



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

Appeal Number: HU/22888/2018

THE IMMIGRATION ACTS

**Heard at Field House
on 19 July 2019**

**Decision & Reasons Promulgated
on 9 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

MR MOSHIN ASHRAF

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Ms R Dulay, Counsel, instructed by AWS Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Gurung-Thapa ('the judge'), promulgated on 19 March 2019, dismissing the appellant's appeal against the respondent's decision to refuse his human rights application on the basis of family and private life.
2. The appellant is a citizen of Pakistan. On 8 November 2018, he appealed against the decision of the respondent to refuse him leave to

remain based upon his relationship with his partner (and sponsor) who is a British national, settled in the UK; and a further refusal under paragraph 353 of the Immigration Rules.

3. Relevant to this onward appeal is the respondent's contention that the marriage between the appellant and his wife is not genuine and subsisting and the judge's finding that she could '*not be satisfied from the appellant's side that his marriage to the sponsor is genuine*' (para 47 of the decision).
4. In granting permission to appeal, Upper Tribunal Judge Smith indicated that the challenge to the judge's conclusion about the relationship being genuine and subsisting was 'just arguable':

'Some of the factors relied on (such as the fact of two marriages) are very weak. The judge was unarguably entitled to rely on the appellant's non-declaration of status and the timing of the relationship and marriage, particularly when coupled with the basis of his earlier asylum claim. Further consideration of the reasons for rejection may ultimately lead to the conclusion that there is no error of law in this regard. However, in circumstances where the judge accepted that the appellant's wife considered the marriage to be genuine and subsisting, it is arguable that the judge has failed to give that factor weight when considering whether it is so'.
5. Judge Smith added, '*the crux of this challenge is to the finding that the marriage is not genuine and, if this is upheld, all other grounds fall away*'.
6. It is against this background that the appeal is listed before me.
7. Ms Dulay asserts that the judge, in determining the issue of genuine and subsisting marriage, failed to conduct a proper assessment of all the evidence available, choosing instead to focus on the appellant's migration history (he had previously made an asylum application maintaining he was gay).
8. In particular, Ms Dulay focussed on the medical evidence in relation to fertility treatment. This, it was advanced, was a relevant factor and ingredient that should have been taken into account in the overall assessment of whether their marriage should be considered genuine and subsisting, particularly in a case where some of the other findings were evenly balanced.
9. Further, it was advanced that by not making any mention of it, the appellant was left in the position of not knowing whether it had been taken into account in conducting the relevant balancing exercise; and even if it had been, the appellant was without an explanation for why the judge had rejected it as a factor in her overall assessment of whether the marriage was genuine.

10. In this regard, I was referred to medical evidence provided to the First-tier Tribunal that showed the appellant and his wife had been trying for a baby, that they had hoped for a pregnancy soon (page 99), that they had had difficulties in this regard due to gynaecological issues (page 101), and therefore had been referred to the Joint Reproductive Medicine Clinic in February 2018, where clinicians had been trying to assist them, including a referral to the Assisted Conception Unit (page 106), and reference to hormone replacement therapy.
11. There was evidence of gynaecological treatment from as early as July 2017, (page 93), when the appellant's wife started attending the Birmingham Women's Hospital.
12. The position was confirmed in the sponsor's witness statement, dated 18 January 2019, at paragraph 17, where she states they had been trying for a baby since getting married, but due to her medical conditions, had been unable to conceive. She was now taking medication for hormone therapy and was awaiting a further referral to the fertility department.
13. While Mr Jarvis advanced that this complaint amounted to a mere disagreement with the judge's findings of fact, I take the view that it goes beyond that. It appears to me that the appellant and sponsor are entitled to an explanation as to why this evidence did not feature in the overall assessment of the genuineness of the marriage.
14. Mr Jarvis further contended that this treatment may be viewed as part of an ongoing attempt to deceptively obtain status in the UK, following the judges detailed and rational findings that demonstrated *'the appellant's desperation for remaining in the UK by whatever means possible including using his marriage to a British citizen'*.
15. I understand the point, but it is to a degree speculative. In my judgement, the First-tier Tribunal's assessment must not only be rational, but also reasoned and those reasons must be clearly expressed. At present there is no proper indication what weight, if any, was given to this tranche of evidence, which on one view, might have gone to the potential lifelong commitment of having a child together.
16. The judge had already found there was documentary evidence of cohabitation, and that she had no reason to doubt the sponsors evidence that she believed the marriage to be genuine and subsisting. Therefore, whatever one makes of this evidence, it does appear to me that it was in part central to the appellant and sponsors claim that their marriage was genuine and subsisting.

17. While the judge does refer to the medical treatment the sponsor was receiving, including for hormone replacement therapy and fertility issues, this is in regard to whether or not there were insurmountable obstacles to continuing their family life together outside of the UK. It is not addressed in terms of the genuineness of the marriage, where it was, in my view, also a relevant consideration.

18. As a result, I find there has been an error of law. I remind myself of *South Bucks District Council v Porter (No 2)* [2004] UKHL 33 [2004] 1 WLR 1953 at 36:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’ disclosing how any issue of law or fact was resolved.”

19. I am satisfied that the tribunal has failed to give adequate reasons and/or weight to a material factor in the appeal. This is not simply a case of the Upper Tribunal being picky or taking a different view about the evidence (about which I have expressed no final view in terms of the test being applied). This is a case where a central part of the appellant’s claim appears to have been overlooked in the context of the issue of genuine and subsisting marriage. The appellant was entitled to have that element of his case addressed, if only for it to be dismissed.

What should happen next

20. First, I have considered whether I should deem this to be a material error of law. I say that because the judge, in an otherwise comprehensive decision, goes on to state that even if she had found that the marriage was genuine and subsisting, i.e. even if she were wrong about her findings in regard to the genuineness of the relationship, she nevertheless was of the view that there were not insurmountable obstacles to family life with the sponsor continuing in Pakistan, and as a result Article 8 was not satisfied.

21. Secondly, I could find that there was a genuine and subsisting relationship, as Judge Smith indicated in her grant of permission to appeal, essentially setting aside the decision and making my own.

22. Alternatively, I could follow the representations from Ms Dulay who asked me to remit this matter to the First-tier Tribunal on the basis that these were matters of evidence that needed to be considered and that the whole decision was tainted by the failure to make findings in relation to the fertility treatment.

23. Mr Jarvis, correctly in my view, acknowledged that another hearing was an option for justice to be done, although it was also open to the tribunal to look to maintain the decision in another way.

24. Having considered once again the evidence, subsequent to the hearing, I have taken the view that this matter should be remitted to the First-tier Tribunal. Four of the further grounds relate to insurmountable obstacles, and it appears to me Upper Tribunal Judge Smith was entitled to observe that it was arguable the judge failed to fully factor in the circumstances surrounding the appellant's spouses previous marriage and her vulnerability (which the judge accepted) when dealing with the issue of insurmountable obstacles to family life continuing in Pakistan.

25. I do not need to say more about those points because I do find there to be a material error of law in relation to the first ground of appeal - genuine and subsisting relationship.

26. This matter therefore is remitted to the First-tier Tribunal to begin again.

Notice of Decision

The appeal is allowed.

The decision of the First-tier Tribunal sitting in Nottingham on 30 January 2019 under reference HU/22888/2019 is set aside.

AND I DIRECT:

- 1. This matter shall be remitted to the First-tier Tribunal sitting in Nottingham for a fresh hearing, not to be listed before Judge Gurang-Thapa.**

No application was made for anonymity in this appeal. The general rule is that hearings are held in public and judicial decisions are published (*A v BBC* [2014] UKSC 25) and I saw no reason to depart from the general rule in this case.

Signed



Date 1 August 2019

Deputy Upper Tribunal Judge Sutherland Williams