Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/35648/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 7 July 2014	**On 6 August 2014**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASAD AYUB

Respondents

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondents: Mr Authi, instructed by Aman Solicitors Advocates

DETERMINATION AND REASONS

The Appeal

1. This is an appeal by the Secretary of State against a determination promulgated on 5 March 2014 of First-tier Tribunal Judge Camp which allowed the Article 8 appeal of the respondent.

2. For the purposes of this determination, I refer to Mr Ayub as the appellant and to the Secretary of State as the respondent, reflecting their positions as they were before the First-tier Tribunal.

Background

3. The background to this matter is that the appellant came to the UK on 21 August 2011 as a student with leave until 26 July 2012. He met his British partner at some point in 2011. At that time she was married under UK law to her ex-husband. Nevertheless, the appellant and his partner formed a genuine relationship and married under Islamic law on 16 July 2012. On 24 July 2012 the appellant applied for leave to remain on the basis of the relationship. The appellant's partner obtained a civil divorce on 5 December 2012. The appellant's application for leave was refused on 12 August 2013.

4. The above matters are not in dispute and it was also common ground before me that the relationship was genuine and that the appellant and his partner were "honest and credible witnesses"; see [14] and [17] of the First-tier Tribunal decision.

Decision of the First-tier Tribunal

5. In addition to the matters set out above, Judge Camp found that the couple had undergone a religious marriage but that this was not one valid under English law; see [17].

6. He also found that the appellant was not a fiancé for the purposes of the Immigration Rules as he could not satisfy paragraph E-LTRP.1.12. of Appendix FM of the Immigration Rules, that being that he had been granted entry clearance as a fiancé; see [20].

7. He went on to conclude at [21] that:

> "… the appellant does not, for reasons which can reasonably be described as legal (in relation to the validity of the marriage) and technical (in relation to the detail of the rules), meet the requirements of Appendix FM."

8. Having found that the appeal under the provisions of Appendix FM could not succeed, Judge Camp conducted a free-standing Article 8 assessment.

9. Following on from the findings at [18] to [20] as to why the appellant did not meet the Immigration Rules, he refers at [25] to a "failure of the immigration rules to deal with [the appellant's] situation." That is a reference to the appellant not being able to show that he was a spouse, fiancé or unmarried partner for the purposes of the Immigration Rules. The First-tier Tribunal makes a similar comment at [28], to the effect that a "literal interpretation of the rules prevents the appellant from being regarded as a fiancé, although his intention to marry the appellant is not changed by the respondent".

10. At [24] he found the circumstances of the appellant to be "unusual" and a '"Catch-22"' situation. The circumstances referred to here were that the appellant had not been able to enter into a valid marriage with his partner even though she had obtained a civil divorce as "the appellant's passport has been retained because he is said to have no right to remain here." At [28] the judge refers to the couple "being unable to marry under English or any other UK law, essentially because the appellant has no leave to remain in the UK."

11. The conclusion at [28] was that these matters, together with the genuine nature of the relationship and the couple regarding themselves as married, made the decision disproportionate.

Error of Law

12. The respondent objects to the finding of the First-tier Tribunal at [25] that there was a "failure of the Immigration Rules to deal with the appellant's situation". She maintains that this finding was not open to the judge and that it should not have been a factor weighed for the appellant in the proportionality assessment.

13. The respondent's challenge has merit. For the purposes of the Immigration Rules, the appellant was not a spouse, a fiancée or an unmarried partner. The appellant does not dispute that.

14. The logic of the First-tier Tribunal judge is that even though this was so, the Immigration Rules ought to provide for someone with his profile to be able to obtain leave under those Rules. I could not see how that could be correct. The Immigration Rules are not required to provide for every situation. It cannot be right that they are unfair or otherwise unsatisfactory such that weight accrues to the appellant's side of the balance in failing to allow for leave to be issued to this appellant, albeit he is in a genuine relationship, has undergone an Islamic marriage and also wants to undergo a civil marriage.

15. The Court of Appeal referred in MM & Ors v SSHD [2014] EWCA Civ 985 to situations where the Immigration Rules might be found to be unfair or otherwise non-compliant with human rights law, commenting at [132]:

> "First, the Secretary of State plainly is under a common law duty not to promulgate an [Immigration Rule] that is discriminatory, manifestly unjust, made in bad faith or involves 'such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men'. "

16. The failure of the Immigration Rules to cover this appellant's circumstances simply cannot be characterised in the terms set out by the Court of Appeal. The appellant was not entitled to weight in his favour arising from his inability to meet the Immigration Rules as apportioned by the First-tier Tribunal, shown at [20], [21], [25] and [28]. Rather, the failure to do so fell to be the starting point of the Article 8 proportionality exercise, an approach not followed by the First-tier Tribunal; see Haleemudeen v SSHD [2014] EWCA Civ 558 at [47].

17. The First-tier Tribunal was also in error in finding at [24] that the appellant's circumstances were "unusual" or a ' "Catch-22" ' situation. It is simply not correct that he could not enter into a civil marriage as he was unable to obtain his passport or any other document allowing him to marry under UK law. There was nothing before Judge Camp to indicate that the appellant had ever made any attempt to obtain his passport from the respondent or any other document that would have allowed him to marry. He had ample time to do so, the partner's civil divorce occurring on 5 December 2012, the decision being made on 12 August 2013 and the hearing before Judge Camp taking place on 12 February 2014. It was conceded before me that he had never made such a request to the respondent or anyone else. There was, in fact, nothing to prevent the appellant from obtaining his passport or other document in order to marry under UK law if he so wished.

18. Without the weight given by Judge Camp to the appellant's inability to marry and the alleged failure of the Immigration Rules to allow for leave to be granted to someone in his position, it appeared to me that it could not be said that the outcome of the Article 8 proportionality assessment would have been the same.

19. For these reasons I found an error on a point of law, set aside the proportionality assessment of the First-tier Tribunal and re-made it.

Re-making

20. It follows from my reasoning above that the fact of the appellant being unable to qualify for leave to remain under any of the provisions of the Immigration Rules is not something that weighs in his favour in the proportionality assessment. On the contrary, the failure to meet the Immigration Rules is the starting point in that assessment and weighs against him.

21. Also, again as above, it is not my view that the appellant is entitled to weight on his side of the balance for being unable to meet the Immigration Rules when it has been open to him to obtain his passport or other documentation allowing him to marry his partner.

22. Without those factors I did not accept that there was anything here that made the respondent's decision disproportionate. The appellant could not meet the Immigration Rules as he does not have the required relationship with his partner. He can return to Pakistan to obtain entry clearance as a fiancée or as a spouse if he and his wife choose to marry there or elsewhere. The rationale for it being reasonable for him to do so is not merely in order to seek entry clearance as in Hyatt (Pakistan) v SSHD [2012] EWCA Civ 1054 but because he does not meet other substantive requirements of the Immigration Rules by way of his relationship to his partner. His circumstances do not show that it would be unduly harsh to expect him to return to Pakistan, the country where he has spent most of his life, having come to the UK with limited leave as a student and with no expectation of remaining beyond his studies and then decide how he and his partner wish to proceed as regards their relationship.

Decision

23. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside. I re-make the appeal as refused under Article 8 of the ECHR.

Signed:  Date: 7 July 2014

Upper Tribunal Judge Pitt