



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

Appeal Number: IA/44196/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 9th November 2015**

**Decision and Reasons Promulgated
On 12th November 2015**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MOHSIN SHAH

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr M Sawar, counsel, instructed by Sanctuary Law

DETERMINATION AND REASONS

1. The First-tier Tribunal allowed the appeal of Mr Mohsin against a decision dated 16th October 2014 under s10 Immigration and Asylum Act 1999 to remove him from the UK for reasons set out in a letter of the same date. The First-tier Tribunal described the decision under appeal as an appeal against a decision to refuse him leave to remain as a spouse which of course it was not. At the date of application for leave to remain as a spouse Mr Mohsin was an overstayer and thus the refusal of that application was not an appealable decision as defined by s82 Nationality Immigration and Asylum Act 2002. The Secretary of State for the Home Department ("SSHD") was granted permission to appeal the decision of the First-tier Tribunal on the grounds that it was arguable that the First-tier Tribunal judge had failed to give adequate reasons for placing such weight as he did upon a witness statement by an individual who did not attend the hearing and was not therefore tendered for cross examination. The First-tier Tribunal

judge had identified discrepancies in the evidence of Mr Mohsin and his wife and had found that Mr Mohsin had previously submitted false bank statements in support of an earlier application for leave to remain and had been found to have fraudulently taken an ETS test which he had relied upon in a previous application.

2. Mr Mohsin first arrived in the UK as a Tier 4 student with a visa valid until 10th August 2012. He submitted an application on 10th August 2012 for further leave to remain as a Tier 1 Entrepreneur together with an ETS language certificate as evidence of his ability to meet the language requirements. That certificate was identified as having been obtained by deception and his application for variation was refused by the SSHD for reasons set out in a decision dated 10th July 2013. Mr Mohsin exercised his appeal rights and the First-tier Tribunal in a determination promulgated on 22nd January 2014 dismissed his appeal. He submitted an application for permission to appeal to the Upper Tribunal and was granted permission to appeal on 21st February 2014.
3. On 9th May 2013 Mr Mohsin had married Ms A B Shah. On 15th July 2014 Mr Mohsin withdrew his appeal against the decision of the First-tier Tribunal dismissing his appeal against the decision to refuse him a Tier 1 Entrepreneur visa. The following day (16th July 2014) he submitted an application for leave to remain as the spouse of a British Citizen. That application was refused for reasons set out in a decision dated 16th October 2014, supplemented by a further letter dated 6th January 2015. It follows from this that Mr Mohsin was unlawfully present in the UK from the date of dismissal of his appeal by the First-tier Tribunal namely 22nd January 2014.
4. In its decision the First-tier Tribunal found that Mr Mohsin did not meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules. There was no appeal by Mr Mohsin against those findings. The First-tier Tribunal judge also made findings that, on the balance of probabilities, the test score obtained by the appellant in his ETS language test had been improperly obtained and the test certificate was 'correctly cancelled'. The First-tier Tribunal judge also found, reflecting the decision of the First-tier Tribunal judge who had heard his 'Entrepreneur appeal' although considering the evidence afresh, that Mr Mohsin submitted false documents namely bank statements in support of his Entrepreneur application. The judge concluded (see [19]) that it was "right for [Mr Mohsin's] appeal under the [Immigration Rules] to be refused on the grounds of suitability.
5. In [20] the First-tier Tribunal judge notes that the SSHD accepted that Mr Mohsin and Ms Shah were married and that Mr Mohsin met the criteria under the Rules save for suitability but did not accept that the relationship was genuine and subsisting or that the couple intended to live together permanently. The judge then proceeded in [21] to set out the discrepancies in the couples account of when they met again after their first meeting, when Ms Shah's mother had met Mr Mohsin, how many events there had been to celebrate the engagement, the lack of witness evidence from Mr Mohsin's brother or Ms Shah's sister and that the only independent evidence was a bank statement and two Barclaycard statements for the period December 2014 to March 2015 addressed to the same address.

6. The First-tier Tribunal judge then refers to a witness statement from a Ms Kaur who states she provides home care services for the previous 7 years for Ms Shah but would not be able to attend the hearing because she was not permitted to become involved in client's legal affairs.
7. It is plain that by writing and signing a witness statement to the effect that she knows the couple are a genuine couple, she is "getting involved in Mr Mohsin's legal affairs". There was no other evidence to which my attention was drawn which indicated or confirmed that Ms Kaur had in fact been providing support services or what those services amounted to or on what basis she was able to reach the conclusion she did as to the nature of the relationship between the couple, other than in general terms. It is plain that the presenting officer before the First-tier Tribunal was concerned about the genuineness and subsistence of the relationship given the detailed questions asked in cross examination about when and where the couple met and contact between Mr Mohsin and his wife's family members. The judge has given no reasons for placing what must by any consideration be considerable weight upon the untested witness evidence of Ms Kaur given that Mr Mohsin has been found to have exercised deception previously on two separate matters and that the marriage was entered into at a time when Mr Mohsin was an overstayer. To place such weight upon that witness statement in those circumstances borders on the perverse and certainly requires reasons other than a simple statement that he accepts the evidence as true.
8. It is therefore plain that the judge erred in law in reaching the findings he did as to the genuineness and subsistence of the marriage such that the decision must be set aside to be remade.
9. Mr Mohsin continued to assert before me that the findings of the First-tier Tribunal as to the deception perpetrated by him were incorrect. No cross appeal had been lodged against the decision of the First-tier Tribunal in relation to that finding or to the finding that he did not meet the requirements of the Immigration Rules.
10. Both parties were of the view that further evidence was required to enable primary findings of fact to be made with regard to the genuineness of the relationship and whether the parties intend to live together permanently. Mr Sarwar indicated that it was the intention of Mr Mohsin to submit further evidence. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.
11. In the circumstances of this appeal I therefore remit the appeal to the First-tier Tribunal to be determined.

Conclusions:

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

I set aside the decision and remit the appeal for hearing before the First-tier Tribunal.

Consequential Directions

The hearing to take place where Mr Mohsin's wife is able to give evidence – she is wheelchair bound.

First-tier Tribunal judges Ennals, Tipping and Pirotta to be excluded from hearing the appeal.



Date 10th November 2015

Upper Tribunal Judge Coker