IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13533/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 3 June 2015	**On 12 June 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

JUNAID SALEEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rahman, Eden Law
For the Respondent: Ms Johnstone, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Junaid Saleem, was born on 8 June 1978 and is a citizen of Pakistan. By a decision which I promulgated on 1 May 2015, I set aside the First-tier Tribunal decision in this appeal and directed a resumed hearing. I have now remade the decision following a resumed hearing which took place in Manchester on 3 June 2015. My reasons for setting aside the First-tier Tribunal decision were as follows:

2. The appellant, Junaid Saleem, was born on 8 June 1978 and is a citizen of Pakistan. He appealed to the First-tier Tribunal (Judge Bruce, as she then was) against a decision of the respondent dated 12 February 2014 to refuse to vary the appellant's leave to remain in the United Kingdom and to make directions for his removal subject to Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal dismissed his appeal in a decision promulgated on 27 June 2014. The appellant now appeals, with permission, to the Upper Tribunal.

3. Judge Bruce's findings and conclusions are contained in her decision at [10 – 13]:

> "10. The relevant Rule is paragraph 287(a) of the Immigration Rules and the provisions in issue are (i)(a), (ii) and (iii).
>
> '287. (a) The requirements for indefinite leave to remain for the spouse or civil partner of a person present and settled in the United Kingdom are that:
>
> (i)(a) the applicant was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years in accordance with paragraphs 281 to 286 of these Rules and has completed a period of 2 years as the spouse or civil partner of a person present and settled in the United Kingdom; ...
>
> (ii) the applicant is still the spouse or civil partner of the person he or she was admitted or granted an extension of stay to join and the marriage or civil partnership is subsisting; and
>
> (iii) each of the parties intends to live permanently with the other as his or her spouse or civil partner; and
>
> 11. It will be observed that there is no specific requirement that the parties prove that they have been cohabiting throughout the entire probationary period. There is however in (i)(a) a requirement that the applicant has completed the appellant period of two years as a spouse. Since the provisions under which the appellant's leave was granted expressly required him to intend to *live* permanently with his wife, it is in my view implicitly that the couple needs to have been living together for the duration of the probationary period, unless particular circumstances exists. It is the appellant's own evidence that in January 2013 his wife left the UK for Australia. Mr Timson asked me to find that this is a temporary arrangement with the substance of the relationship.
>
> 12. I have weighed the evidence before me. There has never been any suggestion that this is a sham marriage. An Entry Clearance Officer was satisfied that the appellant was coming here to marry Miss Ismail. He did marry her within the period stipulated by his fiancé visa. The Secretary of State was therefore satisfied that this was a genuine and subsisting marriage and that the parties intended to live with one another granting the appellant leave to remain on that basis in September 2011. I accept and find as a fact that the couple were indeed living together for the sixteen months that followed. The documentary evidence supports the appellant's evidence that he and Miss Ismail were living together. There is nothing to be read into the fact that the appellant's name still featured on correspondence when he was actually in Pakistan or that her name remains on the bills even though she has not lived there for almost one and a half years. Names can be left on bills out of laziness, convenience, or as the appellant himself notes, in the expectation or hope that the other person will come back to

the property. The question is what is the significance of Miss Ismail's departure for Australia in January 2013, some eight months before the probationary period was over.

13. I have considered the appellant's evidence that his wife has taken this job in order to further her career. This is no doubt the case. However this is not a job that was only to last a few weeks or even a few months. It has been well over a year since she left and on the appellant's evidence her contract will keep her there until at least next year. I appreciate that families may take pragmatic decisions to be apart for a period - even quite long periods – in order to further a partner's career. For instance in the UK married couples very often choose – or are competed by necessity – to live in different cites during the working week. However Australia is a very long way away, and the opportunities for actually seeing each other are likely to be limited. It was not the evidence that Miss Ismail was unable to find any work in the UK; it was her choice to take this 'good job'. I find that this decision raises a strong suggestion that her relationship with the appellant was over, or was ending when she left. Had there been some more evidence from Miss Ismail that suggestion could well have been rebutted, but the evidence from her was scant. At the outset of the hearing there was absolutely nothing from her. The appellant and his representatives have known for months why his application was refused and yet no steps have been taken to get a statement, letter, or live video-link evidence from Miss Ismail. If she is returning to the UK in August the representatives could have made an adjournment application to that effect weeks ago. The email raised more questions than it answered. The papers before me indicate that Gizelle Rowlands changed her name by deed poll to Gazzala Ismail when she and the appellant marred in Islamic law. It was therefore puzzling to see that she currently describes herself as "Gizelle Rowlands formally 'Gazzala Ismail'. The appellant sought to explain this by saying that his wife has reverted to her given name for professional reasons. This is possible but does not explain why she felt the need to make this distinction in this email to the Tribunal nor does she state at any point that the relationship is in fact subsisting. She simply states that 'when' she returns to England - no time frame is offered – she will be 'living with' the appellant. That could simply mean sharing a house. There is not the evidence before me to demonstrate on a balance of probabilities that the appellant and Miss Ismail nee Rowlands are currently in a subsisting relationship or have been at any point since she left the UK."

4. Granting permission, Judge Grubb wrote:

> "It is arguable that the judge erred in law in requiring the parties to establish that the appellants have been living together for the duration of the probationary period, unless particular circumstances exist. That does not necessarily flow from the requirement that they "intend" to live together permanently. Further, the judge arguably drew irrational inference from the spouse's email that she would be 'living with' the sponsor on return from her work in Australia as implying that was other than as a 'spouse'. The judge's adverse findings contrast with the positive findings that the marriage had been genuine and subsisting until the sponsor took a temporary job in Australia."

5. In the hearing before the Upper Tribunal at Manchester on 14 April 2015, I recorded that the appellant pursues the appeal solely on the basis of the Immigration Rules; there is no separate Article 8 ECHR appeal.

6. In addition to the matters raised in the refusal letter, Miss Johnstone also sought to rely upon [5] of the Rule 24 response submitted by her colleague, Mr Parkinson dated 24 December 2014:

> "The sponsor is also concerned from the chronology in the determination as to whether at the date of the application the sponsor was 'present and settled'. It would appear that the sponsor was not spent in the UK at the date of the application. Rule 6 requires that the sponsor is 'present' in the UK."

7. Mr Rahman objected that this additional reason for refusal had not been contained in the original refusal letter nor had it been raised before the First-tier Tribunal. Having heard the submissions of both parties, I directed that the parties should submit written submissions on this issue no later than 28 April 2015 following which I would then make my decision. I have received an email from Mr Rahman in which he states:

> "The issue of whether the applicant's spouse was present in the UK at the date of the application. No reason given when the respondent refused the appellant's application nor an issue raised at the hearing brought before Immigration Judge Bruce [*sic*]. The appellant has instructed us that in fact his wife was in the UK at the date he made the application for indefinite leave to remain."

8. I have received no submissions from Miss Johnstone.

9. I share Judge Grubb's concern (see above) regarding the apparent irrationality of the judge's finding that the appellant's spouse might, on return from Australia, live in the same property as the appellant but "other than as his spouse". As Judge Grubb noted, that finding sits uneasily with the judge's finding that "there has never been any suggestion that this is a sham marriage". [12] I do not consider that the apparent irrationality can be explained away by the use by the spouse of her maiden name [13]; I cannot see any reason why, if she uses both married and a professional names, the spouse should not refer to both names in an email sent to the First-tier Tribunal. Likewise, it is difficult to reconcile Judge Bruce's acknowledgment that couples in subsisting relationships often live and work apart for financial reasons with her concern that Australia is "a very long way away" [13]; there is no obvious reason why, say, a wife working in Brussels may be able to remain in a subsisting relationship with a husband in the United Kingdom while the continuity and viability of the relationship might be doubted if she were working in Sydney. I am not satisfied that the reasons given by Judge Bruce are sufficiently rational to support her conclusion that the appellant and his spouse are not in a subsisting relationship.

10. I also share Judge Grubb's concerns regarding the determination at [11]. Judge Bruce appears to have introduced an additional requirement to the Rule, namely that during the probationary period referred to in paragraph 287(i)(a) spouses should "have been living together for the duration of the probationary period, unless particular circumstances exist". She has added a gloss to the Rule which its proper construction does not require.

11. In the light of what I have said above, I set aside the determination of Judge Bruce. The Upper Tribunal shall remake the decision following a resumed hearing. At that hearing, the issues raised in the refusal letter shall be addressed. In addition, the Tribunal will also address the proper construction of the words "present and settled" as raised by Mr Parkinson in the letter of 24 December 2014. Whilst I am grateful to Mr Rahman for his email submission, his assertion that the appellant's spouse was in the United Kingdom at the time the application was made is, with respect, nothing more than that; the Tribunal will expect the appellant to adduce evidence sufficient to prove, on the standard of proof of the balance of probabilities, that the spouse was present in the United Kingdom as asserted.

DECISION

12. The determination of the First-tier Tribunal which was promulgated on 27 June 2014 is set aside. The Upper Tribunal shall remake the decision following a resumed hearing on a date to be fixed at the Upper Tribunal, Manchester.

13. One part of the error of law decision is not accurate; Ms Johnstone did send submissions to the Tribunal but unfortunately these did not reach me. She gave me a copy at the resumed hearing.

14. The appellant attended the resumed hearing and gave evidence in English. He had supplied, on the morning of the resumed hearing, two additional documents; a photocopy of a passport of Gizelle Camille Rowlands (formerly Gazzala Ismail, his wife) and a photograph of a stamp from a passport (it was not clear whose passport) indicating entry into Melbourne, Australia on 3 October 2013.

15. The appellant's application, which is the subject of this appeal appears to have been signed by Ms Rowlands and the appellant. Their signatures are dated 26 September 2013. The document appears to have a stamp indicating that it was received by the respondent on 30 September 2013. The appellant told me that Ms Rowlands had left the United Kingdom to work in Australia in January 2013. That statement is consistent with the appellant's previous written evidence before the First-tier Tribunal and the record of the oral evidence given by the appellant before that Tribunal (see paragraph 8 of Judge Bruce's decision). He said that his wife had returned to the United Kingdom on or about 21/22 September 2013 and had flown back to Australia on about 1 October 2013 (which, he said, was evidenced by the stamp of 3 October 2013 in Melbourne).

16. The appellant and his representative, Mr Rahman, agreed with the written submissions made by Ms Johnstone in her letter of 17 April 2015, namely that paragraph 287 of HC 395 requires the spouse or civil partner of an applicant for indefinite leave to remain to be both "present and settled" in the United Kingdom when the application is made. Indeed, the appellant explained to me that his wife had travelled back from Australia especially in order to be present in this country when the application for leave to remain was submitted and so that she might comply with the requirements of the Rule.

17. The Tribunal reserved its decision.

18. I expressed my surprise to the appellant and Mr Rahman at the resumed hearing that, notwithstanding the fact that I had given a clear indication in my decision on the error of law [10] that I would expect the appellant to address the matter of the presence of Ms Rowlands in the United Kingdom at the date of the making of the application, nothing had been done until the day before the resumed hearing to obtain any evidence at all from Ms Rowlands. The appellant explained to me that his wife had been busy working and was, as a consequence, tired. I reject that explanation entirely. I do not accept that Ms Rowlands has been so tired or busy with work in the past five weeks that she could not have provided a written statement or a complete copy of her passport or other documentary evidence of her movements to and from Australia during the last two years. Whilst I acknowledge that the application for leave to remain appears to bear the signature of Ms Rowlands (Ms Johnstone did not submit to me that the signature was a forgery) there is simply insufficient evidence to discharge the burden of proving that Ms Rowlands was in the United Kingdom when the application was made.

19. I have also to say that I am compelled to draw an adverse inference from the failure of the appellant to obtain proper evidence from Ms Rowlands. A copy of the passport which has been produced which shows that it was issued to Gizelle Rowlands on 18 September 2013. The application for leave to remain bears the signature Gazzala Ismail. The appellant told me that his wife had changed her name back from Gazzala Ismail to Gizelle Rowlands by deed poll but he did not produce a copy of that document. He told me that his wife had reverted to her maiden name because that name appeared on educational and professional certificates and she wished her passport and official documents to be consistent with the name shown on those certificates for the purposes of her employment as a nurse in Australia. I find that that explanation is unpersuasive in the absence of any direct evidence corroborating it from Ms Rowlands herself. Considering the evidence as a whole and the manner in which it has been presented to the Tribunal, I concluded that, contrary to what the appellant tells me, his relationship with Ms Rowlands is no longer subsisting. For that reason and because I find as a fact that the appellant has failed to discharge the burden of proving that Ms Rowlands was present in the United Kingdom when the application which is the subject of this appeal was submitted to the Secretary of State, I find that the appeal under the Immigration Rules must be dismissed.

20. Mr Rahman submitted that the appellant had a private life in the United Kingdom. He has been here for a number of years and has worked during much of that time. However, I accept Ms Johnstone's submission that there was no family life in this instance because the relationship between Ms Rowlands and the appellant is no longer subsisting. As regards a private life, the appellant does not suggest that he is able to meet the requirements of HC 395 and, having regard to his circumstances, I do not consider that there is any reason for the Tribunal to proceed to consider Article 8 ECHR outside the Immigration Rules.

Notice of Decision

21. The appeal in respect of the Immigration Rules is dismissed.

22. This appeal is dismissed on human rights grounds (Article 8 ECHR).

No anonymity direction is made.

Signed Date 10 June 2015

Upper Tribunal Judge Clive Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 10 June 2015

Upper Tribunal Judge Clive Lane