision under the Immigration Rules and on human rights grounds but it is common ground before me that the appeal should only have been considered under the wider application of Article 8 because the Appellant did not meet fundamental requirements of the Rules. I need not say more about it because that is agreed. To that extent the appeal of the Secretary of State is conceded but the error is not necessarily wholly material for reasons which I shall explain.
3. The judge was cognisant of the fact that there were significant difficulties which would face Mr AA and his partner were they to attempt to enjoy family life in Pakistan. Mr K was originally from India and now a British citizen with 35 years in the United Kingdom. Mr K is HIV positive and was found to suffer from both Hepatitis B and the HIV infection was associated with tuberculosis. The illnesses with which Mr K suffers are being treated in the United Kingdom.
4. The judge properly directed himself when considering the wider application of Article 8 to the five stage test in **Razgar [2004]UKHL 27** and came to the view that it would be disproportionate to require Mr AA to leave the United Kingdom to make application from outside. It is common ground so far as the Immigration Rules are concerned that what Mr AA lacked was the required evidence of his English language skills, in all other respects he would otherwise have satisfied the Rules.
5. Weighing heavily on the mind of the judge was the prospect that Mr AA, were he to return to his home country, faced a real risk of having to disclose his sexual orientation and, more particularly, might be forced into an arranged marriage in circumstances in which he was already lawfully married in the United Kingdom. Having regard to various factors including the fact that Mr AA was healthy, would not be dependent on the British taxpayer, was able to speak English even though unable to provide the prescribed certificate, and looking to the wider public interest in immigration control, the balance was found by the judge to be tipped in favour of Mr AA.
6. Not content with that decision by Notice dated 14th August 2015 the Secretary of State made application for permission to appeal to the Upper Tribunal and on 3rd December 2015 permission was granted by Judge Hollingworth. There were three grounds.
7. The first ground took issue with the judge's finding that Mr AA would necessarily need to disclose his sexual orientation because were he to make application from Pakistan it would only be necessary for him to

disclose his sexual orientation to the British authorities and the information given to them would not be passed on to the Pakistani authorities. There is logic to that ground but it does not, in my view, recognise the reality nor the important point which the judge found, namely the risk of having to disclose his sexual orientation to persons other than the British authorities.

8. The second ground points to the fact that Mr AA has married in the United Kingdom, and has not disclosed his sexual orientation to his family at home, and is therefore prepared to live a lie in the United Kingdom. In those circumstances the Secretary of State contends that he ought therefore to be found to be willing to live that same lie at home again. That ground misses the point because there is a distinction between “living the lie” and the safety of Mr AA. He has chosen not to tell his family at home; that is a matter for him but he has not told them in circumstances in which for so long as he is in the United Kingdom he feels safe. The British authorities rightly offer protection to people in same sex relationships, not so in Pakistan, on the finding of the judge and it is that real risk to Mr AA that weighed heavily with the judge and in my view the judge came to a finding that was open to him.
9. The third ground in my judgment is simply not made out. It joins issue with the findings of the judge the notion that contact can be maintained through visits or a variety of modern methods of communication. That does not meet the true facts of the case. Sometimes it is suggested that an Appellant has the option of leaving the United Kingdom in order to make application from outside and during that time can be joined by his or her partner whilst making and waiting for a result but that is not an option on the findings of this judge that is open to Mr AA. There are a number of reasons for it.
10. Firstly, because the Sponsor as a British citizen would not receive the medical treatment which he is receiving at the moment with the principles in **Beoku-Betts [2008] UKHL 39** applying: there is just one family, and for so long as they are together outside of the country waiting for application there is the risk that they would be discovered and more particularly the reality is that they could not ever on the judge’s findings enjoy the family life that they would wish and are entitled to outside or rather I should say in Pakistan.
11. Findings of fact can only be challenged in certain circumstances. In my judgment the findings were not against the weight of the evidence, the findings were adequately reasoned, there was nothing perverse or irrational in the findings of the judge and indeed on the basis of **Patel v SSHD [2013] UKSC 72** the issue of near-miss was discussed, and following the case of **Miah v SSHD [2012] EWCA Civ 261** and **Patel** there clearly is no basis to allow an appeal on a “near-miss” basis but in circumstances where there is a near-miss that goes to the issue of proportionality so that the closer an Appellant comes to meeting the Rules, the less the additional factors he or she may need to show in order to tip the proportionality scales in his or her favour. I note in fact on the

findings of the judge in this case all the requirements of the Rule were met in the spirit if not in the actual requirement. The additional factors therefore were sufficient for it to be open to the judge to find the scales tipped in Mr AA's favour and the appeal therefore allowed in part given that the appeal was allowed under the immigration rules when it ought not to have been but the decision to allow the appeal on human rights grounds (Article 8) is to be maintained.

Notice of Decision

The appeal to the Upper Tribunal is allowed and set aside. The decision of the First tier Tribunal is remade such that the appeal is dismissed under the immigration rules but allowed having regard to the wider application of Article 8 ECHR.

Signed

Date

Deputy Upper Tribunal Judge Zucker