

Background

2. The appellant, a citizen of Pakistan born on 2 July 1979, arrived in the UK on 4 July 2011 with entry clearance as a visitor valid from 10 May 2011 to 10 November 2011. Thereafter the appellant overstayed.
3. The Judge notes an earlier determination of First-Tier Tribunal Judge Hollingworth promulgated on 24 July 2012 in which it was found the appellant could not satisfy the Immigration Rules and article 8 ECHR was not satisfied as a genuine relationship between the appellant and his alleged spouse did not exist, family life did not exist, and interference with the appellant's private life was necessary to uphold the efficacy of the Immigration Rules and that it was proportionate to remove the appellant from the United Kingdom. The Judge further noted a second determination promulgated on 5 August 2015 by First-Tier Tribunal Judge North in which that Judge found that neither the appellant nor his partner, Mrs [H], saw themselves as genuinely involved in a subsisting relationship warranting recognition by the UK authorities, that no dependent relationship existed in respect of the child of Mrs [H], that the appellant could not satisfy the requirements for a grant of leave as a parent or partner as he could not meet the requirements of EX.1, that the appellant did not meet the requirements for a grant of leave to remain on the basis of his private life in the United Kingdom, the appellant had not shown there will be any significant obstacles to his reintegration into Pakistani required to leave the UK, that the presence of the appellant was not necessary for Mrs [H] who could continue to rely on medical services offered by the NHS in the UK and disability support services provided by the local council as needed, that the appellant's private life establish since his arrival with a visit Visa was established in the full knowledge that he had a short-term Visa and no legitimate expectation of being able to remain in the United Kingdom.
4. The Judge considered the evidence with the required degree of anxious scrutiny before setting out findings of fact from [24] of the decision under challenge. The Judge notes at [25] that for the purposes of the appeal the appellant needed to show he has a genuine and subsisting relationship with Mrs [H]. The Judge noted the evidence of the appellant and Mrs [H] together with that of supportive witnesses.
5. At [28] the Judge finds that the evidence given by Mrs [H] is that the appellant 'stays over' with her 3 nights a week and no more. The Judge states that staying 3 nights does not mean the appellant and Mrs [H] are living together and that Mrs [H]'s evidence suggests that the appellant has a home elsewhere, thus the appellant and Mrs [H] are not living together and are not cohabiting. At [29] the Judge writes:
 - "29. Mrs [H] suggests that she and the appellant are not allowed to live together. There is no relevant legislation that stops a married couple living together. If a benefit claimant is living with a partner as a couple, the claimant must claim benefits as a couple. If the appellant were to be cohabiting with Mrs [H] a new claim for benefits would be needed. Then the benefits office of the Department for Work and Pensions take

both incomes and savings into account when working out a benefit entitlement. It might be inferred that Mrs [H] has satisfied the Department for Work and Pensions that she and the appellant are not living as a couple. The evidence that Mrs [H] is not living with the appellant, establishes that neither Mrs [H] nor the appellant see themselves as genuinely involved in a subsisting relationship, warranting recognition by the Department for Work and Pensions. Whilst the decisions of Judge Hollingworth and Judge North are not binding on me, I am not hearing an appeal against them. As an assessment of the matters that would be before those judges in the previous determinations I regard those determinations as unquestioned.”

6. At [31] the Judge sets out a number of important findings in relation to the question initially posed in the following terms:

“31. I give little weight to the claims of the appellant and Mrs [H] that they are in a genuine relationship. I give no weight to the statement of Mr Raymond Bushell. He was not present, and his statement was unsigned. The appellant and Mrs [H] have not provided reliable evidence of cohabiting. Mr Butts evidence is of visiting the appellant and Mrs [H] at their home. This is inconsistent with Mrs [H] evidence. I find that the evidence generally does not establish that the appellant and Mrs [H] have a genuine and subsisting relationship. I regard the issue as settled and make findings in line with the determinations of Judge Hollingworth and Judge North. In case I am wrong, and there is a genuine marriage and subsisting relationship the consequence of enforcing the immigration decision would be to interfere with the family and private lives established in the UK in the way it is enjoyed at present. I shall therefore consider Article 8.”

7. Having considered competing arguments, including statutory provisions set out in section 117 Nationality, Immigration and Asylum Act 2002, when considering the proportionality of the respondent’s decision the Judge writes at [40– 44]:

“40. In an appeal such as this, it is necessary for the appellant to show a compelling reason why his personal circumstances are sufficient to allow departure from the Rules. The question for me, therefore, is whether the applicant’s circumstances, based on the findings I have made, demonstrated sufficiently compelling circumstances.

41. I cannot find such compelling circumstances established. Whilst there are very significant obstacles to the appellant continuing his disputed family life with Mrs [H] overseas because of Mrs [H] medical conditions and reliance on alcohol, to separate the appellant from Mrs [H] would not be disproportionate. The support the appellant claims he provides to Mrs [H] is unnecessary. He is not a qualified carer. Mrs [H] can and does access NHS healthcare. Persons with a disability or a complex medical condition can qualify for NHS funding. Mrs [H] may also be eligible for funded care and support from her local authority social services department. Whether a person is eligible for funded care and support, the local authority social services department must carry out an assessment to establish needs and the level and type of

care and support required to meet these needs. The services can include homecare - help to enable a person stay in his own home - help with cleaning, shopping, disability equipment, home adaptations, meals, carers, transport, home modifications and equipment that helps with daily living tasks. Mrs [H] evidence is that she has received the Daily Living and Mobility components of Personal Independent Payment. PIP is a passport to other benefits.

42. I find there are good reasons why the appellant should leave the UK. It is reasonable and proportionate to expect the appellant to do so. This will maintain the effectiveness of immigration control, by showing they are robust.
 43. The appellant and Mrs [H] cannot be surprised by the decision given the appeal history. They have known throughout that the appellant's status is precarious.
 44. If the appellant wishes, he can apply for entry clearance through the usual channels and meanwhile live apart."
8. The appellant sought permission to appeal asserting the Judge failed to have regard to any of the relevant case law confirming that in "marriage subsisting" cases, the parties only need to show that they intend to live together permanently. The appellant asserts the Judge's finding the marriage was not subsisting is inadequately reasoned due to the fact there is no legal requirement for parties to be living together according to the immigration rules, that both parties to the marriage attended the appeal hearing and expressed a clear view they wanted to live together in the United Kingdom as a married couple, and that the Judge failed to take of account of concerns raised by Mrs [H] that as her husband has no right to be in the UK he was not allowed to reside with her at her home. The grounds refer to amendments brought in by section 24 Immigration Act 2014 which is said to support the explanation by Mrs [H] that the appellant was not legally allowed to reside in her council house. It is asserted the Judge fails to explain what is meant by "reliable evidence" and that the Judge made inconsistent findings such that the appeal should be allowed.
 9. Permission to appeal was granted by another judge of the First-Tier Tribunal, the operative part of the grant been in the following terms:
 - "3. It is arguable that the Judge in finding that the couple's relationship was not subsisting because they only lived together 3 days in the week failed to consider whether they undertook the activities he lists in paragraph 28 on those 3 days. Further the Judge gives inadequate reasons for rejecting the evidence given by the wife for this. It is argued that the Judge failed to remind himself of the decided authorities on this issue. An arguable error of law has been made in the assessment of the evidence."
 10. In his Rule 24 reply dated 4 September 2018 the Secretary of State writes:
 - "2. The respondent opposes the appellant's appeal which amounts to little more than disagreement with the sound and adequately reasoned decision.

3. While it is correct to say that a couple who only lived together for 3 days a week could nonetheless be found to be in a subsisting relationship, this was not the main reason that the Judge found that the relationship was not genuine. It was significant that this was the 3rd occasion that the appellant had come before the Tribunal seeking to prove his case.
4. The Judge properly sets out the Devaseelan principles and was entitled to conclude that there was very little evidence to take the issue of the subsistence of the relationship beyond the conclusions reached by Judge Hollingworth in 2012 or Judge North in 2015.
5. As regards the appellant's contention that he was unable to live full-time with his wife because the local authority had refused permission for this, it is not apparent from the documents seen by the drafter of this response that any evidence of such a refusal was provided to the Judge. Nor is it clear that any provision found within Part 3 Chapter 1 of the Immigration Act 2014 would bar the appellant from moving in with the sponsor, given that she is the tenant and has her own entitlement to rent a local authority property.
6. Paragraph 5 of the grounds asserts that it is not possible for the appellant to provide documentary evidence of his place of residence because "... Bills and the like cannot be issued to a person who has no lawful status to reside in the UK..." No evidence is provided to support this assertion, which the respondent disputes
7. While it is agreed that there is now, since the coming into force S.40 of the 2004 Act, a barrier to the opening of a bank account by someone without legal status in the UK, there is no such bar to being named on accounts for utilities and other services. The appellant has no good explanation for his inability to provide any significant evidence of cohabitation with his spouse, despite the claim the relationship dating back some 7 years.
8. In complaining of inconsistency, paragraph 6 - 7 of the grounds appear to overlook the fact that, from "*in case I am wrong...*" in his paragraph 31, the Judge is dealing with the alternative situation if the relationship was to be found to be genuine. His primary conclusion remains that it is not subsisting.
9. For the avoidance of doubt, the respondent accepts that the Judge was entitled to find at paragraph 33 that there will be insurmountable obstacles to the sponsor going to live in Pakistan, given all of the circumstances. It is also agreed that the appeal would therefore succeed within the rules, with reference to EX.1(b), should the relationship be found to be subsisting and there was no need for the Judge to go on to consider proportionality outside the rules from paragraph 34 onwards."

Error of law

11. It is not disputed that the appellant and Mrs [H] undertook a ceremony of marriage in 2011 but the Judge correctly directs himself with reference to the need

for the appellant to show he has a genuine and subsisting relationship with Mrs [H].

12. The application for permission to appeal and grant of permission asserts the Judge failed to have regard to relevant case law. Those cases include: GA (Ghana) [2006] UKAIT 00046* in which the Tribunal said that the requirement in paragraph 281 that the marriage be subsisting is not limited to considering whether there has been a valid marriage which formally continues. The word requires an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprises a marriage that can properly be described as subsisting.
13. In Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041(IAC) the Tribunal held that (i) GA (“Subsisting” marriage) Ghana * [2006] UKAIT 00046 means that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted; (ii) Evidence of telephone cards is capable of being corroborative of the contention of the parties that they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question. It is not a requirement that the parties also write or text each other; (iii) Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant.
14. In Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 00040(IAC) the Tribunal held that (i) It is for a claimant to establish that the requirements of the Immigration Rules are met or that an immigration decision would be an interference with established family life. In both cases, the relevant standard for establishing the facts is the balance of probabilities.(ii) Post decision visits by a sponsor to his spouse are admissible in evidence in appeals to show that the marriage is subsisting: DR (ECO: post-decision evidence) Morocco * [2005] UKIAT 00038 applied.
15. The appellant’s submission that the parties only need to show that they intend to live together permanently can only be reference to the need for the appellant to establish on the evidence that the matrimonial relationship has continued.
16. There is no dispute that the Judge was entitled to apply the Devaseelan principles in light of the two earlier decisions. The Judge summarises the findings of Judge Hollingworth in the following terms at [8] of the decision under challenge:

“8. In a determination promulgated on 24 February 2012 Judge Hollingworth found as follows:

1. That the Immigration Rules are not satisfied because:
 - a. The appellant only had leave for six-month visit and there was no leave to come for marriage or settlement.
 - b. The appellant produced no valid English language test certificate.
 - c. There was little evidence of a relationship between the appellant and Mrs [H].
2. Article 8 was not satisfied because:

- a. A genuine relationship did not exist
 - b. family life did not exist
 - c. interference with the appellant's private life was necessary to uphold the efficacy of the Rules in reflecting the policy approach of the respondent in assessing the economic well-being of the United Kingdom against the immigration pursuant to the Rules.
3. That it would be proportionate for the appellant to be removed when weighing in the balance's private life against the objectives of the respondent.
 4. That there was no evidence of racial discrimination practised against the appellant by the making of the decision.
 5. That there was no basis for claiming the gift of a kitten ought to have resulted in the exercise of discretion differently.
17. In relation to the decision of First-Tier Tribunal Judge North the Judge writes at [9]:

"9. In a determination promulgated on 5 August 2015 the findings of Judge North included the following:

1. That the appellant and Mrs [H] decision not to advise relevant authorities that they were cohabiting demonstrated that neither of them saw themselves as genuinely involved in a subsisting relationship warranting recognition by UK authorities.
2. No dependent relationship existed in respect of the child of Mrs [H].
3. The appellant failed to meet the eligibility criteria and the Appendix FM as a partner or parent and he does not meet the requirements of EX.1.
4. The appellant did not meet the requirements for a grant of limited leave to remain based on his private life within the United Kingdom. The appellant had not shown there would be any significant obstacles to his reintegration into Pakistan if required to leave the UK. He had lived in Pakistan for 31 years prior to coming to the United Kingdom, a substantial proportion of his life. He had not demonstrated that he could not return to Pakistan or that he would be incapable of living an independent life there.
5. The appellant's attendance on Mrs [H] was not necessary. Mrs [H] could continue to rely on medical services offered by the NHS in the United Kingdom and disability support services provided by her local council as needed.
6. The appellants private life established since his arrival with a visit Visa was established in the full knowledge that he had a short-term Visa and no legitimate expectation of being able to remain in the United Kingdom.

18. The submission that the Judge erred in seeking evidence of bills to prove the appellant is in a subsisting relationship, as there is nothing in the Rules that says an individual needs to provide such evidence, does not accurately record or reflect the findings of the Judge. The Judge does not say that only because the appellant has not provided specific evidence he has not made out to the required standard that he is in a subsisting relationship. A reading of the determination clearly shows that the Judge considered all aspects of the evidence which included a lack of evidence to support the claim that the parties were cohabiting. The statement at [31] that the appellant and Mrs [H] had not provided reliable evidence of cohabiting does not refer solely to the absence of documentary evidence in the appellant's name but also their own written and oral evidence given in support of this contention. The interpretation of reliable evidence applied by the Judge is a reference to evidence which is 'consistently good in quality or performance; able to be trusted'.
19. The Judge clearly considered the evidence with the required degree of anxious scrutiny including the witness statements in which the appellant and Mrs [H] assert that they do wish to live together as man and wife and that they are in a subsisting relationship. It is accepted that it would have been arguable legal error for the Judge to say that just because the appellant and Mrs [H] only stayed together 3 nights of the week that they were not in a subsisting relationship, without more, as there is no requirement for parties to a marriage to spend a minimum period of time together. There are many reasons why couples may be apart for all or part of the week. Those serving in her Majesty's Armed Forces may be absent from the United Kingdom as may long-distance lorry drivers who work away for most of the week only returning home to spend weekends with their spouses. In such cases a period of absence does not show that any marital relationship that exists is not subsisting, per se.
20. The facts of this case are however different as recognised by the Judge. The appellant claims to have married Mrs [H] in 2011 yet it is not disputed that the parties do not live together as man and wife with there being little evidence to explain why this should be so. Indeed, as the Judge noted at [28], the evidence of Mrs [H] was that the appellant has an alternative home elsewhere.
21. The submission by Mr Hussain made in the application for permission to appeal and orally before the Upper Tribunal that the effect of section 24 Immigration Act 2014 prevents the appellant living with Mrs [H], as a person without immigration status is unable to rent property, has not been shown to have arguable merit. Issues that arise include the fact that the relevant section of the 2014 Act did not come into force until autumn of 2014 whereas the current arrangement appears to have been in place since 2011 for which the later statutory provision provides no satisfactory explanation. It is also the case that it was not made out that the changes brought in by the Immigration Act 2014, even if they prevent a landlord granting a tenancy to a person without immigration status, prevent a person occupying a property with a person lawfully renting the same as they have the required status. In this case Mrs [H] is the tenant of her local authority. There was no evidence before the Judge or the Upper Tribunal that the statutory provision

- prevents the appellant living with Mrs [H] in her property or that the local authority landlord included a specific provision in her lease preventing the same.
22. Although Mr Hussain tried submitted the Judge could and should have departed from the earlier decisions no arguable legal error arises in the Judge considering those decisions as his starting point. They are both unchallenged decisions in relation to which there was no evidence the appellant had successfully appealed either judgement. The Judge was entitled to place weight upon the previous findings and in particular to note that the facts presented to the First-Tier Tribunal on this 3rd occasion were not materially different from those put before both Judge Hollingworth and Judge North. The finding of the Judge that essentially the evidence before him is the same in that in the earlier determinations, the only change being that some time had elapsed, and the attendance of the appellant before the Judge (who was not in attendance before Judge Hollingworth) has not been shown to be affected by arguable legal error. This is a relevant point for as submitted by Mr Mills, the appellant was aware that two judges of the First-tier Tribunal have both found in earlier appeals that the appellant had failed to establish that he and Mrs [H] are involved in a subsisting relationship and the reasons why, yet he fails to adduce sufficient evidence to deal with the concerns of the earlier courts.
23. The Judge clearly considered the documentary and oral evidence given. The Judge did not accept that either the appellant, Mrs [H], or Mr Butts provided reliable evidence sufficient to discharge the burden of proof upon the appellant. The only material that appears to have been before the Judge was the assertion by the appellant and Mrs [H] that they are in a subsisting relationship and that they wish to live together as man and wife.
24. That gives rise to the question considered before the Upper Tribunal and by the Judge, which is that if they genuinely wish to live as man and wife why did they not do so? The Judge addresses this matter at [29] of the decision under challenge which is set out above. The claim by Mrs [H] that she and the appellant are not allowed to live together has been shown to have no arguable merit as recognised by the Judge. There is arguable merit in the conclusion by the Judge that it might be inferred that Mrs [H] satisfied the Department of Work and Pensions that she and the appellant are not living as a couple as otherwise this would have a material effect upon the benefits Mrs [H] receives. It cannot be right that the appellant and Mrs [H] maintain a case before the Benefits Agency that neither are living together or cohabiting to enable Mrs [H] to preserve her benefits on the one hand, yet to claim they are cohabiting and in a subsisting relationship on the other. It is arguable that such an approach is tainted by a fraud upon the Department of Work and Pensions, Mrs [H] no doubt having stated to the benefits authorities that she is a single person who is not cohabiting.
25. Although the Judge considered the matter in the alternative from [31] it was acknowledged by Mr Mills that if the appellant had established a genuine relationship he would have been able to succeed pursuant to paragraph EX.1 of Appendix FM and there is therefore no need to consider that aspect of the decision further.

- 26. On the evidence before the Judge, which the Judge has taken great care to adequately reason in the decision under challenge, it is not made out there is an arguable error of law material to the decision to dismiss the appeal.
- 27. Mrs [H] is clearly a vulnerable individual with a number of needs of her own but, as noted by the Judge at [41], she is entitled to a range of assistance within the United Kingdom to help with her ongoing needs. As such, her personal circumstances do not establish compelling aspects sufficient to enable the appellant to succeed with his appeal on any other basis.
- 28. The conclusion of the Judge that the appellant had not established that he and Mrs [H] are in a genuine and subsisting relationship is a finding within the range of those reasonably open to the Judge on the evidence. Insufficient reasons have been established to warrant the Upper Tribunal interfering in this decision.

Decision

- 29. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

- 30. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Hanson

Dated the 12 September 2018