



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

Appeal Numbers: UI-2023-000707
[HU/53837/2022]

THE IMMIGRATION ACTS

**Heard at Field House
On 31 May 2023**

**Decision & Reasons
Promulgated
On 17 August 2023**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**HARVINDER PAL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Waheed, Counsel instructed by Connaught Law Limited

For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India, born in 1971. There is some dispute as to his immigration history but the essential facts are that he arrived in the UK in May 2002 with leave to enter as a visitor. The respondent asserts (but the appellant denies) that he next arrived in 2005 with entry clearance as a visitor and on 15 March 2005 was refused leave to enter on arrival and removed to India on the same date. On 25 February 2009 it is

said by the respondent that he was encountered by police and granted temporary admission. The appellant's case is that he has been in the UK continuously since 2002.

2. On 13 June 2022 he made a human rights application for leave to remain on the basis of family and private life. That application was refused in a decision dated 20 June 2022.
3. The appellant appealed that decision and his appeal came before First-tier Tribunal Judge Raymond ("the FtJ") at a hearing on 22 December 2022 following which his appeal was dismissed.
4. Permission to appeal was granted by a judge of the Upper Tribunal ("UT") on a limited basis only, in terms of ground 2 of the grounds of appeal (as so described by the UT Judge) namely that the FtJ made findings adverse to the appellant in relation to the genuineness of his relationship with his partner in the UK when this was hitherto a matter not disputed by the respondent.
5. In his submissions Mr Waheed argued that had the appellant had notice of the respondent's change of stance in terms of the genuineness of the relationship he would have provided evidence, or further evidence, of the relationship between them. I was referred to the decision of *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512 which considered a similar issue.
6. It was pointed out that the change of stance by the respondent arose during the course of the hearing and the appellant, therefore, had no notice of it. Mr Waheed referred to the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules") in terms of fairness.
7. I raised various questions with Mr Waheed, who appeared before the First-tier Tribunal (FtT") in relation to when the respondent's change of stance was signalled at the hearing and by whom, whether by the FtJ or the respondent's presenting officer ("PO"), whether there had been any objection by Mr Waheed on behalf of the appellant, whether there was any application for an adjournment to deal with the changed position, and what submissions were made on any question of fairness.

Assessment and conclusions

8. Mr Tufan accepted that there was merit in the appellant's contention of unfairness, as advanced in ground 2, in terms of the genuineness of the relationship between the appellant and his partner and that the FtJ's decision is marred by error of law for that reason.
9. At the hearing I informed the parties that I had decided to set aside the FtJ's decision for error of law on that basis. I set out below the further context for my decision.

10. After hearing from Mr Waheed and Mr Tufan it was still not clear in what circumstances the issue of the genuineness of the relationship arose. At [7] of the Ftj's decision he noted that the respondent's decision accepted the genuine and subsisting nature of the relationship. In subsequent paragraphs the Ftj raised various issues concerning its genuineness.
11. It is not clear from the Ftj's decision whether this was a matter that was raised at the outset of the hearing, during the course of submissions or by the Ftj himself. The respondent's 'rule 24' response to the grounds of appeal argues that appellant's representative was aware of the fact that the genuineness of the relationship was in issue at the hearing, referring to the PO's note of the hearing.
12. That PO's note, which was provided to me and Mr Waheed, indicates that the genuineness of the relationship was raised as an issue during the course of submissions before the Ftj, seemingly in the light of the oral evidence that was given at the hearing. The note also indicates that the Ftj said that the respondent was not restricted to the reasons for refusal letter and, quoting from the note, "since lot of the evidence before the court were not before the CWK [presumably caseworker] and none of the appellant's friends mentions Mrs Kauser as his wife".
13. Mr Waheed informed me that there was no time for his closing oral submissions to be before the Ftj and he made submissions in writing after the hearing. The PO's note refers to that fact. A copy of those closing submissions was provided to me. At [38] of those submissions it is pointed out that there was a concession as to the genuineness of the relationship in the respondent's decision letter. The same paragraph states that "[t]he evidence adduced on behalf of the Appellant would naturally not be expected [to] waste resources or judicial time to address a fact not in issue". It is also submitted there that at no time had the respondent sought to amend her reasons for refusal, in compliance with rule 24(2) and (3) of the Procedure Rules. There then follows submissions as to the genuineness of the relationship.
14. Mr Waheed's submitted that even if he had applied for an adjournment of the hearing to obtain further evidence of the genuineness of the relationship, such an application would not likely have been granted given that the Ftj had already refused an adjournment at the outset of the hearing in relation to a witness who had to leave the hearing in the afternoon, before he had given evidence, because his wife was ill. The PO objected to the adjournment and the Ftj refused the adjournment application. The PO's note refers to that application for an adjournment and the reasons for it, although the Ftj's decision does not refer to that adjournment application, and necessarily therefore, nor to his reasons for refusing it.
15. The circumstances in which the respondent's change of tack over the relationship came about remain rather unclear. Mr Waheed invited me to adjourn the hearing in order to obtain a transcript of the hearing before

the FtJ to clarify the matter. I did not accede to that application because it was not necessary to do so for me to decide the appeal.

16. Whilst it does seem clear from the written submissions made post-hearing to the FtT that the appellant's representative was aware that the FtJ would be considering the genuineness of the relationship in his decision, contrary to the position in the respondent's decision letter, it is evident that the appellant was not given notice in advance of the respondent's new position or, more pertinently perhaps given that the issue appears to have arisen during the course of the hearing, given the opportunity to adduce further evidence as to the relationship, as alluded to in the appellant's post-hearing submissions. The PO's note does not refer to any such opportunity having been afforded to the appellant, and neither does the FtJ's decision.
17. It is not necessary for me to consider whether the decision letter's acceptance of the genuineness of the relationship amounts to a formal concession, or for me to refer to the various authorities on withdrawal of concessions. The issue is plainly one of fairness of the proceedings. I consider that the fairness of the proceedings was materially compromised in the light of the matters to which I have referred above, and bearing in mind Mr Tufan's own very fair concession as to error of law.
18. In the light of that error of law, I set aside the FtJ's decision. Although permission to appeal was only granted on that ground, and not on ground 1 (long residence), I am satisfied that the FtJ's decision must be set aside in its entirety, which is what Mr Waheed invited me to do. Mr Tufan invited me to conclude that the findings made in terms of long residence should be preserved.
19. I agree with Mr Waheed that the FtJ's conclusions in relation to long residence are likely to have been influenced by his assessment of the evidence of the genuineness of the relationship. I only need to refer to [105], [113], and [114]-[116] to illustrate that the FtJ plainly considered that the appellant and his partner had deliberately attempted to mislead the tribunal in relation to their relationship and the appellant's claimed residence. He described it as a joint-enterprise to mislead the tribunal.
20. The further consequence it seems to me is that the appropriate course is for the appeal to be remitted to the FtT for a fresh hearing with no findings of fact preserved. I consider that to be very unfortunate given the very detailed findings of fact made by the FtJ resulting from the evident considerable industry in the preparation of his decision. It is, however, the inevitable consequence of the lack of fairness in the decision.
21. **Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-

tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Raymond.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek

26/07/2023