



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/05729/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester

Decision & Reasons

On 1st June 2017

Promulgated

On 16th June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ASIA BASHARAT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Hussain of Equity Law Chambers

For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant is a female citizen of Pakistan born 1st January 1984. She appeals against the decision of Judge J Austin of the First-tier Tribunal (the FtT) promulgated on 25th June 2016.
2. The Appellant entered the United Kingdom on 4th January 2011 as the spouse of a person settled here. She had a visa valid between 14th December 2010 and 14th March 2013.

3. The Appellant overstayed, and made an application for leave to remain on 22nd June 2015. The application was based upon her private and family life with her spouse.
4. The application was refused on 9th September 2015. The Appellant appealed to the FtT and the hearing took place on 21st June 2016. The FtT dismissed the appeal.
5. The Appellant applied for permission to appeal to the Upper Tribunal. It was contended that the FtT had erred in law by failing to consider the Appellant's reasons for overstaying, had made a mistake of fact as to the dates of documents showing that the couple had cohabited, had taken the wrong approach when considering insurmountable obstacles to family life continuing abroad, and had not properly assessed whether the marriage was subsisting.
6. Permission to appeal was granted by Judge Gibb of the FtT and I set out below, in part, the grant of permission;
 3. Although the grounds have done a poor job of identifying them, having read the determination I have decided that there are a number of error of law points that are arguable and require further consideration. The conclusion at the end of [23], that at [24] and that at [29] arguably indicate that the Article 8 proportionality assessment has not been conducted within the correct legal framework. The determination arguably contains no clear finding as to whether the couple were in a subsisting marriage or not, but if they were then a finding of family life would have followed automatically without any concern about Kugathas dependency. It is arguable that the lack of clear findings and these points create a level of confusion in which it is arguable that the proportionality assessment involved errors of law.
 4. The document date error point may be arguable, but that can be given consideration at the error of law hearing. The other points, and indeed most of the grounds, amount to a re-stating of the case.
7. On 6th March 2017 the Respondent submitted a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, contending, in summary, that the FtT directed itself appropriately. It was submitted that the FtT had made a clear finding at paragraph 18 that the relationship was not subsisting, and given cogent reasons for this finding. As Article 8 was not engaged a proportionality assessment was not necessary, but in any event the FtT had considered it in the alternative at paragraph 29, concluding that any interference was proportionate.
8. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

9. Mr Hussain relied upon the grounds contained within the application for permission to appeal.

10. It was contended that the FtT had erred by failing to take into account the Appellant's explanation for the delay in making an application for leave to remain. The FtT had found a lack of evidence about the Appellant's relationship prior to 2011, but Mr Hussain pointed out that she had been granted entry clearance at that time, it being accepted that she had a genuine and subsisting relationship. The issue in the refusal was whether that relationship continued.
11. It was contended that documentary evidence to support cohabitation did not post-date the Appellant's arrest, and the FtT was wrong in law to find otherwise.
12. Mr Hussain submitted that there was a lack of clear findings and proportionality had not been adequately considered.
13. Mr Harrison relied upon the rule 24 response, although it was accepted that conflicting findings in relation to family life had been made at paragraphs 18 and 23.
14. I announced at the hearing that in my view the FtT had erred in law and had done so materially. I gave my reasons for this conclusion, indicating that a written decision confirming those reasons would be issued.
15. Once I had announced that the FtT decision should be set aside, both representatives indicated that they were in agreement that the appeal should be remitted to the FtT to be heard afresh with no findings preserved.

My Conclusions and Reasons

16. The FtT made conflicting findings as to the relationship between the Appellant and her spouse. At paragraph 18 there is a finding that the relationship is not genuine and subsisting, whereas at paragraph 23 there is a finding that the Appellant has established family life in the United Kingdom.
17. At paragraph 29 the FtT makes the following finding;
 - “29. There is nothing in the evidence to indicate elements of dependency that would take the relationships concerned into being family life for Article 8 purposes.”
18. In my view the above demonstrates a misunderstanding of the concept of family life between spouses.
19. The FtT has therefore made findings which are conflicting and unclear as to whether there is a genuine and subsisting relationship and family life between the Appellant and her spouse. This was one of the main issues in this appeal, as the Respondent in the refusal decision did not accept that the couple still had a genuine and subsisting relationship.

20. I find that the FtT erred at paragraph 18 in making a finding that none of the documents produced, to prove cohabitation, pre-dated the arrest and detention of the Appellant in 2015 as an overstayer, and therefore no weight was attached to them in establishing whether the couple were living together prior to the Appellant's arrest. There were in fact council tax bills in the joint names of the Appellant and her spouse, at the same address, which pre-dated the arrest. These appear to have been overlooked by the FtT, and failing to take into account material evidence is an error of law.
21. The FtT at paragraph 18 finds there is no evidence to suggest that the Appellant and her spouse spent any time together in Pakistan between their marriage in 2006 and 2011 when the Appellant travelled to the United Kingdom. This finding was relied upon by the FtT in reaching the conclusion that there is no genuine and subsisting relationship between the couple. I find this to be an error of law. The Respondent in refusing leave to remain did not take issue with the relationship pre-2011. The issue was whether "the relationship is still subsisting". The Appellant was granted entry clearance as the spouse of a person settled here, it being accepted at that time that she had a genuine and subsisting relationship. The FtT has therefore considered a lack of evidence that was not in issue in the refusal, and was not relevant to the issues in this appeal.
22. For the above reasons, the decision of the FtT is set aside.
23. I have taken into account the views of both representatives, to the effect that this appeal should be remitted to the FtT, and have considered paragraph 7.2 of the Senior President's Practice Statements. I find that no findings of fact can be preserved, and therefore the extent of judicial fact-finding that is necessary, means that it is appropriate for this appeal to be considered afresh by the FtT.
24. The appeal will be heard by the FtT at the Manchester Hearing Centre by a judge other than Judge J Austin.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

Anonymity

The FtT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal. I see no need to make an anonymity order.

Signed

Date: 5th June 2017

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FtT.

Signed

Date: 5th June 2017

Deputy Upper Tribunal Judge M A Hall