Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09660/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 7 October 2013	**On 11 October 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr C H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Pakistan, whose date of birth has been recorded as 1 January 1958. An anonymity direction is in place.

2) This appeal is against a determination by First-tier Tribunal Judge Doyle, promulgated on 28 June 2013. I have concluded that the determination requires to be set aside and the case heard afresh in the First-tier Tribunal. This is notwithstanding the fact that the decision reached by the First-tier Tribunal Judge contains no legal error, based on the

evidence before him, and notwithstanding the lack of focus in the case presented to the Upper Tribunal.

3) There has been unfairness resulting from a mistake of fact. It did not arise through fault of the judge. It was not the fault of the appellant either, but of her representatives. It is of a nature such that by way of a convenient legal fiction it amounts to material error of law.

4) The appeal to the First-tier Tribunal was taken against refusal of indefinite leave to remain as the spouse of a person present and settled in the UK. The appellant did not attend for interview, and did not provide evidence to enable her application to succeed. The decision was in itself impeccable.

5) The grounds of appeal to the First-tier Tribunal, filed on 27 March 2013 through the appellant's present solicitors, are these:

> The decision is contrary to law.
>
> The decision is not in accordance with the Immigration Rules and Article 8 of ECHR.

6) The hearing was fixed for 21 June 2013. On 18 June 2013 the appellant's representatives wrote to the First-tier Tribunal stating that they were to rely on paragraph 289A of the Rules "on the basis that the appellant has been a victim of domestic violence at the hands of her husband". They also asked for this ground to be noted "pursuant to section 120 of the Nationality, Immigration & Asylum Act 2002". The letter does not say whether the matter was also intimated to the respondent.

7) In his determination at 12(e) the judge noted that the appellant's separation from her husband and her determination to remain in the UK as a victim of domestic violence was said to have crystallised on 6 March 2013, yet she was unable to explain why, with the benefit of legal advice, she instructed grounds of appeal as above. The judge thought that even on 27 March 2013, and beyond, the appellant was representing to her solicitors that she was party to a valid and subsisting marriage. The judge said that her solicitors were:

> "… a reputable firm with an experienced and dedicated immigration law department. It was (clearly) not until a few days before the hearing that the appellant chose to tell her solicitors that her circumstances had changed. Until June this year the appellant maintained that she was part of a valid and subsisting marriage … a significant prior inconsistent statement."

8) There was before the judge an email of 6 March 2013 (noted at 11(g) of the determination) from an aid centre. This was sent not to the appellant directly but to her nephew (a witness in the appeal). The email gives the appellant advice, in light of complaints about her husband's conduct, about whether she might stay with him or leave him.

9) In her grounds of appeal to the Upper Tribunal the appellant says that her grounds to the First-tier Tribunal were "general … without any specification whatsoever" and did

not justify the conclusion that the appellant mentioned domestic violence only in June 2013. The grounds also maintain that the letter of 18 June 2013 was not "variation" but "specification" of the grounds.

10) Those are weak points. Grounds of appeal to the First-tier Tribunal should not be over-extensive, but they should state the nature of the appellant's case concisely, and in terms not so general as to be meaningless. They ought to disclose such a radical switch as the appellant abandoning a claim to remain as a spouse and relying on breakdown of her marriage through domestic violence. Otherwise, an appellant runs the risk that an adverse inference may be drawn.

11) Mr Ndubuisi mentioned authority for the proposition that additional grounds in response to a section 120 notice may be put forward at any time, perhaps even at the hearing. That may be so, but good practice is that additional grounds should be intimated to the respondent and to the Tribunal as soon as feasible.

12) I raised the question whether the appellant should have submitted a fresh application to the respondent. Mr Ndubuisi said this would have had the disadvantage that refusal would not carry a right of appeal, and so the appellant rightly preferred to keep appeal proceedings live and to shift her ground within them. I give no weight to the fact that the appellant did not elect to make a fresh application.

13) There is attached to the grounds of appeal to the Upper Tribunal a copy letter from the appellant's solicitors to the appellant dated 19 April 2013. This states that their instructions (obtained not directly from the appellant but through her nephew) are that the relationship had broken down due to domestic violence.

14) There was no application before the Upper Tribunal in terms of Procedure Rules and Practice Directions for this letter to be admitted as evidence, in order to show error of law, and the requirements for such admission were not addressed. The letter is said to be evidence that the appellant's solicitors were "fully advised that the case was of domestic violence from the very beginning". The letter, by its date, does not quite hit that target, but I accept the assurance from Mr Ndubuisi that such were their instructions all along.

15) The appellant did not offer any analysis of how error of law may arise through unfairness resulting from a mistake of fact. The following discussion appears in *Macdonald's Immigration Law and Practice*, 8th ed., vol. 1, at 20.11:

> The Court of Appeal in *E v Secretary of State for the Home Department*, having acknowledged that unfairness resulting from a mistake of fact would be an error of law held that to establish such an error would normally require the following:
>
> "(i) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;
> (ii) it must be possible to categorise the relevant fact or evidence as "established" in the sense that it was uncontentious and objectively verifiable;
> (iii) the appellant (or his advisers) must not have been responsible for the mistake;

(iv) the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

An evidential dispute as to the existence of the 'existing fact' would remove the matter from the 'narrowly confined' scope of the 'mistake of fact amounting to an error of law' ground. The requirement that the appellant's adviser should not have been responsible for the mistake must now apply with less, if any force in the light of the Court's subsequent decision in *FP (Iran)*. New evidence to establish the existence of such a mistake could be admitted if the '*Ladd v Marshall* principles'[4] were satisfied, although they might be departed from in exceptional circumstances where the interests of justice required. Those principles are that:

(a) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);
(b) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and
(c) the new evidence was apparently credible although it need not be incontrovertible.

16) FP (Iran) [2007] EWCA Civ 13 is reported at [2007] Imm AR 450. As to not fixing the appellant with mistakes made by her representatives, FP was followed in SL (Vietnam) v SSHD [2010] EWCA Civ 225, reported at [2010] INLR 651 (see paragraph 38).

17) The judge was misled into the finding that the appellant changed her ground with her solicitors only a few days before the hearing. It is a point which need not have been decisive, but which played a material part in the judge's reasoning. The appellant is not directly responsible for the mistake, which was brought about by her representatives. Perhaps stretching matters in her favour, I find that she is not irredeemably stuck with the mistake, due to the latitude allowed in this jurisdiction, even although the mistake has been compounded by not acknowledging it directly, and by not presenting the correct application for admission of further evidence to establish it. The consequence is that the decision will have to be remade, with unnecessary waste of time and money.

18) Parties did not pursue before me the observation in the grant of permission that the appellant would have to overcome the apparent difficulty of pursuing her appeal on a different basis from that in which she applied for leave to remain. To describe this as "clarification" or "specification" rather than a change of ground goes rather far, but whether that makes any difference can be left to the next hearing.

19) There was another ground of appeal to the Upper Tribunal. The appellant said that the judge erred in suggesting that her failure to provide any specific form of evidence was fatal. That ground is misconceived. The judge did not proceed on any principle inconsistent with Ishtiaq, and the Rules have changed significantly since that case was decided. To comment on the absence of a particular type of evidence is different from falling into the error that a specific type of evidence is legally required.

20) I note on the file an incomplete copy of AIT determination IA/16779/2007, promulgated on 29 November 2007. This appears to relate to the appellant, and to have been lodged by the respondent at the hearing. Its contents may be relevant to her credibility. It is not mentioned in the determination. Both parties should endeavour to

provide a full copy, and to explain the bearing (if any) it has on the present case, at the next hearing.

21) There is nothing legally new in this case, but it may be a useful reminder to representatives that (i) grounds of appeal should be specific and accurate; (ii) significant changes in grounds should be intimated promptly to the tribunal and to the other side; and (iii) if a case goes wrong through representatives' error, they should face up to that, and not blame the judge.

22) The determination of the First-tier Tribunal is **set aside**. None of its findings are to stand. Under section 12(ii)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to **remit the case to the First-tier Tribunal**. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Doyle.

9 October 2013
Judge of the Upper Tribunal