



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/09783/2019 (P)

THE IMMIGRATION ACTS

**Decided Under Rule 34 Without a Hearing
On 25 June 2020** **Decision & Reasons Promulgated
On 09 July 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

URIM [P]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Lucas promulgated on 6 November 2019 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decisions dated 20 May 2018 refusing his human rights claim (under Article 8 ECHR).
2. The Appellant is a national of Albania. He entered the UK illegally in 2012. He was encountered when arrested on 11 April 2018 and interviewed. He stated that he was single. His human rights claim focusses however on a relationship with Ms [S]. He married her on 27 June 2018. [S] is said to

suffer from mental health problems due to a previous violent relationship and other traumatic events in her past. It is said that she suffers from PTSD and a dependent personality disorder and is at risk of suicide. A psychiatric report was produced in support of those matters.

3. The Respondent did not accept that the relationship was genuine and therefore did not consider that [S] would leave the UK with the Appellant. In the alternative, she concluded that there would be no insurmountable obstacles to the relationship continuing in the UK. The Appellant contends that there would be insurmountable obstacles to the relationship continuing in Albania if he were removed. In addition to [S]'s medical condition, the obstacles are said to be that she has family members in the UK and works as a mental health support worker.
4. The Judge did not accept that the Appellant had lived with his partner since 2015. The Judge recognised that the Appellant had married [S] but did not accept that this of itself indicated a genuine and subsisting relationship. He found that the relationship was not genuine. In any event, the Judge concluded that [S] could remain in the UK with family support if she did not wish to leave the UK. If, contrary to his primary finding, the relationship was genuine and subsisting it was open to the Appellant to make an application for entry clearance based on his marriage once back in Albania.
5. The Appellant appeals on five grounds as follows:

Ground one: The Judge erred in his finding that there was no suggestion that [S] should leave the UK if she did not wish to do so. It is said that this is contrary to the Respondent's decision letter.

Ground two: The Judge has failed to give adequate reasons for his finding that the relationship is not genuine and subsisting.

Ground three: The Judge failed to give adequate reasons for giving little weight to the evidence of [S] and the Appellant's sister.

Ground four: The Judge failed to explain why the evidence was not capable of demonstrating that the relationship was genuine and subsisting as at date of hearing.

Ground five: The Judge has erred by suggesting that the Appellant can make an application for entry clearance which is contrary to his finding that the relationship is not genuine and subsisting. It is said that "Devaseelan" would apply in relation to any such future application.
6. Permission to appeal was granted by First-tier Tribunal Judge Gumsley in the following terms so far as relevant:

"... 3. I am satisfied that it is arguable that the judge made a material error of law in failing to provide adequate reasons as to why he rejected the Appellant's explanation on why there was limited documentation to prove any cohabitation prior to 2018, or why he attached little weight to the other evidence called or presented on behalf of the Appellant.

4. In the circumstances permission to appeal on all grounds as pleaded is granted.”
7. By a Note and Directions dated 23 April 2020 and sent on 11 May 2020, having reviewed the file, I reached the provisional view that it would be appropriate to determine without a hearing (pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – “the Procedure Rules”) the following questions:
 - (a) whether the making of the First-tier Tribunal’s decision involved the making of an error of law and, if so
 - (b) whether that decision should be set aside.

Directions were given for the parties to make submissions in writing on the appropriateness of that course and further submissions in relation to the error of law. The reasons for the Note and Directions was the “present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules”.

8. No initial submissions were made by the Appellant. On 2 June 2020, the Respondent filed and served submissions, seeking to uphold the Decision. No submissions were made as to the appropriate method of determination of the error of law issue. The Appellant filed and served a reply to those submissions on 5 June 2020. He took issue with the Respondent’s submissions, particularly as regards whether [S] could be expected to leave the UK. No submissions were made objecting to the determination of the error of law issue on the papers.
9. Both parties have set out their position in relation to the error of law issue in writing. The Appellant’s grounds, whilst concise, provide full argument on the issues raised. The Appellant has also had the opportunity to respond to the Respondent’s submissions which, in any event, for reasons which follow, seem to me to have only tangential relevance to the issues which I have to consider. Neither party has objected to the determination of the error of law decision on the papers. I consider that the Appellant’s case is adequately pleaded to allow me to determine that issue fairly when taken together with the evidence on the file. I have therefore reached the view that the issues can fairly be determined on the basis of the pleadings put forward. I proceed to determine the error of law issue on the papers.
10. At this stage, the issue for me is whether the Decision contains an error of law. If I so conclude, I will need to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

11. The crux of the appeal against the Decision is the finding of the Judge as to the genuineness of the relationship. If the Judge was entitled to make the primary finding which he did that the relationship is not genuine and subsisting, it matters not what the effect of that would be on his secondary finding that the Appellant could make an application for entry

clearance. Nor does ground one make any difference. Whatever the position of the Respondent, the Judge's finding was such that [S] would not need to leave the UK unless she wished to do so because, on his primary finding, the relationship was not genuine and subsisting.

12. I can in any event dispose very shortly of ground one as the passage cited from the Respondent's decision letter ignores the passage immediately preceding it which makes clear that the Respondent's primary position also was that the relationship was not accepted as genuine and therefore that [S] would not leave the UK. The Respondent's primary position is clear from the fact that the paragraphs preceding the passage cited in ground one begin with the words "[e]ven it is were to be accepted that your relationship with your sponsor was genuine and subsisting".
13. In relation to the genuineness of the relationship, the Judge was bound to consider the evidence in the round. As such, it is appropriate to take grounds two to four together as those all challenge different aspects of the Judge's findings in this regard.
14. I begin my consideration by setting out the Judge's findings about the relationship. The Judge did not place weight on the Respondent's reliance on what had been said by the Appellant at interview in 2018. He noted the absence of evidence about this interview. He then went on to look at the documentary and oral evidence which he had received and made the following findings:
 37. It is said that the Appellant has cohabited with his partner since 2015. He stated 2016 in his application form. Yet, there is little or no evidence of this cohabitation until after making the present application in July 2018.
 38. The Tribunal does not regard the Appellant as a reliable witness and places little weight upon his assertion that he has cohabited with his partner since 2015.
 39. The fact that he has been able to register his marriage in 2018 (after his arrest) and obtain joint documents from the period 2018-2019 does not, of themselves, indicate a genuine and subsisting relationship.
 40. The Appellant made no attempt to regularise his status in the UK until after his arrest and having lived here illegally since 2011.
 41. The Tribunal has noted the evidence of the Appellant, his partner and his sister. It places little weight upon this evidence because each is hardly independent and all of them wish for him to remain in the UK despite his lack of basis to be here."
15. I accept that those findings are relatively brief. However, the issue is whether they are sustainable in the context of the evidence which was before the Judge. In this regard, the Appellant has helpfully set out in his grounds the matters which he says are relevant and what evidence was before the Judge. Aside the witness statements and oral evidence of the

witnesses which I come to below, and some cards, receipts and photos which do not and cannot prove that a relationship is genuine and subsisting, the only documentary evidence of cohabitation is said to be as follows:

- Letter from [S]’s housing association dated 9 May 2019 which confirms that the Appellant had “been listed as a household member at [her address] since 30/04/2018” ([AB/81-83]).
- Rent proof statement [AB/81]
- Proof of cohabitation [AB/84-113]

16. Unfortunately, with the exception of the letter from the housing association which appears also in the Respondent’s bundle at [D1], I have been unable to consider those documents for myself as the Appellant’s bundle on file, albeit including those documents in the index ends at [AB/80]. Nonetheless, the Decision shows that the Judge had those documents (see [39] cited above). There is no challenge to the Judge’s understanding of what those documents show; simply the impact of his consideration of them coupled with other evidence. As such, there was evidence both that the couple are now married and that they have lived at the same address since 2018. As the Judge observed, though, the fact of a marriage and even living at the same address does not mean necessarily that a relationship is genuine and subsisting.
17. The Appellant says though that the Judge ignored the reasons given for the lack of documentary evidence prior to that date. Both the Appellant and [S] said that the reason was that they did not realise that he could add his name to the utility bills even though in the UK illegally. The Appellant accepts however that the Judge did note that explanation at [22] of the Decision. Even if that reason were to be believed, the fact remains that there was no evidence pre-dating 2018 showing the couple living at the same address on which the Judge could place any weight. I observe that, even accepting the Appellant’s explanation, there might be other probative evidence if, for example, [S] was paying council tax and was not claiming a single person’s discount.
18. Moving on then to the witness evidence, the Judge heard from the Appellant, his sister and [S]. None of them was cross-examined as the Respondent was unrepresented. Importantly, both the Appellant and [S] said that their relationship was genuine and subsisting. That had of course been put at issue by the Respondent in her decision letter as I have already noted and that was the issue which the Judge had to determine.
19. [S]’s statement contains detail of how and when she met the Appellant, albeit brief. The Appellant’s statement contains very similar details, slightly expanded. The Appellant’s sister also confirms that the relationship is genuine and subsisting.
20. As I have already noted, the Judge did consider the witness’ evidence. In essence, the reason he discounted it was that it was not independent

because “all of them wish [the Appellant] to remain in the UK”. It is on this point that I consider the Judge fell into error. The Appellant himself obviously wishes to remain in the UK and the Judge was entitled to place little if any weight on his evidence. The same might be said of the evidence of his sister, irrespective of the genuineness of the relationship between the Appellant and [S]. However, the same cannot be said of the evidence of [S] herself. If, as is the Judge’s primary finding, [S] is not in a genuine relationship, then she would have little if any interest in whether the Appellant remains in the UK or returns to Albania. There is therefore an inconsistency between what is said at [41] of the Decision and the Judge’s finding that the relationship is not genuine.

21. On a broader point, the Judge has also fallen into error both in failing to provide adequate reasons and in his focus only on the issue of cohabitation. A relationship can be genuine and subsisting even if the parties do not live together. Conversely, the fact of cohabitation on its own does not prove the genuineness of a relationship (as I accept is the substance of the Judge’s conclusion). The Judge failed to consider the broader issue and/or failed to give sufficient reasons for finding that the relationship was not genuine and subsisting. That is the essence of the Appellant’s ground four.
22. The Respondent invites me to uphold the Decision on the basis that, whether or not the relationship is genuine, the Appellant cannot succeed if paragraph EX.1 of Appendix FM to the Immigration Rules (“paragraph EX.1”) is applied to the circumstances of this case as she asserts that there are no insurmountable obstacles to the couple continuing family life in Albania. It is also said that, applying Section 117B Nationality, Immigration and Asylum Act 2002, the Appellant would be bound to lose given his illegal status when the relationship was formed – little weight could be given to that relationship in those circumstances.
23. The difficulty with those submissions is that there was no consideration given to those provisions by the Judge. Although the Judge did go on at [42] and [43] of the Decision to consider the position, apparently on the premise of a genuine relationship, he did so only on the basis that [S] would not be obliged to leave and that the Appellant could seek entry clearance to return as a spouse. As to the first, that is not the relevant question for the purposes of paragraph EX.1. Clearly, as a British citizen, [S] cannot be obliged to leave the UK but the issue is whether she could do so. As to the second, the issue to be determined in relation to paragraph EX.1 is whether family life can be continued in the Appellant’s home country. Whether entry clearance could be obtained to enable an Appellant to return to the UK arises only after consideration of that issue.
24. Whilst I can see the potential merit in the Respondent’s submissions as to the outcome of this appeal if paragraph EX.1 is applied, I am unable to conclude that the appeal would be resolved against the Appellant if that issue is considered. Whilst most of the obstacles said to exist are ones which typically arise in a situation such as this, [S] has mental health

issues which would also need to be taken into consideration. For that reason, I am unable to conclude that the error which I have identified is immaterial.

25. Having found an error of law in the Decision, I set that aside. I have considered whether it is appropriate to re-make the decision in this Tribunal or to remit the appeal to the First-tier Tribunal. I have concluded that the appropriate course is to remit the appeal. The error I have identified is one which concerns the credibility of the Appellant's relationship with [S]. Credibility findings will therefore need to be made afresh. Partly depending on the conclusion in that regard, it will or may also be necessary for the Judge hearing the appeal to consider paragraph EX.1 and Article 8 more widely. As I have already noted, no findings were made previously in relation to EX.1 so that issue will be determined for the first time. Due to the extent of the issues to be determined for the first time and that the appeal involves credibility which will need to be determined afresh, I consider it appropriate to remit the appeal to the First-tier Tribunal for a new decision to be made.

DECISION

The Decision involves the making of a material error on a point of law. I therefore set aside the Decision of First-tier Tribunal Judge Lucas promulgated on 6 November 2019. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Lucas.

Signed L K Smith

Dated: 25 June 2020

Upper Tribunal Judge Smith