



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/09841/2014

**THE IMMIGRATION ACTS**

Heard at Centre City Tower, Birmingham  
On 11 February 2016

Decision & Reasons Promulgated  
On 29 February 2016

Before

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

Between

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

Appellant

And

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr N Lawrence, Counsel instructed by the Law Partnership  
Solicitors

For the Respondent: Ms R Pettersen, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Jeromes sitting in Birmingham on 28 August 2015) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as a refugee, as otherwise requiring international human rights protection and against the Secretary of State's concomitant decision to remove him from the United Kingdom

by way of directions under Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

### **The Reasons for the Grant of Permission to Appeal**

2. On 26 October 2015 Upper Tribunal Judge Perkins gave his reasons for granting the appellant permission to appeal on a renewed application for permission to the Upper Tribunal:
  1. The grounds before me are very much better than those before Designated First-tier Tribunal Judge Manuell when he refused permission to appeal.
  2. I have given permission to appeal because the First-tier Tribunal Judge found that the appellant's marriage is not 'genuine and subsisting'.
  3. One of the reasons advanced for that conclusion is at paragraph 37.2(iii) where the Judge says 'I note that there are no photographs of the marriage or of any subsequent celebrations'.
  4. The appellant say that finding is wrong. If it is wrong (that has not been established) then it is arguable that the Judge's adverse finding is unsustainable.
  5. The appellant must understand that even if he shows that the Judge made a mistake the Upper Tribunal will not necessarily dispose of the appeal in a way that he finds agreeable. It may decide that the mistake was not material or it may decide that the mistake could have made a difference and then set aside the decision, remakes it, and then dismiss the appeal for other reasons.
  6. However it is reasonably arguable that the Judge erred as alleged and I give permission to appeal on each ground.

### **Relevant Background**

3. The appellant is a national of India, whose date of birth 15 February 1975. He arrived in the UK on 28 November 2002 and claimed asylum on arrival. He was instructed to report back to the authorities the following day, but failed to attend. He then absconded from the immigration authorities until 10 August 2013. When the appellant resurfaced, his asylum claim was considered on its merits.
4. The appellant attended an asylum interview on 12 February 2014. He said he had been educated to level 12 in India. He had then obtained employment as a chemist. All his family were still living in his home village. He was still in contact with his mum and dad. He spoke to them maybe every fortnight or once a week. He was asked whether they had experienced any problems since he left. He said they did not tell him. Even if there was a problem, they were telling him that they were ok. He was asked what family he had in the UK (question 19). He answered he did not have any real family here. He just had friends.
5. He was asked about his problems in India. He said he had a girlfriend there, with whom he had an affair. Her dad was in politics, and he was a powerful man. His

girlfriend's father and male siblings objected to the relationship, and started giving him problems in consequence. On one occasion, her brothers beat him up. Later on the same day the same brothers came to his family home and smashed the windows and doors. They were all at home, and his mum and dad got really worried. He had mentioned the incident to the police, but no-one took any notice of him.

6. On 30 October 2014 the Secretary of State gave her reasons for refusing to recognise the appellant as a refugee, or as otherwise requiring international or human rights protection. On the topic of Article 8, consideration had been given to his rights in respect of any family life that he might have established in the UK. As he had not raised anything to suggest he had a partner or child in the United Kingdom, he did not meet the relationship requirements in Appendix FM.

### **The Hearing Before, and the Decision of, the First-Tier Tribunal**

7. Both parties were legally represented before Judge Jeromes. At paragraph [4] of his subsequent decision, Judge Jeromes recorded that the appellant had withdrawn his appeal against the refusal of asylum, and that the only ground of refusal which remained in controversy was the appellant's claim under Article 8. Mr David of Counsel submitted on behalf of the appellant that there were exceptional circumstances which would mean the appellant and his family would suffer unjustifiably harsh consequences if the decision to remove him was upheld.
8. The appellant's evidence by way of appeal was he had met Ms Jaswant Kaur, a British national, in 2007 and had started a relationship. Ms Kaur's brother had sponsored the appellant's father and mother to come to the UK in 2010 to attend the wedding of Ms Kaur's niece. On 28 October 2013 the Coventry and Warwickshire Magistrates' Court had made a restraining order against him to protect Ms Kaur. This restraining order had been discharged on 9 February 2015, as evidenced by the discharge order at page 8 of the bundle compiled for the hearing. The appellant's evidence was that there were problems in their relationship in October 2013 but they had got back together about five months later around April 2014. He had not mentioned Ms Kaur at his asylum interview because at the time they had been separated for two or three months, and they were not getting on.
9. The appellant had first intimated that he was pursuing an Article 8 claim on family life grounds at the CMR hearing which had taken place on 4 December 2014. On 15 December 2014 he and Ms Kaur attended the Coventry Register Office to give notice of an intention to marry, and at the same time the appellant submitted his divorce certificate from India. On 8 July 2015 the appellant and Ms Kaur were married at Coventry Register Office.
10. Ms Kaur had two grown up children from a previous marriage. Satnam lived with him and Ms Kaur at the marital home in Coventry. He was a student, and returning to college in September. The older child Praveen worked in Tesco's, and lived separately from Ms Kaur and the appellant.
11. The appellant said that he and Ms Kaur wanted to settled down in the UK, and that her sons would be distraught if he had to go back to India. If he was forced to leave

it would create a big impact on the children as meeting the financial threshold and the whole process would just take very long and there would be a delay in him returning to the UK. He understood spoken English, but not fully. He could speak some English, but not properly and he was attending English classes.

12. In her evidence, Ms Kaur said that she had been born in the UK, but her parents were from India and she had visited India five to six times. She did not have any relatives there. When she had visited India it was to visit relatives of her ex-husband. She spoke Punjabi. She was currently not fit enough to work, and so she was on Employment Support Allowance. She suffered from various ailments, including psoriasis and joint problems. She would not be able to meet the £18,600 threshold even if she returned to work.
13. Judge Jeromes noted that the appellant's PNC record showed that he was convicted on 2 October 2013 of racially/religiously aggravated harassment/stalking without violence between 7 August 2013 and 10 August 2013, having pleaded guilty. He was sentenced on 28 October 2013 to a community order and to a restraining order for "protection from harassment on conviction until further order".
14. At paragraph [33], the judge said he had been provided with three photographs. One photograph was of the appellant and Ms Kaur, date and occasion unspecified. The second photograph was the appellant and Ms Kaur and four others (including the appellant's parents) on the occasion of the 14<sup>th</sup> birthday of Ms Kaur's younger son. The third photograph was of Ms Kaur and the appellant and a third identified person on an unspecified date and occasion.
15. At paragraph [37] of his decision, the judge gave detailed reasons for not being satisfied on the balance of probabilities that the relationship between the appellant and Ms Kaur was genuine and subsisting. The judge gave a number of reasons for reaching this conclusion. His last reason was contained in subparagraph (iv) of paragraph [37.2]. He accepted the legal validity of their marriage but given its proximity to the hearing date (a matter of a few weeks) this raised suspicion as to the appellant's intent and he had provided very little evidence to allay those suspicions:

I note there are no photographs of the marriage or of any subsequent celebrations.

16. The judge went on to give detailed reasons for finding that the appellant did not enjoy family life with Ms Kaur's sons. The last reason he gave was that he had been provided with just one photograph of the appellant with the younger son on the occasion of his 14<sup>th</sup> birthday, but there were no photographs of the appellant with the eldest son. One photograph in the context of the relationship which had allegedly been continuing for seven or eight years was certainly not indicative of family life. Such evidence was generally ordinarily available, and there was no explanation as to why none had been submitted.
17. The judge concluded at paragraph [37.4] that whilst there was family life between Ms Kaur and her sons, the appellant played an insignificant and peripheral role within that family group as a whole.

18. The judge set out his conclusions on the law from paragraph [39] onwards. The appellant did not qualify for leave to remain under the partner route because inter alia he had found that the relationship with the appellant and Ms Kaur was not genuine and subsisting. EX.1 did not assist the appellant for this reason. The judge moved on to address the private life claim under Rule 276ADE.
19. Having considered Article 8 through the lens of Appendix FM and Rule 276ADE and having concluded the appellant did not meet the requirements of the Rules, the judge said at paragraph [40] that he had looked at the evidence to see if there was anything which had not been already adequately considered in the context of the Rules which could lead to a successful Article 8 claim. The judge proceeded to follow the five step approach in Razgar.
20. The judge set out his conclusions on proportionality in paragraph [40.5]. He found that the appellant spoke limited English and there was no evidence before him to indicate that if allowed to remain he would be financially independent. He also found that Ms Kaur was not in a position to support him financially. He was therefore likely to be a burden on the taxpayer. To the extent that he was in a relationship with Ms Kaur and her sons, this relationship was established when his immigration status was either unlawful or precarious and little weight should be given to this element of his family or private life, which could be continued in any event by modern communication means. Ms Kaur could visit the appellant in India, and she spoke Punjabi. He was not satisfied there were grounds for believing the decision would result in unjustifiably harsh consequences or that it would prejudice the private or family life of the appellant or Ms Kaur or her sons in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. The decision was proportionate to the legitimate aims pursued, paying specific regard to Section 117B(3) of the 2002 Act.

### Hearing in the Upper Tribunal

21. At the hearing before me to determine whether an error of law was made out, Mr Lawrence raised a preliminary issue which had not been canvassed at the hearing in the First-tier Tribunal or in the application for permission to appeal. He submitted that, by the date of decision at the end of October 2014, the appellant required permission from the Secretary of State to raise a new ground by way of appeal that had not been relied upon in the application to which the appeal related. As his lay client had not relied on an asserted family life with Ms Kaur and his sons in his application, he queried whether the requisite permission had been obtained. Although the matter he was raising was potentially adverse to his lay client, Mr Lawrence indicated that he felt it was his professional obligation to draw my attention to this matter.
22. Having regard to the procedural history outlined by Judge Jeromes in his decision, I ruled that the First-tier Tribunal had jurisdiction to entertain the appellant's family life claim, even though it had only been raised after the decision under appeal.
23. I explored with Mr Lawrence the limited grounds upon which permission to appeal had been granted by Upper Tribunal Judge Perkins. As a result of comparing what

was in my file (and hence what was in the possession of the First-tier Tribunal Judge) with the documents in possession of the parties, it emerged that the judge's bundle was incomplete. Instead of having an appellant's bundle running to 30 pages, he had an appellant's bundle that only ran to some ten pages. As a result, the judge had inadvertently "overlooked" a number of additional photographs beyond the three photographs to which he made reference in his decision. He had also not seen copies of utility bills at pages 25 to 30 of the bundle evidencing recent cohabitation (from March 2015).

24. Mr Lawrence submitted that failure to provide the judge with the correct bundle was not the appellant's fault, and so he had been the victim of procedural unfairness.
25. On behalf of the Secretary of State, Ms Pettersen submitted that the alleged procedural unfairness did not affect the outcome. Firstly, the judge had given adequate reasons for finding that the appellant had not discharged the burden of proving that he was in a genuine and subsisting relationship with Ms Kaur, and the additional documents in the appellant's bundle did not salvage the appellant's credibility. Secondly, the case was bound to fail in any event under the Rules, as the evidence did not demonstrate that there would be insurmountable obstacles to family life between Ms Kaur and the appellant being carried on in India.
26. In reply, Mr Lawrence said that if cogent medical evidence had been presented relating to Ms Kaur's medical conditions, there would have been an arguable case that there were insurmountable obstacles to family life being carried on in India. But in the absence of cogent evidence on the point, he conceded that the appellant was bound to fail under EX.1 in any event. He submitted that the procedural unfairness arising from the judge not taking into account the additional documents in the appellant's bundle affected the proportionality assessment outside the Rules.

### **Discussion**

27. It is important to recognise that only one of the two factual "errors" made by the judge relate to the issue of whether there is a genuine and subsisting relationship between the appellant and Ms Kaur.
28. On this topic, the judge simply observed that there were no photographs of the marriage or the celebrations which followed the marriage. I accept that the full appellant's bundle contains photographs of the marriage ceremony and of the celebrations which followed. But given the judge's other, and more cogent, reasons for finding (in effect) that the marriage was one of convenience, it is very doubtful that the photographic evidence would have salvaged the appellant's credibility on the issue of the relationship being genuine and subsisting.
29. In any event, satisfying the relationship requirement was not enough for the appellant to succeed under the partner route in Appendix FM. He also had to show there were insurmountable obstacles to family life with Ms Kaur being carried on in India. With commendable candour, Mr Lawrence rightly accepts that the evidence placed before the First-tier Tribunal was not capable of establishing this.

30. Turning to the appellant's Article 8 claim outside the Rules, I am wholly unpersuaded that the judge's adverse finding on the status of the relationship between Ms Kaur and the appellant had any material bearing on the outcome of the proportionality assessment. Notwithstanding his primary finding of fact, the judge assessed proportionality on the alternative premise that the appellant enjoyed family and private life with Ms Kaur and her two sons. Hence he held at paragraph [40.5(i)(b)] as follows:

To the extent that he is in a relationship with Ms Kaur and her sons, this was established when his immigration status was either unlawful or precarious...

31. The judge's deliberations on proportionality thus cover the contingency that the appellant is in a genuine and subsisting marital relationship with Ms Kaur, just as they cover the contingency that his relationship with Ms Kaur is something rather less. In short, even if the appellant is in a genuine and subsisting marital relationship with Ms Kaur, the judge has given adequate reasons for finding that the decision under appeal will not result in unjustifiably harsh consequences for the appellant or Ms Kaur, or that it prejudices the private or family life of the appellant or Ms Kaur or her sons in a manner sufficiently serious to amount to a (disproportionate) breach of the fundamental rights protected by Article 8. On the hypothesis of a genuine and subsisting marital relationship, the couple face a reasonable choice: settlement together in India or the appellant, who has an adverse immigration history, returning to India in order to seek entry clearance as Ms Kaur's spouse.

### **Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson