Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA336862014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 16th May 2016	**On 24th May 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MUDASSAR SAEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss G Patel, Counsel instructed on behalf of the Appellant
For the Respondent: Miss Johnstone, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, is a national of Pakistan born on 4th April 1980. No application was made on his behalf for any anonymity order. He appeals, with permission the decision of the First-tier Tribunal (Judge Shimmin) who

in a determination promulgated on 8th December 2014 dismissed his appeal against the decision of the Respondent to refuse to vary his leave to remain as the partner of a person present and settled in the UK, made under Appendix FM of the Immigration Rules and on Article 8 grounds. The refusal was dated 18th August 2014.

2. The Appellant's immigration history can be briefly stated. The Appellant made an application for a visit visa in or about 2007 which was refused by the Entry Clearance Officer but following a successful appeal was granted. The Appellant, it appears, did not travel on that visa.

3. The Appellant made an application for entry clearance as a student and on 20th February 2011 he entered the UK in that capacity. However, his college was delisted by the Home Office in 2011. The Appellant remained in the UK.

4. The Appellant met his Sponsor and partner, in July 2012 and it was asserted by them that they began cohabiting in or about October 2012.

5. On 25th February 2014 the Appellant applied for leave to remain on the basis of his family and private life in the UK. The application was considered under Appendix FM and paragraphs 276ADE(1) of the Immigration Rules.

6. The application was refused and in a reasons for refusal letter dated 18th August 2014, the Secretary of State set out the reasons for reaching that decision. In summary, it was considered that whilst he had claimed to be the partner of a person present in the UK, they were not married and they had not lived together until October 2012. The decision letter went on to consider GEN.1.2. and the definition of "partner" for the purposes of Appendix FM and concluded that the evidence that had been provided demonstrated that they had not lived together for at least two years prior to the date of the application and thus the Appellant did not meet the definition of "partner" under the Rules.

7. It is clear from the decision letter that there had been no issue raised as to the genuineness of the relationship. The decision letter did not consider EX.1. as the application had fallen for refusal under the eligibility requirements of the Immigration Rules. The decision also went on to consider the Appellant's private life since his entry on 20th February 2011 that reached the conclusion that he had not lived continuously in the UK for at least twenty years and therefore could not meet the requirements of Rule 276ADE(1)(iii) and that he could not show very significant obstacles to his integration to Pakistan if he were required to leave the UK for the reasons set out in the decision letter.

8. The decision letter also considered whether there were any circumstances outside the Rules and in this context also considered his relationship with a British citizen, and gave reasons as to why they could establish family life together out of the United Kingdom. In considering this, the Secretary

of State took into account Section 55 of the Borders, Citizenship and Immigration Act 2009 as his partner has children in the UK. The decision letter concluded that there were no exceptional circumstances in the Appellant's case to warrant a grant of leave outside the Rules and therefore refused his application.

9. The Appellant appealed that decision and the matter came before the First-tier Tribunal on 1st December 2014. In a determination promulgated on 8th December 2014, the First-tier Tribunal dismissed his appeal under Appendix FM. The judge reached the conclusion from the evidence that the parties had not lived together for a period of the two years prior to the date of the application and therefore could not meet the definition of "partner" in GEN.1.2. [paragraph 22].

10. As to the relationship, he reached the conclusion that the Sponsor and the Appellant were not living together [at paragraph 28] and at paragraphs [29] to [34] on the basis of a visit visa determination from 2007 found that the Appellant had a wife and two children in Pakistan and that undermined his claim that they were living together in a relationship akin to marriage. Thus he found they could not meet the Immigration Rules.

11. At paragraph [38] he made a finding that the Appellant had not established that he was in a relationship with the Sponsor and thus found no family life to consider Article 8.

12. The Appellant sought permission to appeal that decision on a number of grounds (see Grounds 1 to 16 dated 26th January 2015) and on 20th May 2015 Deputy Upper Tribunal Judge Chapman granted permission stating:-

> "The Grounds of Appeal raise arguable errors of law in the determination of the First-tier Tribunal Judge. There was substantial evidence before the judge of the prima facie existence of a relationship akin to marriage including an Islamic marriage certificate dated 12th October 2014 and a letter from the doctor dated 8th October 2014, which confirms that the Sponsor is living with the Appellant, which casts doubt on the safety of the judge's findings at [27] and [28]. It is unclear based on the evidence put before the First-tier Tribunal Judge whether or not in 2007 the Appellant was married and has children in Pakistan, but in light of the extensive evidence before the judge it was arguably not properly open to him to find that he did not have a genuine relationship with his Sponsor at the date of the hearing. Consequently, it is arguable that the judge's Article 8 findings were also erroneous."

13. Thus the appeal came before the Upper Tribunal, Miss Patel relied upon her grounds. She further submitted that the judge had relied upon the First-tier Tribunal decision in 2007 which was seven years before the hearing. He had given an explanation as to how the visa form had been completed and that this was a visa that he had never used. However, he had applied for a Tier 4 student visa in 2011 and there was no copy application available at the date of the hearing because it had not been

raised as an issue and that the Secretary of State should have sent all correspondence and not simply the determination from 2007.

14. She further submitted that the findings made at paragraphs [27] and [28] were unsustainable in the light of the documentary evidence at page 465 and that the judge failed also to set out any reasoning in relation to the oral evidence that was given concerning the nature and genuineness of the relationship. There was no analysis of that evidence within the determination.

15. Miss Johnstone relied upon the Rule 24 response of 1st June 2015. She submitted that the judge had taken into account the evidence at paragraph [28] and he was not required to set out every piece of evidence in relation to the oral evidence of the parties. The judge properly considered the determination in 2007 and was entitled to find that there was an inconsistency which damaged his credibility. Consequently, the analysis of the First-tier Tribunal was correct and there was no family life.

16. In the event of any error of law being found, she made reference to further evidence that the Secretary of State would wish to produce and is set out in a letter dated 18th June 2015.

17. After having heard the submissions of the parties I indicated to them that I considered that the judge had made errors of law and that the decision therefore should be set aside and should be remade in the First-tier Tribunal with none of the findings being preserved. I now give my reasons for reaching that decision.

18. The judge was required to consider the evidence before him concerning the relationship between the Appellant and his spouse; the parties having married in an Islamic marriage on 12th October 2014.

19. There was an extensive bundle of material which on the face of the documents demonstrated that the parties were living together in a relationship akin to marriage. The judge makes reference to this at paragraphs [25] to [28], noting that there were photographs of the couple together in [24], there were utility bills in their joint names dated late 2013 and 2014 [25] and he noted the evidence from the GP at paragraphs [26] to [28].

20. I am satisfied that the judge made a material mistake of fact when considering the evidence from the GP at paragraphs [26] to [28]. His conclusion at [28] that the correspondence from the GP is indicative that the Appellant and the Sponsor are not living together is not consistent with the evidence that was before him. Whilst he correctly identified the contents of the earlier 2014 letter at paragraph [26] and made reference to the later letter of October 2014 at paragraph [27], he ignored the contents of the letter in which the documents stated that she was living with her partner. The finding made at paragraph [28] is simply unsustainable in the light of that evidence.

21. There was also documentary evidence of substance showing the parties living together at the same address (bank statements in their joint names from November 2013 – throughout 2014 (page 219), joint gas bills for 2013/2014, photos of the marriage (October 2014 pages 467 to 471)).

22. Whilst the documentary evidence may not demonstrate that the parties have been living together since October 2012 (the date that they referred to), there was no consideration of or any analysis of their oral evidence concerning the length of their cohabitation and importantly the genuineness of their relationship and there were no findings or analysis of this issue made within the determination or any reference to it (see paragraph [19]).

23. However there was documentary evidence (and the oral evidence) that signified a length of relationship sufficient to consider Article 8 outside of the Rules which the judge also did not consider.

24. There is also a concern as to the procedural fairness of admitting the documents set out at paragraph [17]. This had not been disclosed prior to the hearing. Furthermore, the decision letter did not raise any issue that this was not a genuine relationship. Consequently the Appellant did not have the opportunity to provide any documentary rebuttal evidence and in particular, the Tier 4 application form which had set out his circumstances leading to his entry clearance in 2011. It appears to be common ground between the parties that he did not utilise the visit visa in 2007. Consequently, the judge's findings at paragraph 32 where he found that the Appellant had brought no evidence to support his argument of mistake by the agent, is not surprising when the issue had not been raised prior to the hearing and the Appellant was given no opportunity to provide such documentary evidence.

25. As Miss Patel submits, even if it had been open to the judge to find that he did have a wife and children, it would not necessarily mean that he did not have a genuine relationship with his partner in the light of the other evidence, including the Islamic marriage that had taken place and thus that the finding made at [38] was wrong.

26. Consequently I am satisfied that the judge did make a material mistake of fact when dealing with the documents, and did not give reasons for rejecting the substantial evidence before him relating to the existence of a genuine relationship between the parties and that this constituted an error of law. Thus I have reached the conclusion the decision cannot stand and will be set aside. Both parties agreed that it should be remade by the First-tier Tribunal and that no findings of fact should be preserved. Miss Johnstone indicated that there would be further evidence produced on behalf of the Secretary of State as set out in the letter of 18th June 2015.

27. In the circumstances I am satisfied that the appropriate course is for the decision of the First-tier Tribunal to be set aside and to determine the appeal with a fresh oral hearing by way of a remittal to the First-tier

Tribunal. Due to the nature of the error of law, the Tribunal will be required to hear the oral evidence of the Appellant and his partner and consider the documentation provided on his behalf and factual findings will have to be made. The Respondent will also be required to produce evidence of the other applications that were made by the Appellant.

28. Therefore, having given particular regard to the overriding objective and the issues of fact that require determination, I remit the appeal to the First-tier Tribunal at Manchester in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and the Practice Statement (as amended).

29. The following directions are made:-

(i) The Respondent will file and serve any further documentary evidence relied upon including copies of any applications made by the Appellant and documents in support. The documents referred to in the letter of 18th June 2015 shall also be produced.

(ii) The Appellant shall file and serve any further evidence no later than seven days before the hearing.

(iii) The matter is to be listed at Manchester before the First-tier Tribunal with a time limit of two hours with an Urdu interpreter.

Notice of Decision

30. The First-tier Tribunal made an error of law and the decision is set aside. No findings of fact are preserved and the appeal is to be remitted to the First-tier Tribunal at Manchester in accordance with the decision set out herein.

Signed Date 23rd May 2016

Upper Tribunal Judge Reeds