



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00009/2018

THE IMMIGRATION ACTS

Heard at Bradford

**Decision and Reasons
Promulgated**

On 23 November 2018

On 03 December 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**S H
[ANONYMITY ORDER MADE]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S Bukhari, solicitor with Bukhari Chambers Solicitors

For the respondent: Ms R Petterson, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

The First-tier Tribunal made no anonymity order, despite the Presidential Guidance given by the President of the FtTIAC in 2011 that all asylum appeals should be anonymised at case creation. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order in this appeal. The appellant will be referred to in these proceedings only as K G-K.

Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal to refuse her international protection under the Refugee Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds. The appellant is a citizen of Pakistan.

Background

2. The appellant had family visit visas to the United Kingdom on 4 occasions between 10 August 2005 and 7 April 2010. On the 1 April 2010 the appellant made an application for leave to remain on family and private life grounds. She had a full in-country right of appeal on which she was appeal rights exhausted in November 2010. The appellant did not embark, remaining unlawfully in the United Kingdom.
3. In 2012, the appellant's partner was granted discretionary leave to remain. In May 2012, the parties entered into an Islamic marriage but not a civil marriage under United Kingdom law.
4. On 2 September 2013, the appellant made a second family and private life application, disclosing the relationship but not the Islamic marriage, because, it is said, she had been advised that her husband would not be regarded as a GEN 1.2 partner. Her application was unsuccessful and she sought judicial review of the respondent's decision.
5. On 20 October 2015, the appellant made a family and private life application which was refused on 14 December 2015. In that application, she disclosed the relationship.
6. On 28 October 2016, she made her fourth attempt to seek leave to remain on family and private life grounds but the respondent refused again. The appellant did not embark for Pakistan but remained unlawfully in the United Kingdom.
7. On 28 October 2016, the appellant made further submissions which were refused on 18 November 2016.
8. On 6 June 2017, she made the present asylum claim, which she now accepts had very little chance of success. She endeavoured to revive the family and private life claim within that protection claim. At questions 8-17 of the asylum interview, the appellant said this:

"Q8. It is also noted that your husband resides in the United Kingdom is that correct? Yes.

Q9. *Where did you first meet your husband?* Like understand Sheffield, I think Huddersfield, near to Bradford.

Q10. *How long had you been in a relationship with him before you got married?* 24 Months.

Q11. *Where did you get married?* In Huddersfield. We got Islami Nikah there and that's how it started.

Q12. *Did you receive any documents after the Nikah?* I have got Nikkah Namah which I have not brought it with me, it is with the solicitor.

Q13. *Do you currently live together?* Y.

Q14. *How long have you live together for?* Got married in 2012, and then since then. Every now and then I go and see my siblings as well.

Q.15 *Do you have any documents to provide that you have both been living together?* This is the address to show we live together at this time.

Q.16 *Just to clarify, does your husband have status within the United Kingdom?* He has got status. He has got 3 years to stay and then another 3 years to stay, I don't know what it is called but he has a valid visa.

Q17. *Where does your husband initially originate from?* Pakistan, Faisalabad."

9. At the end of the interview was the following statement:

"We have agreed that you will send me the following further evidence within 5 working days (insert figure as appropriate).

Requested evidence items:

- Marriage documents
- Marriage certificate
- Doctors letters
- The attack which took place, the police report for that.
- My passport"

The appellant did not provide those documents within 5 days or at all.

10. At [82] in the refusal letter, the respondent noted that:

"... Although you have provided no evidence of your marriage, it is considered that regardless of this evidence, your partner is a national of Pakistan with temporary discretionary leave in the United Kingdom. Therefore there are no significant obstacles which stop you and your partner continuing your family life outside of the United Kingdom in Pakistan. "

11. In January 2018, the appellant's husband was granted indefinite leave to remain. It is the appellant's case that this makes a significant difference to

the weight to be placed on her family and private life in the United Kingdom.

First-tier Tribunal decision

12. For the appellant, Mr Bukhari recognised at the First-tier Tribunal hearing and before me that the appellant's asylum claim is very weak. The appeal is posited only on her Article 8 ECHR rights outside the Immigration Rules HC 395 (as amended). The appellant accepted that she could not meet the GEN 1.2 requirements of the Immigration Rules HC 395 (as amended) because of the newness of her relationship.
13. The First-tier Judge considered that the status of the appellant and her husband as a married couple was a 'new matter' for which the consent of the Secretary of State was required. The Home Office Presenting Officer did not consent to its introduction and accordingly, the First-tier Judge was not seised of the marriage question. The question of the marriage and the supporting documents is dealt with at [15]:

"15. At the outset of the hearing, I raised the fact that the appellant's bundle now included the very documents that the appellant had agreed, but failed, to submit to the respondent by no later than the 28th November 2017. ...I therefore asked Ms Hashmi [the appellant's Counsel] whether she was proposing to argue that the decision was unlawful under section 6 of the Human Rights Convention. She confirmed that she was. I then indicated that this was a 'new matter' within the meaning of section 85(6) of the Nationality, Immigration and Asylum Act 2002 because the Secretary of State had 'not previously considered the matter'. The Act therefore *required* me not to consider it *unless* the Secretary of State consented to my doing so. Ms Hashmi argued that the consent of the Secretary of State was unnecessary because, although they had been refused, the appellant had previously made applications for leave to remain on the basis of her family life in the United Kingdom.

The problem with that submission is twofold. Firstly, I have no idea on what basis the appellant made her previous applications. Secondly, and more fundamentally, section 85(6) defines a 'new matter' by reference to the Secretary of State having not previously considered it *in the context of the decision under appeal* or a statement made by the appellant under section 120. Having taken instructions, Mrs Brewer indicated that the Secretary of State did not consent to my hearing the matter. Contrary to Ms Hashmi's later claim that I had *decided* not to hear the appellant's human rights claim I was in fact left with no choice but to refuse to do so." *[Emphasis in the original]*

14. Paragraph 15 concluded:

"Ms Hashmi then asked to take instructions with a possible view to the appellant withdrawing her appeal in the light of my 'decision'. I made it plain to Ms Hashmi that I would take a very great deal of persuading that such a course was in the appellant's best interests. After all, there was nothing to prevent her from subsequently making a discrete

human rights claim to the Secretary of State. *Ms Hashmi decided not to pursue the matter.*" [Emphasis added]

15. The First-tier Tribunal dismissed the appeal.

Permission to appeal

16. The appellant appealed, stating that she had always understood that her asylum claim was weak and that she was 'not able to ascertain her credibility' before the First-tier Judge. She criticised the Judge for accepting as a fact that , having agreed at interview to provide her marriage documents within 5 days, she had failed to do so, making the marriage a 'new matter'. She argued, in effect, that the Judge should have assumed jurisdiction over the marriage question, relying on the Secretary of State's knowledge of the relationship with her now husband when they were unmarried. She argued that any evidence up to and including the date of hearing should have been admitted.
17. Permission to appeal was granted on the basis that the Judge had arguably erred in his approach to section 85(6) of the Nationality, Immigration and Asylum Act 2002 (as amended), given that there were two previous applications relying on family and private life.
18. The judge who granted permission directed the provision of a statement from Ms Hashmi, Counsel who attended the First-tier Tribunal hearing. None has been provided.

Rule 24 Reply

19. There was no Rule 24 Reply on behalf of the respondent.
20. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

21. For the respondent, Ms Petterson said that the grounds of appeal amounted to no more than a disagreement. This had been a decision on an asylum appeal and if the appellant wished to make a human rights claim, it remained open to her to make a charged application on the basis of her current circumstances, which she could have done at any time. The appeal should be dismissed.
22. For the appellant, Mr Bukhari said that the appellant had not understood the need to provide the marriage documents within 5 days (they were in the bundle for the First-tier Tribunal, which was the first time they had been disclosed). The Judge's approach to section 85(6) was an error of law and the decision should be set aside and remade.

Analysis

23. The bundle before me does not provide copies of all of the previous refusal letters on family and private life. It is not possible, therefore, to know what facts had been considered by the respondent in those decisions, but we do have the appellant's own statement that having entered into an Islamic marriage in 2012, she withheld that fact until 2015. She withheld the supporting evidence which was requested by the respondent to prove the marriage and she has not produced a statement from her Counsel before the First-tier Tribunal.
24. There is nothing, therefore, to contradict the Judge's summary that having considered the matter, the appellant's Counsel chose not to pursue the 'new matter' of the appellant's marriage to a settled person. The Judge's self-direction in [15] is sound and proper and it appears that the matter was explored with both representatives. The decision under appeal was a protection appeal and the appellant had, and has, the option of a paid application for leave to remain on family and private life grounds.
25. The Upper Tribunal has considered the approach to 'new matters', most recently in *Quaidoo* (new matter: procedure/process) Ghana [2018] UKUT 87 (IAC), for which the judicial headnote is as follows:
- "1. If, at a hearing, the Tribunal is satisfied that a matter which an appellant wishes to raise is a new matter, which by reason of section 85(5) of the Nationality, Immigration and Asylum Act 2002, the Tribunal may not consider unless the Secretary of State has given consent, and, in pursuance of the Secretary of State's Guidance, her representative applies for an adjournment for further time to consider whether to give such consent, then it will generally be appropriate to grant such an adjournment, rather than proceed without consideration of the new matter*
- 2. If an appellant considers that the decision of the respondent not to consent to the consideration of a new matter is unlawful, either by reference to the respondent's guidance or otherwise, the appropriate remedy is a challenge by way of judicial review."*
26. These grounds of appeal raise no properly arguable material error of law in the decision of the First-tier Tribunal. This appeal is therefore dismissed.

DECISION

27. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Date: 26 November 2018
Gleeson
Tribunal Judge Gleeson

Signed **Judith AJC**
Upper