



IAC-AH-SAR-V1

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

Appeal Number: HU/17558/2018

THE IMMIGRATION ACTS

**Heard at Manchester Civil Justice
Centre
via Skype for Business and BT
Meetme
On 1 September 2020**

**Decision & Reasons Promulgated
On 9 September 2020**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**SAFEER AHMAD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. Bazini, instructed by Gulbenkian Andonian, solicitors
For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on the 10 January 1983 and is a male citizen of Pakistan. He appealed to the First-tier Tribunal against a decision of the Secretary of State refusing his application for settlement under the 10 years residence rule. The First-tier Tribunal (Judge Nightingale), in a decision promulgated on 16 December 2019, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Mr McVeety, who appeared for the Secretary of State at the initial hearing in the Upper Tribunal, told me that the Secretary of State did not oppose the appeal and further stated that the decision should be remade allowing the appellant's appeal on human rights grounds (Article 8 ECHR). I shall, therefore, be brief.
3. Both parties agree that the appellant has enjoyed lawful residence throughout a 10 year period save for a gap in leave which occurred in 2010-2011. The first ground of appeal concerns the argument that, but for the operation of the respondent's unlawful Certificate of Approval of Marriage scheme (hereafter COA), there would have been no gap as the appellant would have married and applied for further leave to remain in time. At [47], the judge wrote that, 'if the appellant had married in December 2009, on his own evidence he would have still waited for 3-4 months to make this application [for further leave to remain]...it is therefore not entirely clear that this application would have been made before the expiry of, or within 28 days of the expiry of, his leave under Section 3C.' The appellant had been approved for marriage on 19 October 2010 and had married promptly thereafter. He submitted an application for leave on 19 February 2011, exactly 4 months later. The appellant became appeal rights exhausted as from 23 April 2010; 28 days from that date would have given him until 21 May 2010 to make his application to the respondent. It is the appellant's case (which the respondent now accepts) that, even allowing for the full 4 month period and calculating from late 2009, the appellant would have made his application in time. As a matter of simply arithmetic, both parties agree that the judge's concluding remark at [47], that is 'not entirely clear' that the application would have been made in time, was incorrect.
4. The second ground of appeal concerns the maintenance and accommodation requirements under the immigration rules. At [48], the judge found that 'even assuming that his application been made in time' the evidence did not establish that the appellant's application on the basis of his marriage would have been successful as it was not clear that he would have been able to satisfy the requirements for maintenance and accommodation. The application was granted eventually in October 2011 but the judge found that there was insufficient evidence to show that, some 12 months earlier, success would have been 'most likely' as the appellant submitted. The parties now accept that that finding is not sound. The appellant's oral evidence had been that his wife had enjoyed a secure tenancy with Camden Council for many years. There was also evidence before the judge to show that the appellant's wife was a very successful musician and teacher with a stable income. Moreover, the question of maintenance and accommodation had not been argued before the First-tier Tribunal; there had been a Case Management Review prior to the hearing before Judge Nightingale at which the respondent had been directed to file and serve a supplementary refusal letter dealing with maintenance and accommodation should she wish to put those matters at issue in the appeal. No such supplementary refusal letter had been produced. Not surprisingly, the appellant contends that the judge's

findings on this issue amount to a procedural irregularity and that, in any event, there had been adequate evidence before the judge to show that maintenance and accommodation requirements would have been met. That submission is now accepted, in full, by the respondent.

5. Finally, at [50], the judge wrote:

“I am fully satisfied that the appellant did not inform the respondent at the basis of his leave to remain attended and that his marriage had ceased to subsist in mid-2012. He continued to remain in the United Kingdom after mid-2012 with leave which he was no longer entitled and, but for his failure to inform the respondent of the marriage breakdown, that leave was highly likely to have been revoked. Had he been honest with the respondent and informed her that his marriage had ended, I find it highly likely his leave would have been revoked and any further appeals against such a decision ended far earlier than October 2016. Even if, which I do not find has been established on balance, the appellant would have had continuous leave over the 2010/2011 period, that leave would, but for his dishonesty, as found by Judge Plumptre, have ended prior to October 2016.”

Judge Plumptre had dismissed an earlier appeal by the appellant and had stated [19]: ‘I find that the application for further discretionary leave to remain was made without informing the Home Office that his marriage had broken down that it was not until the Home Office wrote a letter dated 12 January 2015 requesting evidence of the continuance of the marriage that the first time the Home Office was informed that the marriage had broken down.’ Mr Bazini, who appeared for the appellant at the Upper Tribunal initial hearing, submitted that, in the absence of any relevant policy or direct notification to the appellant by the respondent that he should inform her if his marriage did break down, the appellant was under no duty in law to inform the Secretary of State that he was no longer married. Obviously, if, following the termination of his marriage, the appellant had applied for further leave on the basis of marriage then he would *prima facie* have perpetrated a dishonest act. That was not the case with the present appellant who, though remaining silent as regards the breakdown of his marriage, had made his most recent application for leave on the basis of long residence, not marriage. What was merely an observation in the decision of Judge Plumptre had at [50] of Judge Nightingale’s decision become a firm finding of dishonesty justifying the dismissal of the appeal. However, the Judge Nightingale has fallen into legal error, as both parties now acknowledge. The appellant had never been told in terms by the respondent that he should notify her should his marriage break down and there had been at the time no rule or policy obliging the appellant to notify the Secretary of State. In those circumstances, whilst it is perhaps arguable that a moral duty to inform arose, there had been no dishonesty on the part of the appellant. The appellant had not been dishonest by failing to notify the Secretary of State either when his marriage broke down or when he applied for further leave to remain on the basis of long residence; whether a failure to disclose the marriage breakdown at the time the appellant made his long residence application amounted to a

material non-disclosure (see paragraph 322(1)(A)) was not addressed by the representatives on this occasion. Mr Bazini did submit (correctly, in my view) that the judge's finding that, had the Secretary of State been notified of the termination of the marriage, it was 'highly likely' that the appellant's leave would have been revoked was speculative; the judge had been referred to no evidence (eg. statistics, research etc) capable of supporting it.

6. I set aside the decision of the First-tier Tribunal. I re-make the decision by allowing the appellant's appeal against the decision of the Secretary of State dated 10 August 2018 on human rights grounds (Article 8 ECHR).

Notice of Decision

The decision of the First-tier Tribunal is set aside. I remade the decision. The appellant's appeal against the decision of the Secretary of State dated 10 August 2018 is allowed on human rights grounds (Article 8 ECHR).

Signed
Upper Tribunal Judge Lane

Date 2 September 2020