Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14748/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 11 March 2014	**On 24 March 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

FAISAL SHAHZAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr G Dewar, Advocate, instructed by M & K, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant is a citizen of Pakistan, born on 10 August 1984. He entered the UK as a student on 5 March 2011, but did not enrol at college. Immigration officials found him working in Bristol on 6 March 2013. He was served with notice of his liability to detention and removal, and his leave to remain was considered to have expired.

2) On 8 March 2013, he applied for further leave to remain.

3) The respondent refused that application in a decision dated 24 April 2013, dealing firstly with family life in terms of Appendix FM of the Immigration Rules. The respondent noted that the appellant married in an Islamic ceremony on 16 February 2013, which was not recognised in UK law. The appellant lived in Bristol while his partner lived in Livingstone, in Scotland. He said that he saw her every 15 days. The respondent did not consider this to be a genuine and subsisting relationship akin to marriage. His private life was found not to meet the requirements of paragraph 276ADE of the Rules. Finally, no exceptional circumstances were found to justify allowing him to remain.

4) In his grounds of appeal to the First-tier Tribunal the appellant said there were compassionate and compelling grounds for him to remain outwith the requirements of the Immigration Rules, and that his removal would be disproportionate.

5) Judge Wyman heard the appellant's appeal in the First-tier Tribunal at Hatton Cross on 16 October 2013. The judge noted "numerous inconsistencies" in the oral evidence given by the appellant and his wife (a civil ceremony having taken place on 16 May 2013). He found that the relationship between them was "not genuine and subsisting" (paragraph 60). However, he went on to find that the appellant's wife (a UK citizen whose father was of Pakistani origin, and who did not speak fluent Urdu) could not be expected to return to Pakistan to live with him (paragraph 68) but that there were no insurmountable obstacles to her living with him in Pakistan while he applied for entry clearance (paragraph 74). Alternatively, she could remain in Scotland while he applied. The appeal was therefore dismissed under Appendix FM. Turning to Article 8 (outwith the Rules) the judge accepted at paragraph 83 that the appellant had "family life with his wife who lives in the UK. They are legally husband and wife." At paragraph 90 the judge said, "I do not find the appellant has a genuine and subsisting relationship with his wife. This is not to say that he is not legally married to her – I accept that he is." The judge concluded that it would not be a disproportionate interference for the appellant not to be granted leave to remain in the UK, and dismissed the appeal under the Rules and under Article 8.

6) The appellant sought permission to appeal on proposed grounds of appeal under 4 headings, running to 31 paragraphs over 7 pages. On 21 November 2013, the First-tier Tribunal refused permission to appeal. A further application was made, on the same grounds, to the Upper Tribunal. On 10 December 2013, UT Judge McGeachy granted permission as follows:

> The grounds of appeal point to the fact that the judge … found that the marriage was not subsisting but went on to state, "I accept that the appellant has family life with his wife who lives in the UK. They are legally husband and wife." The grounds claim that the judge was therefore inconsistent in his conclusions and that infects his reasoning …
>
> While it may well be the case that the judge meant that the requirement in the first *Razgar* step was met merely because the appellant and his wife were married, that is not clear. To that extent I consider that the grounds are arguable.

However, the grounds … are prolix and I direct that 10 days before the hearing the appellant's representative shall serve edited and comprehensive grounds of appeal of no more than one page …

7) Mr Dewar on 11 March 2014 produced a condensed version of the grounds under the same 4 headings:

Proper consideration of the Immigration Rules

1. It is submitted that Judge has failed to consider all the evidence in the round in accordance with the principles of ***Tanveer Ahmed [2002] UKIAT 00439,*** contrary to what he says at paragraph 39, especially when considering the evidence he records at Para 53 and Para 55 of the determination.

2. Furthermore, the Judge has failed to apply the correct standard of proof on the evidence available instead putting the Appellant to strict proof particularly when, the parties are Muslims, having gone through both an Islamic and Civil Marriage.

3. The Judge has further made inconsistent findings in relation to the subsistence of the marriage as highlighted at paragraph 60/90, he concluded that he did not find the relationship genuine and subsisting however on the other hand in conducting the five stage ***Razgar*** test he accepted at paragraph 83 "*the Appellant has family life with his wife who lives in the United Kingdom. They are legally husband and wife.*" In these circumstances it is submitted that the Judge's confusion on this legal matter highlights a lack of understanding on the relevant law that should be considered either under the rules or Article 8 of the ECHR.

Insurmountable obstacles

4. It is submitted that the Judge has failed to assess factors that were highlighted by the parties with reference to the ***degree of difficulties*** [see ***MF (Nigeria) –v- Secretary of State for the Home Department [2013] EWCA Civ 1129***] they would face if required to relocate to Pakistan rather he applies the test of insurmountable obstacles.

5. In any case it appears at paragraph 74, the Judge appears to have misunderstood the issue of "insurmountable obstacles" as he states "*I therefore do not accept that there would be insurmountable obstacles with Mrs Jawaid returning to live in Pakistan with her husband, whilst he applies for entry clearance*". The issue of insurmountable obstacles is not one with reference to a short period of time in the home country; it is one of permanence as set out within the Rules.

Findings of Fact

6. Paragraph 55 – in relation to inconsistencies highlighted by the Judge from paragraph 55 – 59 he fails to accord the parties with the benefit of doubt given that memory and recollection is not infallible.

7. Furthermore the Judge has factually erred through his own questioning and record of evidence from the witnesses as to some of the findings in relation to inconsistencies. *(see* paragraph 29, paragraph 30 and Paragraph)

8. Paragraph 61 – the Judge has factually erred when he stated that the Appellant did not tell his wife about his Immigration status until after his arrest on 6th of March 2013. It is submitted that the Appellant had valid student leave before this date given that it was only on this date that it was curtailed. This evidence is consistent and does not highlight any omissions by the Appellant to his wife.

9. Paragraph 63 – 65- the Judge concluded the Appellant had used deception to enter the United Kingdom however, as he obtained a Tier 4 student visa and then failed to enrol at the college, however save for this there is no other evidence that the Appellant came to the United Kingdom for reasons other than to study. No questions or evidence was taken from the Appellant as to why he had not attended the college.

Article 8 of the ECHR

10. The Judge failed to ensure that the decision under the rules was consistent with the guidance of the Court of Appeal's decision in ***MF***, instead he adopts a separate Article 8 assessment from Para 80 onwards. It is submitted that the Judge failed to consider cumulatively the following factors within the rules.

11. That is the parties entered into a relationship at a time the A was lawfully in the UK, it is accepted that they are legally married and able to satisfy the accommodation and maintenance requirements, the A has no criminal convictions, has never claimed public funds and has contributed to the economy through his employment, the sponsor would have certain language barriers (Para 40) and the A's refusal does not arise as a result of any criminal offending.

12. Furthermore, there was no consideration of the principles established under jurisprudence of Article 8 of the ECHR, as set out in the case of ***Chikwamba v The Secretary of State for the Home Department [2008] UKHL*** which clearly set out that the public policy of requiring someone to return simply to apply under the Immigration Rules, when they are able to satisfy all other parts of the immigration rule will usually be a disproportionate measure.

8) Under the first heading, Mr Dewar criticised the determination for failing to take a rounded view of the oral and documentary evidence and for failing to give the appellant the benefit of any doubt. The judge erred as to the standard of proof, the appellant only having to make out his claims to a reasonable degree of likelihood. That undermined the finding that the marriage was not genuine. The appellant and his wife went through both religious and civil ceremonies. The determination was inconsistent and logically absurd, because the appellant and his wife were either validly married or not.

9) Turning to insurmountable obstacles, Mr Dewar submitted that the judge had not taken account of the true degree of difficulty faced by the appellant and his wife. She would have to give up her job, and they would lose their settled life in the UK and the financial stability presently enjoyed. An insurmountable obstacle did not mean literal impossibility. The judge took an overly stringent approach. He misunderstood and misapplied the test.

10) As to the criticisms under the heading of findings of fact, Mr Dewar had nothing to add to the grounds.

11) Regarding Article 8, ECHR Mr Dewar submitted that the judge ought to have carried out the second part of the 2 stage test outlined at paragraph 46 of *MF* [2013] EWCA Civ 119. There was an absence of a cumulative assessment. That should have involved consideration of 6 matters which together amounted to compelling circumstances for leave to be granted outwith the Rules:

    i) The relationship commenced while the appellant was in the UK lawfully.
    ii) The appellant and his partner are legally married.
    iii) Accommodation and maintenance requirements could be satisfied.
    iv) There was no criminal element in the case.
    v) There was a language barrier faced by the sponsor in Pakistan.
    vi) There was no element of reliance on public funds.

    The judge failed to address the case properly in terms of *Chikwamba*, and should have found it disproportionate to expect the appellant to make any application from abroad.

12) Mr Matthews submitted that the determination was in some respects confused, but its crux was at paragraph 60, finding that the relationship between the appellant and his partner was not genuine or subsisting. If that conclusion was justified, everything else was beside the point. The conclusion was properly open to the judge. What the judge meant elsewhere in the determination, as at paragraph 83, was that the marriage was legally subsisting, but no more. The judge properly set out the factors for and against the appellant and gave good reasons for his conclusions, in and out of the Immigration Rules. The analysis of discrepancies in the oral evidence showed that the appellant and his wife were describing two different occasions. Any confusion about the evidence given was in the grounds (particularly in their earlier, lengthier version) not in the determination. The spouses gave plainly inconsistent accounts of their marriage celebrations. No error was shown in that analysis. It was for the appellant to prove his case on the balance of probability. While the respondent had to show that any interference with family and private life interests was justified, that was not an onus of proving the facts. In the final proportionality assessment, burden and standard of proof are irrelevant. The determination showed some confusion over whether the case hypothetically involved short term or long term separation, but that was immaterial, given the primary findings. Even if the appellant and his wife had a genuine relationship, removal, with long term consequences, would not be disproportionate. It was misleading to say that they met while the appellant was here lawfully. The circumstances were that he never enrolled at college and used deception from the outset. His status could only properly have been regarded as precarious from the time he met his partner. No weight should be given to him having had any lawful period of residence. The finding at paragraph 83 that the appellant had family life was inconsistent with the earlier findings. It seemed that the judge thought that a legal marriage automatically led to a finding of family life. That was not correct. On the findings properly reached, there was no need for a consideration outside the Rules, but in any event such a consideration should not succeed. Such error as there was in the determination did not require it to be set aside.

13) I reserved my determination.

14) The only point of real substance raised for the appellant is the apparent inconsistency over whether family life existed. As the judge granting permission suspected, it becomes clear on examination of the determination and after submissions that the judge became confused about what is required before embarking on a *Razgar* analysis.

15) The judge correctly considered the Rules first.

16) The refusal decision was made under Appendix FM, including the relationship requirements, which include:

> E-LTRP. 1.7: The relationship between the applicant and their partner must be genuine and subsisting.
>
> E-LTRP.1.8: If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

17) Those are two questions, so the judge had to decide not only whether there was a valid (in other words, legally subsisting) marriage but also whether there was a genuine and subsisting relationship. Despite the valid marriage, it was open to the judge to conclude that there was not such a relationship. He was right about the onus and standard of proof. There were inadequacies and discrepancies in the evidence from the appellant and his wife. Their descriptions of the marriage ceremonies and of their relationship did not match. There was no onus on the tribunal to enquire further into why the appellant never became a student, a matter which spoke for itself, and which it was up to him to explain away if he could. No error has been shown in the process by which the judge arrived at his conclusion about the relationship. The appellant continues to disagree, but the Upper Tribunal is not entitled to interfere.

18) Up to paragraph 60, no error is shown in the determination. There is force in the Presenting Officer's submission that the rest is immaterial.

19) Appendix FM, EX.1:

> This paragraph applies if … (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen … and there are insurmountable obstacles to family life with that partner continuing outside the UK.

20) On the finding about relationship, the question of insurmountable obstacles was not decisive. The further findings in the determination are all only in the alternative.

21) The same applies to what the determination says about Article 8. *Gulshan* (Article 8 – new rules – correct approach) [2013] EWCA Civ 640 (IAC), reported since determination in this case, is a convenient digest of the case law. Only if there are arguably good grounds for granting leave to remain outside the Rules is it necessary to consider whether the case presents compelling circumstances not sufficiently recognised under the Rules. On the findings here, the case falls well short of either test.

22) For Article 8 purposes, there is a presumption of family life between husband and wife, but it is not irrebuttable, as the judge seems to have thought at paragraph 83. On his findings, properly reached, that the relationship was not a genuine one, the judge did not have to make a finding that family life existed. In any event, on his findings as a whole, the proportionality balance could only have been struck against the appellant. Another outcome would have been irrational.

23) The determination does not err in any respect such as to require it to be set aside, and it shall stand.

20 March 2014
Judge of the Upper Tribunal