



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02985/2020

THE IMMIGRATION ACTS

Heard at Field House
On 5th November 2021

Decision & Reasons Promulgated
On 19th November 2021

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

W.Y.E
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Georget, counsel instructed by Queens Court Law
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Raymond, promulgated on 9 March 2021. Permission to appeal was granted by Upper Tribunal Judge Martin on 11 May 2021.

Anonymity

2. An anonymity direction was made previously and is reiterated below because there is a minor child involved in this appeal.

Background

3. The appellant is a national of Malaysia, aged 51. On 19 May 2016 he entered the United Kingdom as a visitor. On 11 December 2019, he applied for leave to remain on human rights grounds, based on his family life with his partner. That application was refused on 10 February 2020, and it is this decision which is the subject of this appeal.
4. In the decision letter it is explained that the appellant did not meet the eligibility requirements of Section E-LTRP of Appendix FM. In particular, the appellant was not married to his partner, nor had he provided evidence that he had been living in a relationship akin to marriage for at least two years. In addition, the appellant was present in the United Kingdom without valid leave and paragraph EX.1 did not apply because the relationship did not meet the definition of partner. The appellant's private life claim was refused as it was not accepted that he met any of the requirements set out in paragraph 276ADE (1). The respondent considered the appellant's claim that he intended to marry his partner who had a minor child and that he had lost all ties to Malaysia, having lived in the US, Hong Kong and the UK since the age of 20, but there was said to be no exceptional circumstances justifying a grant of leave outside the Rules.

The decision of the First-tier Tribunal

5. In dismissing the appeal following a hearing before the First-tier Tribunal, the judge found there to be features of the evidence which called into question the appellant's credibility and that of his witnesses. He concluded that the appellant did not have a genuine and subsisting relationship with his fiancée or her children. The judge also found that there would be no very significant obstacles to the appellant being able to reintegrate on his return to Malaysia and that the appellant's removal was in the public interest.

The grounds of appeal

6. There is a sole ground of appeal, that is the First-tier Tribunal engaged in procedural impropriety in relying on matters which had not been subject to dispute or which the appellant had not had an opportunity to address. There were three specific areas of concern. Firstly, the judge's finding as to the appellant's obscuration of his personal and financial circumstances. Secondly, the judge considered that the appellant had deliberately concealed his relationship with his biological children and thirdly, the finding that the appellant's relationship with his partner was not genuine and subsisting. In short, it was argued that the judge had rejected the appellant's credibility based on concerns about issues which were raised of the judge's own motion.

7. Permission to appeal was granted on the basis sought. The judge granting permission stating that *"if it was established by the Letter of Refusal and record of proceedings that the matter of the appellant's financial activity and background were not put to him at the hearing or raised in the Letter of Refusal, then it is arguable that the Judge's reliance on those factors in deciding credibility was an unfairness amounting to an error of law."*
8. The respondent's Rule 24 response was received on 11 June 2021 which stated that the appeal was opposed. The author of the said response observed that the judge granting permission did not have the record of proceedings before her and that the respondent had only seen the first 7 paragraphs of the grounds of appeal. In addition, the respondent commented that evidence was taken on the appellant's financial circumstances on entry to the UK and that the judge was entitled to have regard to the appellant's past international employment history in rejecting his claimed destitution.

The hearing

9. Mr Tufan initially indicated that the appeal was opposed. There was some preliminary discussion regarding the various records of the proceedings. The panel discovered that the typed notes on the case file were those of Mr Georget and that the indecipherable handwritten notes were the judge's notes of the hearing. Mr Tufan indicated that he had a typed note and illegible handwritten notes from the presenting officer at the First-tier Tribunal hearing which he could serve by email. In addition, Mr Tufan was waiting for an email from Mr Georget to which was attached the full grounds of appeal.
10. The panel expressed our view, based on the papers, that the third issue of concern identified in the grounds of appeal, that of the appellant's relationship with his partner, appeared to be made out. On the other hand, we considered that there was evidence before the judge which went some way to justifying his rejection of the appellant's claims as to his financial circumstances. Mr Tufan agreed that his colleague's notes showed that it was never submitted on behalf of the respondent that this was not a subsisting relationship. Mr Tufan went on to accept that there was a real issue with the findings as to the relationship and that it was indeed a material error of law. He strongly expressed his view that the matter should be remitted to the First-tier Tribunal.
11. In view of Mr Tufan's concession, which we consider was rightly made, we decided to set aside the decision of the First-tier Tribunal with no findings preserved and to remit the matter to the First-tier Tribunal for a de novo hearing. Our reasons for doing so are briefly set out below.

Decision on error of law

12. This appeal concerned the appellant's relationship with his partner as well as his claim, which was further developed in his witness statement, that there were very significant obstacles to his reintegration in Malaysia owing to his absence from the

country for three decades, lack of relatives and funds or the means of earning a living.

13. The judge did not accept that the appellant was facing destitution upon return to Malaysia, and he was right to find there to be a lack of evidence to support the appellant's claim that he lost all his assets owing to a dishonest business partner [35]. However, the judge went much further than this and made several strongly expressed findings that the appellant was deliberately cloaking his financial circumstances, that he was dishonest [58] and that his claim to be supported by an aunt and friends was a "*patent absurdity*."
14. While the judge was entitled to reject the evidence before him, several of the discrete findings he reached were not matters of concern to the Secretary of State and nor had they been ventilated in the hearing. Had this case not concerned a claim of family life, these errors might not have been material. Indeed, it was the view of the panel that the evidence supporting the claim of very significant obstacles to reintegration was somewhat weak. Yet the judge used these findings to reject the evidence of the appellant's relationship, stating at [45] the "*cumulative result of the preceding features to the evidence...leads me to conclude that the claimed family relationship is one that has been contrived, is without any real basis, and that there is no genuine and subsisting relationship...*"
15. The appellant's relationship with his partner was not in issue either in the decision letter or during the hearing before the First-tier Tribunal. The Secretary of State's concern was only that the relationship was not a qualifying one under the Immigration Rules. As Mr Tufan confirmed, the Home Office presenting officer at the hearing made no submission to the effect that the relationship was not genuine and subsisting. On the contrary, the presenting officer submitted that the appellant could travel to Malaysia to seek entry clearance and return to the United Kingdom with leave to enter as a fiancé. While the judge was entitled to reach an alternative view, it is a matter of obvious fairness that his reservations as to the relationship should have been aired at the hearing to enable further evidence to be provided or at least further submissions on the point. This amounts to a clear material error of law.
16. We considered whether any of the judge's findings could stand, particularly in relation to the appellant's financial circumstances. Notwithstanding our reservations as to the appellant's private life claim, the judge relied on issues raised of his own motion regarding the appellant's circumstances including that the appellant had deliberately concealed his assets and that he was being dishonest about the significant financial support said to have been provided by his aunt which was sufficient to rent a flat in London. We find that all the judge's findings are tainted by his approach to the evidence and accordingly, none of the findings are preserved.
17. In considering the venue for any rehearing of this appeal, the panel were mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, the nature and extent of the findings to be made as well as that the appellant has yet to have an adequate consideration of his human rights appeal at the First-tier Tribunal. We considered that it would be unfair to deprive him of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge Raymond.

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 their 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: 8 November 2021

Upper Tribunal Judge Kamara