Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18275/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2018	**On 31 August 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANUELL

Between

Mr RANA YASIR MUSHTAQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Nicholson, Counsel (E2W(UK) Ltd)
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by Upper Tribunal Judge Coker on 30 May 2018 against the determination of First-tier Tribunal Judge Ripley dismissing the appeal of the Appellant who had sought leave to remain in the United Kingdom on Article 8 ECHR grounds. The decision and reasons was promulgated on 24 July 2017.

2. The Appellant is a national of Pakistan, born there on 7 April 1991. The Appellant had entered the United Kingdom as a Tier 4 (General) Student in January 2009. That leave was extended until 30 November 2012. On 30 November 2012 his marriage to an EEA national was disrupted by immigration enforcement officers. (The marriage never took place.) On 21 December 2012 he made a Tier 1 (Entrepreneur) application, which was refused on 6 April 2013. The Appellant was detained and served with removal directions in June 2013. A stay on his removal was obtained but permission to apply for judicial review was refused on 7 February 2014. On 26 May 2015 the Appellant made a human rights claim, which was refused and certified in August 2015. The Appellant then made another judicial review application, asserting that he should have been granted an "in country" right of appeal. Those proceedings were compromised and on 26 October 2015 the Secretary of State for the Home Department made a fresh refusal decision conferring an "in country" right of appeal. This was the subject of the hearing before Judge Ripley.

3. Judge Ripley made a number of findings of fact, with reasons, when dismissing the appeal. These findings included:

   (a) There were no significant obstacles to the Appellant's reintegration in Pakistan;
   (b) The Appellant had established a significant private life in the United Kingdom;
   (c) The Appellant had a family life in the United Kingdom with his uncle's family beyond normal emotional ties;
   (d) The Appellant had entered into arrangements for a sham marriage;
   (e) The Appellant's removal was not in the best interests of his two (minor) eldest cousins;
   (f) The Appellant's leave to remain in the United Kingdom had at all times been precarious; and
   (g) The Appellant's removal was proportionate despite some compelling features in the case.

4. Permission to appeal was refused in the First-tier Tribunal but was granted by Upper Tribunal Judge Coker because she considered it arguable that the judge had erred in her approach to the materiality of adverse factors, that adverse factors upon which weight was placed were not put to the Appellant and that the judge failed to consider and make findings on the evidence which was before her.

Submissions

5. Mr Nicholson for the Appellant relied on the Upper Tribunal grounds of onwards appeal and the Upper Tribunal's grant of permission. In summary counsel submitted that Judge Ripley had erred in a number of ways. The judge had found that compelling circumstances existed, specifically as to the Appellant's business in the United Kingdom, the family connections he had in the United Kingdom, the best interests of his two (minor) cousins and the background in Pakistan. The judge had misdirected herself, as those compelling circumstances were sufficient to determine the appeal in the Appellant's favour, as SS (Congo) [2015] EWCA Civ 287 at [33] *per* Richards, LJ, showed, as did TZ (Pakistan) [2018] EWCA Civ 1109.

6. The judge had further erred because she had reached adverse findings against the Appellant despite the fact that his suitability had been accepted in the reasons for refusal letter. No point as to "Suitability" as defined in the Immigration Rules had been taken by the Respondent. The judge had erred by raising the issue herself. In any event, the judge's adverse findings on the attempted sham marriage were mistaken and defective. The judge should have had regard to the marriage interview and any accompanying comments: see Miah [2014] UKUT 00515 (IAC). The independent evidence of the uncle had been ignored. The findings could not stand, especially as they were central to the judge's reasoning.

7. The judge had yet again erred when considering the issue of the expiry of the Appellant's leave to remain. Her findings were against the weight of the evidence. Similarly, the judge's finding that the Appellant's business could be run in his absence by a manager had ignored the professional witness's evidence to the contrary. In all the determination was unsafe and should be set aside and remade by another First-tier Tribunal judge.

8. Mr Avery for the Respondent submitted that there was plainly no material error of law. The judge had made sustainable findings of fact. The judge had not been using the term "compelling" as a test but as part of a general assessment of the facts. The Appellant's immigration history had been discussed in detail in the reasons for refusal letter, although there had been no specific application of the Suitability requirements. There had never been an EEA appeal on the sham marriage as the Appellant had not attempted to proceed

with it after he had been stopped. The judge was entitled to make findings about the intercepted attempt, and to take those findings into account in the balancing exercise. The permission to appeal application was simply a disagreement with the findings of fact. The determination showed the reasoning process clearly and why the appeal had been dismissed. The onwards appeal should also be dismissed.

9. In reply, Mr Nicholson emphasised that the judge's findings were inadequate. The judge had misdirected herself as to the consequences of finding compelling factors.

No material error of law finding

10. In the tribunal's view the grant of permission to appeal was not based on a full reading of the determination and failed to reflect the absence of merit in much of the claim. The tribunal agrees with Mr Avery's submissions.

11. Judge Ripley's decision and reasons was full and careful, setting out the procedural history, the evidence and submissions in detail. Some of the findings, e.g., as to the existence of family life, might be considered generous, but proper reasons were given for all findings. The Appellant was found to be an unreliable witness on many contested issues. His immigration history was certainly in issue, regardless of the fact that Suitability as such had not been a point taken by the Respondent under the Immigration Rules analysis. Despite that, there was no admission of fact or concession by the Respondent for the judge to take into account as the application had been firmly refused.

12. The assertion that the judge had ignored evidence and acted unfairly when considering the sham marriage issue was unfounded. The claimed relationship if genuine would not have simply been broken off. The Appellant was no stranger to litigation with the Home Office. There was a full confession from the sham bride included in the Home Office bundle which has never been retracted. The Appellant uncle's evidence was noted in the determination but could not sensibly be regarded as independent. It required no special notice given the comprehensive findings about the Appellant's evidence.

13. Similarly, the judge gave ample reasons for her findings about the expiry of the Appellant's leave, clearly set out, as elsewhere in the determination.

14. The judge considered the consequences of the Appellant's removal upon his business, including his ten employees. It was open to the judge to find that the Appellant's personal presence was not necessary and that a manager could be appointed to keep the business running. That finding dealt with the contrary evidence submitted on the Appellant's behalf.

15. The judge's use of the term "compelling" must be read in the context of each paragraph in which it is used. In each case, as use of terms such as "however" make clear, the ultimate conclusion about each such finding is heavily qualified: see, e.g., [53] of the determination. The judge makes no finding that the Appellant's removal would cause him more than personal inconvenience, as sensible, practical solutions are identified for each of obstacles put forward by the Appellant. The judge noted, in the children's best interests analysis, that the Appellant's relationship is quasi fraternal, not parental, and that contact can be maintained by various means. When the judge conducted the proportionality exercise, she explained convincingly why the legitimate objectives set out in Article 8.2 ECHR were relevant and why they outweighed the Appellant's qualified rights under Article 8.1 ECHR.

16. The existence of facts or factors described by the judge as "compelling" merely identified those facts or factors as important elements of the evaluation required for the balancing exercise under Article 8 ECHR to establish proportionality. The authorities cited by Mr Nicholson such as SS (Congo) (above) were correctly applied by the judge. The compelling facts or factors identified by the judge had to be balanced against the neutral and negative factors, applying section 117B of the Nationality, Asylum and Immigration Act 2002, as the judge did.

17. The tribunal concludes that Mr Nicholson's valiant submissions, like the onwards grounds, amounted in the end to no more than an expression of dissent from the judge's decision. The tribunal finds that there was no material error of law in the decision challenged.

DECISION

The appeal is dismissed

The making of the previous decision did not involve the making of a material error on a point of law. The decision stands unchanged.

Signed **Dated 23 August 2018**

Deputy Upper Tribunal Judge Manuell