Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14308/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On September 4, 2014	**On September 5, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR WAJAHAT HUSSAIN KIYANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holt, Counsel, instructed by Kabir Ahmed & Co
For the Respondent: Mr Harrison (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant, citizen of Pakistan, was born on August 24, 1984. He entered the United Kingdom on July 16, 2005 as a dependant child of airline staff belonging to an overseas airline. He was given leave to remain until May 4, 2008. This leave was later extended on two

occasions until April 30, 2009. On April 29, 2009 he was included as a dependant child on his father's application for leave to remain as a Tier 2 migrant and he was granted leave to remain until July 20, 2010. He then applied for a certificate of approval to marry and on August 26, 2010 he was granted a certificate valid until May 27, 2011. On November 2, 2010 he married Bernita Williams, date of birth April 19, 1966, and on November 13, 2010 he applied for leave to remain as the spouse of a person present and settled in the United Kingdom. He was granted leave to remain until February 23, 2013 and on February 1, 2013 he submitted his application for indefinite leave to remain as a spouse and he attended an interview, as did his wife, on December 11, 2013. The respondent refused his application on March 10, 2014 and at the same time issued directions to remove him under section 47 of the immigration, Asylum and Nationality Act 2006.

2. On March 24, 2014 the Appellant appealed to the First-tier Tribunal under Section 82(1) Nationality, Immigration and Asylum Act 2002 (hereinafter called the 2002 Act), as amended. The matter came before Judge of the First-tier Tribunal Mark-Bell (hereinafter called "the FtTJ") on June 2, 2014 and he dismissed the appeal after an oral hearing in a determination promulgated on June 16, 2014.

3. The Appellant lodged grounds of appeal on June 24, 2014. He argued the FtTJ had materially erred by failing to take into account the appellant and sponsor's written and oral explanations for the discrepancies in their interviews. Permission to appeal was granted by Judge of the First-tier Tribunal Denson on July 3, 2014 because he found it arguable the FtTJ had failed to have regard to this evidence when assessing the evidence about whether the marriage was subsisting. A Rule 24 letter dated July 14, 2014 was filed in which the respondent asserted the FtTJ had referred to all the evidence in his determination.

4. The matter came before me on the date set out above and the appellant was in attendance.

5. Mr Holt relied on the grounds submitted and in particular submitted the FtTJ had failed to consider the evidence fully. There was no evidence that the FtTJ had considered the appellant's statement and in his assessment of their marriage he failed to have regard to their statements in which they had addressed the concerns raised in the refusal letter.

6. Mr Harrison indicated that he accepted the determination was brief and there was nothing in the determination that indicated the FtTJ had had regard to their witness statement with regard to the discrepancies. The FtTJ identified discrepancies but failed to demonstrate he had considered, in his determination, their

explanations. He expressed difficulty in supporting the determination.

ASSESSMENT OF ERROR OF LAW

7. The determination was brief but this does not mean there is automatically an error. However, what is clear is that the FtTJ rejected the appellant's account and highlighted a number of inconsistencies in the evidence. The appellant has submitted, through Mr Holt, that these discrepancies were addressed and I am satisfied that if the FtTJ had dealt with this evidence but still reached the same conclusion then the decision may well have been sustainable.

8. Paragraphs [6], [10], [11]-[13], [15] –[16] of the determination address the evidence but the FtTJ failed to demonstrate he had taken into account the appellant and sponsor's witness statements. These in particular address the areas of concern and any assessment on their relationship should have included an assessment of this evidence.

9. In the circumstances I find there is a material error in law.

10. Having established there was an error in law I asked the representatives whether they had any strong views on where the case should next be heard. I had in mind at this point Part 3, Section 7.1 to 7.3 of the Practice Statement. They agreed this case should be remitted to the First-tier Tribunal because any judge would have to hear the evidence afresh and make findings.

11. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

> "Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
>
> The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

12. In light of the reason for the error in law I was satisfied this was a case that should be returned to the First-tier Tribunal. Subject to my availability the case will be heard before me.

13. I made the following directions:

    i. The case will be listed for a two-hour oral hearing at the Manchester Hearing Centre on December 2, 2014.

    ii. The appellant's representatives must file and serve on both the Tribunal and respondent any <u>additional</u> evidence that is to be relied on by November 21, 2014. The Tribunal already has a bundle dated May 27, 2014 consisting of 250 pages.

<u>Decision</u>

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I have set aside the decision.

15. The appeal is remitted back to the First-tier Tribunal for a fresh appeal hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

DEPUTY UPPER TRIBUNAL JUDGE ALIS Date:
IMMIGRATION AND ASYLUM CHAMBER