



IAC-AH-SC-V1

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

Appeal Number: HU/02274/2020

THE IMMIGRATION ACTS

**Heard at Field House
Remotely by Microsoft Teams
On 23 November 2021**

**Decision & Reasons
Promulgated
On 25 January 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**MR MUHAMMAD UMAR ABBAS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Iqbal (Counsel), instructed by London View Chambers

For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

DECISIONS AND REASONS

1. The appellant is a citizen of Pakistan born on 11 December 1985. He appeals with permission against the decision of First-tier Tribunal Judge Law dismissing his appeal against a decision dated 27 January 2020 to refusing his human right claim. Permission to this Tribunal was granted on 8 February 2021 by Resident Judge Zucker.
2. Both parties requested an oral hearing and did not object to the hearing being held in this manner. Both parties participated by Microsoft Teams. I

am satisfied that a face-to-face hearing could not be held because it was not practicable because of COVID-19 and that all of the issues could be determined in a remote hearing. Neither party complained of any unfairness in the hearing and there were no connectivity issues.

Appellant's Background

3. The appellant entered the United Kingdom in September 2010 as a Tier 4 Student. He was subsequently granted leave on that basis until 10 January 2014. A subsequent application for an extension was refused and his appeal was dismissed on 14 July 2014. In July 2017 he claimed asylum on the basis of his sexuality. That application was refused on 19 January 2018 and the subsequent appeal was dismissed on 2 April 2019. The appellant had no further rights of appeal after 12 July 2019. In September 2019, the appellant applied for leave to remain in the United Kingdom based on his family life with his partner. The decision dated 27 January 2020 refusing the application, is the subject of this appeal.

First-tier Tribunal Decision

4. The main issues in the appeal were whether the parties were in a genuine and subsisting relationship; whether there were any insurmountable obstacles to family life continuing outside the UK; whether there were any very significant obstacles to the appellant's re-integration to Pakistan and whether the removal of the appellant from the UK was a disproportionate breach of Article 8 ECHR.
5. The judge found that the appellant was not in a genuine or subsisting relationship with his partner. Alternatively, the judge found that there were no insurmountable obstacles to the appellant and the sponsor continuing family life outside the United Kingdom because they have extended family in Pakistan, the sponsor is in good health and the appellant's stress could be managed in Pakistan. The judge found that there would be no very significant obstacles to the appellant's integration to Pakistan because the appellant has family, cultural and linguistic ties to Pakistan and has spent the majority of his life there.
6. The judge then turned to Article 8 ECHR. The judge considered the factors pursuant to 117B of the Nationality, Immigration and Asylum Act 2002. The judge took into account that the appellant can speak English, that he is not financially independent, that the relationship with the sponsor was entered into when the appellant was in the United Kingdom unlawfully. In accordance with 117B(5) he was required to give little weight to his private life. The judge noted that Article 8 ECHR does not create a right for a married couple to choose to live in a contracting state.
7. The judge next turned to Chikwamba (FC) v SSHD [2008] UKHL 40. The judge noted that the appellant and sponsor do not have children. He found that there are issues in the evidence with regard to maintenance and accommodation because the sponsor's claimed income appears to be greater than the business income. He found on that basis that an application for entry clearance would not be not bound to succeed and in

those circumstances the principles set out in Chikwamba v SSHD [2008] UKHL 40 do not apply. The judge concluded that it would not be a disproportionate breach of Article 8 ECHR to require the appellant to leave the United Kingdom to re-apply for entry clearance.

Grounds of Appeal

8. Ground 1. Procedural unfairness - The judge erred in his consideration of the evidence in relation to the genuine and subsisting marriage issue.

It is said that the judge criticised the appellant for failing to give oral evidence, but this approach had been agreed in the Case Management Review hearing prior to the hearing. The judge failed to take this into consideration resulting in procedural unfairness in the judge's approach. Further, the judge failed to take into consideration evidence relevant to the issue of whether there was a genuine and subsisting marriage.

Ground 2. Errors in the approach to the financial situation

(i) Error of fact - The judge erred in relation to his findings about the sponsor's earnings.

(ii) The judge's conclusion that the sponsor would not be able to meet the financial threshold was irrational and took into consideration irrelevant factors.

Submissions

9. Mr Iqbal pursued both grounds of appeal.
10. It is submitted that it was an error for the judge to attach significant weight to the fact that the appellant and the sponsor did not give oral evidence and were not cross-examined. The judge failed to take into account the agreement set out in directions made at the Case Management Review hearing about the manner of the hearing. Had the witnesses known that no weight would be placed on their evidence because of their failure to give oral evidence, the appeal would have been presented differently. This was procedurally unfair.
11. Further, there was evidence before the judge in relation to the genuineness of the relationship that should have been taken into account including evidence of cohabitation between the appellant and the sponsor. There was also a failure on the part of the judge to acknowledge that the respondent did not allege on review that the legally valid marriage is a marriage of convenience. It is said that the judge's finding that the relationship is not genuine and subsisting was vitiated by these errors.
12. In relation to Ground 2, Mr Iqbal submitted that the evidence before the judge was that the sponsor's business had pre-tax profits of £18,869. It is unclear how the judge concluded from this that she would not be able to earn a salary the following year of £21,000. The judge's findings in relation to the financial situation are irrational.

13. Mr Iqbal submitted that both of these findings are material because they are relevant to the issue of whether it was disproportionate to expect the appellant to return to Pakistan to apply for entry clearance.
14. He placed considerable weight on the alleged procedural unfairness which is said to undermine the whole appeal.
15. Ms Aboni submitted that there was no procedural unfairness and the judge's findings were open to him on the evidence. It is for the appellant's representative and the appellant to decide how to present their case and whether to put forward oral evidence. The appellant and the representatives were aware that the only concession made by the respondent was that the sponsor and appellant had entered into a lawful marriage, the other grounds were not conceded. The appellant was on notice that there were issues around the genuine nature of the marriage and about the financial position.
16. In any event, the lack of oral evidence was only one factor relied on by the judge for finding that the couple were not in a genuine and subsisting relationship. The judge also relied on the previous false asylum claim and took into account the miscarriage documents. Failure to overlook the agreement between the parties at the CMR was not material. The judge was entitled to take into account the appellant's unexplained change in sexuality, which was not addressed in the documentary evidence and the fact that the appellant had previously been found to be not credible at an asylum appeal. In summary, the judge gave adequate reasons for his findings.
17. As far as the financial issues were concerned, it was open to the judge to find that he would have been assisted by further oral evidence. The judge did engage with the financial evidence. The judge's observation that a salary of £21,000 would be sufficient for the appellant and a child (when this was not required because there was no child) was an observation only and not material. The fact that the judge did not agree with the figures was not material to the outcome of the appeal. The judge did have regard to those factors in Chikwamba and Agyarko v SSHD [2017] UKSC 11. The judge considered all of the relevant issues and provided adequate reasons for dismissing the appeal. The grounds of appeal amount to no more than a disagreement with the outcome of the appeal.

Discussion and Analysis

18. The original reasons given by the respondent in the decision dated 27 January 2020 for concluding that the appellant and sponsor were not in a genuine and subsisting relationship was because the couple had not been cohabiting for two years, were not married and had not provided evidence of long-term cohabitation or shared financial responsibility.
19. At the CMR hearing which took place on 3 June 2020 the parties agreed the issues in dispute. These included inter alia whether the appellant and sponsor were in a genuine and subsisting relationship with each other and

whether there were insurmountable obstacles to family life continuing outside of the UK.

20. At (e) of the directions it was said:

“Both parties accepted that the appeal can be dealt with by way of submissions subject to the appellant appropriately dealing with the contested matters by way of evidence and submissions.”

21. At the outset of the appeal hearing at [8] the judge noted the concession by Mr Williams for the respondent that the appellant and the sponsor had undergone a proxy marriage on 24 June 2020 and that the marriage was legally recognised under UK law.

22. The appellant produced a 103-page bundle of evidence including witness statements from the appellant and the sponsor. These confirmed that they were in a genuine and subsisting relationship, set out how they met, when they entered into their Islamic marriage and explained that the sponsor had become pregnant in November but had a miscarriage on 31 December 2020. Further documents included an NHS document confirming that the sponsor had had a miscarriage, evidence of cohabitation at the same address including bank statements, HMRC documents and NHS letters as well as evidence of the appellants and sponsor’s finances with payments made by the appellant to the sponsor. Letters of support from friends and family were provided with the original application.

23. I agree with Ms Aboni the appellant and the sponsor were aware that the genuine and subsisting nature of their relationship was in dispute which is why they provided further documentary evidence.

24. The judge considered the evidence before him in relation to the issue of genuine and subsisting relationship. The judge noted that the reason given by the respondent in the refusal letter was the lack of evidence of long-term cohabitation or shared financial responsibility. At [13] the judge states:

“There was a case management hearing on 3 June 2020 when various issues and concessions were identified by the Tribunal. There is a copy at page 4 in the appellant’s bundle.”

25. There was no acknowledgement by the judge that at the Case Management Review hearing it was agreed by the parties that the appeal could be dealt with by way of documentary evidence and oral submissions only, provided that the documentary evidence dealt with the issues in dispute.

26. At [7] the judge states:

“There were no preliminary issues, other than Mr Iqbal confirmed that he was not calling the appellant or any other witness to give evidence and would be relying on submissions only.”

27. The judge went on to hear and record the submissions and then gives his findings and reasons from [15] onwards.

28. At [15] the judge states:

“Although the appellant has previously claimed to be homosexual, that is only one factor in my assessment of his claim that he is now in a genuine and subsisting heterosexual relationship. The evidence of the miscarriage is another factor which is also not determinative by itself. **While his current claim is supported by the sponsor’s witness statement dated 21 July 2020, that is untested by cross-examination. No explanation has been offered for the decision not to call her and the appellant to testify in person as to the strength of their relationship.** Although some supporting letters from family and friends were submitted with the application in September 2019, **none of those people were called to give evidence, which I regard as a further significant omission**, given that the Tribunal highlighted in June 2020 that one of the principle issues for determination was whether the relationship was genuine and subsisting. On balance, I am not satisfied that the relationship is genuine or still subsisting. This is because the appellant was found in his previous appeal not to have told the truth, he has not explained the apparent change in his sexuality, and **I am not bound to accept his untested statement or that of the sponsor about their relationship. These matters should have been addressed by examination in chief and cross-examination**, since the appellant was on notice that the respondent was contesting the genuineness of the relationship. “

29. The judge manifestly states that the reason that the witnesses did not give evidence was unexplained.

30. There was in fact, contrary to the assertion of the judge, some explanation for the decision not to call the appellant and the sponsor in person in the form of the directions notice. It is apparent from the decision that the judge was aware of the terms of the directions notice because he refers to it at [13] noting that there was a copy in the appellant’s bundle.

31. I agree with Ms Aboni that it is usually for an appellant and his representatives to decide how to present their case and whether or not to tender oral evidence. In general, a judge is entitled to give weight to the lack of oral evidence because that evidence has not been tested in cross examination.

32. Nevertheless, in this appeal it is manifest from the Case Management Review hearing in that the form of the substantive hearing (subject to adducing further relevant evidence) had been agreed in advance. I accept that in these circumstances that the appellant and his representative prepared for the appeal according to the case management directions. They had produced considerable evidence in support of their argument that the relationship was genuine and subsisting. In these circumstances they were not on notice that the judge would place weight on the failure to give oral evidence.

33. Importantly, both the sponsor and the witness were present at the appeal hearing and the judge could have indicated that he had concerns and

wanted to hear oral evidence and that he would draw negative inferences from a failure to give that evidence. Normally particularly where an appellant is represented, there would be no obligation on a judge to indicate this at the outset of a hearing. However, in these very unique and individual circumstances, I am satisfied that the approach of the judge was erroneous in that it was procedurally unfair. The overriding objective of the rules at 2(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 is to enable the Tribunal to deal with a case fairly and justly.

34. Ms Aboni submits that, in any event, even if the judge erred by giving weight to the appellant's failure to give oral evidence, this is immaterial because the failure to give oral evidence was not the only reason why the judge found that the relationship was not genuine and subsisting. There were other reasons that the judge gave for rejecting the appellant and sponsor's claim to be in a genuine and subsisting relationship. These included the findings in a previous appeal that the appellant was lacking in credibility in relation to his claim to be a homosexual male and his failure to explain his apparent change in sexuality. I note firstly that these reasons were not given by the respondent in the original decision letter. The original reason given was the lack of evidence of co-habitation and financial commitment. The appellant had addressed the paucity of this evidence in the documents in his bundle.
35. It is manifest from the decision that the judge did not place significant weight on the appellant's previous assertion that he was a homosexual male. The judge comments at [14] that the appellant's previous claim to be a homosexual was rejected and that this is not necessarily inconsistent with his current claim to be in a heterosexual relationship. Although of course the judge was entitled to take into account the fact that the appellant had lied in his previous claim for asylum.
36. I am satisfied from the wording replicated above, that the judge manifestly gave significant weight to the fact that the appellant's and sponsor's evidence was not tested in oral evidence. The judge clearly states that the issues in dispute should have been addressed by examination-in-chief and cross-examination. The judge also attached significant weight to the failure of the supporting witnesses to give evidence. This was in my view the primary reason why the judge found that the appellant and sponsor were not in a genuine and subsisting relationship, given that he had evidence before him of a legally valid marriage, co-habitation and financial commitment including importantly evidence from the midwife that they were living together along with evidence of the termination. I am therefore satisfied that the error in this respect was material to the finding that the appellant and sponsor are not in a genuine and subsisting relationship.
37. In my view the appeal is vitiated by error in that there has been procedural unfairness and the appellant requires another opportunity to have his appeal decided fairly. Since I have found that ground 1 is made out, I do not go onto consider ground 2.

38. I therefore set the decision aside in its entirety.

Disposal

39. Both parties agreed that should I find that there was a material error of law that the appeal should be remitted to the First-tier Tribunal to be heard de novo.

Notice of Decision

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

41. The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

42. The appeal is remitted to the First-tier Tribunal for a de novo hearing in front of a judge other than First-tier Tribunal Judge Law.

Signed R J Owens

Date 13 January 2022

Upper Tribunal Judge Owens