Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08042/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 May 2014	**On 9 May 2014**

Before

The Honourable Mrs Justice Andrews DBE
Upper Tribunal Judge Kebede

Between

VIKRAM VIPIN GOHIL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Ofei-Kwatia, instructed by Malik Law Chambers
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant who was born on 5 May 1980, is a citizen of India. He brings this appeal against the decision of the First Tier Tribunal (Immigration Judge Elek) dated 7 January 2014 to dismiss his appeal

against the decision of the Respondent on 28 February 2013 to cancel his indefinite leave to remain (ILR) and to remove him from the United Kingdom and to refuse his claim on human rights grounds.

2. The Appellant entered the UK as a student on 15 September 2001, at the age of 21. His visa was valid from 7 September 2001 until 30 April 2002. His leave was further extended as a student and under Tier 1 (Post Study Work) until 15 October 2010.

3. On 8 December 2009, the Appellant applied for a Certificate of Approval (Marriage) which was duly granted with an expiry date of 25 April 2010. On 20 March 2010 he married a British national, Ruksha Fatania, in a civil ceremony and on 27 April 2010 he was granted limited leave to remain as the spouse of a settled person in the United Kingdom, valid until 27 April 2012. The couple married in an Indian religious ceremony on 30 May 2010. After that ceremony they lived together at 31 Victoria Road, Slough.

4. On 10 April 2012 the Appellant applied for ILR as the spouse of a settled person in the United Kingdom. This application was supported at the time by his wife. However, on 24 July 2012 the Appellant left the marital home. When he returned on the following day, it was simply to collect some of his belongings and paperwork. On 28 July 2012 his wife received in the post a mail redirection confirmation from Royal Mail dated 26 July, which confirmed that they had been asked by the Appellant to redirect his post to another address (which turned out to be his sister's address) as from 24 September 2012.

5. On 30 July 2012 the Appellant's wife wrote a letter to the UKBA stating that as of 24 July 2012 her husband had left the marital residence and had not returned, and she feared her marriage was over as a result. She said that this led her to believe that he had married her under false pretences to obtain residence in this country. She also supplied the UKBA with a copy of the mail redirection confirmation. Due to an administrative error, Mrs Gohil's letter did not reach the decision maker before ILR was granted on 4 August 2012. On 13 August 2012, Mrs Gohil informed the UKBA that she wished to withdraw her sponsorship with immediate effect. On 24 September 2012 she filed a petition for divorce. The Appellant and his wife were not reconciled. On 30 August 2013, Mrs Gohil obtained a decree nisi.

6. The Appellant was under an obligation to inform the Respondent of any material change of circumstances that occurred before his application for ILR was determined. He did not inform the Respondent of the problems in his marriage before ILR was granted or indeed at any time before he left the UK on a trip to India, where he stayed from 29 September 2012 until 16 October 2012. On his return, he was stopped at the airport by an Immigration Officer and asked questions. Initially he said that his marriage was still subsisting, and gave his current address as 31 Victoria Road. When the Immigration Officer told him that his wife had informed them that the marriage was no longer subsisting, he admitted to having had marital problems for the last three months, but he denied leaving the

matrimonial home. It was only after he was informed that the UKBA records showed that he was now residing with his sister that he admitted this, but he said that this was because his wife had changed the locks and would not let him in.

7. The Appellant was granted temporary admission with no restrictions pending further inquiries. By letter dated 22 February 2013, the Respondent gave the Appellant another opportunity to respond to the allegations made by his wife, but his solicitors' response of 27 February said no more than that he strongly denied them all.

8. The Appellant's ILR was cancelled under paragraph 321(A)(1) and (2) of the Immigration Rules on 28 February 2013. On 13 March 2013 the Appellant lodged an appeal against that decision and contended that his removal would breach his rights under Article 8 ECHR. In the light of that appeal the Respondent reconsidered the matter with specific reference to his Article 8 claim. A lengthy and detailed supplementary refusal letter was sent on 4 July 2013.

9. When his appeal came before the FTT, the Appellant, his sister, and his former wife all gave evidence. The Appellant alleged that the marriage had been a happy one and that there had been a minor domestic argument on 24 July 2012 which escalated and led to his being forced out of the marital home by his wife. He had not expected the argument to lead to divorce, and he was giving his wife some space for the good of the marriage. He admitted that he had broken into the former matrimonial home on 6 August 2012, but alleged that because his wife had refused to let him back in and had changed the locks, he had to get a locksmith in order to enter the property to get his Tesco manager's uniform. He did not produce the locksmith's invoice.

10. His former wife stated that she had noticed problems in their marriage only six months after the civil ceremony. Although she had tried hard to make the marriage work, the Appellant had been totally uncooperative and uninterested in improving the situation. Her evidence was that after he had completed his biometric tests in May/June 2012 her husband's attitude towards her changed significantly, and then, to her shock and despair, on 24 July 2012 he left the matrimonial home. When he came back on 25 July she thought it was in order for them to talk and reconcile, but he said he had come back for some of his belongings and his car tax renewal paperwork. He would not consider talking, and was not interested in her or their marriage. On 26 July they exchanged text messages in which he confirmed to her that their marriage was over and this was best for all. Those texts were produced in evidence.

11. In a fully and sufficiently reasoned decision, Immigration Judge Elek made adverse findings about the Appellant's credibility. She held that he had lied to the Immigration Officer and that he had abandoned his marriage before his ILR was granted on 4 August 2012. Those findings were plainly open to the Judge on the evidence before her. It is clear from the decision

that the Judge was well aware of the possibility that the Appellant's ex-wife might be exaggerating through understandable hurt that the marriage had ended, but she decided that Mrs Gohil's conclusions about his behaviour were based on the evidence (including the fact that the Appellant had given instructions to redirect his mail to his sister's address sometime before 26 July 2012). The Judge did not accept the Appellant's evidence that his instruction to redirect the mail was with effect from September 2012 was a mistake. The Judge concluded that Mrs Gohil was telling the truth and that the Appellant was not.

12. On 7 January 2014 Judge Elek dismissed the appeal on immigration grounds and on human rights grounds. On 17 February 2014 Judge Pooler granted an extension of time and permission to appeal on the basis that Judge Elek arguably erred in law by failing to make a finding as to whether there had been a change of circumstances since the grant of leave or the making of false representations in relation to the application. However, the Appellant was granted permission to argue all grounds raised in the Grounds of Appeal. None of these grounds relate to the decision to reject the claim under Article 8 ECHR and therefore we say no more about that.

13. The Respondent submitted that the Appellant's grounds raised no material errors of law and that they amounted to no more than disagreement with the negative outcome of the appeal.

14. Although all those grounds were maintained and relied upon before us, Ms Ofei-Kwatia concentrated on the allegation that the Immigration Judge erred in law because she failed to give consideration to whether the Appellant qualified for ILR under Rule 276B of the Immigration Rules.

15. One of the allegations made by Mrs Gohil in her witness statement was that after her husband left the marital home, she discovered some letters confirming that the Appellant had previously applied to the Home Office for a visa under the Highly Skilled Migrant Programme which had been refused, and which she never knew about. In paragraph 24 of his witness statement dated 27 July 2013, the Appellant said this in response:

"…. my ex-wife states that I had previous application of HSMP. This is suggesting that I used my ex-wife to gain entrance into the UK. At the time of making the ILR on the basis of a spouse settled in the UK on 10 April 2012, I qualified for ILR on the basis of 10 year legal residence in the UK. I wanted to apply on this basis as I have worked hard to get my 10 year legal stay. However, through pressure from my ex-wife and her family, which brought about arguments, I decided, and to appease Ruksha and her family, to get the ILR through the route which my wife consented to."

16. The appellant did not raise the argument that he qualified for ILR under Rule 276B at the time when the original decision was made, or when the matter was reconsidered, or in his section 120 statement, or in his original grounds of appeal to the FTT. Although he was legally represented, there is no evidence that the point was raised before the FTT in oral argument

either. Ms Ofei-Kwatia sought to rely on the case of MU v SSHD [2010] ILIT 442 (IAC) in which it was held that it was open to an appellant to serve a fresh statement of additional grounds in response to a section 120 notice whilst his appeal was pending. However no application to serve such a statement was made to the FTT or to this Tribunal.

17. Ms Isherwood drew our attention to the decision of the Supreme Court in R (Patel) v SSHD [2013] UKSC 72. This confirms that s.85(2) of the Nationality Immigration and Asylum Act 2002 imposes a duty on the FTT to consider any potential ground of appeal raised in response to a section 120 notice, even if it is not directly related to the issues considered by the Secretary of State in the original decision. The Supreme Court held that the grounds for an application for leave to remain can be varied up to the time when the decision is made. If an application is varied after the decision, then it would be open to the applicant to submit further grounds to be considered at appeal. However it appears to be clear from Patel, especially paragraph 44, that on any view, the applicant's last opportunity to raise new grounds in response to a section 120 notice is at the time of the appeal to the FTT.

18. The decision of the FTT cannot be criticised on the basis that the Immigration Judge failed to make a finding in the Appellant's favour on a ground which was never raised or argued before her. Whilst the FTT is obliged to deal with an obvious human rights point which arises on appeal whether it is raised in the grounds or not, there is no wider obligation to consider matters that the Appellant has not raised, particularly if he is legally represented. It was not an error of law for the Judge to fail to draw inferences from the Appellant's evidence about other grounds or arguments that might have been raised, if the Appellant's legal representatives chose not to put those grounds or arguments. If the Judge had taken that approach in her decision, the Respondent would have had a legitimate ground for complaint. The Respondent would have had no forewarning that the ground was being relied upon or that the argument was being deployed or considered, and would have had no proper opportunity to address the FTT about it. It is not the function of the appellate Tribunal to make the Appellant's case for him. There is no unfairness caused to the Appellant by taking this approach.

19. The argument has no merit in any event. Taken at its highest the Appellant's evidence in paragraph 24 of his witness statement goes no further than stating that he had accumulated 10 years' legal residence in the UK by the time he made his application for ILR as a spouse. He then offers an explanation for why he decided not to make an application in his own right. This was in the context of seeking to persuade the Judge not to find that his marriage was a sham from the onset, rather than to persuade her that his application for ILR was meritorious in any event.

20. It does not follow from the fact that the Appellant may have met the threshold for making an application for ILR in his own right before April 2012 that he would have been granted ILR had he made such an

application. One cannot speculate what the outcome of such an application would have been, let alone assume it would have been favourable. Moreover, the Applicant only achieved the ten year period of residence because he had been granted limited leave to remain in the UK as a spouse. It is again a matter of pure speculation that he would have been granted leave to remain in the UK beyond 15 October 2010 had he not married his former wife and obtained limited leave on that basis.

21. Ms Ofei-Kwatia submitted that the fact that the Appellant could have made an application for ILR in his own right undermined the suggestion that he only married his ex-wife in order to obtain ILR. Thus the alleged failure of the Judge to consider this factor undermined her reasoning in reaching that conclusion. However that does not follow at all. First, it ignores the fact that the ten years, which expired in September 2011, included a not insignificant period of leave based upon the marriage in March 2010. Thus, on the face of it, the marriage was a necessary step towards gaining ILR. The submission requires an assumption, without any evidence to support it, that the Appellant would have been able to stay in the UK beyond 15 October 2010 and achieve the 10 year threshold regardless of his marriage.

22. Secondly, the Appellant did not make an application for ILR under Rule 276B either then or at any subsequent time. There is no satisfactory or credible explanation for his failure to do so. There was no reason for his wife or her family to want him to go down the “spouse” route instead of making his immigration status certain by some other route at an earlier juncture if the marriage was a happy one; and the Appellant provides no explanation for their alleged attitude or for his need to appease them. Moreover his evidence that this matter was the subject of arguments does not sit well with the Appellant’s portrayal of the marriage as untroubled until the domestic argument allegedly blew up without warning on 24 July 2012.

23. Given its inherent implausibility, the Immigration Judge was not bound to accept at face value the Appellant’s explanation for why he did not apply for ILR in his own right even though he said that he wanted to, especially in the light of her adverse findings about his credibility which were plainly justified on the totality of the evidence. The Judge was not obliged to deal with every aspect of the Appellant’s evidence when giving her reasons; she gave sufficient reasons for reaching the view that she did about the Appellant’s credibility, and there was more than enough evidence to justify her findings about his motivation for entry into the marriage.

24. Indeed, the fact that the Applicant made no application for ILR in his own right in September 2011 but waited until the end of the probationary period tends to support, rather than to undermine, the assertion that he was only relying on the marriage as the means of obtaining ILR, especially when taken together with all the other evidence about his behaviour on which the Immigration Judge relied in finding that there had been forethought and planning in his abandonment of his marriage and the

matrimonial home prior to its grant. It is at the very least consistent with the adverse findings made in that regard.

25. It is also important to bear in mind that although the Immigration Judge concluded that the forethought and planning of the abandonment of the Appellant's marriage cast doubt on his intentions in entering into it, the cancellation of his ILR was justified on the basis that he failed to inform the Respondent of major developments in his relationship with his former wife that were of critical importance to his entitlement to ILR. What really mattered, therefore, was the marital breakdown and the Appellant's deliberate concealment of it from the Respondent, which would have been sufficient reason for refusing ILR even if the Appellant had entered into the marriage in good faith.

26. It is suggested that the FTT Judge erred in failing to consider whether there had been a material change of circumstances between the grant of leave on 4 August 2012 and the cancellation of leave on 28 February 2013. Although there is no express mention of Rule 321A or the tests under it in the decision under appeal, the Immigration Judge concluded in paragraph 15 that the decision to cancel ILR was "in accordance with the law". She could only have done that if she were satisfied that the requirements of Rule 321A (1) and/or (2) were made out. There would have been ample justification for making an express finding to that effect.

27. At one point it appeared that the Appellant was seeking to argue that because the marriage was already over before the grant of ILR, and remained over at the time of the decision to cancel his ILR, there was no material change of circumstance. However, in the light of the decision in Fiaz v SSHD [2012] UKUT 00057 (AC) that argument is untenable. When he came back from India, it was not the Appellant's intention to re-enter in order to resume his marriage and go back to the matrimonial home (though that was the story he told the Immigration Officer and maintained on appeal), and that critically undermined the basis on which he had sought and obtained ILR. That suffices to amount to a material change of circumstances for the purposes of the exercise of the statutory power to cancel ILR. In any event, it was plain that after 4 August, at least by the time she filed for divorce in September 2012, his wife was no longer willing to take the Appellant back. The Immigration Judge was entitled to find on the evidence that it was incredible that his wife did not tell the Appellant when he was in India that she had filed a petition for divorce, particularly since he maintained that he was in telephone contact with her during that time. The fact his wife had filed for divorce was in and of itself a material change of circumstance.

28. Ms Ofei-Kwatia submitted in reply to the Respondent's submissions that it was only after the decision to grant ILR was made that the Appellant's ex-wife made it clear to the UKBA that she wished to withdraw her sponsorship. That argument does not assist the Appellant because if it were right, the wife's decision to withdraw her sponsorship after ILR had been granted would clearly have been a material change of

circumstances. However the argument is factually misconceived; the Appellant's ex-wife's view expressed in her earlier letter was that the marriage was over and that she feared it had been a device to get ILR. It was clear from that letter that she had withdrawn her support for her husband's application.

29. Ms Ofei-Kwatia also submitted that the Appellant's lies to the Immigration Officer on re-entry occurred after he had been granted ILR and therefore could have had no impact on the decision to grant ILR. Of course that is true in terms of the chronology; but the lies told to the Immigration Officer reinforced the misleading impression of the marital relationship created by the Applicant's failure to inform the UKBA of the developments in his marital relationship on and since 24 July 2012, including his decision to leave the matrimonial home and redirect the mail to his sister's address, as he was obliged to do. His behaviour also cast doubt on his credibility, including his claim that this incident was just one of the normal ups and downs of any marital relationship. It is plain that if the decision maker had seen Mrs Gohil's earlier letter before 4 August, and if the Appellant had informed the Respondent of the true situation, as he was obliged to do, ILR would not have been granted. The decision to grant ILR was therefore based on a false representation that the marriage was subsisting, which the Appellant tried to maintain when he was questioned on re-entry, although he knew it was false. Thus even if there had been no material change of circumstance, the alternative requirements of paragraph 321A(2) were plainly satisfied.

30. There is no merit in any of the other grounds of appeal. We have already indicated that the adverse findings on credibility were more than adequately reasoned and justified on the evidence. There is a complaint that there was "massive procedural unfairness" because it is alleged that insufficient time was given to the Appellant to counter the issues raised by his ex-wife prior to the initial decision being taken. We find there is no substance in that complaint. The Appellant chose to issue a bare denial despite being given the opportunity to put his side of the story to the UKBA after he was granted temporary admission, and even if he did not have sufficient time to do so before the initial decision was made, he had ample opportunity to do so before the matter was reconsidered and the second decision was made in July 2013.

DECISION

31. It is quite clear that the conclusion of the Immigration Judge in paragraph 14 of the decision under appeal that the cancellation of the Appellant's ILR was in accordance with the law was correct, and that there was no material error of law. Even if there had been, we would have reached the same conclusion. We agree with the Respondent's submission that no properly constituted tribunal could have arrived at a materially different outcome on the basis of the material facts. We therefore dismiss the appeal on all grounds.

Signed Date 7th May 2014

Mrs Justice **Andrews**