



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

Appeal Number: HU/05462/2020

THE IMMIGRATION ACTS

**Heard at Birmingham Civil Justice
Centre
On 3rd March 2022**

**Decision & Reasons Promulgated
On 22nd March 2022**

Before

**UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR LAKHVIR SINGH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Williams, Home Office Presenting Officer

For the Respondent: Mr S Bhukari, Bhukari Chambers

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Juss promulgated on 9th June 2021. The appellant before us is the Secretary of State for the Home Department and the respondent to this appeal, is Mr Lakhvir Singh. However, for ease of reference, in the course of this decision we adopt the parties' status as it was before the First-tier

Tribunal. We refer to Mr Singh as the appellant and the Secretary of State as the respondent.

2. The appellant is a national of India. He arrived in the UK on 23rd January 2011 with leave to enter as a Tier 4 (Student) Migrant valid until 29th February 2012. Following two in-time applications, he was granted further leave to remain as a student until 30th April 2015. However, on 25th June 2014 his leave to remain was curtailed so that it expired on 29th August 2014. The leave enjoyed by the appellant was curtailed because his sponsor's licence was revoked, and he was given, in effect, two months to make a further application to regularise his status and extend his stay in the UK should he wish to do so. The appellant did not challenge the curtailment of his leave to remain and, it seems, made no further application to extend his leave to remain. In any event, on 12th November 2014, the appellant was served with a Notice to a Person Liable to Removal in form IS.151A. The reason was that the respondent considered the appellant to be a person who had sought leave to remain in the UK by deception.
3. It was not until 30th January 2020 that the appellant took any steps to regularise his immigration status. He submitted an application for leave to remain in the UK on the basis of a family life he had established with his partner Shabnam Kaur Mahal. The application was refused by the respondent for reasons set out in a decision dated 9th April 2020. The respondent concluded that the application fell for refusal on the grounds of suitability. At paragraph [13] of her decision, the respondent said:

“The Secretary of State is satisfied that you made false representations for the purpose of obtaining leave to remain or in order to obtain documents from the Secretary of State or a third party in support of the application for leave to remain. In an application dated 01 July 2013, you used an ETS certificate dated 15 January 2013, which upon checking, ETS (Educational Testing Service) confirmed was invalid. On the basis of the information provided to her by ETS, the SSHD is satisfied that your certificate was fraudulently obtained and that you used deception in your application of 01 July 2013. Accordingly, I am satisfied that you have made false representations in a previous application for leave to remain. Having considered all of the circumstances of your application, in light of these false

representations, there are no exceptional circumstances which make it appropriate to exercise discretion in your favour. You do not meet the requirements for leave to remain because paragraph S-LTR.4.2 of Appendix FM of the immigration rules applies.”

4. The respondent also concluded that the appellant did not meet the eligibility relationship requirement set out in paragraphs E-LTRP.1.1. to 1.12. of Appendix FM of the immigration rules. The respondent was not satisfied from the information provided that the appellant had been living together with Shabnam Kaur Mahal in a relationship akin to a marriage for at least two years prior to the date of application. The respondent also noted that the appellant had not provided specified evidence as required by paragraph 26 of Appendix FM-SE that the appellant and his partner were in a valid marriage. Furthermore the respondent was not satisfied that the appellant satisfied the immigration status requirement set out in paragraphs E-LTRP.2.1 to 2.2. In any event, the respondent was not satisfied that the exceptions to the eligibility requirements for leave to remain as a partner set out in section EX.1(b) of Appendix FM were met by the appellant. The respondent did not accept that there were insurmountable obstacles to the appellant’s family life with Shabnam Kaur Mahal continuing outside the UK. We pause to note that the respondent’s decision is silent as to whether the financial requirements set out in paragraph E-LTRP.3.1 of Appendix FM were met. The respondent went on to consider whether the appellant met the requirements for leave to remain on private life grounds, but concluded the requirements set out in paragraph 276ADE of the immigration rules were not met. The respondent referred to the fertility treatment being received by the appellant’s partner but in the end, concluded that the decision to refuse the application for leave to remain was proportionate in all the circumstances.
5. The appellant’s appeal against that decision was heard by First-tier Tribunal Judge Juss on 12th April 2021 and allowed for reasons set out in a decision promulgated on 9th June 2021. The judge referred to the respondent’s reasons for refusing the application in paragraph [2] of his

decision. He set out, at paragraphs [4] to [6] of his decision, what he considered to be the salient facts. At paragraphs [8] to [13] he set out the evidence before the First-tier Tribunal. At paragraph [16] the judge stated “... *I am allowing this appeal for the following reasons*”. The findings and reasons follow at paragraphs [17] to [25] of the decision. The judge concludes at paragraph [26] by saying “*Accordingly, this appeal is allowed*”.

6. Permission to appeal on all grounds was granted by First-tier Tribunal Judge Saffer on 2nd July 2021. The appeal comes before us to consider whether the decision of the First-tier Tribunal involved the making of a material error of law and, if so, to remake the decision.
7. At the outset of the hearing Mr Bhukari conceded, entirely sensibly in our judgement, that the decision of the First-tier Tribunal judge is inconsistent and must be set aside. He submits that the appropriate course is for the decision to be set aside with no findings preserved and for the appeal to be remitted for rehearing afresh.
8. As it is common ground that the decision of the First-tier Tribunal cannot stand we need say little about the respondent’s grounds of appeal. We did canvas with the parties whether any of the findings made could be preserved and the decision remade in the Upper Tribunal. However we are persuaded that the appropriate course is for the matter to be remitted to the First-tier Tribunal with no findings preserved.
9. It is now well established that what is required in a decision is that the reasons provided must give sufficient detail to show the parties and the appellate Tribunal the principles upon which the lower Tribunal has acted, and the reasons that led it to its decision, so that they are able to understand why it reached its decision.
10. The judge appears to find that the appellant meets the “eligibility requirements” and had no hesitation in concluding that the appellant and

his wife are in a genuine and subsisting relationship “.. *and have been since December 2017 at least when they had their Sikh religious engagement ceremony.*”. At paragraph [17] of his decision, the judge refers to the engagement ceremony on 31st of December 2017 and, a ‘Sikh Wedding’ on 12th May 2019. He states that “.. *After that they travelled together to the Isle of White on 9th March 2019 and returned back on 12th March 2019. They moved in together on 12th May 2019 and stayed together in that accommodation until 7th June 2019.*”. It is obvious that these dates do not tally because if the ‘Sikh Wedding’ took place on 12th May 2019, the appellant and his partner could not have travelled to the Isle of Wight ‘after’ it, if they left on the earlier date of 9th March 2019.

11. The respondent had said in her decision that she was not satisfied from the information provided that the appellant had been living together with Shabnam Kaur Mahal in a relationship akin to a marriage for at least two years prior to the date of application. It seems the judge was prepared to accept that the appellant and his partner have been in a relationship since December 2017 and that they started living together on 12th May 2019. The appellant made his application on 30th January 2020. On that chronology, adopting the definition of ‘partner’ in Appendix FM, GEN.1.2, they could not have been living together in a relationship akin to a marriage for at least two years prior to the date of the application such that this finding was erroneous.
12. The respondent had also noted that the appellant had not provided specified evidence as required by paragraph 26 of Appendix FM-SE of the immigration rules, that the appellant and his partner are in a valid marriage. A simple finding that the appellant and his partner are in a genuine and subsisting relationship and have been since December 2017, does not address the relationship requirements set out in paragraphs E-LTRP.1.2 to E-LTRP.1.12. There was no investigation as to the question of whether they were in a valid marriage.

13. At paragraph [18] the Judge states he was equally satisfied that it would not be reasonable and proportionate to expect the appellant's partner to relocate to India "*.. and live there for any length of time.*". The judge refers to the British citizenship of the appellant's partner, her employment and income, and the research project that she had enrolled to take part in. At paragraph [19], the judge rejected the claim by the appellant's partner that she is under threat from her previous husband's relatives. The question for the judge was not whether the appellant and his partner could live in India "*for any length of time*", but whether there are insurmountable obstacles to the appellant's family life with his partner continuing outside the UK. To that end, at paragraph [22], the judge said that the respondent has properly "*not accepted that (i) para EX1(b) was met in relation to 'insurmountable obstacles'*".
14. At paragraph [20] of his decision, the judge addressed the respondent's refusal on suitability grounds in the following way:

"... I do not accept that the appellant has ever engaged in fraudulent activity in procuring his ETS certificate. The allegation from the respondent Home Office has not been made good. I have found the evidence of the appellant himself to be compelling, on the other hand, when he states that he has no reason to cheat, and he speaks and writes English perfectly well. This means that the rejection of his claim presently the (*sic*) SSHD on 'suitability' grounds is unwarranted. So the appellant satisfies both the eligibility and suitability requirements."
15. There was evidence that was relied upon by the respondent before the Tribunal regarding the English language test completed by the appellant at New London College and evidence regarding a criminal inquiry into abuse at New London College. The Judge fails to engage with any of that evidence but simply states he accepts the appellant's claim that he has no reason to cheat, and he speaks and writes English perfectly well, without more. That might have been perfectly true in 2020 when the appellant gave evidence before the First-tier Tribunal, but it is in our judgment irrational to conclude that because an individual could speak and write English perfectly well in 2020 (and the basis for the finding as to writing was not clear in any case), he was able to do so some years

earlier in January 2013 when the relevant English language test was completed. It is equally possible that a person who is proficient in the English language might take steps to secure an English language test by fraud, so as to avoid the risk of failing, and ensuring the relevant certificate is available to support an application they need to make.

16. The judge noted, at paragraph [21], that the appellant's partner married the appellant at a time when he was an overstayer, and that she was aware of the precarious nature of his immigration status. The Judge failed to properly remind himself and have regard to the fact that s117B(4)(b) of the 2002 Act requires that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.

17. At paragraph [22] of his decision, Judge Juss said:

"The respondent SSHD has properly not accepted that (i) para EX1(b) was met in relation to 'insurmountable obstacles' or that (ii) Para 276ADE (vi) was met on account of their being 'very significant obstacles to integration'.... The remaining question is whether (iii) there were any exceptional circumstances leading to 'unjustifiably harsh consequences'."

18. At paragraph [23], the judge said:

"On the question whether there are 'exceptional circumstances to the appellant's claim, he obviously does not succeed inside the rules. The question is whether he succeeds outside them. I do not find that he does...."

19. After referring to relevant authorities, at paragraphs [25] and [26], the judge concludes:

"25. I am satisfied that the appellant cannot discharge the burden of proof that is upon him because it would not be unjustifiably harsh to expect him to return back to India to make another application in a proper and lawful manner under the rules. Section 117B expresses the public interest in immigration control and nothing I have heard indicates that it should not be given the weight as a consideration that is intended for it.

20. Having found that the appellant cannot succeed under immigration rules and cannot succeed in an Article 8 claim outside the rules, it is difficult to see any proper basis upon which the judge could rationally conclude that

the respondent's decision to refuse leave to enter is unlawful under s6 of the Human Rights Act 1998.

21. We are persuaded that the appeal should be remitted to the First-tier Tribunal with no findings preserved. The decision contains a number of inconsistent statements and fails to adequately address material issues. Having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012, the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

NOTICE OF DECISION

22. The decision of First-tier Tribunal Judge Juss promulgated on 9th June 2021 is set aside.
23. The appeal is remitted to the First-tier Tribunal for rehearing, with no findings preserved.

Signed **V. Mandalia**

Date 3rd March 2022

Upper Tribunal Judge Mandalia