



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/53131/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 8 January 2014**

**Determination
Promulgated
On 16 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ABU ZAFAR MOHAMMED TAREK
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin of the Specialist Appeals Team

For the Respondent: Mr M Haque of MQ Hassan, solicitors

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as the Applicant is a citizen of Bangladesh born on 17 September 1987. On 27 February 2008 he entered the United Kingdom as a student. His leave was extended as a Tier 4 (General) Student and expired on 30 November 2012. On the same date and so in time he made an application for further leave in the same capacity.

2. On 28 November 2013 the Appellant (the SSHD) refused his application and decided under Section 47 of the Immigration, Asylum and Nationality Act 2006 to give directions for his removal to Bangladesh.
3. The Respondent refused the application under paragraph 322(1A) of the Immigration Rules because the Applicant had submitted a letter and a statement from the City Bank Limited which the SSHD considered were false because the bank had informed the SSHD that the account did not exist. Additionally, the SSHD found the Applicant had not shown evidence that sufficient funds available to him because the bank statements he had provided were false and so the application under the Points Based System was refused under paragraphs 245ZX(a) and 245ZX(c) of the Immigration Rules.
4. Between the Applicant's application and the SSHD's decision to refuse it, the applicant married on 13 May 2013 Nusrat Johan Yasmire Mudsbbir, a British citizen of Bangladeshi descent born on 18 October 1992.
5. On 13 December 2013 the applicant lodged Notice of Appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds were generic and asserted disagreement with the Respondent and that the bank statements submitted were genuine. By way of a Statement of Additional Grounds the Applicant referred to his marriage and submitted that his application should be decided "on the ten year family route of Appendix FM: family members as he is a spouse of a British citizen."

The First-tier Tribunal Determination

6. By a determination promulgated on 19 September 2014 Judge of the First-tier Tribunal Thanki found the Applicant had submitted false documents in support of his application for further leave as a student under the Points-Based System and dismissed his appeal under paragraph 322(1A) and also under paragraph 245ZX of the Immigration Rules.
7. The Judge then assessed the Appellant's claim in his Statement of Additional Grounds based on his marriage to a British citizen. On the basis of the Applicant's marriage certificate he accepted the Applicant was genuinely married. He stated the SSHD had not questioned the availability of suitable accommodation or the Applicant's facility in English language. He found the Applicant's wife spoke only a little Bengali, had no relatives in Bangladesh and that it would be unreasonable to expect her to re-locate to Bangladesh. He found the Applicant and his wife met the requirements of Appendix FM and went on to allow the appeal on the basis of the Applicant's marriage "under Appendix FM under the Immigration Rules."
8. The SSHD sought permission to appeal on the ground that the Judge had made a material misdirection of law. The first ground was that the Applicant had not sought to vary his application for further leave on the

basis of his marriage and that the Judge should have directed that he submit the appropriate application to the SSHD rather than apply directly to the Tribunal by way of a Statement of Additional Grounds so as to make the First-tier Tribunal the primary decision maker. The second ground was that the Judge had erred in not considering whether the Applicant was a suitable person because his original entry to the United Kingdom had not been for the purpose of marrying his wife and secondly because he had submitted false documents. Additionally, the SSHD also relied on a third ground that the Judge had failed to take into account the provisions of Section 117A-B of the 2002 Act as amended by Section 14/19 of the Immigration Act 2014.

9. The other grounds were that the Judge erred in law by failing to take account of the jurisprudence in *Gulshan [2013] UKUT 00640 (IAC)* and *R (oao Nagre) v SSHD [2013] EWHC 720 (Admin)*.
10. On 7 November 2014 Judge of the First-tier Tribunal Simpson granted the SSHD permission to appeal on all grounds.
11. The Applicant did not file any cross-appeal or any response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended.

The Upper Tribunal Hearing

12. The Applicant and his wife who is pregnant attended the hearing.
13. At the outset I noted that since there had been no cross-appeal and no Procedure Rule 24 response, the findings of the Judge in relation to the appeal against refusal of further leave as a Tier 4 (General) Student Migrant were considered as unchallenged. Consequently the appeal focussed on the admissibility of the Applicant's claim for further leave based on his marriage to a British citizen. I referred to the judgments in *AS (Afghanistan) v SSHD [2009] EWCA Civ. 1076* and *AQ (Pakistan) v SSHD [2011] EWCA Civ. 833* and noted that the Applicant had married subsequent to his application leading to the decision under appeal and had not notified the SSHD of the marriage until after the decision giving rise to the appeal. Mr Haque requested time to consider the two Court of Appeal judgments. I adjourned the hearing until he had had an opportunity to consider the two judgments and the hearing resumed after some 40 minutes.
14. For the SSHD Mr Melvin relied on the Grounds for Appeal especially the first two grounds. The determination should be set aside and the Upper Tribunal immediately proceed to a substantive consideration of the appeal and dismiss it.
15. Mr Haque submitted the SSHD had not referred to the judgments in *AS* and *AQ* in the Grounds for Appeal. I accepted that they had not been expressly mentioned but pointed out that the substance of the first

Ground of Appeal depended on the jurisprudence enunciated in these two judgments.

16. He continued that at the date of his marriage the Applicant had leave only by virtue of Section 3C of the Immigration Act 1971 as amended and the One-Stop Notice/Statement of Additional Grounds procedure was designed to enable an applicant with only Section 3C leave to make a further application. The Applicant had now in his Statement of Additional Grounds made an application based on his marriage. I pointed out that the marriage application effectively engaged paragraph 284 of the Immigration Rules. Mr Haque continued that the SSHD was wrong to continue to query the Applicant's suitability on the basis of his submission of false documents in support of his PBS claim because the documents were not applicable in relation to his different claim based entirely on his marriage.
17. The Ground for Appeal that the Judge had erred by failing to address the provisions of Section 117A-D of the 2002 Act had no weight because the Judge had dealt with the claim for further leave based on the Applicant's marriage entirely within the Immigration Rules and Appendix FM including paragraph EX of Appendix FM which applied because the Applicant's wife was pregnant. Therefore, he submitted, there was no need for the Judge to have considered the application outside the Immigration Rules. He had not made any error of law and the determination of the First-tier Tribunal should be upheld.
18. He added that the judgment in *AQ (Pakistan)* related to an appeal against a refusal of further leave under the Points-Based System and the Applicant's substantive application was based on his marriage to a British citizen and so the jurisprudence in *AQ (Pakistan)* was not applicable. If I were to disagree with him on this point then the appropriate course would be either to allow the appeal outright or to remit it to the First-tier Tribunal or to the SSHD.
19. In response Mr Melvin for the SSHD noted that the Applicant's relationship with his wife began after he had submitted his application for further leave as a student. The Applicant had failed to seek to vary his application. Consequently there was no application for further leave based on his marriage before the SSHD.
20. He continued that the Judge's consideration of the Applicant's claim under the Immigration Rules based on his marriage to a British citizen was incomplete because the Judge had not considered all the documentary requirements of Appendix FM-SE. These were errors of law and although the determination should be set aside, I should immediately proceed to a substantive consideration of the Applicant's appeal and dismiss it. What the Applicant needed to do was to make a fresh application to the SSHD based on his marriage.

21. Mr Haque sought to make a further submission referring to the wording contained in the SSHD's form of notice under Section 120 of the 2002 Act. The section headed "One-Stop Warning - Statement of Additional Grounds" referred in the first bullet point to "any reasons why you think you should be allowed to stay in this country." He submitted that if the wording referred to any reason then there was no reason why the Applicant should need to make a fresh application. Mr Melvin in response stated that the requirements of Appendix FM had to be met in full and in order for this to be ascertained, it was necessary for the application to be considered by the SSHD. No valid application based on the Applicant's marriage had been made and therefore the appeal based on the marriage had to fail. In addition, there was the aspect of suitability in that the Applicant had submitted false documents in support of his student application.

Findings and Consideration

22. The issue in this appeal is whether the First-tier Tribunal had jurisdiction to entertain the Applicant's claim for further leave based on his marriage and first disclosed in the Statement of Additional Grounds incorporated into his Grounds of Appeal against the SSHD's decision to refuse him further leave as a Tier 4 (General) Student Migrant.
23. The Applicant did not seek to vary his application for further leave as a student under the Points-Based System at any point until he lodged Grounds of Appeal under Section 82 of the 2002 Act. It is instructive to note the chronology:-
- 30 Nov 2012. The Applicant's leave as a student expires and on the same day he applies for further leave in the same capacity.
- 13 May 2013. The Applicant marries a British citizen at a time when he has leave by reason of Section 3(C) of the Immigration Act 1971 as amended. He does not notify the SSHD or seek to vary his existing application for further student leave.
- 28 Nov 2013. The SSHD refused the application for further leave as a student.
- 13 Dec 2013. The Applicant seeks to rely on his marriage in his Statement of Additional Grounds forming part of the Grounds for Appeal under Section 82 of the 2002 Act.
24. The judgment in *AS (Afghanistan)* related to circumstances referred to in the Statement of Additional Grounds which existed at the date of the applications for further leave and which could then have formed the basis for an application for leave in a slightly different category under the

Points-Based System: see paragraphs 70 and 73 of *AS (Afghanistan)* and paragraph 26 of *AQ (Pakistan)*.

25. The circumstances of the appellant in *AQ (Pakistan)* related to matters which had arisen subsequent to the SSHD's decision then under appeal: see paras.6 and 26 of *AQ (Pakistan)*.
26. In the present appeal the circumstances giving rise to the claim comprised in the additional grounds occurred between the date of the Applicant's application for further leave as a student under the PBS system and before the SSHD's decision to refuse the PBS application. Crucially, the Applicant failed to notify the SSHD of the change in his circumstances and there was no explanation to the First-tier Tribunal or the Upper Tribunal why he had failed to notify the SSHD or failed to seek to vary his application for leave before the SSHD had decided it.
27. At paragraph 24 of *AQ (Pakistan)* the Court of Appeal referred to paragraph 49 of *MS (AS and NV Considered.) Pakistan [2010] UKUT 117* where Senior Immigration Judge Allen had said:-

I consider that the Court of Appeal limited the ambit of its decision to cases where a fresh ground is raised in respect of the particular immigration decision made, rather than the making at a later date of an application based on fresh evidence ... I consider that the purpose of the procedural scheme established by Section 120 is to encourage an applicant to provide all the reasons he or she has for appealing against a particular decision (e.g. to refuse or vary leave to remain), rather than permitting the later submission of evidence relating to subsequent circumstances in a case such as this where the Rule in question specifies a fixed historic time-line.

28. At paragraph 41 of *AQ (Pakistan)* Sullivan LJ noted that *AS (Afghanistan)* was not concerned with PBS decisions. The Applicant's original application led to a PBS decision and at paragraph 38 Pill LJ said:-

I see no inconsistency between the intention in Section 120 and an intention by which the determination by the Tribunal is by reference to the decision being appealed, that is the decision of the Secretary of State. Section 3C of the Immigration Act 1971 provides for continuation of leave to remain pending a variation decision on leave. It applied in the present case to extend the Appellant's leave to remain until his appeal against refusal is determined (Section 3C(2)).

Sub-section (4) provides:

A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this Section.

That limitation appears to me to be inconsistent with the Appellant's submissions. These would have the effect of permitting a fresh application to the Tribunal, as primary decision

maker, based on events occurring while the leave has been extended by virtue of the Section.

29. The Applicant married while his leave had been extended by virtue of Section 3C of the Immigration Act 1971 and I find paragraph 38 of AQ (*Pakistan*) is immediately applicable to his circumstances. The consequence of this is that the First-tier Tribunal's determination contained an error of law when it sought to address the Applicant's claim for further leave based on his marriage. This part of the determination must therefore be set aside.

Consideration of the Substantive Appeal

30. At the hearing I informed the parties I intended to dispose of the substantive appeal in the light of my error of law finding without a further hearing. Both parties had no objection and had nothing further to add.
31. For the reasons for which I have found the Judge have erred in law in his determination, I find that the part of the determination dealing with the Applicant's claim based on his marriage must be set aside. The First-tier Tribunal had no jurisdiction to entertain such a claim and to that extent the SSHD's appeal against the First-tier Tribunal determination is allowed. It is for the Applicant to take advice on his legal position, as I indicated to him at the end of the hearing.

Anonymity

32. There was no request for an anonymity order and having heard the appeal I find none is warranted.

NOTICE OF DECISION

The determination of the First-tier Tribunal contained an error of law in its treatment of the Applicant's claim based on his marriage to a British citizen. The findings of the First-tier Tribunal on the Applicant's appeal against refusal of further leave as a Tier 4 (General) Student Migrant is upheld. The following decision is substituted for the decision on the Applicant's marriage claim:-

The appeal of the SSHD against the First-tier Tribunal's determination allowing the Applicant's appeal based on his marriage is allowed. Consequently the Applicant's claim based on his marriage is dismissed.

Signed/Official Crest

Date 15. i. 2015

Designated Judge Shaerf

A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal of the Applicant for further leave as a student has been dismissed by the First-tier Tribunal and his appeal based on his marriage has been dismissed by the Upper Tribunal. Consequently no fee award may be made.

Signed/Official Crest

Date 15. i. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal