



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03398/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19th February 2018

Decision & Reasons Promulgated
On 18th April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR MALAK MUMTAZ KHAN
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Amy Childs, Counsel, instructed by Rashid and Rashid Solicitors.

For the Respondent: Mr. L.Tarlow, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Pakistan, born on 19 April 1972. He came to the United Kingdom on a visit Visa in 2008. He was arrested on 27 June 2009 for possession of cannabis and for overstaying. When advised he was liable to detention he claimed asylum. This was refused in July 2009. He then made an application for leave to remain as a spouse. This was refused in April 2010. He made a further application, this time as a partner. This was refused in April 2013. He made various submissions in November 2012 in June 2013: all without success. He made a further application for leave to remain which was refused in October 2014.

2. On 24 July 2015 he made another application for leave to remain. This was on the basis of his marriage to a British citizen, Ms Mercedes Rivera. This was refused on 25 January 2016. Under Appendix FM the suitability grounds were not met because of his failure to disclose a conviction on 4 July 2014. He did however meet the eligibility requirements and it was accepted he was in a genuine and subsisting relationship. EX1 was considered but the respondent concluded there was no evidence of insurmountable obstacles to family life continuing in Pakistan. The couple had no children.
3. Regard was had to paragraph 276 ADE and private life. The respondent saw no significant obstacles to the appellant integrating again into Pakistan. No exceptional circumstances were identified. The appellant referred to mental health issues but the respondent concluded there was adequate treatment available in Pakistan.

The First tier Tribunal

4. His appeal was heard before First-tier Judge Chana on 21 April 2017. In a decision promulgated on 26 May 2017 it was dismissed. The appellant was represented then, as he is now, by Miss Childs.
5. The decision records at paragraph 10 that the judge advised the appellant's representative that although the genuineness of the relationship had been accepted in the refusal letter, following the evidence of the appellant and Ms Mercedes Rivera, it had become an issue. The judge questioned the credibility of the appellant and Ms Mercedes Rivera and sets out details of their evidence. The judge concluded by finding that the appellant was not in a genuine and subsisting relationship. In respect of his private life the judge found he did not meet the terms of the immigration rules and there was no basis for granting leave outside the rules.

The Upper Tribunal

6. The appellant was granted permission to appeal on the basis it was arguable that the judge erred in law in questioning the relationship between the appellant and his wife when the respondent had not taken the point. It was also contended the judge had not properly considered the evidence about the relationship. A further ground was that the judge failed to make findings on whether the appellant met the suitability requirements under the rules. It was also arguable that the judge engaged in speculation about the appellant supporting himself by selling drugs. It was arguable the judge did not adequately consider the appellant's health issues when carrying out the proportionality exercise.

7. Miss Childs relied upon the grounds for which permission had been granted. She submitted that the judge should not have questioned the relationship when this was undisputed by the respondent. She contended that in any event there was a wealth of photographs and other evidence before the judge as to the relationship and that the findings were perverse. Regarding suitability, the issue was whether his presence is conducive to the public good. He had one conviction and the focus by the judge was upon the nature of the offence. The appellant's account was that he believed the conviction was spent and that is why there was no disclosure. The judge had referred to the appellant supplying drugs whereas there was no conviction for this. She contended that the proportionality exercise was flawed. The appellant's wife was a Christian which would cause them significant problems in Pakistan.
8. In response, the presenting officer pointed out the judge was aware the respondent had not challenged the relationship but had indicated to the appellant's representative concerns and invited them to call additional witnesses if required. He submitted that the conclusion was one that was open to the judge. Regarding suitability, this was dealt with at paragraph 32 and 33 of the decision. He accepted that it was speculation that the appellant was dealing in drugs but this did not amount to a material error of law. He submitted that if the decision is taken as a whole, the outcome was sustainable.
9. The appellant's representative confirmed that the earlier asylum decision was before the judge. She submitted that it was unfair of the judge to speculate that the appellant was dealing in drugs and that this matter had not been put to the appellant. Regarding his private life, she submitted it was an error for the judge not to have considered this in the context of the appellant's health issues.

Consideration

10. I have been provided with the decision of Kalidas (agreed facts-best practice)[2012] UKUT 00327. The guidance is that judges should only look behind factual concessions in exceptional circumstances. If evidence develops in such a way that the correctness of the concession needs to be revisited the judge must draw that to the attention of the representatives and an adjournment may be necessary.
11. At paragraph 18 the judge records the appellant's evidence is being his wife supported him from her earnings as a nanny. She earned £2000 per month. The judge noted that they were living in Chelsea and the judge took judicial note of the fact this was an expensive part of London. There was no presenting officer in attendance and the judge asked the appellant why, if money was tight, they did not live somewhere cheaper. His explanation was

that the accommodation was close to her place of employment. The appellant said that he had a car and would drive his wife to and from her place of work.

12. His wife then gave evidence. It is not stated in the decision but the normal practice would be for her to remain outside whilst he gave evidence. The rationale behind this is that the witness cannot then adapt their evidence to what was said by the earlier witness. I would take it this practice has been followed. Notably, it was recorded that her evidence was she earned £26,000 per year. She said that their rent in Chelsea is £1750 per month. She also referred to another part-time job. She said that she would travel to work by bus which would take 20 min or on occasion walk, which would take 40 min.
13. Clearly, from the recorded of the appellant's evidence at paragraph 18 and his wife's evidence at paragraphs 19 to 22 there was inconsistency in the two accounts. The judge at paragraph 23 records that following Miss Childs was advised that whilst the genuineness of the marriage had not been raised in the refusal letter from the evidence before the judge it now had become an issue. The judge suggested she take such measures as she sought suitable, including recalling witnesses.
14. It is a basic principle that the parties are entitled to know the case they have to meet. The judge was entitled; in light of the way the evidence had developed, to question the respondent's acceptance that the marriage was genuine and subsisting. The judge quite properly drew this issue to the attention of the appellant's representative. In principle, if this is done and the party is not placed at a disadvantage there is no error of law. There was no application for an adjournment. Consequently, I conclude no material error of law has been established on the first ground.
15. It is submitted that the judge's conclusion that the relationship was not genuine was perverse. The judge refers to the disparity in their age: the appellant being 35 and his wife 61. The judge refers to their different nationalities with his wife being Filipino. At paragraph 30 the judge pointed out they were not saying somebody older cannot fall in love with somebody younger. However, the judge seeks to put matters in context by referring to the appellant's background; the various applications he had made to remain; and the inconsistency in the evidence. At paragraph 31 the judge refers to the photographs and documents provided. The judge found they were taken opportunistically in order to form the basis for an application to remain. The judge referred to the appellant having made five applications for leave to remain all of which had been refused. The judge concluded he was desperate to remain by any means. The conclusion was the relationship had been manufactured with this aim in mind and was based upon an economic transaction between the appellant and Ms Rivera so that he could attempt once again to remain. It was a matter for the judge to evaluate the evidence and to draw any inferences which were appropriate. I find no material error of law established.

16. The judge was considering the appellant's article 8 rights through the prism of the rules. Under appendix FM this included consideration of his suitability. The respondent had found his presence was not conducive to the public good. This can be evidenced by criminal convictions, character or other reasons. The decision referred to the appellant having been convicted on 4 July 2014 which he had not declared in his application. The judge's decision refers to a conviction connected with an illegal drug, cannabis. The judge did not have the benefit of documentary evidence about the conviction. The appellant's account of the judge dealing with the criminal charge telling him to plead guilty and he would receive a £15 fine and would not have a criminal record is unbelievable. It was recorded by First-tier Judge Chana that he continued to claim he was innocent and that the drug had been planted. The judge did not accept this as credible.
17. His explanation for not declaring this conviction was equally incredible. Paragraph 11 of the decision records he said he waited until his conviction was spent, notwithstanding his claim he was told he would not have a criminal record. He said he went to the post office and provided his fingerprints to check if he had a criminal record and none was found. Such services not provided by the post office.
18. Whether his presence was conducive to the public good is not confined to convictions but also includes his character. I note the decision of July 2009 on his asylum claim was before the judge. Paragraph 3.2 refers to him being arrested on 27 June 2009 by the police for possession of cannabis and for overstaying whereupon he claimed asylum.
19. The judge noted the claim was that the appellant had no income. However the judge found the claim relationship was an economic transaction in order to help the appellant stay in the country. Consequently, he would not be supported by his partner has claimed. The judge had regard to her income and outgoings. The judge at paragraph 35 concluded the appellant had his own income and said there may be a connection between his cannabis conviction and his ability to live in an expensive part of London. The judge refers to the appellant having an expensive lifestyle and that cannabis was found on him, albeit he said he did not smoke cannabis. If he was not going to smoke it then an alternative was he was going to sell it. The judge drew an inference from this. The judge does not make specific findings on suitability but it can be taken this was considered material. If the comments about how the appellant was maintaining his lifestyle amounted to speculation I do not find they affect the outcome of the appeal.
20. It was contended that the judge's assessment of the proportionality of the respondent's decision was flawed. The judge did not find the existence of family life. He had not been here for the length of time specified in the rules. The grounds for permission focus upon the appellant's mental health. There is

reference to him having post-traumatic stress relating to events in Pakistan, with a heightened risk of suicide if returned. The appeal decision in his asylum appeal was back in July 2009 and the judge there accepts his claim that his wife and children and other family members had been murdered. However, the judge found that he could reasonably relocate. There was little reference in First-tier Judge Chana's decision about the appellant's mental health beyond that recorded in paragraph 13. The skeleton argument before the judge makes limited reference to this at paragraphs 23 and 25. This will briefly referred to in the refusal letter with reference to treatment available in Pakistan. The impression is that his mental health was not the main thrust of the appeal. I bear in mind the high threshold to succeed in such a claim. Whilst it would have been preferable had the judge referred specifically to this issue I do not find its omission amounts to a material error.

21. The judge did not have the benefit of presenting officer. It is not apparent if the judge appreciated there was only a limited right of appeal (Now see Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC)). This is not made clear in the skeleton argument provided to the judge as it suggests the appeal is on all grounds. The judge was mistaken in this regard them given the outcome has made no material difference.
22. Although not mentioned in the application for leave I note the judge has not referred to the factors set out in section 117 B. Although it is preferable to refer to this provision the spirit of the provision can be inferred (see AM(S117B)Malawi [2015] UKUT 0260.) Given the judge's findings about his marriage family life was not established. Section 117 B provides that little weight should be afforded to a private life established when here unlawfully or when a person's situation was precarious. I note the appellant was able to give his evidence in English and appears to have integrated. However given the statutory provision on private life I do not find the judge's failure to refer specifically to it will have made a material difference. The judge does refer to the legitimate aim of immigration control and that the appellant can rebuild a private life in Pakistan.
23. My conclusion is that a material error of law has not been established.

Decision

A material error of law in the decision of First-tier Judge Chana has not been established. Consequently, that decision dismissing the appeal shall stand

F.J.Farrelly

Deputy Upper Tribunal Judge

9th April 2018