**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/01053/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 1st November 2018** | **On 9th November 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROOM**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**[A A]**
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A Miah, Counsel

**DECISION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department, who appeals with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal S J Clarke, promulgated on 22 March 2018, in which she allowed the appeal of Mr [A] against a decision of the Secretary of State, dated 28 December 2016, refusing him leave to remain on human rights grounds. It is more convenient to refer to the parties as they were before the First-tier Tribunal. From now on I shall refer to Mr [A] as "the appellant" and the Secretary of State as "the respondent".

2. The appellant is a failed asylum seeker from Eritrea (disputed) who first entered the UK in November 2007, aged 16. He is now 27. On 15 August 2016 he made a human rights claim, seeking further discretionary leave, on the basis he was still the partner of Ms [CS], a British citizen, and they had a child together, [D], born in 2016. However, his application was refused on 28 December 2016. The respondent decided the appellant no longer enjoyed family life because his relationship with [CS] had ended and he no longer had contact with [D], who had been adopted. The appellant met the suitability requirements of the rules but did not satisfy paragraph 276ADE(1) of the rules. He was 26 years of age and had resided in the UK for nine years. It was not accepted there would be very significant obstacles to his reintegration in the country to which he would have to go. There were no exceptional circumstances to warrant a grant of leave outside the rules.

3. The appellant lodged a notice of appeal and the grounds simply asserted that removing him would breach articles 2, 3 and 8 of the Human Rights Convention.

4. At the hearing the appellant gave evidence but Ms [S] did not attend. The respondent relied on a report by a consultant clinical and forensic psychologist that Ms [S] was not interested in long-term relationships and her report made no mention of the appellant. The judge nevertheless accepted the appellant's oral evidence that he and Ms [S] had resumed living together. She found this was consistent with the statement made by Ms [S]. The judge accepted this was an enduring relationship and that they lived together on and off. The judge concluded that, although the rules were not met, removing the appellant would be disproportionate.

5. The grounds seeking permission to appeal argued the judge's finding that the appellant enjoyed family life was not adequately reasoned. There was no independent evidence confirming the relationship and the judge's decision that there was a subsisting relationship was irrational.

6. The First-tier Tribunal refused permission to appeal on the basis the grounds were essentially disagreement with the judge's decision. The renewed grounds argued the only reason given by the judge for her finding was that the evidence of the appellant was consistent with Ms [S]'s statement. This was insufficient. The finding that the appellant had moved back into Ms [S]'s home in early 2016 was contradicted by evidence from the landlord. In granting permission, Upper Tribunal Judge Freeman said,

> "The evidence of the appellant's partner was a crucial part of his case: although the judge made it clear that she took into account the fact that she had not heard from her in person, arrangements could easily have been made for the partner to give her evidence in a suitable way for a vulnerable witness, if she was one."

7. The appellant's representatives have lodged a rule 24 response opposing the appeal and arguing the judge was entitled to conclude as she did.

8. I heard oral submissions from the representatives concerning whether the judge made a material error of law such that her decision should be set aside.

9. Mr Melvin said the judge had not taken proper account of the psychologist's report, albeit it was two years' old, which stated Ms [S] was not interested in having a relationship. He pointed out that there was no evidence from Ms [S]'s sister or her mother to support the claimed relationship. In short, there was a lack of independent evidence to corroborate the claim. He relied on *TK (Burundi) v SSHD* [2009] EWCA Civ 40 in which Thomas LJ said as follows,

> "16. Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. This may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons. I accept, as did the Judge, that Miss Mutoni, his first partner, might well have been reluctant to help, but there was no evidence that any attempt had been made to seek her help in circumstances where her failure to help would result in serious financial disadvantage to the support to her child, and no evidence as to the payments alleged to have been made. Nor in my view can Immigration Judge Scobie in any way be criticised for his rejection of the appellant's account of why he had not sought evidence from his current partner, Miss Ndagire. In my view the approach of the Judge on the evidence before him was an approach he was entitled to take in assessing the appellant's credibility; there was no error of law. On that evidence, he was entitled to reach the view that the family life was not as strong as the appellant claimed or in other words not strong at all. He was therefore entitled to come to the conclusion he demonstrably arrived at with great care, that the balance under Article 8 came down in favour of the appellant being returned to Burundi . In my judgment, there was no error of law and this ground of appeal fails."

10. Mr Melvin argued that it was an obvious step to obtain such corroboration in this case and the judge should have drawn an adverse inference from its absence.

11. Mr Miah argued, in effect, that it was open to the judge to reach the conclusion which she reached on the evidence before her and the respondent's arguments were simple disagreement with the decision.

12. Having considered the matter carefully and having had the assistance of the thoughtful submissions of both representatives, I concluded that the judge's assessment contains no material error of law. Whilst the decision might be described as a generous one, it cannot be said that the decision is erroneous on any of the bases put forward.

13. The judge clearly had in her contemplation the issues which might have caused another judge to come to the opposite conclusion. For example, she noted the psychologist's report made no mention of the appellant and that it records Ms [S] was uninterested in having a long-term relationship. However, there was no dispute about the fact that the appellant was the father of [D] and the judge viewed the report, which was two years' old, in that context. She was plainly entitled to conclude that the relationship was up and down. She noted Ms [S]'s explanation in

her witness statement that she may have said that [to Dr Morgan] but that she now relied on the appellant and continued to do so every day.

14. The judge accepted the explanation for the lack of documentary evidence showing that the appellant lived with Ms [S] which was that, as the appellant is working, an arrangement hereby they lived together as partners would have drastic implications for Ms [S]'s benefit entitlement. She did not condone the arrangement but found it was plausible.

15. As for Ms [S]'s decision not to attend to give evidence, the judge accepted what she said in her statement about her experiences of family proceedings concerning [D]. The judge recognised this meant the respondent's representative had no opportunity to cross-examine her. She explained why she nonetheless preferred the appellant's account and Ms [S]'s statement. She noted the evidence that, if the appellant had been seeking a relationship for the purpose of remaining in the UK, it would have been a lot easier for him to find another partner. She found this had the ring of truth. The judge was not, in those circumstances, bound to consider how Ms [S]'s evidence might otherwise be facilitated.

16. Turning to Mr Melvin's point about the well-known case of *TK (Burundi)*, I note that it concerned the opposite situation in which the challenge made was to a judge drawing an adverse inference from the absence of supporting evidence which it was reasonable to expect to see. In this case, the argument seems to be that the judge should have drawn an adverse inference from the absence of corroboration. However, it was a matter for the judge to give such weight as she saw fit to the evidence and it is not at all clear that she was asked to infer anything from the absence of supporting evidence from Ms [S]'s family members. Her overall conclusion was that the couple lived together on and off but this was nonetheless an enduring relationship so as to engage article 8.

17. It has not been shown the judge failed to have regard to relevant evidence.

18. To the extent the respondent's challenge is that the judge failed to provide adequate reasons for her conclusions and findings, I have had regard to the well-known decision in *MK (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC), which sets out the applicable principles. More recently, in *MD (Turkey) v SSHD* [2017] EWCA Civ 1958, Singh LJ considered the extent of the duty to give reasons and, in particular, the question of adequacy. He said as follows,

> "26. … It is important to appreciate that adequacy in this context is precisely that, no more and no less. It is not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons is, in part, to enable the losing party to know why she has lost. It is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case some error of approach has been committed."

19. Treacy and Longmore LJJ agreed with Singh LJ.

20. I have concluded in the light of this binding authority that the reasons given by the judge in this case are adequate. I consider she has shown that she considered the evidential issues which might have gone against the appellant but that she gave sound reasons for finding that the relationship was genuine and subsisting.

21. To the extent the grounds rely on a perversity challenge, I remind myself that in *R (Iran and Others v SSHD)* [2005] EWCA Civ 982 Brooke LJ set out the test for perversity as follows:

> "11. … It is well known that "perversity" represents a very high hurdle. In *Miftari v SSHD* [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no willful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter."

22. There is no basis for arguing the judge was not entitled to reach the conclusion she reached on the evidence before her. She chose to believe the appellant and this was not a situation in which she could not rationally do so. Mr Melvin held back from suggesting it was.

23. I therefore dismiss the respondent's appeal. The decision of the First-tier Tribunal to allow the appellant's appeal shall stand.

**Notice of Decision**

The Judge of the First-tier Tribunal did not make a material error of law and her decision allowing the appeal shall stand.

The anonymity direction made by the First-tier Tribunal is continued.

Signed Date 1 November 2018

**Deputy Upper Tribunal Judge Froom**