



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19601/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 12 March 2018

Decision & Reasons Promulgated
On 9 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

ZESHAN HAMEED
[NO ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M Schwenk, instructed by Sandhill Solicitors
For the respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Quinn promulgated 27.9.17, dismissing his appeal against the decision of the Secretary of State, dated 14.7.16, to refuse his application for entry clearance (EC) to join his partner in the UK, pursuant to Appendix FM of the Immigration Rules.
2. First-tier Tribunal Judge Holmes granted permission to appeal on 8.12.17.
3. Thus, the matter came before me on 12.3.18 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons summarised below, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision should be set aside.
5. In granting permission to appeal, Judge Holmes observed that there was no reference to case law in the decision and it was not clear if the judge accepted whether the appellant and the sponsor are married.
6. However, reading the decision it appears that the fact of marriage was not challenged. The appellant and the sponsor were married in Pakistan on 8.11.15. Throughout the decision, the judge referred to both the relationship as a marriage and the sponsor as the appellant's wife. The issue in the appeal was not about the validity of the marriage. Both Mr Bates and Mr Schwenk confirmed that there was no issue as to marriage, only as to the subsistence of the relationship.
7. However, Mr Schwenk went on to elaborate a number of errors of fact and law in the decision, so that I was satisfied that the decision cannot stand. After hearing part of Mr Schwenk's submissions, Mr Bates confirmed that he felt the respondent could no longer resist the appeal against the decision of the First-tier Tribunal. In the circumstances, it was not necessary for Mr Schwenk to continue the balance of his submissions.
8. It is not necessary to set out all of the matters of concern in the decision, but the following were some of the points which I found persuasive of establishing an error of law.
9. In support of the conclusion that the relationship was not strong, at [22] the judge relied on an alleged absence of photographs or statements from friends confirming the status of their relationship in the UK. The point about photographs is repeated at [24]. In fact, the appellant's bundle contained at least two photographs of them in the UK at A382. More significantly, there were a total of 9 statements from friends and associates attesting to their relationship in the UK. It appears that the judge may have forgotten about those statements until drafting [40] when referencing the 9 statements and stating that they were not in the bundle where the skeleton argument had suggested. The skeleton argument was indeed in error on the page reference (so was the judge in citing the skeleton argument), but the index to the bundle reveals the location of the statements at A27-36. It is not clear from [40] whether the judge ever saw the statements, but whilst the fact that those persons were not called to give evidence may reduce the weight to be accorded to the evidence, their absence was insufficient reason to reject the evidence. All of this affects the adequacy of the judge's fact-finding exercise.
10. At [24] the judge commented on the telephone records, noting that a number of them were of short duration, when the judge would have expected their calls to be of a substantial duration. However, the judge ignored the explanation that whilst some of the calls were short, that was because they were cut off by the Lyca service, evidenced by an examination of the call record, which shows that many of the calls were very long indeed and that many of the short or zero duration calls were

followed by a longer call shortly afterwards. More importantly, both the appellant and his wife explained in their statements that the calls were often short because they conducted most of their relationship using WhatsApp. In support of that several hundred of the pages in the appellant's bundle comprises transcripts of their WhatsApp communications, evidence pointing towards the genuineness and subsistence of their relationship.

11. At [25] the judge pointed out that the relationship was entered into in precarious circumstances, which is a fair and relevant point. However, the judge was in error in stating that the appellant was subject to removal directions. After a check online with Home Office records, Mr Bates confirmed that the appellant was not subject to removal directions. Mr Schwenk pointed out that he had made a student application, then varied the application to rely on private and family life, but following legal advice decided to make a voluntary departure from the UK, as confirmed by the Home Office letters at A319-320. I find that the judge erred by making an adverse finding against the appellant.
12. The judge also erred in relation to the sponsor's employment. Whilst there were several features addressed in the decision which gave justifiable cause to regard the employment with suspicion, the judge made a number of factual errors which infected the validity of the conclusion that the employment was not genuine.
13. Some of the factual errors appeared at [34] of the decision. The judge noted that there were a number of payments from Manchester City, which the judge took to be housing benefit. This was derived from the description of deposits into the sponsor's bank account labelled as Manchester City. However, there are similar deposits labelled Chorlton. It is clear when the statements are examined more carefully that these descriptions are not of the employer, but of the bank location where the deposits were made. Mr Schwenk also pointed to the evidence in the appellant's bundle that she is not on housing benefit but has a mortgage and produced the land registry registration for her property, all of which documents were within the appellant's bundle.
14. More significantly, the judge took as a major credibility point against the appellant that the judge could not reconcile the wage slips with the bank deposits. The judge also ignored the submissions and representations explaining the correlation between the payslips and the bank deposits set out in detail in the letter from the appellant's representatives, contained within the bundle at A282-285. In summary, the sponsor did not immediately bank her wage cheques, but generally did so on a monthly basis in groups of four cheques combined to make a single deposit. Thus, the £1,222.76 made on 2.2.17 computed to the four preceding wage slips. Mr Schwenk pointed out that the particular examples the judge chose to highlight at [34] and [36] post-dated the refusal decision, when the judge should have concentrated on the 6-month period prior to the date of application. Mr Schwenk took me to a number of similar examples, all suggesting that the wage slips did in fact correspond to the bank deposits. A full schedule of the corresponding wages and deposits was set out in the appellant's bundle.

15. As stated above, there were matters relied on by the judge that do cast suspicion on the genuineness of the employment. However, the serious mistakes of fact in relation to the employment entirely undermine the credibility assessment, so that it is flawed and unfair to the appellant.
16. The judge also made an unfounded suggestion at [27] that the sponsor's lack of English undermined the credibility of the claim to work as a Customer Service Advisor. That does not necessarily follow, as the sponsor was employed by a retail business serving the Pakistani community. Neither was it fair to suggest there was any contradiction between the descriptions of the same employment as a shop assistant and as a Customer Service Advisor when it is commonplace for both descriptions to be employed.
17. In all the circumstances, it is clear that there were a number of significant factual errors, which were undoubtedly material to the credibility assessment of both the subsistence of the relationship and the sponsor's claimed employment. These errors infect the remainder of the findings so that none of the findings and assessments are safe or fairly made. In the circumstances, the decision cannot stand and must be set aside to be remade in its entirety.

Remittal

18. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors in the decision vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
19. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh, with no findings preserved.

Decision

20. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal.



Signed
Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed
Deputy Upper Tribunal Judge Pickup