Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13901/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 8 April 2014	**on 11 April 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

WASEEM SHAHZAD
(no anonymity order requested or made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr M Sabir, of MBS, Solicitors, Edinburgh
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Pakistan, born on 4 March 1974. On 12 November 2009 he was granted limited leave to enter the UK until 12 February 2012 as a spouse. On 9 February 2012 he sought further leave to remain in the same capacity.

2) The Secretary of State issued a notice of decision, refusing the application, which is headed by reference to paragraphs 284 and 286 of the Rules and also paragraphs D-LTRP1.3, R-LTRP(a)2(c), EX.1, 276CE and 276ADE(iii) to (vi).

3) The notice of decision was accompanied by a Reasons for Refusal Letter which firstly refuses the application by reference to paragraph 284(ix)(a) and non-provision of an English Language Test Certificate. At page 2, the letter founds also on failure to submit a marriage certificate. It goes on to

reject the evidence of income by reference to Appendix FM and further considers paragraph EX.1 and private life under paragraphs 276CE and 276ADE.

4) In his notice of appeal to the First-tier Tribunal the appellant said that he was attaching his "life in the UK test" and a copy of the marriage certificate, the original of which he would be able to produce as soon as received from Pakistan.

5) At a hearing before Judge Agnew on 1 November 2013 the respondent for the first time put in issue whether the appellant could satisfy the Rules in respect of intention to live permanently with his spouse in a subsisting marriage. There was evidence of a separation. The appellant was unrepresented, and the sponsor was not in attendance. The case was adjourned.

6) The case next came before Judge Wallace on 16 December 2013. The appellant was again unrepresented. The Presenting Officer appears to have taken the line that the case turned on paragraph 284 and not on anything in Appendix FM of the Rules. (Mr Shabir briefly suggested that the case falls under paragraph 287. Nothing presently turns on which particular part or version of the Rules applies, but this will have to be resolved when the case again comes before the First-tier Tribunal.) Evidence was heard from the appellant, his wife and his father-in-law. The respondent's case was put on 3 grounds: (i) lack of a language certificate; (ii) inadequate evidence of maintenance; and (iii) inadequate evidence of intention to live together in a subsisting relationship. The Presenting Officer said that the appellant had to prove that he met the requirements of the Rules at the time of the application or at the time of the decision, but does not seem to have said which, or if either would do. (It appears to have been conceded implicitly, but inconsistently, that the absence of a marriage certificate was cured by its later production.)

7) The appeal was dismissed by determination promulgated on 30 December 2013. At paragraph 33 the judge said that because the language certificate came after the application had been refused, the appellant could not meet the requirements of paragraph 284. At paragraphs 34-39 the judge pointed out what she saw as deficiencies in the evidence regarding employment, family life, and cohabitation (evidence which both Presenting Officer and judge seem to have thought admissible and relevant as at the hearing date). She then said:

> 39 … The assertions of co-habitation cannot be substantiated.
>
> 40 Looking at the evidence in the round, there is a question mark over the intention of the appellant and the genuineness of his intention to pursue a permanent relationship with this spouse. However, notwithstanding that the appeal has to fail because of the factual circumstances. The appellant did not and could not meet the requirements of paragraph 284 at the time of the application. He did not possess a language certificate as required by (ix)(a) and there is a lack of evidence to support his assertions that he could maintain himself financially.

41 These factual circumstances could not be met at the time of the application or the decision. Accordingly, the appeal must fail.

8) The appellant has had legal representation only since the stage of seeking permission to appeal to the Upper Tribunal. His first ground of appeal is that the judge failed to appreciate that under section 85(4) of the 2002 Act, as explained in *LS* (Post Decision Evidence) Gambia [2005] Imm AR 310, the Tribunal was obliged to consider circumstances in existence at the date of the hearing.

9) The point is put thus in *Macdonald's Immigration Law and Practice*, 8th ed., at 19.14(8): an appellant able to show that he met the requirements of the Rules at the time of the hearing should succeed on the ground that the decision was not in accordance with the Rules, even if he did not qualify at the time of the decision.

10) Mr Mullen submitted that although evidence at the hearing date might shed light on circumstances at an earlier date, it was not sufficient to show that the appellant met the Rules at the hearing date. Such a matter could be resolved only by making a fresh application. He supported those submissions by briefly mentioning two cases (but not by going to the reports): *EA* (Section 85 (4) Explained) Nigeria [2007] UKAIT 00013 and *AQ* (Pakistan) [2011] IMM AR 832.

11) On this point I prefer the analysis in the note of argument for the appellant at pages 2-7. *EA* did not overturn *LS*. Nor did *AQ*, which is part of a line of cases arising from the Points Based System and from section 85A of the 2002 Act (which does not apply here). *AQ* also involved matters raised by way of a section 120 notice. A case such as the present is not subject to a "fixed historic time line", or to a requirement to produce the necessary evidence with the original application. The correct understanding of section 85(4) continues to be as established in *LS*.

12) The First-tier Tribunal Judge had no useful help on this point from the respondent, but she did not apply her mind clearly to whether she should decide according to the circumstances and evidence at the time of application, at the time of the respondent's decision, or at the time of the hearing. The case fell into a muddle, looking at matters at three different dates. This error requires the determination to be set aside.

13) In that light, I can deal more shortly with the further grounds. The second ground attacks the findings on the maintenance requirement, partly for the same flaw about the relevant date, and partly for what amounts to lack of clear reasoning. I agree. The third ground criticises the findings on whether there is a subsisting marriage. Mr Sabir realistically accepted that much of this ground amounted to little more than disagreement on the facts. Nevertheless, he submitted that there was a lack of clear findings, given the way the conclusion is expressed at paragraph 40 in terms of "a question mark". That is a fair observation. Reading the determination up to that

point suggests that the judge might have found that there was no subsisting marriage. However, having wrongly persuaded herself that the appeal failed on other grounds, she left the matter unresolved.

14) The fourth ground criticises the determination for failure to mention Article 8 or the best interests of the child of the marriage. It relies on *Azimi-Moayed* [2013] UKUT 197 at headnote (2) for a duty on a judge to take such a point "where the issues arise on the evidence, irrespective of whether the appellants or the advocates have done so." Mr Sabir reminded the Upper Tribunal that the appellant in the FtT was unrepresented, and submitted that the judge should have further explored this matter on her own initiative. I have doubts about that. The critical phrase is "where the issue arises on the evidence". There was nothing to suggest how the child's best interests might be served. There is a limit on the duty of a judge to explore, even where an appellant is unrepresented. I would not have set aside the determination on this issue alone.

15) As to further procedure, if error of law were to be found, Mr Mullen firstly submitted that the appeal should go back to the First-tier Tribunal for fresh hearing. I pressed him on the basis that the appellant had not applied to introduce any further evidence, so it might be for the Upper Tribunal simply to substitute its own decision. Mr Mullen modified his position, and said that a further decision could be made by the Upper Tribunal. Mr Sabir said that the appellant would be satisfied by a fresh decision from the Upper Tribunal.

16) Having considered matters further, I have come to the view that this case does require an entirely fresh hearing. The judge heard oral evidence from three witnesses. The case might have gone either way on the question of a subsisting marriage, a point on which an evaluation of the evidence of the witnesses is critical. I note also (although it is not a point raised in the grounds of appeal) that the judge accepted a submission from the respondent that the evidence of the third witness (the appellant's father-in-law) was to be disregarded because he admitted having conversed with the appellant after the appellant had given evidence. That could properly be taken into account in evaluating the evidence, but (at least without further explanation) I do not think it could be a reason for excluding it entirely. Evaluation of the oral evidence bore also on the maintenance aspect, so I do not think there is any point by which the appeal can decided one way or the other, so as to avoid a fresh hearing.

17) The determination of the First-tier Tribunal is **set aside**. None of its findings are to stand. Under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to **remit the case to the First-tier Tribunal**. The members of the First-tier Tribunal chosen to reconsider the case are not to include Judge Wallace.

10 April 2014
Judge of the Upper Tribunal