Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10066/2016

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 11th September 2017	**On 19th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

GURDEEEPAK [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Read; Counsel instructed by VAS UK
For the Respondent: Ms Peterson; Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by F*t*T Judge Williams promulgated on 16th December 2016 in which the Judge dismissed an appeal against a decision made by the respondent on 22nd March 2016, to refuse the

appellant's application for entry clearance as the parent of a child present in the United Kingdom under Appendix FM of the Immigration Rules.

2. The appellant is a national of India. He made an application for entry clearance as a parent of a child in the UK. Both the appellant and [SS], whom the appellant claims is his ex-wife, were interviewed on 22nd March 2016.

3. The background to the application is set out in the decision of the Entry Clearance Officer and the witness statements that were before the F*t*T. The appellant had been illegally present in the UK since 2011 and had made no attempt to regularise his stay. He claims that he has been in a relationship with [SS] since 2012, and that he had spoken to a solicitor prior to departing the UK for India in January 2015. He was advised that he should return to India and apply from abroad for leave to enter. [SS] travelled to India in July 2015 and they married on the 3rd August 2015. The appellant claims that after his wife returned to the UK, their relationship broke down. There are two children of the marriage. The eldest child, the appellant's son, is residing with him in India and their daughter lives in the UK with her mother. In the refusal of entry clearance, the respondent stated:

> *"Both you and your wife were interviewed in relation to your application. From these interviews I cannot be satisfied that you are in fact separated. It is my opinion that you have applied under this category to circumvent the rules. Your wife is British and for you to qualify for settlement as a spouse under appendix FM rules she would have to be earning an annual income of £18,600. You both confirmed during interview that she is on benefits. This means that you would not qualify to join her and your children in the United Kingdom.*
>
> *You state that you and your wife are separated and there is no chance for reconciliation, however, neither of you has started divorce proceedings. Furthermore, you were only married in August 2015 and soon after your wedding your daughter fell ill and your wife returned to the UK with her for NHS treatment. Your relationship broke down while she was in the UK and you were in India. You have not met since then to reconcile."*

4. Before the F*t*T, the appellant relied upon a bundle comprising of 83 pages. The appellant's bundle included a witness statement from the appellant dated 25th October 2016 and a witness statement made by [SS] dated 20th October 2016. Both statements are signed and contain a declaration that the facts stated in the statement are true and complete.

5. The F*t*T Judge found that the appellant cannot meet the requirements of the immigration rules. At paragraph [7], the Judge states "*I am satisfied that the appellant and wife are not separated and that the appellant can apply for entry clearance as a partner under Appendix FM E-ECPT 2.3(iii). I reach that conclusion for the following reasons*". The reasons are then set out at paragraphs [8] and [9] of the decision.

> *"8. Firstly, the appellant claimed that he had been in a relationship with his wife since 2012 and married her on 03/08/15 in India. The appellant claimed that the relationship irretrievably broke down due to his wife committing adultery, his wife also made that claim in her statement dated 20/10/16. However, this is inconsistent with the appellant's wife's initial claim in her statutory declaration dated 16/02/16 (AB page 59), which vaguely states that the relationship simply became "strained", with no mention of an accusation of adultery. The accusation of adultery is the core reason for the breakdown of the relationship, and the fact that the appellant's wife did not mention it when matters were freshest in her mind undermines the credibility of the whole claim.*
>
> *9. Secondly, notwithstanding the supposedly irretrievable breakdown of the relationship there is no evidence from family members which would be readily available (they were supposedly very much involved in the breakdown/ its aftermath) or of a Divorce Petition having been issued. The only evidence of any legal proceedings is correspondence from an Advocate's practice (AB pages 27-33). I attach little weight to this documentation since it is photocopied and the originals are not before me. Moreover, whilst the documentation refers to a divorce petition a copy of that divorce petition (which would have confirmed the supposed basis for divorce) has not been submitted, notwithstanding the claim that it was lodged on 01/04/16."*

6. Having considered all matters, the F*t*T Judge concluded at paragraph [10] of his decision that it is proportionate to interfere with the family and private life of the

appellant as he is eligible to apply for entry clearance as a partner under Appendix FM or alternatively, the appellants children and his wife can visit him in India to maintain family life.

7. In the grounds of appeal advanced by the appellant it is contended;

a. The conclusion of the Judge that the appellant and his ex-wife are not in fact separated is baseless and contradicts the evidence. They are separated and the appellant could not therefore apply for entry clearance under the Partner route;

b. The appellant's ex-wife referred to the relationship being "strained" in her statutory declaration, as a reference to the onset of the problems in the relationship. Her failure to refer to the accusation of adultery does not undermine the credibility of the claim. She had mentioned the accusation of adultery when interviewed. The Judge failed to consider the evidence as a whole. Had the Judge taken all the evidence into account, he would not have concluded that the credibility of the claim as a whole, is undermined.

c. The Judge erred in rejecting the account of the appellant because there was no evidence from family members, of the breakdown of the relationship.

d. The Judge erred in stating that there was no evidence of a 'Divorce Petition', and that the only evidence is from an Advocate's practice. There was evidence of a divorce petition at pages 29-33 of the appellant's bundle. The court documents confirm the matter was before the court. The Judge should have accepted the documents to be genuine.

e. The Judge failed to give due weight to the respondent's failure to provide a transcript of the interview.

f. Article 8 was applied incorrectly as the decision clearly has such a dramatic interference on the appellant and his children's private and family life, as it will separate them permanently.

8. Permission to appeal was granted by First-tier Tribunal Judge O'Garro on 30th June 2017. He noted that at pages [29]-[33] of the appellant's bundle, there are documents which seem to refer to a divorce petition, and in light of this, it is arguable that the Judge reached his findings without considering all of the evidence. The matter comes before me to consider whether or not the decision of the F*t*T Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

9. Before me, Mr Read submits that the Judge failed to consider all of the evidence that was before him. The Judge failed to consider the statutory declaration that was at page [59] of the appellant's bundle that refers to the dissolution of the relationship between the appellant and his ex-wife. Mr Read submits that the failure to refer to this evidence set out in the statutory declaration is material to the outcome of the appeal. He conceded that the divorce petition was not in the appellant's bundle that was before the F*t*T and accepted that there is a lacuna in the evidence before the F*t*T about the divorce itself. He submits that the Advocates statement that was before the F*t*T refers to the breakdown of the marriage, and the Judge should have given more weight to the explanation given by the advocate for the delay. He submits that the veracity of the documents relied upon by the appellant were not in question, and there was sufficient evidence put before the F*t*T of the breakdown of the relationship, to establish that the relationship between the appellant and his ex-wife has broken down as they claim. Mr Read submits that the respondent's case was essentially that the appellant had been dishonest in making the application that he did. The respondent was alleging that the appellant had made a false application and it was therefore for the respondent to establish that the appellant had indeed been dishonest. He submits that the respondent failed to establish that the appellant had been dishonest.

10. In reply, Ms Peterson submits that the documents that were before the F*t*T at pages [27] to [33] of the appellant's bundle were clearly considered by the Judge. A copy of the divorce petition itself was not included in the bundle. She submits that the appellant did not make any application for disclosure of the interview transcripts and did not apply for an adjournment of the hearing so that the transcript of that interview could be made available. Ms Peterson submits that it was open to the judge to conclude that he was not satisfied that the appellant and his wife are separated as they claim, for the reasons set out in the decision. She draws my attention to the witness statement of [SS] and particularly paragraph [14] of that statement in which she states:

> *"Bearing in mind the fact that we have shown we are more than capable of maintaining and accommodating each other indefinitely, I would be grateful if you could allow my wife permission to remain in the United Kingdom so we can put this disruption to an end and continue to live a joyous and happy married life."*

11. Ms Peterson submits that this passage in [SS]'s witness statement entirely undermines the claim that the appellant and [SS] have separated as they claim. This passage in the witness statement in fact adds credence to the conclusion of the respondent and the Judge of the F*t*T, that they have not separated.

DISCUSSION

12. In **R & ors (Iran) v SSHD [2005] EWCA Civ 982**, the Court of Appeal held that before the Tribunal can set aside a decision of a Judge on the grounds of error of law, it has to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

13. I have carefully considered the decision of the F*t*T Judge. The Judge states at paragraph [9] of his decision;

> *"…The only evidence of any legal proceedings is correspondence from an Advocate's practice (AB pages 27-33). I attach little weight to this documentation since it is photocopied and the originals are not before me. Moreover, whilst the documentation refers to a divorce petition a copy of that divorce petition (which would have confirmed the supposed basis for divorce) has not been submitted,…"*

14. The Judge considered the material that is to be found at pages [27] to [33] of the appellant's bundle. He noted that whilst the documentation refers to a divorce petition, a copy of that divorce petition (which would have confirmed the supposed basis for divorce) has not been submitted. Although the appellant claims that there was evidence of a divorce petition before the F*t*T, Mr Read concedes that a copy of the divorce petition was not before the F*t*T. The fact that the divorce petition, which would have confirmed the supposed basis for the divorce, was not before the F*t*T, was plainly a matter that the Judge was entitled to take into account when considering whether the appellant and his wife have genuinely separated. Although there is no requirement for corroboration, in my judgment it also was open to the Judge when he was considering the evidence as a whole, to note that there is no evidence from family members that were supposedly very much involved in the breakdown of the marriage and its aftermath.

15. I reject the submission that the Judge failed to have proper regard to the statutory declaration. The Judge makes reference to the statutory declaration at paragraph [8] of his decision. I reject the submission by Mr Read that the failure to refer to the assertion at paragraph [7] of the statutory declaration that the relationship has broken down, is material. The entire thrust of the appeal was premised on the claim that the relationship has broken down and it is against that background that the Judge considered the appeal and the evidence before him.

16. In my judgement, it was open to the Judge to dismiss the appeal on the material that was before him, for the reasons that he has given.

17. Paragraph [14] of the witness statement of [SS] is curious to say the least. That paragraph urges that "*..you could allow my wife permission to remain in the United Kingdom so we can put this disruption to an end and continue to live a joyous and happy married life.*". As I have said, the statement contains a declaration that it is true and complete. As Ms Peterson submits, that paragraph in fact lends support to the claim by the respondent, and the finding of the F*t*T Judge that the appellant and his wife have not genuinely separated. As that paragraph did not form part of the decision of the F*t*T Judge's reasoning, I need say nothing more about it.

18. At the end of the hearing before me, I handed down an oral decision setting out briefly, my reasons for dismissing the appeal. I informed the parties that a perfected decision would be promulgated in due course. After the hearing had ended and I had handed down my reasons for dismissing the appeal, I turned to other matters in my list. I was informed by the Tribunal clerk that Mr Read wished to return before me and make an application for me to set aside my decision as he had erroneously made a concession that he wished to withdraw. Having had regard to Rule 43(2) of the Upper Tribunal Rules, and noting that although I had handed down an oral decision, a perfected decision was yet to be promulgated, with the agreement of Ms Peterson I agreed to hear Mr Read. When the parties returned, Mr Read stated that he would prefer to make a written application for me to set aside my decision under Rule 43(2)(d) of the Upper Tribunal Rules. Notwithstanding the fact that my decision had not been promulgated, at 13:06 on the same day, an email was received by the Tribunal from Mr Read claiming to be an application under Rule 43. It is not entirely clear from the email whether the Presenting Officers Unit has been served with a copy of the application. I note that that a Home Office email address is cc'd.

19. Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) provides that the Upper Tribunal may set aside a decision which disposes of

proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if (a) the Upper Tribunal considers that it is in the interests of justice to do so; and *inter alia* there has been some other procedural irregularity in the proceedings. In the written application made by Mr Read it is said that there has been a procedural error. Mr Read contends that I appear to have been misled by his concession that no divorce petition was included in the appellant's bundles that was before the F*t*T, and I was therefore wrong to proceed on the basis of that concession.

20. The oral decision that I handed down after hearing the parties' submissions is not a final decision promulgated by the Tribunal which disposes of the proceedings. It is when a decision is promulgated that there is a decision of the Upper Tribunal which disposes of the proceedings. I have however considered the further representations made by Mr Read in writing, and whether the withdrawal of the concession that Mr Read made in his submissions, that the divorce petition was not in the appellant's bundle that was before the F*t*T, would alter my decision. If it would, I would have given the respondent an opportunity to respond in writing before a final decision is promulgated.

21. In my judgement, the concession made by Mr Read does not affect the outcome of the appeal before me. As I have set out at paragraphs [13] and [14] above, the F*t*T Judge considered the material that is to be found at pages [27] to [33] of the appellant's bundle. The Judge refers at paragraph [9] of his decision to the evidence of "legal proceedings". He noted that whilst the documentation refers to a divorce petition, a copy of that divorce petition (which would have confirmed the supposed basis for divorce) has not been submitted. I have again carefully considered that documentation. At page [27] there is a letter from Tarlok Singh addressed to the appellant's representatives in the UK and dated 17th October 2016. The letter states that a "Divorce Petition is pending" and is "fixed for 03.12.16 for presence.". The letter states that [SS] "has already summoned *(sic)* in the case mentioned above". At page [28], there is a letter from Tarlok Singh addressed to the F*t*T dated 5th April 2016. In that letter Mr Tarlok Singh confirms

that the appellant is his client and that he was consulted by the appellant about filing a divorce petition on 2nd March 2016. He states "..The Divorce petition is filed on 01.4.2016 in the Hon'ble Court of Mr. Jatinderpal Singh Khurmi, Addl. District Judge, Ludhiana bearing Case No. HMA/652/2016 and is fixed for 12.7.2016 for the service of respondent". I pause to note that the appellant's application to the respondent was made on 15th February 2016, before he consulted Mr Tarlok Singh. If it is right that a Divorce petition was filed on 1st April 2016, that was after the decision of the respondent *(on 22nd March 2016)* to refuse the application for entry clearance. At pages [29] to [33] of the appellant's bundle are various documents that bear a seal of the "Copying Branch, District & Session Judge's Office". As the Judge of the F*t*T rightly noted, the documentation refers to a divorce petition, but a copy of that divorce petition has not been submitted. The appellant claims that there was evidence of a divorce petition before the F*t*T. The Judge of the F*t*T accepted at paragraph [9] of his decision that "whilst the documentation refers to a divorce petition, a copy of that divorce petition (which would have confirmed the supposed basis for divorce) has not been submitted.".

22. In my judgement, the Judge had proper regard to the documents relied upon by the applicant. The documents refer to a divorce petition and legal proceedings but a closer reading of the documents, confirms that the Judge was entitled to conclude that a copy of the divorce petition itself had not been submitted. In my judgement, having considered the evidence before him, it was open to the Judge to find that the appellant cannot meet the requirements of the Rules. Section EC-PT.1.1. of Appendix FM sets out the requirements to be met for entry clearance as a parent. The appellant must meet all of the requirements of Section E-ECPT: Eligibility for entry clearance as a parent. Section E-ECPT.2.3(iii) provides that the applicant must not be eligible to apply for entry clearance as a partner under this Appendix. Here the Judge found that the appellant can apply for entry clearance as a partner for the reasons that he has set out. It was open to him do so.

23. I have carefully read the paragraphs that the appellant seeks to criticise and the decision as a whole. The Judge carefully sets out the evidence before him and considers the inconsistencies in the evidence, and the explanations given by the appellant. It is now well established that although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the Judge. It is equally well established that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really cannot understand the original judge's thought process when the Judge was making material findings. Here, it cannot be said that the Judge's analysis of the evidence is irrational or perverse. The Judge did not consider irrelevant factors, and the weight that he attached to the evidence either individually or cumulatively, was a matter for him. I am satisfied that the Judge's decision is a sufficiently reasoned decision that was open to him on the evidence.

24. The appeal is dismissed.

Notice of Decision

25. The appeal is dismissed.

Signed Date 19th September 2017

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The appeal is dismissed and there can be no fee award.

Signed Date 19th September 2017

Deputy Upper Tribunal Judge Mandalia