



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/00922/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 30 May 2017**

**Decision Promulgated
On 01 June 2017**

Before

Upper Tribunal Judge Southern

Between

RUWAN KUMAR HAPUTHANTRIGE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H. Kannangara, of counsel

For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Walters who, by a determination promulgated on 26 September 2016, dismissed her appeal against a decision of the respondent, made on 5 June 2015, to refuse her application for leave to remain as the unmarried partner of [MW], a British citizen, with whom she said she had been in a same sex relationship since August 2014.

2. The primary reason given by the judge for dismissing the appeal was that, although he accepted that the appellant and [MW] lived together in the same accommodation, he made a finding of fact that the appellant and [MW] were not, in fact, in a same sex relationship as they claimed to be, and that their evidence to that effect was untrue. He dismissed the appeal both under the immigration rules and on human rights grounds.
3. In the grounds upon which the appellant sought permission to appeal it was observed that by the time of the hearing before the First-tier Tribunal the appellant and [MW] had been living together in a relationship akin to marriage for two years. But, quite apart from the fact that the judge found that there was no such relationship at all, as the requirement of E-LTR 1.2 is that they must have been living together in such a relationship for at least two years prior to the date of the application, that took them no further so far as the Immigration Rules are concerned.
4. The next challenge raised in the grounds was to the adverse credibility finding made by the judge in respect of the asserted relationship. The judge gave two reasons for finding that the appellant and [MW] were not in the relationship they claimed to be. First, he had recorded at paragraph 27 of his determination that in evidence [MW] said she had not travelled abroad but, as could be seen from the copy of her passport produced, before the relationship was said to have been formed in August 2014 she had in fact travelled to Thailand in 2011 and 2012 and to Burma in April 2014 until 1 May 2014. This led the judge to conclude, at paragraph 30, that there were “significant discrepancies” in her evidence which caused the judge to doubt her credibility. Second, although the judge found it to be “understandable” that the appellant had not told her relatives about being in a lesbian relationship, he found it damaging to her credibility that she had not produced evidence from friends testifying to their relationship.
5. There are a number of serious difficulties with that reasoning. Most importantly, it is not apparent from the record of proceedings made by the judge nor the recollection of Mr Kannangara, who appeared below, that either of those concerns were raised either with the appellant or [MW]. If they had been, there may have been an explanation that would have caused the judge not to hold those matters against the appellant. Secondly, I do not accept that those two reasons are legally sufficient to support a finding of fact that the relationship did not exist. Thirdly, the existence of the relationship was not specifically disputed by the respondent in the refusal letter and so it was not immediately apparent to the appellant why additional evidence of that might be required.
6. For these reasons, I am entirely satisfied that this was a finding of fact not reasonably open to the judge on the evidence. His failure to raise with the appellant a matter he proposed to take against her that was not

on its face in play and so she could not deal with it, also discloses legal error.

7. The question, therefore, is whether that error of law was material to the outcome of this appeal. For the reasons that follow, it is clear that it was not.
8. Mr Kannangara accepts, and is plainly correct to do so, that the appeal could not succeed under the Immigration Rules, not least because it was the appellant's own case that the relationship began in August 2014 and so had not existed for at least two years at the date of the application. Therefore, he accepted also that the appeal could succeed only on the basis of rights protected by article 8 of the ECHR.
9. I have explained why the judge made an error of law in finding that the account of the appellant and [MW] of their relationship was untrue. That finding of fact cannot stand and must be considered to be of no effect at all. However, the judge determined the article 8 claim in the alternative, on the basis that he was wrong to find untrue the claim of the appellant and [MW] that they were in the relationship claimed. At paragraph 31 of his determination the judge said:

“In case I were held to be in error on this, I have gone on to consider the other matters under Article 8.”

There is no challenge raised in the grounds to this aspect of the decision of the judge, and nor could there be, as the analysis that followed was one plainly open to the judge on the evidence. Therefore, even though the judge was wrong to reach his primary finding of fact that the appellant and [MW] were not in the relationship they claimed to be, as he was correct to find that the appeal could not succeed under the Immigration Rules and there is no challenge raised to his determination of the Article 8 claim on the basis of the relationship as asserted, the legal error made by the judge was not a material one and so his decision to dismiss the appeal shall stand.

Summary of decision:

- (i) The Judge of the First-tier Tribunal made no material error of law error of law and the decision of the judge to dismiss the appeal shall stand
- (ii) The appeal to the Upper Tribunal is dismissed

Signed



Upper Tribunal Judge Southern

Date: 30 May 2017