



IAC-AH-KRL-V1

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

Appeal Number: IA/13957/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14<sup>th</sup> March 2016**

**Decision & Reasons Promulgated  
On 25<sup>th</sup> April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR HAMZA BENGHIDA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Jesurum

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals, with permission granted by the Upper Tribunal, against a decision of First-tier Tribunal Judge Colvin promulgated on 27<sup>th</sup> August 2015 dismissing his appeal for further leave to remain in the UK. The appellant, a citizen of Algeria, born on 25<sup>th</sup> February 1984 had appealed the decision of the Secretary of State made on 13<sup>th</sup> March 2014 to refuse him further leave to remain in the UK as the spouse of a person present and settled in accordance with paragraph 284 of the

Immigration Rules and a decision was made to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant's immigration history is that he entered the UK on 29<sup>th</sup> October 2011 with leave to enter as a spouse valid until 19<sup>th</sup> January 2014. On 9<sup>th</sup> January 2014 he applied for further leave to remain on the basis of his marriage to Linda Christine Benghida, a British national. They met over the internet in December 2011, proceeded to take holidays together and visits and married on 26<sup>th</sup> August 2010. The appellant entered the UK on 29<sup>th</sup> October 2011 and started working as a chef at various restaurants in Margate. It is reported that the appellant was surprised when his application was refused by the Home Office. When he made his application on 6<sup>th</sup> March 2014 he had yet to pass the knowledge of the life in the UK test and his then application was supported by a large file of his wife's medical records and documents. The appeal was allowed but overturned by the Upper Tribunal where he represented himself and at that hearing he was told there was no such file of medical documents on the court file. He does now have an English language certificate having passed the entry level certificate in ESOL, skills for life and the life in the UK test.
3. His wife has chronic kidney disease and renal failure with type 2 diabetes and, it was asserted, would not be able to continue her treatment in Algeria. The current immigration problems and his wife's health issues had recently taken a toll on their marriage.
4. The respondent refused the appellant's application on the basis that he had failed to provide evidence of having passed an acceptable English language test, further to paragraph 284(ix)(a) of the Immigration Rules. With regards to Appendix FM the respondent was not satisfied that there were insurmountable obstacles preventing the appellant from continuing his relationship with his wife in Algeria and the application failed further to EX.1(b) of Appendix FM.
5. With regards to private life and Paragraph 276ADE the appellant had ties in Algeria and there were no very significant obstacles to his return.
6. The appellant had not provided medical evidence to show his wife was suffering from the claimed conditions and there was treatment in Algeria.
7. At the hearing before the First-tier Tribunal on 5<sup>th</sup> August 2015, the appellant gave evidence that he and his wife were still a couple but just living apart. She was unable to come to court because she was so ill that she had to stay a night in hospital. He had no advice from a lawyer to get a statement from his wife.
8. First-tier Tribunal Judge Colvin accepted that the appellant had shown that he fulfilled the requirement of the English language test but proceeded to consider paragraph 284(vi) which refers to "each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting". The judge found that in this case the appellant was no longer living with his wife although he was less clear when they separated but it

appeared to have been in February. At paragraph 21 the judge found “the difficulty for the appellant is that there is no evidence from his wife to show that she is supporting his claim for an extension of stay as her spouse”. Indeed there was no statement submitted by his wife either of the two previous hearings to confirm that this relationship is subsisting and no statement submitted for this hearing to explain why they are no longer living together. There was no medical evidence submitted to say that she could not attend that hearing and the evidence was that she travelled to London regularly to see her consultant at Guy’s Hospital. The judge proceeded as follows

- “22. Ms Daykin relied on the case of *BK and Others (Spouses: Marriage meaning of ‘subsisting’) Turkey [2005] UKAIT 00174* which held that a marriage is subsisting if it has been lawfully entered into and has not thereafter been lawfully dissolved or annulled. She appreciated that this was not in line with the starred decision in *GA (subsisting marriage) Ghana \* 2006 UKAIT 00046* which held that subsisting requires that there is a real relationship as opposed to a formal one of marriage. I intend to follow the starred decision of *GA* and in doing so I am satisfied that the appellant has not shown to the balance of probabilities that he fulfils this requirement of paragraph 284 (vi). I do not find on the evidence before me that this is a subsisting marriage.
23. The appellant has therefore not shown that he satisfies all the requirements of paragraph 284 of the Immigration Rules.

*Article 8*

24. In light of my finding that the appellant does not have a subsisting relationship with his wife in the UK, this necessarily means that Article 8 is not engaged on grounds of family life even if the old regime under Part 8 applies to the appellant as his previous spouse visa was granted prior to July 2012.”
9. An application for permission to appeal was made on the basis that there had been a change of circumstances and since the First-tier Tribunal the appellant and his sponsor had reconciled and were again living together as a married couple. It was also submitted that the judge had not doubted the credibility of the appellant and that there had not been a complete breakdown of the relationship and it was submitted that subsisting was not an absolute term and that there may be degrees of subsisting based on the factors mentioned in ***GA (Subsisting marriage) Ghana***. It was submitted the appellant played an essential and necessary part in the sponsor’s private life and the appellant cared unpaid for the sponsor who would not be able to cope without his support and considered that the judge’s decision was unreasonable. First-tier Tribunal Judge Saffer found that the grounds amounted to nothing more than a disagreement with the facts and there was no error of law and the judge was entitled to make on the evidence that there was no subsisting relationship.
10. Permission was, however, granted by Upper Tribunal Judge Reeds who found that the judge had found that the appellant could satisfy paragraph 284(ix)(a) but went on of his own motion to consider whether the marriage was subsisting. It was unclear from the determination whether this was raised by the judge to the appellant’s representatives so that this could be adequately dealt with and whether the evidence in this respect was in fact clarified. It was arguable that the nature of the relationship

as a whole should have been considered when considering whether or not the relationship was subsisting.

11. A Rule 24 response was served, citing **RM (Kwok On Tong HC 395 paragraph 320) India [2006] UKAIT 00039**. The head note of **RM** confirmed that **Kwok On Tong** was still good law and the judge cannot allow an appeal on the ground that the decision was not in accordance with the Immigration Rules, unless the requirements of the Immigration Rules were or are as appropriate met. The appeal is not limited to the issues raised in the notice of refusal. Under the circumstances it was open to the judge to conclude that the evidence before him was wholly insufficient to conclude that the appellant was party to a subsisting marriage and the parties intended to live together. The respondent was not in a position to take this point against the appellant as it did not appear to have been disclosed to the respondent that the appellant was living apart from his wife. It was raised at the hearing that his address was different from his wife since February 2015. There was no evidence from his wife in support of the application nor did she attend the hearing. No adjournment was sought and the appellant's representative clearly appreciated that there were serious concerns about the state of the marriage and seeking to rely on **BK** (see 22 of the decision). That authority held that marriage is subsisting if it has been lawfully entered into and has not thereafter been lawfully dissolved or annulled. It was appreciated that this was not in line with the starred decision in **GA (Subsisting marriage) Ghana [2006] UKAIT 00046** which held that subsisting requires there is a real relationship as opposed to a formal one of marriage. The judge followed the starred decision in **GA**.
12. At the hearing before me, Mr Jesurum referred to the complicated history as set out above and the wife's difficult medical condition. It was acknowledged that at the date of the hearing there was a temporary separation, but he submitted that there was some latitude between **BK** and **GA** and the fact that the appellant and his wife were in a temporary separation did not necessarily mean that this was the end of the marriage. There was no rejection of the appellant's credibility or his assertion that the marriage was *not* at an end. With respect to Article 8 the judge dealt very briefly with Article 8 and having found that there was no relationship promptly dismissed any further consideration. There were powerful elements to suggest that there was still a continuing relationship between the appellant and his wife and the private life that should have been considered.
13. Mr Whitwell referred to **Kwok On Tong** and that it was necessary for the judge under paragraph 284 to consider the genuineness of the relationship. The evidence was that the appellant had moved out, there was no evidence from the spouse and that his wife did not attend the previous Upper Tribunal hearing. On both those occasions there was no input from the spouse and the judge was entitled to raise the point. **GA Ghana** trounced **BK** and was a starred determination. The matter was raised by the judge. The burden on the appellant was not discharged. The challenge to the position on Article 8 was parasitic on the subsistence of the marriage.

14. In conclusion, and I take the matters in reverse order, the judge made a finding that as the appellant did not have a subsisting relationship with his wife and he found that Article 8 was not engaged in relation to family life. He proceeded to find that in relation to his private life that the relationship had broken down and made no assessment of the continuing albeit limited relationship between the appellant and his wife. The judge made a record of the evidence at paragraph 7 that the appellant was working as a chef and spent his time off with his wife and his submission that they were still a couple but just living apart. The evidence from the appellant and against whom there was no credibility finding, was such that the wife still considered themselves a couple. Evidence was given that she could not come to court because she was so ill.
15. There was no factoring of the private life into Article 8 assessment. That said the reasons for refusal letter made no assertion that there was no genuine and subsisting relationship and an inspection of the skeleton argument presented to the judge in the First-tier Tribunal showed that the relationship was not a matter which was raised in the reasons for refusal letter, and evidence thereto was not submitted on that point. As such it is clear that the judge raised the matter at the hearing because he refers to his questioning at paragraph 9 of the decision. There may have been a reference to **GA Ghana** and **BK and Others** in closing submissions but it is not clear from the determination that the *appellant* was given the opportunity to respond to the assertion that the relationship had ended. The judge states at 21 “the difficulty for the appellant is that there is no evidence from his wife to show that she is supporting his claim for an extension of stay as her spouse”. The judge proceeds:
- “21. This means that I can now be satisfied that the appellant has shown that he fulfils the requirement of the English language test certificate as submitted for this appeal. However, paragraph 284 (vi) states: *“each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage of civil partnership is subsisting”*. In this case the appellant says that he is no longer living with his wife. Whilst he was less than clear as to when they separated, it seems that this was in February 2015 although they may have spent a further month together in June. He maintains that this is a ‘break’ in the relationship principally requested by his wife and he hopes that they can be reconciled. The difficulty for the appellant is that there is no evidence from his wife to show that she is supporting his claim for an extension of stay as her spouse. Indeed, there was no statement submitted by his wife for either of the two previous hearings to confirm that this relationship is subsisting and no statement submitted for this hearing to explain why they are no longer living together. There is no medical evidence submitted to say that she could not attend this hearing and the evidence is that she travels to London regularly to see her consultant at Guys Hospital. There is also no documentary evidence to show that the appellant and his wife even remain in contact as claimed by the appellant.”
16. Submission was made that there should have been an application for an adjournment but I find that even considering **Kwok On Tong** it is not clear that this was raised such that it could be adequately dealt with and whether the evidence in this respect was in fact clarified. At the outset of the hearing one of the matters in issue was not that of the relationship. In effect the appellant was not given the opportunity to

answer the criticisms made in relation to the evidence and thus a fair hearing on this discrete but fundamental point.

17. I therefore found an error of law and set aside the decision in respect of the findings regarding the relationship.
18. I was invited to consider the one issue under paragraph 284(vi), in other words whether “each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting”.
19. Both the appellant and his wife attended court and gave evidence before me. There were some minor inconsistencies between the evidence in relation to council tax but on the whole they gave consistent evidence. There were concerns that the appellant’s wife had filled in forms making an application for personal independence payment in which she makes no reference to the appellant at all but her explanation for that was that the appellant worked six to seven days a week at the date she filled out the application form in July to September 2014 and that the person she relied on for personal care at that time was her daughter.
20. I find that the appellant has been in effect candid with his evidence to the effect that he acknowledged that they had separated temporarily during 2015 but both the appellant and his wife confirmed that they had maintained contact throughout September 2015 and had reunited and gave consistent evidence that they went out for meals together. Indeed the appellant’s wife produced photographs of themselves from last summer which postdated their temporary separation.
21. They are currently living together at [ ] in Margate and produced documentary evidence in the form of a water bill to confirm that that was indeed the case.
22. I accept therefore that the appellant is in a genuine and subsisting relationship and that the requirements of the Immigration Rules specifically paragraph 284(vi), have been fulfilled.
23. On a separate basis, even though not required in view of my findings above, I also accept on the basis of the medical evidence that the appellant’s wife would have very significant difficulty in relocating to Algeria bearing in mind that she is listed for a kidney transplant and her daughter is the donor. The treatment in Algeria is very far away from the appellant’s family home and also extremely expensive. I therefore find that in relation to Appendix FM and EX.1 there would be very significant obstacles to the appellant’s returning to Algeria.
24. Even if that were not the case further to **Singh v SSHD [2015] EWCA Civ 74** that not all the considerations had been factored into the proportionality assessment, and I find on the basis of the wife’s very poor health that there are compelling circumstances for the matter to be considered outside the Immigration Rules. I find the appellant has engaged a family life and private life and reached the threshold for that to be engaged. At the date it was taken the decision was in accordance with the law and necessary for the legitimate aim, however on a proportionality assessment I

have found that the appellant can now meet the Immigration Rules in terms of paragraph 284 and that his wife suffers very poor health and is due for a kidney transplant and she places heavy reliance on his assistance and care, for example in terms of personal and intimate care and general domestic tasks around the house.

25. His wife explained to the court that her daughter had been cited liberally in the application form because she could drive whilst the appellant could not and it was her daughter that would take her to hospital on the emergency occasions. I have considered Section 117 of the Nationality Immigration and Asylum Act 2002 in my proportionality assessment and note that the appellant is a chef and can be financially independent and he can speak English. His family life was formed at a time when he had leave. Following the authority in **Huang v SSHD [2007] UKHL 11** and taking full account of all considerations weighing in favour of the refusal, I find the decision to remove the appellant prejudices the family life of the applicant and his wife in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8.
26. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 allowing the appeal.

**Notice of Decision**

The appeal is allowed under the Immigration Rules and on Article 8 grounds.

Signed

Date 21<sup>st</sup> April 2016

Deputy Upper Tribunal Judge Rimington

**TO THE RESPONDENT**

**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because of the complex nature of the case.

Signed

Date 21<sup>st</sup> April 2016

Deputy Upper Tribunal Judge Rimington