



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

Appeal Number: IA022702015

THE IMMIGRATION ACTS

**Heard at Field House
On 7 April 2016**

**Decision & Reasons Promulgated
On 25 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR. KARAN SALUJA
(NO ANONYMITY DIRECTION MADE)**

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N. Mallick, counsel instructed by Veja & Co solicitors
For the Respondent: Mr N. Bramble, Home Office Presenting Officer

ERROR OF LAW DECISION & REASONS

1. The Appellant is a national of India, born on 5 September 1982. On 25 March 2013, the Appellant obtained entry clearance to join his wife in the United Kingdom and entered the country on 15 April 2013. The relationship suffered difficulties, including the loss of her job by the Appellant's wife, which caused her to make a suicide attempt. She recovered but it is claimed increasingly directed her frustration at her circumstances at the Appellant.

2. The Appellant visited India for a wedding in December 2014 and upon his return to the United Kingdom on 11 January 2015, the Appellant was stopped

and questioned and served with a decision refusing him leave to enter. The Appellant appealed against this decision on 15 January 2015. In his grounds of appeal he asserted that he had suffered domestic violence from his wife.

3. The appeal came before FtTJ Kimnell for hearing on 1 July and 6 August 2015. The Appellant gave evidence, along with a witness, Inderjit Singh Daheley. In a decision promulgated on 26 August 2015, the First tier Tribunal Judge dismissed the appeal, on the basis that the relationship between the couple was over and the Appellant had left the matrimonial home well before the decision was taken in April 2015 [47] and there was no causation between the violence and the end of the marriage [53].

4. An application for permission to appeal was made in-time on 8 September 2015. The grounds in support of the application asserted that the First tier Tribunal Judge had materially erred in law: (i) in treating the Respondent's decision as being taken on 7 April 2015 when in fact it was taken on 11 January 2015; (ii) the error in relation to the date of decision resulted in an unfair conclusion given that the Judge had to assess whether there had been a material change in circumstances justifying refusal to leave at the date of decision; (iii) the Judge failed to give adequate reasons as to why the Appellant was not entitled to leave to remain as a victim of domestic violence; (iv) the decision was taken under paragraph 321 rather than 321A and was thus not a mandatory ground of refusal but erroneously no discretion had been exercised.

5. Permission to appeal was granted by First tier Tribunal Judge Simpson, on all grounds on the basis that there is a duty to act fairly and justly and it is arguable that the error as to date of decision has led to unfairness because the Judge's assessment as to whether there had been a material change in circumstances at the date of decision was predicated on the wrong facts.

Hearing

6. At the hearing before me, Ms Mallick sought to rely upon the grounds of appeal, which she had not drafted. She further sought to argue that the issue of domestic violence can be a contributory factor rather than a causal link in respect of the breakdown of a relationship *cf. Ishtiaq* at [31] and [38] per Dyson LJ as he then was and *R ota Butler* [2002] EWHC 854 where Lady Hale at 21, 26, 30-33 found that whilst the relationship had not broken down as a result of domestic violence it was a significant contributory factor. She submitted that the Judge made a crucial error of law in applying the wrong rule when considering the change in circumstance as paragraph 321 refers to "may" lead to a refusal and 321A provides that leave "is to be cancelled" at the port, where there is a change in circumstances. One is discretionary and one is mandatory. Yet there was no complaint that the marriage had broken down prior to that date [11 January 2015]. She submitted that the only evidence before the Judge that the Appellant had not lived there was from a witness Mr Dehaley and he had said that the Appellant had not lived for a few days a week at the matrimonial home since shortly after the marriage had begun. That being the case when the Judge came to make his decision he wrongly looked at the change in circumstances. He wrongly records at [8] and

at [14] that the Appellant had denied saying this. He did not consider that the endorsement on the landing card could have arisen as a result of the Immigration Officer speaking to the Appellant's wife on the telephone. It is not clear the sequence of events and how they took place.

7. She submitted that the sequence of events are also relevant to the claim of domestic violence and that the Judge failed to consider the factual matrix and whether there was psychological domestic violence- it may well have been the Appellant's wife gave the account to the Immigration Officer of her not having a subsisting marriage because of her psychological state and that this is another form of abuse, which was not considered in the factual matrix. The other points the Judge does not consider are in the witness statement, such as the suicide attempt by the wife. If the marriage had broken down in 2013 why would the Appellant assist her in finding a job in his area of expertise - media and not in hers and why is it that she obtained a job through his assistance and why is it then it was not until December 2014 when she is settled in her job that he decided to have a short visit to India. She attempted suicide because she lost her previous job. In applying the wrong Rule the Judge made a material error of law and did not consider all the circumstances before him.

8. Ms Mallick further submitted that the Judge placed too much weight on the Immigration Officer's evidence and he was not cross examined. The evidence of the Appellant was far weightier and the Judge should have placed little weight on those who decided not to give evidence. On the issue of change in circumstances, Ms Mallick essentially set out Grounds 1 and 2 of the grounds of appeal and the fact that the Judge erred in finding that the relevant date was April, which was when the explanatory statement was sent out. When one looks at the date of circumstances and decision she submitted that there is no evidence to indicate that the Appellant left the family home and no evidence to indicate that divorce proceedings had been commenced. Notably the Judge at [41] said the change of circumstances was that the marriage had been in difficulty for some time, but this is not sufficient for the purposes of paragraph 321A. A change of circumstances would have to be more than a difficulty and the Immigration Officer would have to be satisfied that the parties no longer intended to live permanently together. If the Judge was going to make findings on matters that post dated 11 January 2015 he should have found that the decision was erroneous as of that date and remitted it back to the Home Office to be reconsidered.

9. In respect of the domestic violence point, she submitted that this was challenged on the basis that it lacks reasoning and that parts of the decision are simply unsupported by any evidence e.g. the reference at [53] to a mutually tempestuous relationship. The Judge was required to look at what evidence existed of domestic violence and there was no evidence before him or referred to that showed that his wife had made allegations of domestic violence and this is an unsupported assertion of fact and trivialises the allegation of the Appellant that he was a victim of domestic violence. In April 2014 the Appellant went to the doctor [51]. There was evidence from the witness that there had been some domestic violence very early on in the marriage. That is not referred to by the Judge when he comes to make his

decision at [53] when he finds there is no such causation in this case. What he should have asked was whether the domestic violence was a significant contributory factor, rather than just finding it was not the cause of marriage breaking down. The Appellant's statement at [21] onwards states that the violence continued and he became the punching bag. He also refers to the GP and psychological violence and at [27] refers to the fact that he started counselling. The decision was clearly inadequately reasoned in light of the evidence before the Judge, who applied the wrong test.

10. In response, Mr Bramble relied upon the Rule 24 response. He submitted that both the decision of 11.1.15 and the decision of 7.4.15 refer to paragraph 321(A) and that the Judge was entitled to refer to paragraph 321(A) and cite it in the decision. In respect of Ground 1, Mr Bramble accepted that at [46] and [47] the Judge does refer to April 2015 and that this is an error but it is not material. He submitted that it was necessary to look at is the construction of the reasoning as to whether there was a change in circumstances, at [40] onwards. He submitted that the Judge took into account the landing card and found the fact that the marriage has broken down is consistent with the evidence. The Appellant's wife had no contact with him in 2015. There has clearly have a change in circumstances on the basis of the Appellant's own evidence. The Judge considered the evidence about the relationship at [50] onwards and the letter from Dr Kooner at [51]; the Judge has reminded himself of what is required when considering domestic violence at [52] and at [53] the Judge has set out the reasons why on this set of circumstances he was not satisfied that the circumstances are a contributing factor to the breakdown of the marriage. The Judge was entitled to find this on the basis of the evidence; he looked at everything in the round and was entitled to come to that conclusion. It does not undermine the decision but looks at the more important factors. The Judge took into account the comments that were made in the medical reports and the actions of the Appellant that he would have remained with the wife if it was not for the divorce proceedings and the evidence of a witness who acknowledged the fact that the Appellant had left the home on previous occasions. The Judge has taken all this into account and when coming to the conclusion has found the Appellant was not a victim of domestic violence and the Judge was entitled to come to that conclusion having considered all the competing factors. He asked me to uphold the decision of the First tier Tribunal Judge.

11. In response, Ms Mallick submitted that in respect of the correct Rule, irrespective of how it is cited it is how it is applied that matters. The Immigration Officer refused the Appellant leave to enter and this was a paragraph 321 decision and not a cancellation of leave under 321A. In respect of the consideration of domestic violence, she submitted that what crucially is missing is that nowhere in the decision of the Judge are his reasons as to why he rejected the claim of domestic violence and he has not put all the evidence together. She confirmed in response to a question from me that no formal application under the Rules had been made but representations had been made to the Secretary of State in the grounds of appeal: see [4] of decision. These were before the Secretary of State and the First tier Tribunal Judge. I asked Ms Mallick whether it was not inconsistent that the Appellant both

claimed that he wished to remain in the marriage and that he had been subjected to domestic violence. She replied that it was important to look at the sequence of events. You can be a victim of domestic violence and remain in the marriage. At the point the Appellant returned to the United Kingdom in January 2015 he considered his marriage to be subsisting and when his wife tells the Immigration Officer that the marriage is not subsisting he then has a claim to be a victim of domestic violence. She reiterated that we do not know when the Immigration Officer spoke to the Appellant's wife and whether this was before or after he spoke to the Appellant, which is important because if she is right this supports the Appellant's claim.

My findings

12. It is the case, as is identified in Grounds 1 and 2, that the First tier Tribunal Judge erroneously referred to the Respondent's decision as having been taken on 7 April 2015 whereas it was in fact taken on 11 January 2015. The Explanatory Statement is dated 7 April 2015 and appended to it are interview notes with both the Appellant and his wife, in respect of interviews that took place on 11 January 2015. Whilst the Judge erred in respect of the date of decision, I do not consider that it is a material error in light of the following:

12.1. the Respondent's consideration of whether or not there had been a change in circumstances took place on 11 January 2015, following interviews with the Appellant and his wife, who attended Heathrow Terminal 5 in person on that day and signed her interview notes. In the Appellant's wife's interview, which is not numbered, the following exchange took place:

"Q. Do you live together?"

A. No - we have been separated since the 12.12.13. We haven't lived together since then."

In the Appellant's interview, which is also not numbered, the following exchange took place:

"Q. According to your wife you have not lived together since December 2013?"

A. On and off. She left her job and she wanted to rent her house. I moved out in Feb because of her medical condition."

The reference to "Feb" must be to February 2014, given that it post dates December 2013 and predates the interview on 11 January 2015. However, in his oral evidence it is recorded at [8] that the Appellant stated that in May 2013 he "*had stayed away from home for three to four days because of indecent behaviour by his wife then he would return.*" And at [10] that on 5 April 2013 his wife finally lost her job, was detained in hospital overnight and her behaviour then changed. "*The appellant's doctor advised him to move out. The appellant travelled for about six months working as a broadcaster.*" It is implicit that this was in the latter part of 2013. Then, in cross-examination at [14] "*the appellant said that between April 2014 and December 2014*

everything was fine." He accepted that in April 2014 he took legal advice about what to do if physical violence occurred. His evidence was that he had moved out (of the matrimonial home) on 18 February 2015 [17]. The Appellant's witness, Mr Daheley's evidence, recorded at [29] is: "*The appellant told Mr Daheley that he moved out of the matrimonial home in February 2014 following which he stayed for a few days with the witness before moving to an address in Chigwell.*"

12.2. As is apparent, the evidence in the form of the interviews of the Appellant and his wife is discrepant; the Appellant's evidence is internally discrepant and there is a discrepancy between his evidence and that of his witness. The Appellant was interviewed both before and after his wife's interview, so that he could be given an opportunity to refute some of the points that she made, which substantially differed from his answers. Given that the Appellant's wife attended for interview at Heathrow Terminal 5 and signed her interview notes, I find that the Immigration Officer has discharged the burden of showing that there had been a change in circumstances so as to justify cancelling the Appellant's leave to enter and the First tier Tribunal Judge was justified in upholding the decision of the Immigration Officer.

12.3. Whilst First tier Tribunal Judge Kinnell refers to the decision as having been taken in April 2015 and that is an error, and his reference at [47] to subsequent events having shown that a divorce is taking place between the couple is also erroneous, given that the issue before him was whether or not there was a change in circumstances to justify the cancellation of leave at the date of decision [11.1.15] I do not find that it is a material error given the discrepancies in the evidence set out at 12.1 above. On the Appellant's own account in interview he left the matrimonial home in February 2014 and this is consistent with the evidence of his witness and the medical notes (which indicate that in fact he left in January 2014). This clearly pre-dated the date of decision. Even if, on the basis of his interview record, they lived together on and off, the Appellant's wife clearly stated that they had not lived together since December 2013 and neither the evidence of the Appellant nor his witness has displaced that evidence so as to show that the marriage was subsisting and both parties intended to live with each permanently. Thus there had been a change in circumstances which justified the refusal of leave and/or the cancellation of leave.

13. In respect of Ground 3 and whether or not the Judge gave adequate reasons as to why the Appellant was not entitled to leave on the basis of domestic violence, I find there is no material error of law. The evidence before the Judge was, at best, scanty, comprising: the Appellant's own evidence, both oral, which is internally inconsistent and his witness statement which is undated but in any event attests at its highest to aggression and verbal abuse by his wife; the evidence of his witness that the Appellant telephoned him within 2-3 months of his arrival in the UK and said he needed a place to stay as his wife was behaving in a very peculiar manner and they had fallen out; the medical notes, which on 13.1.14 refer to "*stress at home. Erratic behaviour from wife of 2 years... wife has ?mental health issue ... he has moved out temporarily.*" There is also reference to threats by his wife to kill him or herself

and constantly trying to email and phone him and ask for money on 25.4.14 and on 18.57.14 reference to “*wife’s disruptive behaviour again.*” The Appellant was referred to a counsellor but there is no specific evidence as to how long he received counselling nor the specific focus of the counselling, if any.

14. Whilst there is a discretion as to the evidence considered to show that domestic violence has taken place and each case should be considered on a case by case basis [Domestic Violence guidance 29.5.15 at 21] the evidence normally required is, for example, evidence of court conviction or police caution [22] an injunction [24] or non molestation order [27]; a medical report confirming that the applicant has injuries consistent with domestic violence, which may not be physical injuries or a report from a domestic violence organisation [29]-[30]. No evidence of this nature was submitted. Moreover, even if the Appellant was subjected to domestic violence by his wife by way of psychological or emotional abuse or controlling and/or coercive behaviour, all of which are covered by the definition adopted by the Home Office in their guidance cited above, paragraph 289A of the Rules requires that the domestic violence is causative of the breakdown of the marriage. Whilst, as Ms Mallick submitted, it need not be the only cause as long as it is a significant contributory factor, on the facts of this case the marriage was not caused to break down due to domestic violence against the Appellant by his wife but because his wife did not wish to be married to him any longer. The Appellant’s evidence at interview on 11.1.15 was that he loved her and wished to continue the marital relationship, despite the fact that he had been subjected to domestic violence. Whilst the breakdown of his marriage is clearly a personal tragedy for the Appellant, I find that the threshold for showing that his marriage broke down due to domestic violence has not been reached on the evidence before me, or the First tier Tribunal Judge.

15. I further find that the basis of the Judge’s finding that the relationship between the Appellant and his wife was “mutually tempestuous” which was impugned by Ms Mallick, can be found in the interview record of the Appellant’s wife where she stated, in response to an arguably leading question from the Immigration Officer, that the Appellant had been violent towards her. There is also a letter on file from the Appellant’s solicitors to him dated 3 February 2015 to the effect that his police station matter is concluded as his ex-wife has refused to provide a statement to police in support of her earlier allegation. This is referred to by the Judge at [53]. The Appellant in his witness statement at [29] he states that he was interviewed by the police on 18 January [2015] as his wife had accused him of rape in June 2013. For the reasons set out at [13] and [14] above, I find no error of law in the manner in which the Judge dealt with and reasoned his findings at [48]-[53] that the Appellant was not entitled to leave on the basis of domestic violence.

16. In respect of Ground 4 and the question of whether or not the First tier Tribunal Judge applied the correct paragraph of the Immigration rules – 321 or 321A, I have concluded that this is misconceived. Paragraph 321 makes provision for the refusal of leave to enter in relation to a person in possession of an entry clearance. Paragraph 321 (ii) provides that he may be refused leave

only where the Immigration Officer is satisfied that there has been a change of circumstances since it was issued which has removed the basis of the holder's claim to admission. Paragraph 321A makes provision for grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom and include at (1) that there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled. It is the case that paragraph 321 is in discretionary terms whereas paragraph 321A is in mandatory terms. Reference is made in the refusal to both cancellation of leave and the refusal of leave to enter, essentially referring to both paragraphs of the Rules. However, the test is essentially the same and I find on the particular facts of this case that nothing turns on the distinction between a discretionary and a mandatory refusal as the Immigration Officer was bound to reach the conclusion he did, having interviewed both the Appellant and his wife, in light of his wife's clear indication that the marriage was no longer subsisting.

17. For the reasons set out above, I find no material error of law in the decision of First tier Tribunal Judge Kimnell and I dismiss the appeal.

Decision

18. The appeal is dismissed.

Deputy Upper Tribunal Judge Chapman

24 May 2016