Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18719/2019 (V)

THE IMMIGRATION ACTS

Heard by Skype for business
On the 5 February 2021

Decision & Reasons Promulgated
On 2 March 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

Y K
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L. Butler, instructed on behalf of the appellant.
For the Respondent: Mr S. Kotas, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a citizen of Pakistan, appeals with permission against the decision of the First-tier Tribunal panel (Judge Curtis and Judge Birrell) (hereinafter referred to as the "panel") who dismissed his human rights appeal in a decision promulgated on the 26 February 2020.

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2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The hearing took place on 5 February 2021, by means of *Skype for Business* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely. There were no issues regarding sound, and no technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

Background:

4. The history of the appellant is set out in the decision of the FtTJ panel, the decision letter and the evidence contained in the bundle.

5. On 30 April 2011, the appellant was married to G, a British citizen, in Pakistan. This was an arranged marriage.

6. On 2 August 2012, the appellant applied for entry clearance as a spouse under the rules. The application was refused by the respondent on 31 October 2012 on the basis that the sponsor, G, had not provided the specified documents in relation to her income under Appendix FM -SE.

7. The appellant appealed against this decision and his appeal came before FtTJ Herwald on 26 June 2013. The judge found as a fact that the appellant and his spouse had not met since May 2011 (the date being shortly after their marriage) and that they had only kept in touch by telephone on a sporadic basis, once or twice a week.

8. The judge further found that his spouse had misled the court in her original statement suggesting she was self-employed and that she was a sole Pakistani national. In the evidence before the judge, his spouse confirmed that she held dual nationality. When applying the considerations under Article 8, the judge was not persuaded that the appellant and G were in a subsisting marriage. The appeal was therefore dismissed.

9. On 22 August 2013, the appellant made a second application for entry clearance as a spouse of a British citizen, G. This again was refused by the respondent because, as before, the sponsor had not provided the prescribed documents to establish her financial circumstances.

10. The appellant appealed against that decision on 9 September 2014. The appeal was heard on 4 March 2015 during the hearing the appellant withdrew the appeal. There is no reason given for that withdrawal in the papers.

11. The appellant entered the UK on 13 October 2016 after being granted entry clearance as a spouse. The entry visa was valid until 10 July 2019.

12. On 26 September 2017, a child of the marriage, A, was born.

13. On 14 November 2018, the appellant's leave to remain was curtailed to expire on 11 February 2019.

14. On 2 May 2019, the appellant applied for leave to remain outside the rules under the destitution domestic violence concession ("DDVC") and was granted from 9 May 2019 to 8 August 2019.

15. On 17 July 2019, the appellant applied for indefinite leave to remain as a victim of domestic violence.

The decision of the 5 November 2019:

16. The application was refused on 5 November 2019 because the appellant did not meet the requirements of Paragraph E-DVILR 1.3 of Appendix FM, under which the appellant is required to provide evidence that demonstrated during the last period of limited leave as a partner the relationship broke down permanently as a result of domestic violence.

17. The following was set out in the decision letter:

- Under Paragraph E-DVILR of Appendix FM, the appellant must provide evidence to demonstrate that during his last period of limited leave as a partner, his relationship broke down permanently as a result of domestic violence. It is acknowledged that he had leave as a spouse of a settled person valid until 10 July 2019 which was subsequently curtailed to expire on 11 February 2019.

- In the form completed, the appellant stated that the relationship broke down on 15 November 2018, within the probationary period.

- Consideration was given to whether the appellant had demonstrated that his relationship broke down due to domestic violence.

- The decision letter set out the definition of domestic violence.

- The respondent set out that all aspects of the claim to have suffered domestic abuse, including his claim to have been subjected to controlling and controlling behaviour had been assessed in line with the definition and the modernised guidance.

- In the application form the appellant stated that no legal action been taken against the person who had committed the abuse of which he claimed to have been a victim.

- The documents provided as supporting evidence of his claim consisted of a personal statement dated 3/7/2019, police logs and letter from the police dated 6/6/2009, email from modern slavery helpline dated 3/7/2019 and bank statements and wage slips.

18. Consideration was given to the matters set out in his application form and personal statement dated 3/7/2019.

19. He stated that after he arrived in the UK on 13 October 2016 after his marriage in Pakistan on 30/4/2011, as soon as he got off the plane, his spouse's family took his passport, ID documents and personal documents. The appellant stated that he quarrelled often, and his spouse told him that her father had forced her to marry him against her wishes. The appellant stated that she put cameras in the bedroom to record him "failing" having sex and that she would show the tapes to the family if he did not do what she said. The appellant stated that she never took him to visit her parents and told him to stay away from them. However sometimes his brother-in-law would take him to visit them and his father-in-law would give him food and arrange for a job for him working in a factory. He said he had his own bank account but that his spouse took the debit card so he could not access the money and she controlled all of it. He would be given £50 cash every week to spend on himself.

20. In addition he stated that he did not have a key to the house, he was often locked out from morning till night. He stated that for the first three months he was allowed to stay in his wife's bedroom but then she moved to a small room of her own. He stated that he was only allowed in this room in the toilet. He was not allowed to go to the kitchen and get himself something to eat and if you wanted to shower the hot water is turned off.

21. The appellant stated that his wife found out that he was spending time with her father after work and began threatening him saying that she would show the video recordings to everyone and she would call the police and say that he was abusing her. He stated that in November 2016 that his wife stopped giving him food.

22. In January 2017, his wife told the doctors that she was not pregnant because there was something wrong with him. He gave of specimen and she used it to get pregnant. Things at home were volatile with his wife smashing two mobile phones and throwing one at him.

23. In May 2017, the appellant claimed that his wife's brother assaulted him at the home, slapped him and afterwards his wife hit him with a broom handle to the side of the jaw. The next day his colleague took him to the hospital. The appellant stated that he was not allowed in the family home for iftar and when

his wife had their child in September 2017 he was not allowed to go to the hospital and only got a hold her two or three times although he did see her when his wife returned from hospital.

24. In October 2018, his wife went to Pakistan for a family wedding and left strict instructions at what time he was allowed in the house and where the house he was allowed to go with cameras keeping track of his movements. He could not endure the situation, so he left the marital home in November 2018.

25. The respondent set out that it was accepted that the personal statement was his account of events but that on its own it was insufficient to establish that the relationship was caused to permanently breakdown as a result of domestic violence. Reference was made the guidance and that the appellant must provide a sufficient degree of information from independent and objective sources which supported his claim to have been a victim of domestic violence.

26. Reference in the decision letter was made to the police logs dated 6/6/2019. The respondent noted that the appellant submitted records which confirmed that on 6/6/ 2019 he reported historical abuse to the police as outlined in the witness statement. The police notes consist of an incident report where he reported being the victim of controlling behaviour between October 2016 – November 2018 including allegations of his spouse taking his bank cards and other documents as well as physical abuse of his wife and brother. The notes state that he was advised by the immigration solicitor to go to the station to report the historical abuse. No further action was taken, and all the reports were closed.

27. The respondent noted that the information contained in the police information is a record of the appellant's own testimony and that the report of the abuse in June 2019 was seven months after the breakdown of the relationship. No further action was taken by the police in relation to the allegations which were unproven. As a result the police logs submitted were not considered to be sufficient to establish that he was a victim of domestic violence or that the marriage broke down as a result of domestic violence.

28. Consideration was given to the email from modern slavery helpline dated 3/7/2019. The appellant submitted an email from the helpline to his immigration solicitor which confirmed that he called them on 3/7/2019 and reported his account of domestic abuse. The email stated that the helpline advisers took the call did say that there were indicators of modern slavery in the situation however the email clarified that such indicators do not "conclusively tell us that the situation is one of modern slavery. We would need to speak your client more detail using one of our interpreters, to more fully assess the situation." The email also confirmed that he did not wish to pursue the National Referral Mechanism ("NRM") but that he wanted help with the recovery of owed wages which is not something they would assist with.

29. The respondent noted that the email confirmed that he made a report of the alleged situation to the helpline which they logged. However the report was taken entirely from his own testimony and the helpline confirmed that the appellant had told them that he did not wish to pursue the NRM and therefore they were unable to identify whether his case fitted the criteria of modern slavery. Thus the information was not sufficient to demonstrate that he had been a victim of domestic violence or that the relationship broke down as a result.

30. The respondent stated that whilst it was accepted that there could be conflict between the relevant parties in the aftermath of the marriage breakup, it was concluded that without any acceptable evidence and support for the various claims, there was nothing of sufficient substance to distinguish the breakdown of the marriage from any other unhappy marriage that ends in acrimony.

31. Consideration was also given to the bank statements and wage slips with regard to the claim that his wife abused him financially. It was noted that the bank statements and wage slips permitted provided no evidence which indicated or demonstrated that he was subjected to financial abuse or coercion is claimed. As such they were not accepted to establish that he was a victim of domestic violence or that the marriage broke down as a result of domestic violence.

32. The appellant lodged grounds of appeal on 7 November 2018 in which it was said that the refusal to grant the appellant leave to remain breached his and A's rights under Article 8. It was further submitted that the respondent had failed to adequately consider the independent evidence relating to the appellant's claim that he was a victim of domestic violence such that the refusal to grant leave to remain was not sustainable.

<u>The decision of the First-tier Tribunal panel:</u>

33. The appeal came before the FtT panel on 18 February 2020. The panel set out the evidence that was before them including the chronology, skeleton argument and further statement from the appellant dated 14 January 2020 and documents in support of the appeal.

34. It is also recorded that whilst a letter had previously been sent dated 10th February 2020 indicating that the protocol with the family Court should be initiated, at the hearing itself, the appellant's advocate confirmed that there was no application to adjourn to invoke the family court protocol (see paragraph [22 – 23]).

35. At paragraph [24] the panel asked the presenting officer to clarify the position in relation to the previous grant of leave (for a period of three months under the DDVC concession). As set out there, the grant of limited leave of three months was to allow the appellant to access public funds and to allow him to access accommodation whilst he completed and submitted an application for

indefinite leave to remain as a victim of domestic violence thus there is no concession that the appellant had in fact been a victim of domestic violence by that grant of leave.

36. The panel heard evidence from the appellant and set out his case at paragraphs [25] – [32] and also heard submissions from each of the advocates which were also summarised in the decision.

37. The findings of the panel are set out at [40]-[56]. They can be summarised as follows:

(1) the domestic abuse summary, the incident report on the crime report contained within the bundle carried little evidential weight as the appellant had not contemporaneously reported any offending/violence to the police.

(2) The report to the modern slavery helpline was similarly a report made which was not contemporaneous.

(3) The panel found that the sole purpose of disclosing the alleged historic abuse carried out by the appellant's wife and brother were to generate the independent paperwork required under the guidance of assessing applications for leave to remain as a victim of domestic violence (at [40]).

(4) The panel found that there were inconsistencies between the appellant's evidence and the content of the paperwork.

- The domestic abuse summary (page 16) noted that the appellant was assaulted numerous times during 2017 in 2018, he was abused a couple of times per week, he was assaulted by pushing, shoving, punching and sometimes his spouse used to hit shoes on his knees and arms which caused bruising. However in the appellant's statement, he describes only two incidents of assault occasioned by his wife – once throwing a mobile phone at him (paragraph 21) and once where she hitting with a broom handle on the left side of the jaw (paragraph 23). He did not mention in his witness statement the account given to the police that he was pushed, shoved punch, or hit with his shoes (at [41]).

- In the domestic abuse summary the appellant disclosed that the reason why his wife put cameras in the bedroom was to record him changing his clothes. However this was inconsistent with his witness statement when he gave a different reason that his wife had installed the cameras in the bedroom to recording "failing at having sex" (at [42]).

- At paragraph 14 of the witness statement, the appellant said that he and his wife did not have sexual intercourse after she disclosed having erected cameras in the bedroom. This was inconsistent with

the domestic abuse summary which the appellant stated that the only time they slept together was on one occasion in 2016 when she visited him in Pakistan. According to the domestic abuse summary, they had not had sexual intercourse in the UK.

(5) Thus the panel found that the discrepancies in the evidence which affected the overall credibility of the account provided by the appellant.

(6) The panel recorded the appellant's evidence where the appellant said that having reported the historic allegations against his wife he did not want to proceed any further with them in case his wife would be arrested and sent to prison, and he was worried about whether his wife would be taken away from his daughter. The panel considered that this evidence did not adequately explain why he did not wish to pursue a complaint against his wife's brother who he had said had used violence and had slapped him in the face. The panel found that neither his wife nor her brother had ever been arrested in relation to the allegations and the only evidence in support of that was contained in non-contemporaneous reports made by the appellant (at [45]).

(7) With respect to the attendance at the hospital, the panel recorded that the document demonstrated that he attended the hospital at 1604 on 14 May 2017 and was discharged at 1914 the same day. It recorded that the appellant presented with a face injury and was diagnosed with a laceration to the left-hand side of his face. The only treatment that is noted is that of observation. The panel accepted that on that day the appellant had an injury to his face. They also observed that they had been told that his colleague took him to hospital. The panel found that it was "perfectly possible that the injury was actually sustained as a result of an accident in the workplace. Given that the appellant still works at the factory it is reasonable to have expected him to adduce evidence of his colleagues as to what he had disclosed to them as the explanation of his injuries. That he has not done so affects the credibility of his account" (at [46]).

(8) As regards the bank statements, the panel found that during the period in which the appellant was residing in the matrimonial home a standing order of £150 per week was set up to an account in what appears to be in his wife's name and the remainder of the weekly wage was withdrawn as cash. The panel concluded that "given that the bank account statements do not show any expenditure that might be related to normal family expenses (such as utility bills, Council tax et cetera) it is not unreasonable to conclude that the standing order was to a bank account from which regular bills of the household would be paid. We do not accept the bank statements demonstrate that the appellant's wife had inappropriate control over the appellant's money. Further support for this conclusion can be drawn from an analysis of the bank statements during the period which the appellant was living with his friend in Rochdale, since those bank statements do not

show the standing order to his wife's account. The fact that the standing order appears to have been deleted (since the appellant is not living in the matrimonial home) suggest that the appellant had control over his bank account" (at [47]).

(9) In conclusion, the panel after assessing the evidence in the round, did not find that the relationship had broken down as a result of domestic violence (as defined in the Home Office guidance) perpetrated by the appellant's wife. The panel went on to state "it seems to us that the relationship has never been harmonious and was one in which the appellant's wife did not wish to be part of. We draw the conclusion because the appellant's wife was unable on two prior occasions to satisfy the respondent that she met the financial requirements of the sponsor of an application for leave to enter as a spouse, that she only visited the appellant once in Pakistan between their marriage in April 2011 on his arrival in the UK in October 2016 and that they appear not to have had sexual relations in the UK" (at [48]).

(10) The panel took into account the decision in *Ishtiaq* (and paragraph 38 relied upon by the appellant) which confirmed that a decision maker has a discretion to decide what evidence to require the applicant to produce in individual cases. The panel concluded that the decision "does not change the fact that the documents that were produced, in our view, carry little weight in supporting his claim. We have already noted the non contemporaneous nature of the crime report and domestic abuse summary that were provided. We also noted the A&E attendance document but that provides no details as to what account, if any, the appellant gave to the medical professionals as to how the injury had been sustained. No documents listed in the Home Office guidance document that might carry conclusive, strong or moderate weight were provided and the decision-maker was entitled to reach the decision they did" (at [50]).

38. The panel therefore did not accept that the appellant had met the rules when he applied for indefinite leave to remain as a victim of domestic violence.

39. Turning to Article 8, the panel took into account that the appellant's evidence was that he had no contact with his wife or child since November 2018 and the application for contact made to the Family Court was only lodged after the respondent refused his application for indefinite leave to remain. The panel noted that the appellant's advocate did not seek an adjournment to await the outcome of the application for contact with the child. The panel considered that it was relevant that the application for the contact order was only made after the respondent had refused to grant leave and was made in the context of there being no subsisting relationship with a at the time (applying *RS(immigration family Court proceedings) India* [2012] UKUT 00219 and *R (on the application of Singh) v SSHD* [2014] EFHC 461 (admin). The panel considered that as the appellant was capable of obtaining legal advice in relation to his immigration status, had there been a genuine desire for him to have contact with his child it

would have been expected that the appellant would have taken affirmative action in relation to formalising contact much sooner than he did.

40. On the evidence, the panel found that the appellant did not have a genuine subsisting relationship with A and therefore section 117B(6) did not apply. The panel also observed at [52] that the evidence appeared to demonstrate that the appellant had had very little contact with A since her birth and having regard to A's best interests in accordance with section 55 of the 2009 Act, in the light of the evidence that the appellant has not hitherto formed relationship with A and that A lived permanently with her mother in the UK, her best interests were for the status quo to be maintained and for A to continue to reside with her mother.

41. The panel found that it is had not been suggested that any of the appellant's family were in the UK and as he did not have a genuine subsisting relationship with A or G (his former spouse) there was no family life in the UK which might engage Article 8 therefore refusal to grant leave to remain did not interfere with any family life in the UK.

42. As to his private life, the panel accepted that he was likely to have a private life during his residence of three years and four months in the United Kingdom. He worked full-time and lived with a friend. The panel observed that there was little evidence of the nature of that private life and there was no attendance by any friends or supporters or any letters of support in the bundles. Thus they did not find that they could place weight on his private life and as such the consequences of the interference were not of such gravity to engage Article 8. However, in the alternative, the panel considered the issue of proportionality in accordance with the public interest considerations set out under S117B of the 2002 Act and that section 117B(1) applied confirming that the maintenance of effective immigration control is in the public interest; the appellant could not speak English, and this was a factor that weighed against him in the balance sheet exercise (S117B(2)). The panel took into account in favour of the appellant that he had worked when living in the UK and was therefore likely to remain financially independent (s117B(3)). The weight of any private life formed while the appellant's status as precarious would be limited in accordance with Section 117B(5). In conclusion the panel considered that the decision made to refuse leave was a proportionate interference with the appellant's Article 8 rights. They therefore dismissed his appeal.

43. Permission to appeal was sought relying on two grounds and permission was granted by FtTJ Neville on 28 April 2020.

<u>The hearing before the Upper Tribunal:</u>

44. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 17 July 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and that this could take place via Skype. Both parties have indicated that they were

content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties. I am grateful for their assistance and their clear oral submissions.

45. Ms Butler, who had appeared before the First-tier Tribunal appeared on behalf of the appellant and relied upon the written grounds of appeal. There was also a skeleton argument in the same terms which she had provided to the Tribunal.

46. Mr Kotas, senior presenting officer appeared on behalf of the respondent. He relied upon the written submissions which were sent on the 28 July 2020 by his colleague Mr Tan. The written submissions set out that having considered the grounds lodged, there was no material error of law in the decision of the panel and that the panel directed themselves appropriately.

47. I also heard the oral submissions of the parties and I am grateful for the clear and helpful submissions made by the advocates. I intend to consider those submissions by reference to the two grounds advanced on behalf of the appellant.

The submissions:

Ground 1:

48. Dealing with ground 1, it is submitted that the judge did not give proper weight to the evidence of domestic violence on behalf of the appellant.

49. The written grounds cite paragraph [40] where the panel stated that the domestic abuse summary, and the incident reporting the crime report carried little evidential weight and submit that notwithstanding that finding, the panel considered that evidence in three paragraphs. Ms Butler submitted that the panel relied upon inconsistencies for an adverse credibility finding but that none of these inconsistencies were put to the appellant in court.

50. In her oral submissions, Ms Butler submitted that the police report would have more detail of the crimes committed whilst the witness statement for court addressed the elements of his appeal namely, that he met the requirements of the immigration rules by virtue of being in the UK with a grant of leave as a partner, and subsequently having the relationship breakdown due to domestic violence.

51. Ms Butler, in her oral submissions relied upon the grounds at paragraph 7. She referred the Tribunal to the decision of *Ishtiaq v SSHD* [2007] EWCA Civ 386 and submitted that the panel did not fully engage with the findings in that case that relate to the wide discretion available and also that the appellant's cultural and personal background and his vulnerability were all reasonable explanations for his late reporting of the abuse. This had not been addressed in the determination. Ms Butler initially confirmed that the details of the reasonable explanation was provided in the covering letter sent with the

application on 17 July but on further consideration stated that it was not set out in any written evidence (appellant's witness statements) but that it was primarily addressed in the oral submissions.

52. Mr Kotas, on behalf of the respondent submitted that when considering the evidence relied upon by the appellant, the panel were entitled to place less weight on the evidence. Firstly, by the nature of the reports they were summary of accounts given to the police by the appellant himself. Further they were reports made at least seven months after the claimed incidents took place. The grounds did not argue with the fact that there are clear discrepancies within what is in effect the accounts of the appellant. It was submitted that it was incumbent upon the appellant to provide a credible and consistent account of that alleged abuse across the evidence relied upon.

53. It is further submitted that at paragraphs [45] – [47] the panel found issues with other areas of the evidence that did not support the account of the appellant. At [45] the panel noted that even if the appellant did not wish to pursue charges against his wife, he did not explain why he did not seek to do so against her brother whom he claimed assaulted him. At [46] the panel noted an absence of corroborative evidence from work colleagues, who the appellant claimed to have taken him into hospital after he was assaulted. At [47] the panel found the banking evidence suggested that the appellant had control over his own finances rather than them being controlled by his wife. The grounds did not challenge any of these findings which were clearly material matters.

54. As to the grounds where it is asserted that the panel erred in law in not considering other explanations for the absence of evidence, the respondent in the refusal decision highlighted the delayed nature of the evidence. It was for the appellant to provide a full explanation as to why he did not report abuse at an earlier stage. At [49] and in other areas of the decision the judge identified an absence of detailed evidence when the appellant was treated at hospital, an absence of corroborative evidence from work colleagues, and clear discrepancies in his own account and that given to the police. Furthermore it was noted that in the witness statement of the appellant he did not put forward any detailed explanation as to why he did not report any abuse at an earlier stage. While the grounds argue that the cultural background of the appellant and his vulnerabilities explained the delay, they were not particularised in his evidence. Mr Kotas additionally submitted that there was no objective evidence put before the Tribunal to support the appellant's claim that he was reticent to report domestic violence and that in any event the appellant was not someone who had just entered the United Kingdom but had been here for a number of years.

<u>Ground 2:</u>

55. As to the second ground advanced on behalf of the appellant, Ms Butler submits that section E-DVILR.1.3 was not properly applied by the panel.

56. Ms Butler submits that the respondent and the court accepted that the appellant had leave to remain in the UK as a partner when his relationship broke down however, at paragraph [48] the panel found that the relationship did not break down due to domestic violence. In support of the finding, the panel referred to his wife's earlier failed attempts to sponsor the appellant in the UK and from there concluded that the relationship "has never been harmonious and was one in which the appellant's wife did not wish to be a part of."

57. Ms Butler submitted that the respondent had earlier accepted the relationship was genuine and subsisting and accordingly granted the appellant leave to enter a spouse. This was not in dispute. Had it been so, the repeated attempts to sponsor the appellant could be relied upon as evidence of the genuineness of the relationship. Thus she submitted that there is no requirement in E-DVILR 1.3 that a relationship be "harmonious" before it breaks down due to domestic violence. Relationship may be both inharmonious and genuine.

58. Therefore it is submitted that the panel erred in law in their application of the relevant law and should be set aside in its entirety and remitted to the FtT for a rehearing.

59. Mr Kotas submits that the finding at [48] that the relationship had not broken down due to domestic violence was a finding open to the panel to make on the evidence. He submitted that the panel set out a number of reasons to support the conclusion that the relationship was never harmonious which included limited visits made/contact and previous failing to provide adequate evidence in previous applications but that the panel did not require a relationship to be harmonious before any claim to domestic violence could be made. The reference to that was merely a reflection of the evidence that the relationship was not harmonious prior to any breakup but that the parties' separation was not due to domestic violence.

Decision on error of law:

60. I have carefully considered the grounds advanced on behalf of the appellant and in the context of the submissions made by the parties and the evidence that was before the panel and their decision. I am grateful to both advocates for their submissions.

61. Having done so, I am not satisfied that there is any error of law in the decision of the panel. I shall set out my reasons for reaching that conclusion.

62. The grounds challenge the assessment of the issue of domestic violence and do not seek to challenge the overall assessment of Article 8 made by the panel.

63. Dealing with ground 1, it is submitted on behalf of the appellant that the panel failed to give proper weight to the evidence of domestic violence adduced by him.

64. The evidence that the appellant relied upon is set out in the decision of the panel and consisted of a domestic abuse summary produced to the police, the incident report, the accident and emergency attendance document, witness statement and an email sent to the modern slavery unit. Alongside that evidence the appellant had submitted his own two witness statements.

65. It is plain in my view that when reaching their decision the panel properly engaged with that evidence and neither the grounds nor the oral submissions identify any other evidence that was not properly considered by the panel.

66. In their consideration of the factual elements of the appeal, the panel set out their analysis expressly by reference to the content of those documents. I see no error in their analysis of that evidence where they reached the conclusion that the appellant did not contemporaneously report any of the domestic abuse to the police at the time of the incidents or any other agency. Indeed, Ms Butler in her oral submissions acknowledged that there was a paucity of external evidence.

67. When looking at the contents of that evidence, for example, the email to the modern slavery unit, it has not been demonstrated that the panel were in error in placing little or no weight on that document given its contents (atp41AB). The report was made significantly after the separation of the parties in November 2018 but in any event the email made it plain that the author could not form any view as to the veracity or otherwise of the claim because they would need to talk to the appellant and fully assess his situation.

68. The point relied upon by Ms Butler is at the panel erred in its conclusion that no weight should be given to the evidence on the basis of it not being contemporaneous and that the panel failed to apply the decision of *Ishtiaq* and in particular paragraph 38 of that decision.

69. I have considered the decision in *Ishtiaq*. Having done so it is clear that the tribunal is not confined in an appeal to the evidence "required" by the Secretary of State, nor is an appeal bound to fail if the "required" evidence has not been produced. The question of whether domestic violence has occurred is to be determined on the basis of all the evidence before the tribunal. As stated in the decision of *Ishtiaq*(as cited), the Court of Appeal confirmed that an applicant should be expected to produce evidence of the kind provided for in the IDI guidance but if the relevant person cannot do so any cogent relevant evidence can be taken into account (at paragraph [31]).

70. Ms Butler submits that the panel did not engage with paragraph 38 where it is stated:

"For the reasons that I have given, I would hold that paragraph 289A (iv) gives the caseworker a discretion to decide what evidence to require the applicant to produce and the individual case. In exercising that discretion, I would expect the caseworker usually to start by applying the guidance given in section 4 of

chapter 8 of the IDI's. But if the applicant is unable to produce evidence in accordance with that guidance, it would seem to me that the caseworker should seek an explanation of his or her inability to do so. If the applicant provides a reasonable estimation of her inability to produce such evidence, that the caseworker should give the applicant the opportunity to produce that other relevant evidence as she wishes to produce."

71. Ms Butler submits that the applicant's cultural and personal background and his vulnerability were all reasonable explanations for his inability to provide evidence.

72. Looking at the material that was before the decision-maker, there is no reference to any explanation, reasonable or otherwise, for his inability to produce evidence. Whilst Ms Butler initially indicated that reference was made to such an explanation in the covering letter to the application, upon further consideration she accepted it was not in that covering letter for the application. Nor was any explanation provided at any other time to the decision-maker nor was there any factual basis setting out details of any explanation based on cultural grounds in either in the two witness statements, the one prepared for the application and the other one prepared shortly for the purposes of the hearing. I have not been taken to any evidence by Ms Butler that provides any evidential foundation for the submission. No record of evidence has been produced on behalf of the appellant. That said, I accept the oral submission made by Ms Butler that the issue was raised in her oral submissions. This is reflected in the decision at [37] where the panel recorded the submission as follows "Ms Butler says that the appellant had no cultural reference about reporting domestic violence and it was only after taking advice that he realised he could."

73. However that submission was directed to the issue of delay and the point raised by the Tribunal that none of the evidence was contemporaneous thus it did not deal with the issue set out at paragraph [38] of *Ishtiaq* that referred to the circumstances where an appellant can provide a reasonable explanation for his failure to produce evidence. The appellant in fact did produce evidence for this application which the panel properly considered when reaching a conclusion on the issue of whether the marriage broke down due to domestic violence.

74. Even if the panel referred to the appellant's failure to obtain evidence, as Mr Kotas submits, the panel set out their conclusions on the evidence that was provided by the appellant at paragraphs [40 – 49]. Whilst they reached the conclusion that none of that evidence was contemporaneous, that is, no reports were made either at the time of the incidents or at the time of the separation in November 2018, they did not go on to reject the evidence solely on that basis. I am not satisfied that it has been shown by Ms Butler that there was any evidential foundation for the submission made at [37]. However, even if there had been a reasonable explanation for the delay as reflected in the submission

set out at [37], or even on the basis of a failure to provide further evidence, the panel properly went on to consider the evidence that had been put before the tribunal.

75. In my judgement, the question of whether domestic violence has occurred is to be determined on the basis of all the evidence before the tribunal. The weight to be attached that evidence is entirely a matter for the judge or judges concerned.

76. In my view it was reasonably open to the panel to consider the evidence and set out the inconsistencies in that evidence in reaching their conclusions. The panel identified that the appellant's evidence was discrepant concerning different accounts of the frequency of abuse, the manner in which he claimed to have been abused (at (41]), and the account of the appellant differed as to why cameras have been placed in the bedroom (at[42]). At [43] the panel noted the appellant's inconsistent account as to whether the there had been sexual intercourse in the UK. Other factual findings were made at [47] in relation to the financial evidence provided which went to the claim made that there was coercive and controlling behaviour on the part of his wife. The panel, for the reasons set out [47] reached the conclusion that the evidence relied upon did not demonstrate that the appellant's wife did have inappropriate control over the appellant's money and contrasted that evidence with the more recent evidence following his separation from his wife.

77. I do not accept the submission made by Ms Butler both in her grounds and in her oral submissions that the police report would have been by its nature likely contain more detail. Ms Butler in her reply sought to submit that the inconsistencies may not necessarily be characterised as inconsistencies, but as varying degrees of abuse expressed in the documents. However no specific particularisation has been provided concerning the inconsistencies either in the written grounds or in the oral argument.

78. The issue before the Tribunal was to determine on the evidence whether the appellant had given a credible or consistent account of being a victim of domestic violence in the way claimed and that this was the cause of the breakdown of the marriage. Therefore the credibility and consistency of the appellant's account was entirely relevant to their assessment.

79. I also reject the submission made that the panel erred in law by failing to put those inconsistencies to the appellant. There is no general obligation upon the Tribunal to give notice to the parties during the hearing of all matters on which it may rely in reaching its decision. The Tribunal is not bound, as a matter of natural justice, to point out all the inconsistencies since an applicant can be generally expected to be aware that the Tribunal will have to assess his credibility and the consistency of the account given in evidence with any previous account contained in any documents which will plainly be relevant to the assessment.

80. I also observe, as did the respondent in the written submissions, that the grounds do not argue with the fact that there are clear discrepancies in the appellant's account.

81. For those reasons, I am not satisfied that ground 1 is made out.

82. Dealing with ground 2, by reason of my assessment of ground 1 and that the key findings and analysis made by the Tribunal were rationally open to them on the evidence, ground 2 has to be seen in that context.

83. Ms Butler submits that the panel did not properly apply E-DVILR 1.3 and challenges their findings set out at [48] that the relationship did not break down due to domestic violence.

84. I am satisfied that there is no error of law in the panel's assessment in the way that the grounds assert. The evidence referred to at [48] properly reflected the two previous applications for entry clearance which had failed because the appellant's sponsor and spouse had not provided the necessary evidence. Furthermore a previous judge had not been satisfied at the hearing before him that the relationship was in fact subsisting (see immigration history at paragraph 7). However the panel proceeded on the basis that the relationship was genuine and subsisting at the time he entered the UK for entry clearance to be granted for the probationary period. In my judgement paragraph [48] should be read alongside paragraph [49] and the preceding paragraphs in which it is plain that the panel did not accept that the appellant had demonstrated that there had been domestic violence and that the relationship had broken down due to such domestic violence.

85. Contrary to the submission made, the panel did not misconstrue or misapply paragraph E-DVILR 1.3 nor did they incorporate any further element requiring the relationship to be "harmonious" before any claim of domestic violence could be made. In my judgement, the reference to the general nature of the relationship was an observation made from the past evidence that their relationship was not "harmonious" prior to breakdown but the panel after considering the evidence in the round reached the conclusion that that the marriage did not break down due to domestic violence.

86. For those reasons, I am not satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and that the appeal should be dismissed. The decision of the First-tier Tribunal panel stands.

Notice of Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtT stands. The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Upper Tribunal Judge Reeds*

Dated 11 February 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.