



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01790/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1 May 2018

Decision & Reasons Promulgated
On 11 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MAHBUB HASAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim of Counsel instructed by Shahadoin Karim

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Walker promulgated on 12 September 2017 dismissing the Appellant's human rights appeal against a decision of the Respondent dated 1 April 2016 refusing leave to remain in the United Kingdom.
2. The Appellant is a citizen of Bangladesh born on 10 August 1982. He entered the United Kingdom as a Tier 4 student on 25 October 2009 with leave valid until 31 October 2013. He was granted a further period of leave in the same capacity until 31 July 2014. On 30 July 2014 he made the application, the refusal of which is the subject of these proceedings. The Appellant's application was based on his marriage to Laura May Fletcher (d.o.b. 20 May 1992), a British citizen to whom he was married on 24

March 2014. It was indicated in the application that Ms Fletcher was expecting the couple's child, and indeed a daughter was delivered of the couple on 8 January 2015.

3. In the course of considering the Appellant's application the Respondent invited both the Appellant and Ms Fletcher to attend a marriage interview, transcripts of which appear at Annex C of the Respondent's bundle before the First-tier Tribunal. On the basis of what was said to be discrepant answers during the course of those interviews, the Respondent did not accept that the Appellant and Ms Fletcher were in a genuine and subsisting marital relationship. Accordingly, the application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') of 1 April 2016. The Secretary of State did not accept that the Appellant satisfied the requirements of the Immigration Rules with regard to the so-called 'partner route'. Moreover, the Secretary of State was not satisfied that the Appellant met the requirements in respect of private life, in particular pursuant to paragraph 276ADE(1) of the Immigration Rules. The Respondent did not otherwise consider that there were any circumstances that warranted the grant of leave to remain.
4. It is to be noted that the Respondent did not give any particular or separate consideration to the so-called 'parent route' which, in the event of the Appellant being found not to be in a relationship with Ms Fletcher but perhaps being the father of her child, might have been available to the Appellant.
5. The Appellant appealed to the IAC.
6. The First-tier Tribunal Judge considered all of the evidence before him, including the interview records. The Judge also had regard to the oral evidence that he heard from the Appellant and Ms Fletcher. The Judge reached much the same conclusion in respect of the marital relationship as had the Secretary of State. The Judge's reasoning in this regard may be seen in the Decision from paragraph 24 onwards. The Judge considered that conflicting and evasive answers had been given in the interview (paragraph 24), and also that the evidence of the Appellant and Ms Fletcher before him had been "*a mixture of correct and incorrect answers*" (paragraph 25). The Judge noted that no independent witnesses had been called to corroborate any of the claims made by the Appellant and no member of Ms Fletcher's family had attended; the Judge considered that such absences detracted from the Appellant's case (paragraph 26). The Judge noted that the Appellant gave incorrect information as to Miss Fletcher's family, including getting the names of her parents wrong (paragraph 27). The Judge was concerned about differences in their evidence in respect of the major expense of their claimed lives together (see paragraph 28). The Judge also considered that the evidence given by each of them was divergent with regard to the question of Ms Fletcher's conversion to Islam (paragraph 29). The Judge also made reference to other areas of discrepancy, but treated them as more marginal in the overall consideration (paragraphs 30 and 32). However, it is observed "*The Appellant knew little of his*

daughter's school or the names of her teachers" (paragraph 31). It is essentially on these bases that the First-tier Tribunal Judge found that there would be no breach of any rights to family life if the Appellant were to return to Bangladesh.

7. The challenge to the decision of the First-tier Tribunal Judge raises grounds in respect of both the Judge's approach to the child and to the Appellant's relationship with Ms Fletcher. It is the former matter that attracted particular attention in the grant of permission to appeal, it being noted that *"The grounds assert that the Judge erred in relation to the finding of the genuineness or otherwise of the relationship between appellant and child"*.
8. I have made reference above to one sentence in the Decision that refers to the Appellant's knowledge of his daughter's school: *"The Appellant knew little of his daughter's school or the names of her teachers"* (paragraph 31). The only other reference to the child that is apparent in the Judge's evaluation of the case is to be found within paragraph 37 where the following appears: *"The child's best interests and welfare are for her to remain with her mother, her primary carer"*.
9. There is no other consideration of the child's circumstances or of the Appellant's relationship with his child.
10. It seems to me clear enough that it was the absence of any proper consideration of this aspect of the case, and the potential consequent consideration of section E-LTRPT.2.4. of Appendix FM of the Immigration Rules - which in turn would have informed a due and proper evaluation of Article 8 - that prompted the Respondent to file a Rule 24 response on 19 April 2018 not resisting the grounds of challenge to the Decision of the First-tier Tribunal.
11. I accept the Respondent's concession to the effect that the First-tier Tribunal Judge failed adequately to engage with, or offer any reasoning in respect of, the Appellant's relationship with his child. In my judgement this constitutes material error of law such as to require the decision of the First-tier Tribunal to be set aside.
12. That said, it plainly would have been difficult for the Judge to engage with issues in respect of possible contact between the Appellant and the child in circumstances where his case had been put on the basis that there was a subsisting, cohabiting, family unit. Necessarily the case having been put on that basis, there was no alternative submission, or alternative evidence, addressing the very different question of whether the Appellant was exercising contact with the child or his role otherwise in the child's life. Such matters will now need to be considered in remaking the appeal.

13. There was some discussion before me as to the appropriateness or otherwise of preserving the First-tier Tribunal's finding of fact with regard to the relationship. The Judge did not accept that the relationship was genuine and subsisting.
14. The grounds of appeal to the Upper Tribunal in this regard, in my judgement, essentially amount to a disagreement and do not identify any error of law. It is pleaded, for example, that the Judge has erred in failing to take into account that the parties live together, in failing to have regard to the documentary evidence, and/or in failing to have regard to the fact that the couple had had a child together. It seems to me absolutely clear that the Judge had all of these matters well in mind. He refers to the supporting evidence, and clearly had it in mind that there was a child. I can find nothing in the challenge that undermines the findings of the First-tier Tribunal Judge: in my judgement they were sustainably made without error of law.
15. In my judgement those findings should stand as having been sustainably made. However, that does not mean to say that those findings could not be revisited within the principles of Devaseelan on a rehearing; they should stand as a starting point to consideration of remaking the decision in the appeal. In this context it is to be noted that the First-tier Tribunal Judge expressed concerns about the absence of certain sorts of supporting evidence: it is open to the Appellant, together with Ms Fletcher, if he or they wish to maintain that they are indeed in a committed subsisting genuine marital relationship to advance further evidence in support: for example, one matter that the Judge expressed concern about was the absence of independent witnesses and/or testimony from members of Ms Fletcher's family who might have reasonably been expected to be willing and able to give evidence as to the nature of the relationship.
16. Accordingly, in upholding and preserving the findings of the First-tier Tribunal Judge in respect of the relationship between the Appellant and Ms Fletcher I do not preclude the Appellant from revisiting this matter. However, any reconsideration by the Tribunal of the relationship is not to be done on the basis of a *de novo* hearing, but on the basis that it is for the Appellant to advance evidence that would permit the next judge to revisit the finding of Judge Walker pursuant to the guidance in Devaseelan. Of course, if the Appellant now wishes to acknowledge and accept the findings of the Judge, he will no doubt wish to shift the focus of his case to providing evidence as to the nature and extent of his contact and relationship with his child.
17. The issues to be considered in the remaking of the decision are open to be presented by the Appellant as he sees fit, but bearing in mind that if he wishes to contest all issues in the appeal he will have the obstacle of addressing the adverse finding with regard to the marital relationship and will necessarily need to bring forward new evidence, or different evidence, in this regard and cannot simply re-put the case that has already

been rejected. Exactly how the Appellant wishes now to present his appeal is essentially a matter for him, perhaps duly advised by those that represent him.

18. Because matters that may likely now need to be considered – the relationship between the Appellant and the child outside the context of a marital relationship with the child’s mother - have not been the subject of any fact-finding it is appropriate that the decision in the appeal be remade before the First-tier Tribunal.
19. The Appellant and his advisers will no doubt take on board the discussion above. It is for the Appellant to file and serve any evidence upon which he wishes to rely within the timetable of standard Directions. Otherwise, I make no particular Directions with regard to the continuing process of the appeal.

Notice of Decision

20. The decision of the First-tier Tribunal contained a material error of law and is set aside.
21. However, the First-tier Tribunal’s adverse finding of fact in respect of the Appellant’s marital relationship is not impugned and is preserved.
22. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge R L Walker, taking as a starting point the preserved finding in respect of marital relationship.
23. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **9 June 2018**

Deputy Upper Tribunal Judge I A Lewis