Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34864/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 6 July 2015	**On 22 July 2015**
Prepared on 7 July 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KASHIF MEHMOOD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Rogers, Solicitor of Immigration Advice Centre Ltd
For the Respondent: Mr Kingham, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, born 25 September 1985, is a citizen of Pakistan. He first came to the UK to study with a valid grant of entry clearance as a Tier 4 student on 19 February 2011. That leave was later varied so as to expire on 20 May 2014.

2. On 18 May 2014 the Appellant applied for a further variation of his leave as a Tier 4 student, but that application was refused on 18 August 2014 because he had supplied no CAS in support of the application. A removal decision was also made pursuant to s47 of the 2006 Act.

3. The Appellant duly appealed against those immigration decisions. In response to the "one stop" s120 notice served upon him he argued that he should be granted discretionary leave to remain outside the Immigration Rules in the light of the relationship he had formed with his sponsor. His appeal was heard on 19 November 2014 and dismissed under the Immigration Rules and on Article 8 grounds in a Decision promulgated on 19 November 2014 by First Tier Tribunal Judge Hands.

4. The Appellant's application to the First Tier Tribunal for permission to appeal was refused by Judge Davies on 19 January 2015 on the basis that the Judge's findings were open to her on the evidence, and the grounds disclosed no arguable error of law, but mere disagreement with them. Undaunted the Appellant renewed his application to the Upper Tribunal, and it was granted by Upper Tribunal Judge Warr on 28 April 2015. He observed that it was not entirely clear whether the Judge was saying that the couple had entered into an Islamic marriage purely for immigration purposes, or, that although this was the primary purpose the underlying relationship was genuine. He observed that the grant should not engender too much optimism on the Appellant's part given that it may well be that the Judge had reached the correct conclusion upon the Article 8 appeal.

5. The Respondent filed a Rule 24 response to the grant of permission dated 14 May 2015.

6. Thus the matter comes before me.

The hearing below

7. It was not in dispute before the First Tier Tribunal;

   i) that the application which the Appellant had made for a variation of his leave as a student could not succeed under the Immigration Rules for lack of a CAS when it was made [18].

   ii) that the Appellant had not passed an IELTS test to establish to the requisite standard his fluency in English [30].

   iii) that the original course for which he had been granted entry clearance had not been completed due to the closure of the college providing it. Nor had the Appellant been able to complete a subsequent course at a second college, which he blamed upon the closure of that college.

   iv) whilst he had made his most recent application for a variation of his leave in anticipation of the issue to him of a CAS by a third college, for a third course, none had been issued to him, which he again blamed upon the closure of that college, although absent any IELTS test it is difficult to see how anything other than a conditional CAS could have been issued to him [18].

   v) that the Appellant did not meet the requirements of paragraph 276ADE.

vi) that the ceremony of Islamic marriage he and the sponsor claimed to have undertaken did not constitute a legally recognised marriage, because the mosque where it had been held was not registered under the Marriage Acts [2].

vii) that the relationship the Appellant claimed to have formed with his sponsor did not constitute a "durable relationship" within the meaning of that phrase as used in Appendix FM to the Immigration Rules, because it had not endured for two years [2].

viii) That the Appellant did not meet the financial threshold requirements of Appendix FM to the Immigration Rules because the evidence relied upon as to his sponsor's income did not meet the requirements of Appendix FM-SE.

8. In these circumstances, the Appellant only pursued his appeal before the First Tier Tribunal on Article 8 grounds outside the Immigration Rules [2 & 7].

Error of law?

9. Both the Appellant and the sponsor gave evidence to the Tribunal, and it is accepted before me that they were the subject of a searching cross-examination by the Respondent's representative. The Judge's assessment of the evidence given under cross-examination shows that in her judgement it was devastatingly effective in terms of the damage that it occasioned to their credibility as witnesses of fact [24-28]. Thus the Judge concluded that no matter what he might later have said in re-examination, the Appellant had admitted under cross-examination to having paid the sponsor to undertake a ceremony of marriage with him, and that he had done so in order to stay in the UK [26]. The Judge also concluded that the couple had given evidence that was discrepant with one another both as to when they had met, and as to how long they had known one another before forming the relationship they relied upon [24]. The Judge also concluded that although the sponsor had maintained that she could not, and would not live in Pakistan, she had sought to avoid disclosing her own lengthy visit to Pakistan in 2013, and the presence of family members living there. The Judge also concluded that their oral evidence showed that she could place little weight upon the existence and content of the two letters relied upon in evidence from two ladies who had claimed to be friends and neighbours of the sponsor, but had failed to attend the hearing despite living locally [ApB p68-9].

10. In the light of those findings the Appellant advanced three grounds in his application for permission, although when the appeal was called on for hearing Ms Rogers abandoned ground 2 before me without seeking to argue it, and argued grounds 1 and 2 as if they were one.

11. I am not satisfied that there is any merit in ground 3, which is not supported either by any evidence of what was said by either of the two witnesses during

the course of the hearing in evidence, the sponsor's passport, or, the air tickets used by her to travel to Pakistan. The sponsor's witness statement of 12 October 2014 prepared for the purposes of the appeal was extremely brief, and it clearly failed to disclose either her first marriage, her divorce, or, her lengthy stay with her grandparents in Pakistan during 2013 [ApB p7]. All of these matters emerged during the course of the hearing and the oral evidence given by the Appellant and sponsor.

12. Ground 3 asserts that the Judge made an error of fact that amounted to an error of law in recording at one point in her decision that the sponsor had said she returned to the UK in November 2013 [24], and at another point that she had said she returned in August 2013 [25]. Read properly I am satisfied however that the decision discloses no error of fact. Three different dates were given for the return of the sponsor to the UK from Pakistan. Two discrepant dates were given by the sponsor of August and November 2013 following a visit made in March 2013. A third was given by the Appellant of February 2014 in the context of his claim that the sponsor had visited Pakistan between December 2013 and February 2014. I am satisfied that all the Judge did was to record the evidence she had been given, and then go on to find, not unreasonably, that it was discrepant.

13. In ground 1 it is asserted that the Judge's findings in relation to the relationship between the Appellant and the sponsor were perverse. Ms Rogers confirmed that she wished to maintain that assertion notwithstanding the relevant very high threshold not on the basis that there was no evidence to support the finding, but on the basis that it was irrational in the light of the sponsor's pregnancy; Miftari v SSHD [2005] EWCA 481.

14. The first limb to this ground is the assertion that the Judge failed to consider the evidence that the sponsor was pregnant with the Appellant's child when considering whether or not their relationship was a genuine one. Put simply this assertion is unfounded. The Judge was well aware of the evidence that the sponsor had conceived, and was pregnant with the Appellant's child, which was due in May 2015 [7(v), 19, 27].

15. The second limb to this ground is the assertion that since the sponsor had claimed in evidence that she was pregnant with the Appellant's child, it was perverse of the Judge to find that the couple had formed their relationship and undertaken a ceremony of Islamic marriage not because they were in love, but because they had arranged to do so for the purpose of allowing him to stay in the UK [29]. That finding was not irrational, and in my judgement the criticism advanced of it conflates the issue of whether this was a genuine relationship at the date of ceremony of Islamic marriage with the issue of whether it had become a genuine relationship subsequently.

16. What the criticisms of the decision fail to engage with is the extremely damaging evidence that was before the Judge. There was the admission made

by the Appellant that he paid the sponsor to undertake the ceremony of Islamic marriage with him, and that he had done so for the purpose of staying in the UK. It is difficult to see that any evidence given in re-examination could be given sufficient weight to mend that damage. The Judge had the benefit of seeing the Appellant give his evidence, and if she concluded that the damage was not repaired, that was a matter for her.

17. There was also the discrepant evidence as to when the couple had first met. The Appellant said that he first met the sponsor in December 2013, and that they did not meet again until January 2014 when they decided to marry. That could not be true if she was in Pakistan between December 2013 and February 2014 as he had also claimed was the case.

18. Even if the sponsor did return from Pakistan in November 2013, newly divorced, met the Appellant for the first time in December 2013, and agreed to marry him at their next meeting in January 2014 as was her evidence, that was inconsistent with the evidence of her neighbour who had claimed that there were multiple meetings between the couple over a period of time.

19. In my judgement the Judge's finding that the couple had agreed to undertake a ceremony of Islamic marriage together not out of love, but because they had arranged to do so with the purpose of allowing the Appellant to remain in the UK was one that was open to her on the evidence, and it was adequately reasoned.

20. Even if that relationship had developed over time to become one that was genuinely based upon affection and an intention to live together as a married couple, as indeed the conception of a child might indicate, it did not follow that the Article 8 appeal was bound to be allowed. That is the misconception at the heart of this challenge to the Judge's decision.

21. On any view the relationship that the Appellant relied upon had been formed under the most precarious of circumstances. Both the Appellant and the sponsor had family in Pakistan, and they could both live together in safety in that country, as the sponsor had amply demonstrated by doing so for an extended period in 2013. The only sensible interpretation of her evidence was that the sponsor had admitted that she knew when they met that the Appellant had no leave to remain in the UK save the limited grant of leave as a student that would expire on 20 May 2014, and that he was not studying, and that he was unable to extend that leave as a student.

22. Whilst the Judge made no reference to the principles set out in Chikwamba [2008] UKHL 40, and SSHD v Hayat [2012] EWCA Civ 1054, it does not follow that her decision is inconsistent with them.

23. It cannot be said that the Appellant has a "poor immigration history", but equally this is not a case in which it can with confidence be said that the Appellant could upon return to Pakistan be immediately granted entry

clearance to return for the purposes of settlement as the partner of the sponsor. They did not meet the requirements of the Immigration Rules to do so at the date of the hearing. In Hayat [2011] UKUT 444, the Upper Tribunal said;

> "23. The significance of Chikwamba, however, is to make plain that, where the only matter weighing on the respondent's side of the balance is the public policy of requiring a person to apply under the rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance.
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> 24. Viewed correctly, the Chikwamba principle does not, accordingly, automatically trump anything on the State's side, such as a poor immigration history. Conversely, the principle cannot be simply "switched off" on mechanistic grounds, such as because children are not involved, or that (as here) the appellant is not seeking to remain with a spouse who is settled in the United Kingdom.
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> 25. Like the absence of children, that last factor may be one which diminishes the force of the principle; but whether it will do so depends upon an assessment of the facts. For example, if the position disclosed by the evidence had been that the appellant's wife was due to finish her studies only a few weeks after the date of the hearing, and was intending to return to her country of origin, and the evidence was such that she did not need the appellant to be present with her while she finished her studies and prepared to leave, then the Chikwamba principle would have had nothing to add to the appellant's case. The actual facts of the present case, however, were very different. As we have already seen, the appellant's wife had the best part of a year to go before the end of her first tranche of the ACCA course. She has now been given leave to remain until 2014 in order to complete that course. There is no suggestion that her practical and emotional need for her husband to be with her has diminished in any respect.
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> 26. The fact that the presence in the United Kingdom of the appellant's wife depends upon her status here as a student, and only on that, has to be acknowledged in undertaking the balancing exercise. However, as we have indicated, that fact alone does not negate the Chikwamba principle. She is entitled to remain and study here until 2014. In practice, if the appellant were to be removed, it is highly likely that she would be without his help and support for a very substantial proportion of that time. The evidence is that she needs the appellant's help and support. She has committed no breach of the Immigration Rules. Nor has the appellant. There is a likelihood that, if the appellant were removed, his wife will find she is unable to continue her studies, thus negating the rationale of requiring him to go back to Pakistan to make an entry clearance application.
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> 27. In short, on a proper analysis of the facts, the principle in Chikwamba points plainly to the factors in favour of the appellant outweighing the single factor relied on by the respondent."

24. As explained by the Upper Tribunal in Hayat, the Chikwamba principle does not therefore mean that no individual should ever be required to return to their country of origin to seek entry clearance in the usual way. On the contrary if there are factors that weigh in the Respondent's favour when balancing the proportionality of removal, other than simply the public policy of requiring

entry clearance to be sought from abroad, then the Chikwamba principle does not automatically mean that they carry no weight.

25. The Court of Appeal in Hayat [2012] EWCA Civ 1054 approved that approach. (I do not consider that Zhang [2013] EWHC 891 adds anything to the analysis of the relevant principle by the Court of Appeal.) Nor does the Court of Appeal approach in MF (Nigeria) [2013] EWCA Civ 1192 alter the guidance given in Hayat, indeed in my judgement it reaffirms that guidance.

26. On the facts of this case the significant fact in the Respondent's favour are the findings as to when this relationship was formed, and the circumstances in which it was formed. Looking at the evidence in the round the Judge was perfectly entitled to conclude that the removal decision was proportionate, and thus dismiss the Article 8 appeal [30-31]. The arguments available did not rely upon the core concepts of moral and physical integrity, and given the sponsor's previous ability to live in Pakistan for an extended period she could hardly be heard to say that she would not do so again for any period of time. In my judgement the Judge was correct to conclude that the evidence relied upon did not establish that there were any compelling compassionate circumstances that meant the decision to remove the Appellant to Pakistan, lead to an unjustifiably harsh outcome.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 19 November 2014 did not involve the making of an error of law in the decision to dismiss the appeal that requires that decision to be set aside and remade. The decision to dismiss the appeal is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

The Appellant did not seek anonymity before the First Tier Tribunal, and no request for anonymity is made to me. There appears to be no proper basis for the Upper Tribunal to make such a direction of its own motion.

Deputy Upper Tribunal Judge JM Holmes
Dated 7 July 2015