IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10280/2018**

THE IMMIGRATION ACTS

Heard remotely on *Skype for Business*
On 12 February 2020

Decision & Reasons Promulgated
On 01 March 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

USMAN MUNIR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Ms D Ofei-Kwatia of Counsel, instructed by M-R Solicitors

DECISION AND REASONS

INTRODUCTION

1. Although the appeal to the Upper Tribunal has been brought by the Secretary of State, for ease of reading, I shall refer to the parties as they were before the First-tier

Tribunal: the Secretary of State is once more "the respondent" and Mr Munir is "the appellant".

2. The respondent appeals against the decision of First-tier Tribunal Judge Rowlands ("the judge"), promulgated on 3 January 2020, by which he allowed the appellant's appeal against the respondent's refusal of his human rights claim.

3. The appellant had originally arrived in the United Kingdom in 2006 with leave as a student. He obtained at least one extension in that capacity. An appeal against a subsequent refusal of further leave was dismissed and the appellant became appeal rights exhausted on 11 June 2010. Meanwhile the appellant had applied for a certificate of approval to marry a Hungarian national, Ms K. This application had been made on 17 December 2009 and was granted on 12 December 2010. The appellant married Ms K on 18 May 2011 and subsequently applied for and was issued with a residence card. The residence card was revoked on 1 November 2016 and an appeal dismissed on 26 February 2018. This decision went unchallenged.

4. The appellant then made a human rights claim on 20 October 2017. This was refused on 18 April 2018. An appeal to the First-tier Tribunal was dismissed but its decision was subsequently set aside by the Upper Tribunal and the matter remitted. In this way the matter came before Judge Rowlands.

THE JUDGE'S DECISION

5. Having set out the immigration history, the judge recorded the appellant's acceptance that was unable to meet the requirements of the Immigration Rules ("the Rules"), specifically paragraph 276B (long residence in the context of ten years' continuous lawful residence in the United Kingdom). The judge was satisfied that Article 8 was engaged in respect of the appellant's private life and that the respondent's refusal of the human rights claim constituted an interference with that protected right. In paragraph 14 the judge made reference to factors connected to the mandatory considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Paragraph 15 states as follows:

> "15. I have now taken into account the fact that, were it not for the consent to marry issue, his time in the United Kingdom would have all been lawful in which case he would have met the Immigration Rules and would have by right been given leave to remain on the basis of his long residence. I find that this weighs heavily in his favour in the proportionality test such that his removal would be disproportionate and that he is entitled to succeed under Article 8."

THE CHALLENGE

6. The respondent's grounds are in essence twofold. First, it is said that the judge erred in respect of his consideration of the continuous lawful residence issue with

particular reference to what appears to have been his reliance on a delay in approving the certificate for approval application. Second, it is said that the judge failed to adequately consider the mandatory considerations under section 117B of the 2002 Act.

7. Permission was granted on all grounds.

8. A rule 24 response was then provided by the appellant's representatives and a skeleton argument followed from the respondent.

9. I heard concise submissions from Mr Kotas and Ms Ofei-Kwatia, which I will not repeat here.

DECISION ON ERROR OF LAW

10. I am satisfied that the judge did materially err in law.

11. On a sensible reading of the decision, the cornerstone of the judge's reasoning as to why the appeal should be allowed on Article 8 grounds was that there had been a delay by the respondent of sufficient magnitude in respect of the certificate of approval application so as to substantially reduce the weight afforded to the public interest (or, alternatively, to substantially increase the weight to be given to the appellant's private life). This premise was in my view fundamentally flawed.

12. As noted earlier, there was a delay in the processing of the certificate of approval application. This amounted to, on my calculation, five days short of a year. On any rational view and with particular regard to what is said in the well-known decision of Collins J in FH and others [2007] EWHC 1571 (Admin) and the discussion set out in paragraph 16 of EB (Kosovo) [2008] UKHL 41; [2008] 3 WLR 178, this delay could not be considered unreasonable, inordinate, illustrative of a dysfunctional system, or in any other way deserving of the importance attributed to it by the judge in this particular case. There is no indication whatsoever of any time limits within which such applications should be determined. There were no undertakings given to the appellant as to how long it would take for his particular application to be determined. In order for the delay point to have even stood a chance of being a relevant factor, the judge would have needed to conclude that the application should have been determined before 11 June 2010 (the point at which the appellant became an overstayer). No such conclusion was stated and, if it had, it would have been eminently susceptible to a rationality challenge: a period of some six months (the period between the date of application and 11 June 2010) could not have amounted to a material delay. Whilst it no doubt would have been ideal for the application to have been determined sooner, the fact that in the event it took just under a year was not a factor that was capable of attracting such weight as to tip the scales in the appellant's favour, particularly when the considerations under section 117B of the 2002 Act were taken into account.

13. The judge's decision must be set aside on this basis alone.

14. There is a further matter which falls to be considered in respect of the delay. In 2018 an appeal by the appellant against the revocation of a residence card was dismissed by the First-tier Tribunal on the primary basis that the marriage to Ms K had been one of convenience (EA/13327/2016. Ms Ofei-Kwatia confirmed that she was aware of the decision and its contents, and I am satisfied that the judge was aware of its existence, if not perhaps everything stated therein). It seems to me unreal, for want of a better term, for the appellant to have been able to rely on a delay in obtaining a certificate of approval which, when it was granted, he then used to enter into a marriage of convenience.

15. In respect of the second ground of appeal, I acknowledge that the judge made reference to factors in paragraph 14 which bore on section 117B of the 2002 Act. I have to say it does rather look to me as though the appellant's financial independent and ability to speak English were counted as positive factors as opposed to being of neutral value, although this is not of any great consequence. More importantly, whilst the judge acknowledges what is described as the appellant's "unsettled" status in the United Kingdom, he failed to undertake any reasoned assessment of why that precarious status should attract anything other than limited weight in light of section 117B(5) of the 2002 Act. In my view the judge has made an observation as to the status but has not then gone on to engage with it on a correct legal footing. This amounts to a second material error of law.

16. I set the decision of the First-tier Tribunal aside.

RE-MAKING THE DECISION

17. Both representatives were agreed that I should go on and re-make the decision without a further hearing. This I now do.

18. By way of evidence, I have taken into account the appellant's bundle prepared for the hearing before the First-tier Tribunal, indexed and paginated 1-155. No further evidence had been adduced in respect of the re-making decision. The appellant was not called to give oral evidence and the hearing proceeded by way of submissions only (Ms Ofei-Kwatia declined the opportunity to provide additional post-hearing written submissions).

19. Mr Kotas' submissions were to the point. He submitted that in light of the evidence and relevant case-law it was clear that the appellant could not succeed on Article 8 grounds. He was unable to meet any of the relevant Rules. It had not been suggested that there were any very significant obstacles to his integration into Pakistani society. Beyond this and in light of the mandatory considerations set out in section 117B of the 2002 Act, there was no merit in the claim.

20. Ms Ofei-Kwatia relied on the rule 24 response and the evidence contained in the appellant's bundle, in particular the witness statement dated 15 October 2019.

Findings of fact

21. In light of the evidence as a whole, I make the following findings of primary fact.

22. I find that the appellant's immigration history is as set out in paragraphs 3 and 4, above.

23. I find that the appellant married a Hungarian national, Ms K, on 18 May 2011. However, I do not accept that prior to this they were ever in a genuine and subsisting relationship, as apparently accepted by the First-tier Tribunal on the basis that the appellant's witness statement had not been challenged. The reason why I have taken a different view is the First-tier Tribunal's 2018 decision in respect of the appellant's appeal against the revocation of the residence card. As stated previously, it was concluded that the appellant had entered into a marriage of convenience with Ms K, a conclusion that went unchallenged. There is no proper basis on which I should go behind that finding and I do not. The fact, as I find it to be, that the appellant's marriage to Ms K was one of convenience leads me to conclude that his relationship prior to the marriage was not genuine and subsisting.

24. If I was wrong on the nature of the pre-marriage relationship, it would make no difference to the outcome of the case.

25. I find that whilst the appellant has established a private life in the United Kingdom over the course of his relatively lengthy residence, the evidence provided as to the strength of that life is thin, to say the least. The bundle contains nothing of relevance to this issue except for the appellant's brief witness statement. This contains very little by way of detail. For example, there is nothing as to the strength of any friendships that might have been established. There is nothing to indicate family life connections in this country. There is no evidence about any community or other activities undertaken. There are no letters of support in the bundle.

26. On the basis of what I do have, I find that the appellant has not established any significant relationships in the United Kingdom, whether in respect of relatives or friends. I find that he is in good health. I find that he has not undertaken any meaningful activities in terms of social matters or otherwise.

27. I am prepared to accept that the appellant speaks English to a reasonable level and that he has not been reliant on public funds.

28. In respect of the appellant's ties to Pakistan, I have no doubt that she has family members living in that country and maintains contact with them. There is no reliable evidence to suggest that he would not receive support of one sort or another from his family members if he were to return to Pakistan. I find that the speaks Urdu.

Conclusions

29. I now apply the factual matrix to the relevant legal framework.

30. I have found that the appellant enjoys private life in the United Kingdom, although I emphasise the fact that this is certainly not of a particularly meaningful nature. There is no family life.

31. I am prepared to accept that the respondent's refusal of the appellant's human rights claim constitutes an interference with the latter's private life.

32. It is accepted that the respondent's decision is in accordance with the law and pursues a legitimate aim.

33. As to proportionality, I weigh the following factors in the appellant's favour.

34. First, the appellant has been in the United Kingdom approximately 14 ½ years. That is a relatively lengthy period of time. Having said that, it is some way off the 20 years measure adopted by the respondent in paragraph 276ADE(1)(iii) of the Rules. In addition, the appellant arrived in this country well into adulthood (aged 24) and, notwithstanding the length of residence, has failed to show that he has established significant ties here. Overall, whilst the length of residence does count in the appellant's favour, it does not attract significant weight.

35. Second, some of the residence in this country has been on a lawful basis.

36. The following matters weigh on the respondent's side of the balance sheet.

37. First, the importance of maintaining effective immigration control is a weighty consideration (section 117B(1) NIAA 2002).

38. Second, it is plainly the case that the appellant is unable to meet any of the Article 8-related Rules (specifically, paragraphs 276B and 276ADE). Included in this is the absence of any very significant obstacles to integration into Pakistani society. This is an important consideration.

39. Third, when the appellant did have leave to remain it was always on a highly precarious basis (section 117B(5) NIAA 2002). There is nothing in this case which could sensibly be described as a compelling feature such as to contribute anything other than little weight to the appellant's private life established during his lawful residence.

40. Fourth, since 11 June 2010 the appellant has resided in this country without leave to remain. It is right that he resided here for a period in possession of a residence card issued under the Immigration (European Economic Area) Regulations 2016. However, it transpired that his marriage to Ms K had been one of convenience all along and therefore he never enjoyed a right of residence as the family member of an

EEA national. For the sake of completeness, any "durable relationship" which may have existed pre-marriage (contrary to my primary finding) did not give the appellant a right of residence as he had never been issued with a residence card on this basis.

41. It follows that he has been in this country unlawfully since 11 June 2010 with the effect that his already thin private life attracts little weight (section 117B(4) NIAA 2002).

42. Fifth, far from assisting the appellant's case, the alleged "delay" in the respondent issuing the certificate of approval for marriage in fact weighs in favour of the latter. There was nothing remotely unreasonable or otherwise significant about the 51-week time it took for that application to be determined. Further, and in any event, the conclusion of the First-tier Tribunal in 2018 that the appellant's marriage to Ms K had been one of convenience wholly undermines any (minimal) value that the time it took to issue the certificate might have afforded the appellant. It is manifestly the case that the appellant cannot benefit from any perceived delay by the respondent in giving him permission to enter into a marriage of convenience. Indeed, the appellant's misconduct in entering into the marriage of convenience adds to the already strong public interest.

43. The appellant's ability to speak English and his financial independence are of neutral value.

44. Bringing all of the above together, I have no hesitation in concluding that the respondent's refusal of the appellant's human rights claim constitutes an entirely proportionate and fair striking of the balance between the public interest and the rights protected under Article 8.

45. It follows that the appellant's appeal must be dismissed.

NOTICE OF DECISION

The decision of the First-tier Tribunal contains errors of law and it is set aside.

I re-make the decision by dismissing the appeal against the refusal of the human rights claim.

No anonymity direction is made.

Signed *H Norton-Taylor* Date: 16 February 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

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

Signed *H Norton-Taylor* Date: 16 February 2021

Upper Tribunal Judge Norton-Taylor