



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

Appeal Number: HU/03093/2016

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke-on-Trent**      **Decision & Reasons Promulgated**  
**On 17<sup>th</sup> November 2017**                              **On 11<sup>th</sup> December 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**A S  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Maqsood (Counsel)

For the Respondent: Mr C Bates (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Ford, promulgated on 28<sup>th</sup> January 2017, following a hearing at Birmingham, Sheldon Court on 19<sup>th</sup> January 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of India, and was born on [ ] 1992. He appealed against the decision of the Respondent dated 20<sup>th</sup> January 2016, refusing his application for leave to remain in the UK on the basis of his marriage to a British partner, [GD], who was expecting his child.

### **The Judge's Findings**

3. The judge heard evidence both from the Appellant and from [GD] and found neither to be credible witnesses. This was because the Appellant was asked when his relationship had started and he said it was in September 2015. He was asked when he and [GD] started living together and he said it was in March 2016. They had both agreed to marry. He had proposed to her (paragraph 8). In the photographs that the Appellant and his partner produced, however, there are date stamps, which showed that they were together in June 2015. When the Appellant had been asked in cross-examination, "Were you kissing like that three months before the relationship started", he had said "yes" and when the question was put again, the ambiguity was not resolved (see paragraph 15). The judge held that the parties had been given "ample opportunity to explain why several of the photographs predated the time when they said they met for the first time even though the photographs were of them spending time together" (paragraph 20). There was evidence, by the time of the appeal hearing, of the birth of their son, with whom the Appellant spent time, but the judge was not satisfied that they shared family life together or that the Appellant and his partner were in a genuine and subsisting relationship together (see paragraph 22).
4. The appeal was dismissed.

### **The Grant of Permission**

5. On 6<sup>th</sup> September 2017, permission to appeal was granted on the basis that the judge, in focusing on the discrepancy between the photographs which bore dates of June, July, and August 2015, and the declaration that they met in September 2015, may have led the judge to fall into error in assessing the relationship, and the Appellant's paternity of his partner's child, when considering the evidence as a whole.

### **The Hearing**

6. At the hearing before me on 17<sup>th</sup> November 2017 Mr Maqsood, appearing on behalf of the Appellant, submitted that the primary issue had always been whether the relationship between the Appellant and his British citizen partner was genuine and subsisting. They had said that they started the relationship in September 2015. There were photographs, however, that predated what had been declared, showing that they were together in an intimate pose in June, July and August 2015. However, Mr Maqsood submitted that this was the only inconsistency in the evidence

that the parties gave (see paragraph 8 of the determination). However, this was a wholly inadequate basis upon which to determine that the parties, who by this stage were living together and had a child, were not in a genuine and subsisting relationship, or did not enjoy family life together.

7. Second, it was also inadequate because it ignored other evidence provided at the hearing, which the judge found to have been plausible. For example, the judge recorded how the Appellant “takes care of their son who was born in Kettering on 15<sup>th</sup> July 2016” and is “a British national”, and both the Appellant and his partner were consistent as to the poor relationship which the Appellant’s partner enjoyed with her mother, together with the causes for that poor relationship (see paragraph 10). The judge was also satisfied that, “she and the Appellant were consistent in their evidence about what he had given her as a Christmas present” (paragraph 14).
8. Third, the GP’s letters showed that the Appellant’s partner was undergoing depression pending the application for a visa for the Appellant, and this too pointed towards demonstrating that they were in a genuine and subsisting relationship together. The judge did not refer to this.
9. Fourth, it was also ignored that prior to the marriage application, there had been a previous application on the basis that the two of them were living together as “unmarried partners” on 8<sup>th</sup> October 2015, and this had been refused on the basis that they did not share a family and private life on 25<sup>th</sup> January 2016 (see paragraph 1 of the determination). The judge had stated this fact at the outset but had failed to draw upon the implications of this for the purposes of deciding whether they were now in a genuine and subsisting relationship, having married and had a son together.
10. Fifth, at page 31 of the Appellant’s bundle, there was a letter dated 21<sup>st</sup> December 2016, from the Appellant’s wife, that she was receiving counselling, and this was less than a month before the date of the hearing, and it plainly showed that she was going through a lot of worry and stress on behalf of her husband, wanting to stay in this country as her husband. No reference was made to this by the judge.
11. Sixth, the judge stated (at paragraph 26) that the Appellant had a poor immigration history, but there was no suggestion to this effect in the refusal letter, and the judge failed to make out a case for why this conclusion had been arrived at. Finally, there was now DNA evidence provided, showing that the Appellant is the father of the child in question, which is evidence from a government approved organisation.
12. For his part, Mr Bates submitted that the DNA evidence was not before the judge and it had not been presented in a proper manner today, with samples from other relatives shown.

13. Second, both parties to the relationship had married after the date of the decision against them given by the Respondent Secretary of State.
14. Third, there was no duty upon the Secretary of State to undertake an investigation into the nature and quality of the relationship for the ensuing 70 days after their marriage.
15. Fourth, the judge gave adequate reasons, which were rational, and not perverse, for coming to the conclusion that she did, and the ambiguities between the photographs taken, and the statement of when the relationship began, still have not been clarified or resolved.
16. Fifth, the fact that the Appellant had been named on the birth certificate as the father of the child was not dispositive of the question that he was the genuine father, and the judge had so said, explaining that the naming of the father on a birth certificate does not mean legally that he is to be recognised as the natural father of the child (see paragraph 21).
17. Sixth, the judge observed that the parties before the hearing had been “given repeated opportunities” (paragraph 18) to clarify the discrepancy raised by their evidence, and had failed to do so.
18. Seventh, there were alleged witnesses to the relationship, including a letter from a [US], the Appellant’s landlady, but neither she nor anybody else was in attendance at the hearing to be cross-examined.
19. Finally, it was not “unduly harsh” to expect the Appellant to return, with or without his wife, to India, and to make a new application, given the Court of Appeal judgment in **Agyarko**, which showed that the threshold for so demonstrating, was a high one.
20. In reply, Mr Maqsood submitted that the criticism of the findings of the judge were not that she was drawing attention to an inconsistency in the evidence, which was plainly known to exist and remained unexplained, but to the fact that she had attached undue weight to this inconsistency, in the light of other compelling evidence, that went both to the genuineness of the relationship, and the existence of family life between the parties and their child.

### **Error of Law**

21. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. My reasons are as follows.
22. First, whereas it is right that the Appellant and his partner failed consistently to provide an explanation for why there were photographs, which preceded by some three months, the date of their claimed start of relationship, there was plainly other evidence which helped dispel any doubts about the genuineness of the relationship and the claimed right to

family life. This evidence consisted of such matters as the Christmas present that the Appellant gave his wife (paragraph 14) and detailed knowledge on the part of the Appellant about reasons why his wife had a poor relationship with her mother, together with “the cause of that relationship not being a good one” (paragraph 10). At the same time also, there is evidence that, with the child being born to the couple, the Appellant “takes care of their son” (paragraph 10).

23. Second, there is the question as to what the identified inconsistency in the evidence actually went to. If there were photographs, which preceded by three months, the date when the Appellant and his partner claimed to have started their relationship, namely, in September 2015, this did not show that they were not in a relationship at all. If anything, it showed that the claim that their relationship began in September 2015 was incorrect, because there were photographs, date marked, going back to June, July and August, which showed them in intimate pose, which only demonstrated the depth of the relationship, and one which was subsequently borne out by events that followed, namely, the marriage and birth of their son, with whom they are living at present. The error, therefore, was not a material one on the part of the parties to the appeal. The frustration, at their not being able to explain the discrepancy, may well have been evident, given the answer that the Appellant repeatedly gave when asked, “Were you kissing like that three months before the relationship started”, to which he replied, “yes” (paragraph 15), but this does not show that the relationship had not actually started as early as June 2015, or was not in existence at the time when they claimed the relationship to have started, namely, in September 2015.

### **Re-making the Decision**

24. I re-make the decision on the basis of the findings of the Immigration Judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

### **Notice of Decision**

25. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

26. An anonymity direction is made.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Juss

6<sup>th</sup> December 2017

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable I make a fee award of the amount that has been paid or is payable.

Signed

Date

Judge Juss

Judge of the First-tier Tribunal

6<sup>th</sup> December 2017