



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

Appeal Number: HU/01149/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 11th June 2019**

**Decision & Reasons Promulgated
On 26 June 2019**

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

Between

**MR JASIM UDDIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N K Mustafa, instructed by Kalam Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 30th December 2015 to refuse his application for leave to remain in the UK on human rights grounds as the spouse of Farzana Amin. First-tier Tribunal Judge Callow dismissed the appeal in a decision promulgated on 29th January 2019 and the Appellant appeals against that decision with permission granted by First-tier Tribunal Judge Grimmett on 2nd May 2019.

2. The background to this appeal is that the Appellant entered the UK on 7 October 2009 with leave as a Tier 4 Student. He was last granted leave as a Tier 4 Student until 16 August 2015. On 7 September 2015 he applied for leave to remain on the basis of his private and family life. The Secretary of State refused the application on the basis that the Appellant did not meet the suitability requirements of paragraph S-LTR 1.6 of Appendix FM of the Immigration Rules. This was because the Secretary of State considered that his presence in the UK is not conducive to the public good as he had fraudulently obtained a TOEIC certificate from Educational Testing Service (ETS) by the use of a proxy test taker. The application was further refused under Ex1 of Appendix FM as the Secretary of State did not accept that the Appellant's relationship with his spouse was genuine and subsisting. As a result of the decision under the suitability requirements the Secretary of State did not accept that the Appellant met the requirements of paragraph 276ADE of the Immigration Rules. The Secretary of State decided that there would not be very significant obstacles to the Appellant's integration in Bangladesh and refused the application under paragraph 276ADE (1)(vi) of the Rules. The Secretary of State did not accept that there were any exceptional circumstances such as to justify a grant of leave to remain under Article 8 outside the Immigration Rules.
3. The Appellant's appeal was initially determined by First-tier Tribunal Judge Zahed in a decision promulgated on 24th July 2017 dismissing the Appellant's appeal. That decision was appealed to the Upper Tribunal. In a decision promulgated on 3rd May 2018, Deputy Upper Tribunal Judge Saini preserved the First-tier Tribunal Judge's finding in relation to paragraph S-LTR 1.6 of Appendix FM that the Appellant had taken the TOEIC test himself and that he did not arrange a proxy to take his test and that he did not act dishonestly. However Judge Saini set aside Judge Zahed's decision that the Appellant's removal would not breach his right to private and family life on the basis that the findings were inadequate and unreasoned. This issue was remitted to the First-tier Tribunal to be made afresh.
4. First-tier Tribunal Judge Callow heard the appeal and found that the Appellant had not established that the relationship between him and his wife was genuine and subsisting and found that Ex1 of Appendix FM did not apply. He dismissed the appeal.

Discussion and conclusions

5. The Grounds of Appeal take issue with a number of aspects of the First-tier Tribunal Judge Callow's decision.
6. The first ground contends that the First-tier Tribunal Judge erred because the previous determination of Judge Zahed had been preserved from paragraphs 1 to 17 and that Judge Callow was bound by the unchallenged findings in paragraphs 16 and 17 of the decision. It is contended that the First-tier Tribunal Judge was bound to take these as a starting point but had failed to do so.

7. First-tier Tribunal Judge Zahed said the following at paragraphs 16 and 17 of his decision:

“16. The Appellant appeals that it would be a breach under human rights for the Appellant to be refused further leave to remain because he is married to his wife who is settled in the United Kingdom.

17. The Appellant’s spouse Mrs Farzana Amin stated that she first met the Appellant in Bangladesh, as he was her brother’s friend and that he would come around to their house. She had lived 18 years in Bangladesh before coming to the UK in 2006. She met the Appellant in the UK at a wedding in September 2014 and started a relationship. Her civil marriage was registered on 11 June 2015. Her parents, brother and sister lived in Bangladesh.”

8. In his decision Upper Tribunal Judge Saini concluded that, as no party had challenged paragraphs 1 to 17, of the decision those would remain intact [7]. However he set aside paragraphs 18 to 20 of the decision as they were infected by legal error. At paragraph 8 Judge Saini said:

“The consequence of my findings is that the First-tier Tribunal’s decision regarding suitability, concerning paragraph S-LTR.1.6, remain intact, but the remainder of the decision in respect of the issues concerning the genuineness of the Appellant and his spouse’s relationship, insurmountable obstacles and exceptional circumstances (the jurisprudential vernacular for a proportionality assessment in light of *Agyarko*) are hereby set aside and these issues will require re-making by the First-tier Tribunal *de novo* upon remittal.”

9. At paragraph 4 Judge Callow set out paragraphs 16 and 17 of Judge Zahed’s decision. It is clear therefore that he was aware of the observations there. In our view paragraph 16 of Judge Zahed’s decision simply sets out the assertion of the basis of the Appellant’s appeal. Paragraph 17 sets out the claimed factual basis of the Appellant’s wife’s background. In our view it is clear that Judge Zahed made no findings in those paragraphs. Further, the decision was remitted from the Upper Tribunal to be remade on a number of issues *de novo* including the genuineness of the Appellant’s relationship with his wife. There is nothing in paragraphs 16 and 17 which go to that issue. Accordingly the judge was not bound by paragraphs 16 and 17 or required to take those as a starting point as there was nothing of substance in those paragraphs. In our view ground 1 has not been made out.
10. It is contended in ground 2 that Judge Callow was required as a matter of law to take the positive credibility findings made by Judge Zahed at paragraph 15 as a starting point when determining the Appellant’s credibility. Reliance is placed on **Devaseelan (second appeals - ECHR - extraterritorial effect) Sri Lanka [2002] UKIAT 00702**. At the hearing Mr Mustafa highlighted the final sentence of paragraph 15 of Judge Zahed’s decision and said that the positive credibility finding there should have been a starting point in assessing the credibility of the Appellant and his wife. At paragraph 15 First-tier Tribunal Judge Zahed

found that the Appellant took the TOEIC test himself and he did not arrange a proxy to take the test and went on to say *"I find that the Appellant did not act dishonestly and has at all times acted lawfully in connection with his immigration matters"*. Judge Zahed went on to consider the marriage and related matters from paragraph 16 on. In our view it is clear that Judge Zahed made those positive credibility findings in relation to the separate matter of the Appellant's English language test. Those findings were made in June 2017 and were not part of a wider assessment of the credibility of the Appellant's claim in relation to his marriage. Judge Zahed's conclusions in the assessment of Article 8 were set aside by Judge Saini on the basis that they were inadequate and unreasoned. Accordingly, in our view ground 2 has not been made out.

11. It is contended in the third ground that Judge Callow erred in his assessment of credibility. It is contended that the judge failed to give adequate reasons for his finding of credibility. It is also contended that he failed to have regard to a number of material factors such as the attendance of the Appellant's wife at the hearings; the fact that she gave evidence; evidence of cohabitation for a number of years; the fact that the parties were permitted to marry and no issues were raised by the registrar; and the documentary evidence in the Appellant's bundle. It is contended that Judge Callow wrongly applied principles of **Tanveer Ahmed [2002] UKIAT 00439** which applies in the context of documents emanating from abroad in asylum appeals. It is further contended that the judge took into account irrelevant factors, for example at paragraph 20 he said that there was no evidence of joint financial responsibility or contribution and it is contended this ignores the fact that the Appellant has no permission to work and therefore cannot contribute and shows the lack of anxious scrutiny.
12. In his submissions at the hearing Mr Mustafa pointed to a number of factors in paragraph 20 of Judge Callow's decision. He contended that the conclusions in relation to credibility were not open to the judge. He highlighted the evidence of the Appellant recorded at paragraph 8 of the decision where he said that he had met his wife at a wedding and that in re-examination he clarified that he had met her a long time ago as her brother was one of his classmates. He compared this with paragraph 10 where in her evidence the Appellant's wife said that she had known the Appellant in Bangladesh as a friend of her brother and they met up in the UK at a wedding. In his submission there was therefore no inconsistency as to how and where the Appellant and his wife first met. He pointed out that at paragraph 20 the judge also highlighted inconsistencies in relation to the evidence of the Appellant and his wife as to their qualifications. However in his submission there was no significant inconsistency in that at paragraph 8 it is recorded that the Appellant said that he thought that she had not finished a degree course and at paragraph 10 it is recorded that the Appellant's wife said that she had completed a higher national diploma in business in 2016. In his submission this factor was not sufficient to find that the Appellant and his wife were not aware of each other's qualifications.

13. When put to him that there was an inconsistency between the evidence of the Appellant and his wife as to whether the marriage had been arranged, Mr Mustafa accepted that there was a conflict between paragraph 8, where it was recorded that the Appellant said that the marriage had been arranged, and paragraph 10, where it is recorded that his wife said that it was not an arranged marriage. However, in his submission this was a point upon which clarification was not sought at the hearing and the Respondent did not rely on that point in submissions. He submitted that there were no other major inconsistencies and the evidence is broadly consistent. In his submission the judge gave no adequate reasons for finding that the Appellant and his wife were not credible, in his submission that the reasons given were not rational. When put to him that it is clear from paragraph 8 the judge took into account how the evidence was given by the Appellant he accepted that the judge could take that into account but he submitted that the Appellant did put forward his account through clarification and re-examination when he corrected the position.
14. In our view this ground has not been made out. In considering credibility the judge set out the oral evidence given by the Appellant at paragraph 8 and by his wife at paragraph 10. The judge noted that the Appellant's representative at the hearing acknowledged that there were inconsistencies as highlighted by the Presenting Officer at the hearing. The judge analysed the evidence at paragraphs 18 to 20. The judge highlighted that they had submitted very brief poorly prepared written statements [18]. The judge noted that in his witness statement the Appellant did no more than state his position and failed to give any evidence as to the genuineness of the relationship [18]. The judge took into account the manner in which the Appellant gave evidence noting that it was inexplicable that the Appellant was unable to answer simple questions about the claimed background of his relationship with his wife, where and when they met and for which he apologised without an explanation under re-examination [19]. The judge considered that the Appellant's wife too was vague in respect of in this part of her evidence.
15. In our view the judge was entitled to take into account the way in which the Appellant gave evidence as noted at paragraph 8 including the fact that the judge considered that the Appellant had to have questions repeated and that he gave some information in re-examination and he apologised when asked why he had been asked so many times to explain when he met his wife. The judge also took into account at paragraph 19 that the Appellant and his wife relied on a tenancy agreement valid for twelve weeks with effect from 1st June 2015. The judge also took into account the further documentary evidence including evidence of a bank account and bank statements which were sent to the address at which it was claimed that the couple were living together but noted that there were only four transactions over a period in excess of three years. The judge took into account that there was no explanation as to how the parties claimed to live together at a property where the lease expired over three years ago [19].

16. The judge considered the oral evidence of the parties at paragraph 20 finding that they were unable to provide accurate personal details about each other in material aspects and that they “did not have a shared understanding of the core details of their relationship” including how, where and when they met prior to marrying and they were unaware of one another’s qualifications.
17. Mr Mustafa pointed to what he submitted were broadly consistent accounts in oral evidence. That submission fails to take account of the manner in which the Appellant gave oral evidence, a factor which the judge was entitled to take into account. It also fails to take into account the fact that a significant core detail of the relationship is whether or not the marriage was arranged and there was a fundamental discrepancy between the Appellant in regard to that matter. This is a matter which is clearly before the judge and could clearly be encompassed by a finding that they did not have a “shared understanding of the core details of the relationship”. We reject Mr Mustafa’s submission that this was not a matter put before the judge.
18. We also reject his submission that the judge could not rely on the evidence as to the qualifications. At paragraph 8 the Appellant said that he did not know what qualifications his wife had but thought that she had not finished her degree course. In her oral evidence, as recorded at paragraph 10, the Appellant’s wife said that she was unaware of the Appellant’s qualifications but that she had completed her higher national diploma in business in 2016. This is the basis for the judge’s findings that the parties were unaware of one another’s qualifications.
19. It is contended in the grounds that it was not open to the judge to find that there was a lack of shared financial or other domestic responsibilities. However the judge highlighted that there was no evidence of appropriate contribution to the responsibilities of a marriage, for example a lack of shared financial or other domestic responsibilities, and highlighted that there was a lack of evidence from family or friends testifying to the parties living together in a genuine relationship. In our view it was open to the judge to highlight gaps in the evidence and evidence which could have been produced to support the Appellant’s claim that he and his wife were in a genuine relationship.
20. There is no basis for the submission in the grounds that the judge should have taken into account the fact that the parties were permitted to marry and no issues were raised by the registrar. This was not an issue put to the judge. In any event it cannot be the case that the fact that a couple are permitted to marry is in any way determinative or relevant to the issue of the genuineness of the marriage.
21. It is further contended that the judge wrongly applied the principles in **Tanveer Ahmed [2002] UKIAT 00439**. However the judge referred to that decision in general terms at paragraph 17. It is clear reading paragraphs 18 to 20 that the judge took into account all of the oral and

documentary evidence giving appropriate weight to that evidence and reaching a decision as to the evidence as a whole. In our view the judge's decision at paragraph 20 that he attached little weight to the limited number of documents separately addressed to the parties was open to him in the context of all of the evidence.

22. Mr Mustafa submitted that the judge failed to take account of the fact that the Appellant had no immigration status and therefore could not have made a financial contribution. However the judge's finding at paragraph 20 is broader than that and relates to an absence of evidence in relation to contribution to the responsibilities of a marriage and does not simply highlight a lack of financial documentation in relation to the Appellant.
23. It is contended in the fourth ground that the judge made an error in his application of paragraph EX.1 of Appendix FM. Mr Mustafa accepted that this ground only comes into play if we accept that the judge made a material error in relation to the assessment of credibility. As set out above we do not accept that the judge made any errors in the assessment of credibility. However we do note that the judge stated at paragraphs 14 and 21 that EX.1(b) did not apply in this appeal as the Appellant's wife is not a British citizen but simply holds ILR [14]. The judge appeared to understand that EX.1(b) did not apply to the Appellant as his wife has indefinite leave to remain in the UK. However the judge did quote from EX.1(b) which applies where there is a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK. It appears that the judge had an erroneous misunderstanding of EX.1(b). However that is not material in this case as we have found that the judge made no error in the assessment of the genuineness of the relationship. If there is no genuine relationship then the Appellant is not a partner within Appendix FM and EX.1(b) does not apply.
24. In any event it was accepted by Mr Mustafa there was no evidence in the papers that the Appellant's wife does have indefinite leave to remain. However he submitted that it is implicit in the reasons for refusal letter that the Respondent must have been satisfied that the Appellant's partner was settled as, if it had not been accepted, the Respondent would not have gone on to consider the application under Appendix FM. We do not accept that submission because the Respondent refused the application because the Appellant had not, in the Respondent's view, met the suitability requirements of Appendix FM because he had fraudulently obtained a TOEIC certificate. Further, the Respondent did not accept that there was a genuine and subsisting marriage. The Respondent did not therefore consider the substance of EX.1.
25. In any event, in this case, there was no evidence of indefinite leave to remain before the Secretary of State as it is indicated in the application for leave to remain that the Appellant's wife's passport was not available because it had expired (B41 Respondent's bundle). There is a copy of what appears to be extracts from the Appellant's wife's passport at C1 to C5, but nowhere there is there evidence of indefinite leave to remain. In

these circumstances the judge made no material error in the apparent misunderstanding as to Ex1 of Appendix FM.

26. Mr Mustafa did not pursue ground 5 in his oral submissions. There it is contended that the judge did not consider the historic injustice resulting from the incorrect ETS allegation raised by the Respondent. Reliance is placed on the cases of **Khan and Others v Secretary of State for the Home Department [2018] EWCA Civ 1684** and **Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009**. However in this case no reliance was placed upon any arguments under private life [22]. It is unclear where, in the context of a relationship, any historic injustice would arise from the ETS allegation. In any event it is unclear what disadvantage the Appellant would have suffered in the circumstances of this case where it has been found that he was not in a genuine relationship with his claimed wife.
27. We conclude that none of the grounds have been made out. In these circumstances we dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law. The decision of the First-tier Tribunal will stand.

No anonymity direction is made.

Signed

Date: 24th June 2019

A Grimes

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT **FEE AWARD**

The appeal has been dismissed therefore there can be no fee award.

Signed

Date: 24th June 2019

A Grimes

Deputy Upper Tribunal Judge Grimes