



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

Appeal Number: IA/30471/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5 May 2015**

**Decision & Reasons
Promulgated
On 19 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**SALMAN JAMALINOWROOZANI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T D H Hodson of Elder Rahimi Solicitors
For the Respondent: Mr A Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge O'Flynn promulgated on 3 December 2014 dismissing the appeal of Mr Salman Jamalinowroozani against a decision dated 18 July 2014 to refuse leave to remain and to remove him from the United Kingdom.

Background

2. The Appellant is a national of Iran, born on 31 January 1985. He entered the United Kingdom with leave as a Tier 4 Student on 19 May 2012 valid until 28 September 2012. He was granted a further period of leave up until 31 May 2014 in the same capacity. On 15 May 2014 he was married to Ms Magdeline Nteseng Herd (date of birth 3 October 1950), a South African citizen with indefinite leave to remain in the United Kingdom. On 29 May 2014 the Appellant applied for leave to remain as a spouse in consequence of that marriage. The Appellant's application was refused on 18 July 2013 for reasons set out in a Notice of Immigration Decision and 'reasons for refusal' letter.
3. The Appellant appealed to the IAC.
4. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his determination.
5. The Appellant sought permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Cruthers on 10 February 2015.
6. The Respondent has filed a Rule 24 response dated 26 February 2015 resisting the challenge, and indeed Mr Melvin has provided today an amplified version of that Rule 24 response by way of skeleton submissions.

Consideration

7. The background facts to the Appellant's application and appeal are set out in some detail in the decision of the First-tier Tribunal. It is to be noted that at paragraph 3 of the Grounds in support of the application for permission to appeal to the Upper Tribunal, settled by Mr Hodson, it is accepted that the Judge's summary of the case is "*accurate and generally fair... as is the summary of the Respondent's reasons for refusing the application based entirely on a home visit by the Kent Arrest Team*". That 'home visit' by the arrest team is a reference to a visit conducted on 11 July 2014, the details of which are summarised at paragraphs 4 and 5 of the First-tier Tribunal Judge's decision.
8. During the course of that visit immigration officers noted a number of matters which in their view indicated that the Appellant and Ms Herd, whilst living at the same property, were not in a genuine relationship. I will say little about those matters except that in due course the First-tier Tribunal Judge rejected most of the Respondent's reasoning in this regard.
9. However there was another matter that emerged during the course of the visit which was in respect of what appeared to be a relationship between the Appellant and a person said to be a Lithuanian national, Ms Augusta Kemtyte. There were a considerable number of messages on the Appellant's mobile telephone, including messages sent on the same day as the arrest team's visit, which were indicative of a relationship between the Appellant and Ms Kemtyte. There were also a number of intimate photographs of Ms Kemtyte, and of the Appellant and Ms Kemtyte

together. It is said that during the course of his interview by the immigration officers of the arrest team the Appellant admitted to having been in a relationship with Ms Kemtyte for the past two years. He said, however, that Ms Herd, his wife, knew nothing of this and that he was still genuinely married to and in love with Ms Herd.

10. The Appellant subsequently denied admitting that at the time of the visit to his home he had said that he was still in a relationship with Ms Kemtyte and in fact asserted that the relationship had broken up in June or July 2013 – see for example paragraph 20 of the First-tier Tribunal Judge’s decision.
11. The issue in this case came down essentially to whether or not the Appellant was in a genuine and subsisting marital relationship with Ms Herd within the meaning of Appendix FM of the Immigration Rules, and in particular those parts of Appendix FM that deal with leave to remain for partners – see E-LTRP.1.7.
12. The Judge having set out the history of the application and decision and the evidence that was before him went on to set out his findings and conclusions from paragraph 12. From paragraphs 13 to paragraph 19 the Judge addressed most of the matters that the Secretary of State had focused upon as being indicative of a lack of a genuine relationship by reference to the observations made during the course of the arrest visit. The Judge essentially considered that the matters relied upon by the Secretary of State were not reliably indicative of the genuineness or otherwise of a relationship. For example he rejected the notion that an ability to give a consistent account as to the colours or patterns of bedding was a powerful indicator of genuineness.
13. The Judge, however, took a different view in respect of the Appellant’s relationship with Ms Kemtyte and the implications for the relationship with Ms Herd in consequence of the relationship with Ms Kemtyte. The key passage that the Appellant directs my attention to is that at paragraph 32 of the First-tier Tribunal Judge’s decision. It is in the following terms:

“That brings me to an unusual and difficult decision. Does the fact that one party to the relationship believes that she is in a genuine and subsisting marriage but the other party is continuing a relationship with another woman necessarily mean that the marriage is not genuine and subsisting? On balance I think that it must. It is not possible to have a ‘genuine and subsisting’ marriage if that is not the feeling of both parties. If I am wrong on this, then the appeal should be allowed. However, it seems to me that the feelings that underline whether a marriage is genuine must, by their very nature, be reciprocal. I am satisfied that the appellant is not committed to this marriage and for evidence of that I rely on the hundreds of texts and WhatsApp messages and photographs from Ms Kemtyte found on his telephone right up to the day of the visit from the Arrest Team. It must follow that, from the appellant’s point of view, the relationship between him and Ms Herd is not genuine and subsisting. It must further follow, a marriage requiring the involvement of two people, that the

marriage itself cannot be genuine and subsisting, much as Ms Herd would like it to be. For these reasons, I have to dismiss this appeal.”

14. Perhaps entirely understandably, in the grounds of challenge, and indeed echoed in the grant of permission to appeal, Mr Hodson focuses attention on the question that the Judge poses himself at the start of paragraph 32 and the alternative answers that he gives. I will return to those matters in a moment. Before I do so however it seems to me that it is appropriate to also take into account the context of the matters being considered at paragraph 32, and to that end the Judge’s observations at paragraphs 30 and 31 are particularly pertinent. At paragraph 30 the Judge having stated that he considered Ms Herd to be a genuine and honest witness, said the following:

“But here is the nub of this case. The appellant was entirely unable to give satisfactory answers as to why he had so many texts on his mobile telephone from Ms Kemtyte right up to the day of the arrival of the Immigration Officers, including photographs of a scantily clad Ms Kemtyte. I simply cannot accept that the relationship had ended before he met Ms Herd. He gave no reasonable explanation for why he had kept those texts and WhatsApp messages and photographs or indeed why he had not simply blocked this caller.”

15. I pause to remind myself that it was said that the Appellant had informed the immigration officers at the time of the visit that he had been in a relationship with Ms Kemtyte for the past two years - which would take the relationship back to mid-2012. Necessarily if the relationship had continued right up to the time of the visit, it means that the Appellant was in a relationship with Ms Kemtyte when he met Ms Herd and indeed when he married Ms Herd on 15 May 2014. In this context the particular sentence at paragraph 30 that is perhaps to be emphasised is the one where the Judge says, *“I simply cannot accept that the relationship had ended before he met Ms Herd.”*

16. At paragraph 31 the Judge, having again made reference to Ms Herd’s point of view and her commitment being genuine to the relationship with the Appellant, stated the following:

“However, it is clear that [the Appellant] is still in a relationship with Ms Kemtyte. I am sure that is unknown to Ms Herd. I have taken into account that the appellant stated that, if he wanted to stay in the UK, he could have married Ms Kemtyte because, as a citizen of Lithuania, he could have applied under the EU Regulations. That is neither here nor there. The evidence of the couple has clearly shown to my satisfaction that the appellant is continuing his relationship with Ms Kemtyte unbeknownst to Ms Herd.”

17. If those findings at paragraphs 30 and 31 are taken forward, in my judgment the Judge’s reasoning in the latter part of paragraph 32 is entirely sustainable. The Judge is saying in terms that on the facts of this particular case he was not satisfied that the Appellant was committed to the marriage, and he was not so satisfied because it was clear that the

Appellant was in a relationship with another woman and had been so throughout the period of the supposed formation of a relationship with Ms Herd and the entry into a marriage with Ms Herd. In my judgment it is entirely understandable in those circumstances why the Judge would take the view that the continuing relationship with Ms Kemtyte demonstrated an absence of commitment to a genuine marital relationship with Ms Herd. In those circumstances the Judge's conclusion - "*it must follow that from the appellant's point of view the relationship between him and Ms Herd is not genuine and subsisting*" - was a conclusion entirely open to the Judge on the findings that he made in the preceding paragraphs.

18. That leaves the matter that is, as I have said, the particular focus of the challenge: the question posed by the Judge in the first part of paragraph 32.
19. In the abstract I entirely accept that it may be possible for an individual to be in a genuine and subsisting marital relationship and yet nonetheless to conduct an extramarital affair. Whilst necessarily an extramarital affair that is not known to one's spouse may put one's marriage at risk, it does not necessarily follow that the adulterer is minded to leave his spouse or do anything other than continue the marital relationship. It follows that if the Judge was indeed asking a question of general widely applicable principle in posing the question in the second sentence of paragraph 32 and answering it in the way that he did, he was, in my judgment, wrong. It seems to me that for the reasons I have already indicated, it does not follow that if a party to a marriage is conducting an affair that the marriage itself is inevitably not genuine and subsisting.
20. In the circumstances I consider that there are two ways of looking at the question that the Judge has posed himself.
 - (i) Firstly, and this is my preference: the Judge was not asking himself a question of general principle but was asking himself a specific question in the context of the particular relationship. In my judgment this is the preferable view because the Judge refers to '*the relationship*' rather than '*a relationship*', and posits a scenario that is exactly consistent with the facts as he has found them in this particular case - "*one party to the relationship believes that she is in a genuine and subsisting marriage but the other party is continuing a relationship with another woman*". In my judgment the Judge is not asking a question of general principle, but rather saying that in the context of the particular facts of this case the commitment of Ms Herd does not demonstrate a genuine and subsisting marriage. The Judge's question is posed and answered in the context of circumstances where the Appellant was conducting a relationship with another woman - a relationship being conducted in a manner already explained by the Judge in the immediately preceding paragraphs 30 and 31, and then further referenced in the following part of paragraph 32: that is to say a relationship that pre-existed entering into the contract of marriage with Ms Herd.

(ii) The other potential way of looking at the question is that the Judge was indeed posing himself a question of general principle, but that he was, with respect, misconceived in the way that he answered it. That is essentially Mr Hodson's argument. If that were indeed the case then I acknowledge that perhaps there is therefore an error of principle. I am not however persuaded that in all of the circumstances any such error was material to the outcome of this particular case, for all the reasons explored above in respect of the sustainability of the conclusions in the latter part of paragraph 32 in light of the findings in paragraphs 30 and 31, and for the reasons summarised below.

21. The bottom line in my judgment is quite simple. I have no doubt that the Judge has adequately explained that he did not find the Appellant to be committed to his relationship with Ms Herd, and the reason for that was essentially because at all material times he had been committed to a different relationship. This is not a case where somebody has formed a relationship subsequent to marriage but nonetheless wishes to continue their marriage. This is a case where somebody has seemingly entered a marriage at a time when they were in a relationship with another person. It is entirely understandable why the Judge was not satisfied in those circumstances as to the genuineness of the Appellant, and his conclusion that this was not a genuine and subsisting marital relationship was inevitable in such circumstances.

Notice of Decision

22. The decision of the First-tier Tribunal contained no material error of law and stands.
23. The appeal is dismissed.
24. No anonymity order is sought or made.

The above represents a corrected version of an ex tempore decision given at the conclusion of the hearing.

Signed

Date: **14 May 2015**

Deputy Upper Tribunal Judge I A Lewis