



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14485/2018

THE IMMIGRATION ACTS

Heard at Field House
On 20th June 2019

Decision & Reasons Promulgated
On 08th July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

USMAN ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr Lewis Moore, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Usman Ali against the decision of Judge Samimi to dismiss his appeal, made on human rights grounds, against the decision of the Secretary of State to refuse his application for leave to remain in the United Kingdom by reason of his long residence in the United Kingdom. For reasons that I explain at paragraph 11 (below) I decided to hear this appeal in the absence of the appellant. An anonymity direction was not made in the First-tier Tribunal and I consider that little purpose would be achieved by making one now.

2. The application had been made under paragraph 276B of the Immigration Rules which, it will be recalled, requires the Appellant to meet certain requirements concerning his character and immigration history, as well as requiring him to prove that he has been lawfully resident in the United Kingdom for a continuous period of at least ten years.
3. The Respondent refused that application on the basis that, whilst it was accepted the appellant had proved that he had been continuously resident in the United Kingdom since his arrival in 2006, he had failed to prove that the period of his residence since 2010 was lawful.
4. The Appellant claimed his residence since 2010 was lawful because he had retained a right to reside in the United Kingdom as the former spouse of an EEA national who, at all material times, was a “qualified person” under the Immigration (European Economic Area) Regulations 2006. The Respondent challenged that claim on the basis that the Appellant’s marriage had been one of convenience.
5. Judge Samimi found that there was “credible evidence ... to show that the Appellant had been a party to a marriage of convenience”, which the appellant had failed to rebut by way of an, “innocent explanation” (paragraph 15), and that he had thus failed to show that he had acquired a period of ten years’ lawful residence in the United Kingdom (see paragraph 16). The judge thus concluded that the Appellant had, “... not satisfied the requirements of the long residence Rules in accordance with paragraph 276B of the Immigration Rules”. The judge thereafter dismissed his appeal on this sole ground.
6. The Grounds of Appeal are principally based upon various factual inaccuracies in the decision including, by way of example, incorrectly stating the Appellant’s date of birth and, more seriously, cutting and pasting a paragraph that related to an entirely different appeal at paragraph 6 of the present decision. The grounds were drafted by the Appellant himself.
7. The application for permission to appeal on those grounds was initially refused by First-tier Tribunal Judge Lever, who said that the judge had set out in some detail the evidence in the case and had found, for reasons that were sustainable, that the Appellant had been a party to a marriage of convenience. Judge Lever added that this was a reasoned decision based on the evidence available and had reached a conclusion clearly open to him on that evidence.
8. The Appellant renewed his application, on the same grounds, to the Upper Tribunal. In a decision dated 22nd May 2019, Deputy Upper Tribunal Judge Chamberlain said as follows -

“It is arguable that the judge has failed to apply anxious scrutiny to the Appellant’s case given her recitation of incorrect facts at paragraphs 1 and 6 relating to the Appellant’s marriage and immigration history. It is also arguable that, in dismissing the appeal under the Immigration Rules, the judge erred in law as the only right of appeal is on human rights grounds. It is arguable that she erred in failing to consider Article 8.”

Deputy Upper Tribunal Judge Chamberlain went on to say that she was less impressed by the arguments challenging the finding in relation to the Appellant's allegedly sham marriage. Thus, the matter came before me.

9. I should begin by observing that the principal ground on which Deputy Upper Tribunal Judge Chamberlain granted permission to appeal was not one that was explicitly raised by the Appellant. However, in my discussion with Mr Moore during his well-presented arguments, he said that he did not take any point on this. In my judgment he was right not to do so. The reason for this is that the only Ground of Appeal that was open to the Appellant under Section 84 of the Nationality, Immigration and Asylum Act 2002 was that the decision was unlawful under Section 6 of the Human Rights Act as being contrary to his rights under the Human Rights Convention. That being the case, the judge was required as a matter of law to determine the appeal on that basis irrespective of whether the Appellant specifically addressed it at the hearing of his appeal.
10. The judge gave no consideration whatsoever to the question of whether the decision would lead to a breach of the appellant's right to respect for private and family life under the Human Rights Convention. Instead, she focused entirely upon the question of whether the Appellant had established that he had lawfully resided in the UK for a continuous period of ten years under paragraph 276B of the Immigration Rules. However, her finding in this regard was by no means dispositive of the appeal, which ultimately depended upon whether the appellant's removal in consequence of the decision would be unlawful under section 6 of the 1998 Act as being incompatible with the appellant's rights under Article 8 of the 1956 Convention. Having made her finding on the lawfulness of the appellant's residence in the United Kingdom, her focus should therefore have shifted from paragraph 276B to paragraph 276ADE of the Immigration Rules, for it is the latter rather than the former provision that represents the Secretary of State's view of the operation of Article 8 in relation to the right to respect for private life. That is not to say that the question of the period of the Appellant's lawful residence in the United Kingdom was irrelevant to the Article 8 issue; it was not. It was, however, but one of a number of factors that fell to be weighed in the balance when considering whether the public interest required the Appellant to return to Pakistan. I will come to what other factors should have been considered in a moment. However, it will suffice for present purposes to state that the failure to consider the one Ground of Appeal that the Appellant could lawfully bring against the decision is so fundamental that the decision of Judge Samimi must be set aside.
11. Before considering the appropriate procedure for re-making the decision in this appeal, I should first mention that the Appellant did not appear at the hearing before me by reason of illness. This was evidenced by my clerk, who had not only witnessed the Appellant vomiting outside the hearing room, but had arranged for an ambulance to take him to hospital. By the time I was informed of these facts, I had already formed a provisional view that the decision of Judge Samimi could not stand. It therefore seemed to me that there would be no procedural unfairness in conducting the 'error of law' hearing in his absence.

12. Mr Moore submitted this was the type of case where I could satisfactorily substitute my own decision on the question of Article 8 for that of the First-tier Tribunal without remitting it for a complete rehearing. However, there are a number of reasons why I do not think that this is appropriate.
13. The first and most obvious reason is that this is not a case in which I can simply substitute my own decision for an erroneous decision of the First-tier Tribunal Judge given that the First-tier Tribunal has not made any decision at all upon the single Ground of Appeal that was open to the Appellant. It follows from this that a decision upon the compatibility of the Respondent's decision with the rights of the Appellant under Article 8 of the Convention remains outstanding. It is therefore only right and proper, as a matter of principle, that the first port of call in this regard is to the First-tier Tribunal.
14. Secondly, and related to the first reason, is that there are a very considerable number of consequential primary findings of fact that need to be made before any sensible decision can be made upon the question of whether the Appellant's removal from the United Kingdom would breach his fundamental right to respect for private and family life. This includes (but is not limited to) the question of whether the Appellant continues to have any social, cultural or family connections to Pakistan of which he is a citizen, and the extent to which he is integrated into the society of the United Kingdom. There are no findings of fact about any of these things. I accept Mr Moore's point that it may well be that no evidence was advanced about those matters at the hearing. Nevertheless, given the restricted nature of the appeal, it was in my judgement incumbent upon the Presenting Officer and, if necessary the judge herself, to enquire into these matters. It is difficult to see how it would otherwise be possible to make a sensible decision as to whether there would be "very significant obstacles to integration" in Pakistan under paragraph 276ADE of the Rules.
15. Thirdly, when looking at the matter outside the Rules, the Tribunal was legally required (but failed) to have regard to the factors listed under Section 117B of the 2000 Act. These include the Appellant's facility in the English language and the extent to which (if at all) he is financially independent of the state. Indeed, the only matter that the judge did address under section 117B (seemingly by accident rather than by design) was the question of whether the Appellant had established his private life in the UK at a time when his presence in the United Kingdom was unlawful.
16. I am not in any event satisfied that the judge's finding on the one matter that she considered, namely the lawfulness of the Appellant's residence in the UK, is entirely sound. This is because she appears to have approached the question of the burden and standard of proof as though this were an appeal against the refusal by the Secretary of State to issue the appellant with an EEA Residence Card in recognition of his rights of free movement under the Immigration (European Economic Area) Regulations, whereunder the burden of proving that his marriage was one of "convenience" would have been upon the Respondent. However, given that this was an appeal against the Respondent's decision to refuse his human rights claim, it is at

least arguable that the correct approach was to consider whether the Appellant had proved all relevant primary facts, including the question of whether his private life was established at a time when he was lawfully in the United Kingdom, as were necessary to establish the basis of his claim that his human rights would be contravened by his removal from the United Kingdom. Be that as it may, even if the judge's finding in this regard could be viewed as satisfactory, there remain a significant number of other factual findings that need to be made before this appeal can be properly determined.

17. Fourthly, it is not practical for me to embark immediately upon the necessary fact-finding exercise given that the Appellant is currently indisposed by reason of illness.
18. So, for all of the above reasons, I conclude that the most appropriate course is to set aside the First-tier Tribunal's decision and to remit this matter to be re-heard in the First-tier Tribunal before any judge other than Judge Samimi.

Notice of Decision

19. The appeal is allowed. The decision of the First-tier Tribunal is set aside and the appeal is remitted to be heard completely afresh by any judge other than Judge Samimi.

No anonymity direction is made.

Signed

Date: 3rd July 2019

Deputy Upper Tribunal Judge Kelly