Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34639/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2018	**On 18 December 2018**

Before

THE HONOURABLE LORD MATTHEWS
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE CRAIG

Between

MR MD NURUZZAMAN SHAHIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Canter of Counsel
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 1 January 1983. He entered the United Kingdom on 11 August 2005 with a student visa valid to 31 January 2008. He was granted three further periods of leave as a student between 1 February 2008 and 31 October 2010. On 15 October 2010 he applied for further leave as a Tier 4 (General) Student. He varied that application on 26 September 2011 when he applied for leave as the spouse of a person present and settled in the United Kingdom. That

was granted from 22 January 2013 to 22 January 2015. On 31 December 2014 he submitted a further application for indefinite leave to remain as the spouse of a person present and settled in the United Kingdom, but that application was refused by a decision dated 24 November 2015, which was made under paragraphs 322(5), 276B, S-LTR.1.6. and Appendix FM of the Immigration Rules. He appealed against that decision but his appeal was refused in a decision of First-tier Tribunal Judge A M Black promulgated on 22 June 2017.

2. His applications for permission to appeal were refused both in the First-tier Tribunal and in the Upper Tribunal, but the Upper Tribunal's refusal to allow permission was quashed in the High Court of Justice on 1 June 2018 on the basis that it was arguable that the decisions of the Upper Tribunal and the FTT were wrong in law and that the claim raised an important point of principle.

3. The case came before us in order for us to determine whether there was any error of law in the decision of the First-tier Tribunal. The grounds of appeal were lengthy and need not be repeated at this juncture. We shall refer to them as we go along. Put shortly, it was asserted that the respondent had failed to follow certain guidance in relation to the process whereby the assessment of what might be called "non-convictions" was undertaken, that being the basis on which the refusal of leave was made. Secondly, there were a number of detailed challenges to findings of fact. The details of the criticisms will be made clear. There was a challenge to the FTT's findings about the appellant's credibility and that of his wife. There was a challenge to the FTT's alleged failure to follow guidance in her assessment of the long residence requirements, particularly in relation to his family life. Lastly, the assessment of insurmountable obstacles was challenged.

4. We shall deal with each of these in turn but we do not propose to rehearse at length the contents of the FTT's decision.

Failure to Follow Guidance – Ground 1

5. The background to all this is that many of the matters relied on by the respondent in refusing leave to remain predated a previous grant or grants. The FTT referred to this specifically at paragraph 20. The respondent's guidance on general grounds for refusal applicable as at the date of the decision says the following:

> "Before you refuse leave to remain under paragraph 322(5), you must first refer your decision to a senior case worker. … when you consider such a case you must only take into account information which is new and was not known to the Home Office at the time of any previous decision. You must not take action on information which was known to the Home Office at the time of the previous decision, unless advised by a senior caseworker."

Paragraph 20 goes on as follows:

> "This guidance does not preclude basing a decision on information already known to the respondent at the date of an earlier decision; it requires that a

> senior case worker is consulted. The guidance is consistent with **Omojudi v UK (Application 1820/02**) in which the ECtHR held that, although the applicant had committed several earlier offences, these had been effectively waived by the UK when granting him indefinite leave to remain. So only the most recent offence which caused his imprisonment and subsequent deportation was to be weighed against him in the Article 8 balance. In that case, this was outweighed by the applicant's length of residence and strong family ties in the UK."

The FTT went on to say that the respondent must have taken into account the appellant's "non-convictions" when deciding to grant leave to remain as a spouse of a British citizen and it could be reasonably inferred that she did not consider those matters engaged the general grounds of refusal. She took account of the fact that the respondent did not consider matters predating January 2013 to be sufficient to engage the general grounds. She found however that those events might nonetheless be of relevance to the respondent's decision in 2015. The respondent was entitled at that time to take a holistic approach in assessing the appellant's conduct and character at that time, given that she had been alerted by the police that his history gave them cause to believe he was a sexual predator. To have done otherwise might have undermined her assessment of any risk arising from his remaining in the UK. It was not inappropriate for her to assess new information in the context of the pre-2013 information.

Mr Canter did not refer to Omojudi but relied on SF (Albania) [2017] UKUT 00120 (IAC). There was no ground of appeal in the instant case that the decision was "not in accordance with the law" but that did not matter since SF stated that

> "Even in the absence of a 'not in accordance with the law' ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal."

He accepted that this was not a judicial review but the Tribunal ought to take the guidance into account. Even if it were to be thought that the pre–2013 matters should be considered as part of the overall picture it was not legitimate to look at non-sexual matters, of which there were a number, as will be shown later.

Unfortunately for this argument, it was pointed out by Mr Jarvis, both in his skeleton and in his argument that in fact the case had been considered by a senior caseworker so the guidance had been followed. Mr Canter was unaware of this but did not dispute what was said by Mr Jarvis. He pointed out however that there was no evidence before the FTT about it. In our opinion, even if there had been no referral to a senior caseworker this would not have prevented the FTT from considering all of the evidence. The guidance relates to the question of processing of the application and it is difficult to see what difference it would make to the FTT's assessment of the evidence if it were or were not referred to a senior caseworker. We accept that it was so referred, however, and we do not consider it necessary for there to have been any evidence about it. Any challenge to the process should have been made by way of judicial review. SF (Albania) was of no assistance to the appellant. There was no

question of the guidance pointing clearly to a particular outcome in the instant case. As Mr Jarvis pointed out in his skeleton, it was impossible reasonably to suggest that the Home Office would do anything other than re-refuse on the basis of the post-2013 evidence, to which we shall turn.

6. There is accordingly nothing in the first ground of appeal.

Ground 2: Failure Properly to Assess "Non-Convictions"

7. In order to understand the context of this it will be necessary to give a brief outline of the basis of the refusal of leave to remain.

The appellant had no convictions but the refusal letter referred to eleven "non-convictions", being three counts of rape of a female, two sexual assaults, one offence of controlling prostitutes, one possession of Class B drugs with intent to supply, two malicious communications, one of which was with criminal damage, and one harassment. It was said that the appellant was well-known for running an escort agency which offered extra services such as sexual intercourse. His presence in the UK was said not to be conducive to the public good because his conduct made it undesirable for him to remain in the UK. He had completed ten years' residence in the UK with lawful leave but did not qualify under the long residence provisions in paragraph 276B because it was undesirable for him to be given indefinite leave to remain. His ties to the UK were not sufficiently strong to outweigh the conclusions in the police evidence. His presence in the UK was not conducive to the public interest (paragraph S-LTR.1.6.). Paragraph EX.1. of Appendix FM had been considered in the light of his relationship with his British partner who was serving a prison sentence and was due to be released on 11 August 2016. He could maintain contact with her as he currently did while she was in prison if he were removed to Bangladesh. There were no insurmountable obstacles to the couple continuing their family life in Bangladesh. As regards his private life there were no significant obstacles to his integration on return to Bangladesh (paragraph 276ADE(1)(vi)).

The respondent produced a bundle containing certain supporting documentation, a statement of a DC Yau, the appellant's passport and the Reasons for Refusal Letter as well as two supplementary bundles, all as set out in paragraph 6. The appellant lodged a bundle of documents, as detailed in paragraph 7, including his own and his wife's further statements dated 24 May 2017.

The judge sets out the evidence which she heard and that contained in the various documents. Except for one or two particular criticisms, no substantive criticism was made of the manner in which she summarised the evidence.

8. The respondent's representative made a number of additional points. The Metropolitan Police Service had provided evidence of the appellant's criminal history and intelligence as to his conduct and character. His evidence and that of his wife was not credible. It was inconsistent, particularly as regards his escort agency

business. His circumstances which gave rise to his various arrests as a result of complaints by potential employees of the escort agency were similar, albeit he had not been convicted of any offence. His own evidence as regards complaints was not consistent. He had visited his wife in prison but those visits were few and far between. Full details of the submissions can be found in paragraph 4.

The grounds of appeal are summarised in paragraph 5 and need not be repeated here.

The FTT's findings and conclusions commence at paragraph 12. She correctly identifies that the approach in **Farquharson (removal – proof of conduct) [2013] UKUT 146 (IAC)**, had to be followed. She made a number of specific findings in relation to allegations of particular conduct and we will turn to those now when dealing with the particular criticisms of them

9. The first matters dealt with are said to be criminal damage and malicious communication on 14 January and 4 February 2009. These are referred to in paragraphs 24 to 28. Mr Canter was content to rely on the FTT's summary of evidence. He submitted that the complainant did not see the appellant break the window but there was certain circumstantial evidence. The appellant was not charged with any offence. The respondent's position was that the finding was plainly lawful and followed the guidance derived from **Farquharson**. The ground of appeal was simply a disagreement and re-argument. The CRIS record was that the complainant had worked for an escort agency and the appellant had paid for her company. He had become infatuated with her and this led to him making phone calls and texts which had made her feel uncomfortable. She was at home one evening and that was why she ignored the text from the appellant. He was standing outside her window shouting at her. He would not leave and wanted her to look at the text message. She heard the glass in the window, which he had been knocking, break. An argument ensued and he clapped his hands, whereupon five males appeared and stood beside him. Two days later she received a message which she believed was from the appellant and which referred to his having broken her window because of her having a sex client with her. The criminal damage matter was not taken any further because the complainant did not see the appellant break the window. We are quite satisfied that there was ample evidence for the FTT to draw the inference that the appellant broke the window, despite the complainant not actually seeing it, at least to the civil, if not the criminal, standard. Paragraph 26 refers to the complainant being at home alone when she received a text from the appellant threatening to kill her. Several attempts were made by the police to contact her in order to provide her telephone as evidence, but she did not respond to repeated messages and the case was closed. The appellant did not accept anything which was said within the allegation, according to his statement. The text threatening to kill her was recorded by the police. There was ample evidence upon which the FTT Judge could reach the conclusion which she did.

10. The second incident relates to harassment between 1 and 9 August 2009. This is dealt with from paragraphs 29 to 35. The complainant contacted officers regarding threatening messages he had received. He had met the appellant while studying at London Metropolitan University and referred to the appellant running an escort agency. The complainant worked for him over the previous three months. The appellant had become upset because the complainant had undertaken other work for another escort agency. Police had seen prints of e-mails dated 9 August 2009:

> "… implying there will be violence, the susoect (sic) is also asaid (sic) to have attended the old address of the VIW (victim/informant/witness) with a large group of males and demanded to know where he was. He was told by the landlady that he was away on holiday and this prompted the suspect to text the VIW saying that a named associate had a brother who worked in the police and that they could track him down at the press of a button".

The e-mail address on the e-mails was in the name of the appellant at London Metropolitan University. The complainant decided to change his telephone number, block the appellant from emailing him and move to a new address. The police concluded that apart from vague, ambiguous, veiled threats, the suspect had not actually done anything to the complainant. When they spoke to the appellant he said that he and the complainant were best friends. He was given a first instance harassment warning and told to cease contact with the complainant. He complied with this. The complainant withdrew the allegation on 3 September 2009 on the basis that it had been a misunderstanding and that they were friends again. However, on 2 October 2009 he reported he had received threatening texts from the appellant and that he was going to cut him up. He also threatened to beat up the complainant and break into his property. The complainant went and told the police he did not want any further action to be taken and that he had become friends with the appellant again. A police officer later considered the original text messages and formed the view that these did not contain any threats and also thought the complainant was not being completely open and honest. Reasons for that were given. The appellant had complied with the terms of the harassment warning and there was a dearth of evidence to substantiate the second allegation. It was considered that the complainant had given false information with regard to the date of changing his mobile telephone number. The FTT thought that the fact that a first instance warning had been given was indicative of threats having been perceived by the complainant to have been made by him, albeit on their face the texts did not appear to amount to threats per se. This was corroborated in her view by the fact that the appellant accepted the warning. It was pointed out by Mr Canter that there was no question of accepting the warning. He was just given it and that was it. He accepted however that he complied with it. The FTT found that the appellant had harassed the complainant. We are satisfied that this was a finding open to her. She was not obliged to reach the same view as the police. In any event, even if she was wrong about this it is of no materiality in the overall context of this case.

11. The next matter was possession of cannabis with intent to supply on 29 October 2009. This is set out at paragraphs 36 to 40. It appears that an informant called the police because someone was trying to get into his house and he was concerned for his key

worker who was waiting outside. The police attended and met a complainant with mental health or learning difficulties. He said that the appellant had been invited into the premises by another person and had "taken it over". The complainant wanted the police to take the appellant's belongings. He told them that he had found a large bag of herbal cannabis within his belongings. He also reported that the appellant ran an escort agency. Officers found four mobile telephones with the appellant's belongings, which they took, including the drugs. The appellant attended the police station and was arrested on suspicion of possession with intent to supply and the theft of various personal documents including a driving licence, cheque book and banking correspondence in another person's name. He denied any involvement when he was interviewed. He said he had been duped into renting a room in the complainant's building and that there were ten other people at the address. He had heard a named individual and others talking about drugs and about an escorting company and that they were dealing on the kitchen table. He sold bankcards and driving licences. He was asked why he did not report this to the police and he said he wanted to find a new address first and be safe before he told the police. He said he had given the passport and his laptop to the named individual and others and that they were using his mobile telephone for calls. He denied knowing about the cannabis or the documents in other people's names. Forensic examination revealed that the cannabis had been widely handled by occupants at the address and the police took no action. There was no evidence that the drugs belonged to the appellant. They were found in a flat with multiple occupants and handed to the police by a vulnerable adult. There was no suspicious reporting of duplicate licences or stolen licences. No suspicious activity had been noted on the bank accounts. The appellant had said that cannabis was being sold from the address. He did not deny that cannabis was found in his belongings nor that he had four mobile telephones or a driving licence and banking documentation in the name of another person. The FTT found that his account that he did not report the matter to the police because he wanted to wait until he had found somewhere safe did not have the ring of truth about it. It would not have been necessary for him to be identified as the source of the information. The evidence of the complainant to the effect that he had taken over the property had a ring of truth about it. The appellant's reference to another resident running an escort agency was noted. It was found incredible that the appellant who was a computer science student at the time would give the passport on his laptop and lend his mobile phone to people whom he knew to be dealing in drugs when he intended to report them to the police. On balance the First-tier Tribunal preferred the account given to the police by the vulnerable complainant who had the support of his key workers. The fact that he went to the police was consistent with the appellant having moved into the property and "engaged in criminal activity there". Mr Canter criticised this finding. The cannabis had been widely handled by others and there was no evidence that it belonged to the appellant. The judge did not say what criminal activities she found that he was involved in. The fact that she disbelieved what he had to say did not prove anything. She should have said that she did not accept his evidence but the allegation was not proved.

We do not agree that the FTT in rejecting the appellant's account found that that proved the opposite. There is no basis for saying that she did anything other than put it to the side. The other evidence set out in the paragraph to which we have referred seems to us to be quite sufficient to find that the appellant was in fact involved in possession of cannabis with intent to supply. It is perhaps unfortunate that she did refer to that crime specifically. It is not clear whether she accepted that he was dealing in drugs or dealing in stolen property and we agree with Mr Canter that the reference to "criminal activity" is not clear enough to enable the appellant to know precisely what she found him to be doing. However, given the other findings which she made, and which we find she was entitled to make, we do not consider this to be material.

12. The next incident referred to is on 23 September 2010 and is described as "malicious communications". It is dealt with in paragraphs 41 to 44. This relates to an entry in the CRIS report about the complainant attending a bank and lending the appellant £2,000. In due course he contacted the appellant by telephone to ask for the money back and the appellant said he had no intention of repaying it and became abusive. Certain detailed threats are set out in paragraph 41. The complainant said he did not wish to pursue the investigation. A first instance warning was given to the appellant by telephone. The appellant now accepted that he owed this person money and that he could not pay him back straightaway but said he was racially abused by him. There is no mention of this in the CRIS report. The FTT noted that she would have expected this to have been noted. The appellant made no reference in his statement to having been given a first instance warning. She found therefore that his evidence was not an accurate reflection of events as recorded in the CRIS report and downgraded the outcome. The FTT was satisfied that the threats were made. Mr Canter accepted that the appellant did not say that he had been given a warning but said it was wrong to say that his account was not an accurate reflection of the CRIS report. We disagree. The failure to refer to the warning renders his account of events inaccurate and the FTT was entitled to make the finding which she did.

13. The next event referred to is a sexual assault on a female on 31 January 2011. Mr Canter said that the FTT had fairly summarised the CRIS report. She dealt with the matter between paragraphs 45 and 50. Mr Canter submitted, however, that her conclusions were perverse. The alleged sexual assault, the details of which are set out in paragraph 45 and which we need not repeat, was said to have taken place in a dormitory. The police spoke to other people who were in the dormitory. None of them heard or saw anything. The police were concerned that the complainant did not tell her friend about the assault and indeed fell asleep next to her alleged attacker after the alleged assault.

Mr Canter accepted that this would not necessarily show that she was not telling the truth. However, she was never cross-examined. That was a fundamental criticism of the Nexus system and indeed was a criticism which he made in respect of a number of the particular instances of conduct referred to in the decision. He did not indulge in a root and branch criticism of the Nexus system but it brought into focus the

standard of proof. It showed the importance of being very careful in analysing evidence. In a theme which he developed later, he said it was important not to make mistakes. Given the circumstances set out in the paragraphs to which I have referred, there was a significant level of doubt and it was perverse to find on the balance of probabilities that this conduct occurred. The skeleton argument pointed out the fact that the judge, in paragraph 50, referred to an alleged inconsistency in the appellant's evidence in that on the one hand he said he fell asleep when the complainant was standing naked nearby and on the other he was excited (at another stage) when he saw her naked body. There was said to be no necessary inconsistency in this account and indeed this was not a point raised by the respondent but was something that the judge raised for the first time in the decision. It was not put to the appellant and he had no opportunity to respond to it. The judge said that she gave little weight to the fact that other residents did not hear the complainant during the assault. It was not a prolonged incident and occurred at night when others would have been asleep. Nor did she consider it unreasonable that the complainant went back to sleep in her bunk near the appellant. She had repelled him and he had complied with her instruction to stop assaulting her. This was a dormitory and she would have drawn comfort from the presence of others in the room who would have come to her aid if the appellant had assaulted her again or refused to stop. This latter finding perhaps enters into the realms of speculation but her overall finding that the conduct took place is unchallengeable. It was a matter for her to determine whether the appellant's evidence was inconsistent. She was entitled to find that it was. It was suggested in the skeleton that she had reversed the burden of proof in her reasoning. We do not accept that. She has rejected the account of the appellant but has not as a result believed the opposite.

We do not consider that there is anything in the criticism of her findings.

14. The next matter is the rape of a female over 16 years of age on 19 July 2011. This is set out between paragraphs 51 and 66. The offence was said to have taken place at the appellant's residence. The CRIS noted that the appellant ran an escort agency from these premises and two witnesses described in the CRIS as "employees of the company" were also on the premises at the time. The complainant was there for a job interview. The appellant allegedly took her into a bedroom and locked the door while the witnesses remained in the living room. The complainant and the appellant emerged about 30 minutes later and the complainant said she was going to call the police because the appellant had had sexual intercourse with her against her will. She then called the police and the appellant was arrested. During a search of the property police found a camera containing sexually explicit images of individuals. The complainant told the police that the company name was "Soulmate". She discussed the job with him and was told it involved rich people paying for time/company with no sex involved. She was asked to take off her T-shirt to see her size and she complied with this. She then gave an account of the appellant having sexual intercourse with her even though she told him that she did not want to have sex. One of the witnesses gave an account recorded in the CRIS report. She had put an advertisement on Gumtree offering her services for babysitting and had received

a call from the appellant saying that he was calling from Soulmate escort agency. He said she could earn £400 on a bad night and £700 on a good night. When she attended he told her that prostitution was illegal and the escort agency was just for spending time with others and keeping them company. She reported that the appellant had told her to go into a bedroom and had asked her to expose her breasts and kissed her before pushing her onto the bed. He said that he had thought she was open-minded and he had made it his job to check her out as he did not want just anyone working for him. He could not give her a job if he did not check her over. She did not really want to have sex with him but she wanted the job and had sex. He then took photos of her for his website. She left and arranged to return to two days later. The appellant was not there but he arrived later and told her that she had missed loads of jobs over the weekend. He told her that two girls were coming to be interviewed and then said that he had cancelled one as she was Romanian and already experienced and she already had a pimp. Later another girl turned up but he stated that he did not like her and he did not have sex with her. Another girl (recorded as the complainant), was coming for an interview according to the appellant and she arrived half-an-hour later. The appellant took her into the bedroom while the others remained in the living room. He called one of them in the living room to bring in a condom. When they came out the complainant started crying saying she felt cheap and dirty and that he had "come up her". She asked the appellant for money for the morning after pill but he refused to give her any as she worked for him. He then said he had changed his mind about giving her a job and called her names. The complainant said if he did not give her the money she would call the police and she did so. This account was corroborated by the second female who was in the living room when the alleged rape occurred in the bedroom. The complainant did not co-operate with the police and said that sex had been consensual. The appellant gave an account which was recorded on CRIS. He said that in about 2008 he bought the domain name for the Soulmate escort agency. He was not running the business himself but was completing work on the website, ensuring the company name came out top when searched for in Google. The name was rented out to other agencies for short periods of time and was given back. He decided to run the agency himself in 2009. The agency suffered due to financial constraints. He married in April 2010 and continued running the agency without his wife's knowledge. He and his wife did not live together at the time. He made a further attempt with the agency and began trying to recruit girls. He had a number of checks and procedures that were followed during interviews, including checking ages and addresses. He explained to the girls that he was only selling their time and not for prostitution. He also made sure they were open-minded for the clients. He did not like to say "don't do sex". He told the police that the complainant had asked him more than once in the bedroom if he wanted to have sex. He told her it was not part of the interview process but she had stated that she needed to have sex with him as she was desperate for a job. They had unprotected sex and she went to the bathroom to clean herself. He was asked why it was necessary to see the complainant naked if the agency was only selling her time. He said there was no need to do that nor was there a need to touch them. This had been optional and none of the girls had to accept. He accepted that this was for his own gratification. He

agreed it was not necessary but stopped short of agreeing to deliberate manipulation. In short all three women reported that they had sexual intercourse with the appellant in the course of the interview by him and this had been at his behest. The complainant initially said it took place without her consent but the other two did not object. Semi-indecent images and advertisements of the agency were found on examination of the appellant's laptops and cameras. The CPS concluded that the case did not pass the evidential threshold test. The appellant's account in his first appeal statement is set out at paragraph 61. He accepted having consensual sex with the complainant but did not rape her. He regretted it because it was wrong as he was married.

The FTT found at paragraph 64 that the alleged rape occurred in similar circumstances to the earlier sexual assault, namely in the course of an interview for work with Soulmate's with complainants reporting that the appellant had taken them into the bedroom, told them to take their tops off and assaulted them. The police report referred to a website "dedicated to the support of and advice for escorts". There was a post regarding Soulmate agency in which a girl stated that Shahin asked her to have sex with him in order to get a job. She was in contact with the police and referred to being manipulated into having sex with the appellant. If she did not she would not get any work in London. The police accepted this might not be criminal behaviour but noted it displayed ongoing manipulation, propensity for lying and encouragement/incitement of prostitution.

In paragraph 65 the FTT noted that she agreed with the police comment that there was no reason for the appellant to tell women to remove their clothing in interview or to have sex with him if they were merely being employed to provide companionship. The manner in which sexual contact occurred, namely in the course of a so-called interview for work at the agency, was consistent with the witnesses and complainants' evidence of manipulation and abuse. There was a significant imbalance as between the appellant and each of the women. She was satisfied that the number of reports by witnesses suggested the appellant did indeed engage in sexual touching and on occasion sexual intercourse with girls he was interviewing for roles within Soulmate. She could see no reason to do so other than that put forward by the witnesses, namely that he wanted to check them out before deciding whether to take them on. There would also have been an element of sexual gratification. The similarity of their accounts was telling. She found that irrespective of whether or not the complainant told the appellant she did not consent to sexual intercourse, she was manipulated into having sex with him during the interview and that she did not want to take part in that intercourse.

Mr Canter said that there was an error in paragraph 64 where the FTT said that the alleged rape occurred in similar circumstances to the earlier sexual assault, namely in the course of her interview for work with Soulmate's. The earlier assault referred to was of course in a dormitory in a hostel. Mr Canter is right that there is an error. He submitted that her findings in 65 and 66 in relation to manipulation were equivocal. There had been no opportunity to cross the complainant. We accept that an error

was made since the earlier sexual assault referred to did not involve an interview for work with Soulmate's. However, the allegation of rape was not found to have been proved by the FTT and, *pace* what Mr Canter was to say in relation to paragraph 71, we do not consider this error to be material. While the FTT was wrong about the circumstances in which the first alleged sexual assault took place, had she approached the matter by looking at later assaults she would undoubtedly have come to the same conclusion, and quite rightly in our view.

15. Reference was then made to an alleged sexual assault on a female on 30 October 2011. The details of that are set out in her paragraphs 67 to 71. The complainant in this case contacted the appellant via a website to enquire about a job as an escort and was interviewed. She said that the appellant told her that while it was not a requirement for her to have sex with her clients "it was expected". The appellant "asked to have sex with her to say how she would react". She consented in order to get the job. He took pictures of her naked for the Soulmate's website. She stayed in the appellant's home at his proposal and in the early hours of the morning she woke to find him in her room. He started touching her, including rubbing her vagina and she told him to stop. He became annoyed and left. She told him that she did not want to work for him any longer and he threatened to shoot her and to stab her. She told the police and he was arrested. She reported that he had uploaded naked photographs of her on her own Facebook account and a friend had witnessed these photographs. The police seized the appellant's laptop, memory stick, memory card, digital camera and mobile phones. He answered "No comment" to questions put at interview. It was not clear why no action was taken in relation to the Facebook account. The FTT found that the allegations of threats to shoot and stab the complainant were similar to those made in other circumstances and to that extent were consistent with other witnesses' descriptions of the appellant's short temper and threatening behaviour. This gave credence to the complainant's account. The allegation of sexual assault was similar to others made against the appellant by girls in similar situations, namely either at the interview stage or in the early days of working for him as an escort. There was no motive for a false allegation by the complainant. The appellant's response in his first appeal statement was to reiterate his denial to the police at the time and maintain that denial. The FTT preferred the account of the complainant and went on to say that it was "consistent with other, earlier, allegations of sexual assault which I have found to be reliable". This was set out in paragraph 71 and Mr Canter said that while the modus operandi was similar to that in the second sexual assault allegation (that of 19 July 2011) the judge fell into error when she said that it was consistent with other earlier allegations. Had she said another earlier allegation instead of allegations such a criticism could not have been made. It seems to us with respect that this is a very minor matter indeed, if indeed it is a mistake at all. While the circumstances of the offence are more similar to the later allegation which involved an interview, they are also consistent with the allegation of sexual assault which did not involve an interview. They were similar to the first allegation, for example, in respect that they involved an assault on the complainant when she was in the bed which had been allocated to her. They were

similar to the second allegation in respect that they were at or about the time of an interview.

In our view there is nothing in this point.

16. The next matter was the alleged rape of a female over 16 years of age on 30 May 2014. This was the first of what might be called the new non-convictions, in other words, the first matter which postdated the earlier grants of leave.

The details are set out from paragraphs 72 to 76. It was not cited in the police statement of DC Yau (referred to in particular at paragraph 17 of the decision) and the judge found it was not proved.

17. The next allegation related to a matter on 3 September 2014, namely the alleged rape of a female over 16 years of age. Details of this are set out at paragraphs 77 to 80. At paragraph 79 the FTT said that given the poor mental health of the complainant she was unable to find her allegation of rape reliable. But nonetheless she gives some weight to her evidence that the appellant wanted sex at the time of an interview and that he was a pimp. The complainant had worked as a prostitute in the past. Her willingness to disclose to the police that she had worked as a prostitute suggested a degree of honesty in her evidence. She was unable to make a finding as to whether or not she consented to sex or whether or not she told the appellant as such, but she did accept that the complainant had had sexual intercourse in the course of an interview. She also accepted that the complainant believed the appellant to be a pimp. At paragraph 80 the FTT pointed out that the appellant said in his second statement that he found it "very unfair that an allegation made by this kind of person could be used against me by the Home Office". She commented that a person's evidence is not unreliable merely because she is a prostitute and/or has mental health issues and that this remark by the appellant was an indicator of his lack of respect for vulnerable women. Mr Canter criticised this. She did not find the allegation proved and that should have been the end of it. We disagree. In our opinion the judge was perfectly entitled to note what the complainant said about the appellant being a pimp, that was her impression of the matter, and wanting sex during an interview as being a common thread throughout much of the allegations of adverse conduct. We agree with Mr Jarvis's comments to that effect. We are satisfied that she was entitled to have regard to his attitude to women in her overall assessment of the appellant's credibility.

18. The next matter is an allegation that the appellant was controlling prostitution for gain. It is dealt with at paragraphs 81 to 87. The CRIS referred to a number of reports to the police over previous years in which escorts alleged that sexual offences were committed by the appellant and an investigation was lodged as a result into whether or not he was involved in controlling prostitutes for gain. He was arrested at his home and various items seized, including computer equipment and telephones. He made no comment in response to questions at interview. The CRIS report stated that downloads were to be checked on the iPad, iPhone and two

disposal phones. The laptop was to be submitted to the lab for e-mails. There was no indication that downloads were to be checked on the laptop. The forensic report confirmed that the appellant's emails showed that he ran an escort agency called Soulmate's but there was no indication that it was being used for the purposes of prostitution. The FTT inferred from the entries in the CRIS that only the e-mails were checked on the laptop. There was no indication that deleted files had been accessed or retrieved by the police. It was noted in the CRIS that the phones and laptop showed that the appellant was the manager of the company and that male customers did enquire about sex via e-mail but there was no evidence to suggest that sex was being offered or paid for. There were no witnesses who were willing to give evidence of prostitution and at that time there was no other evidence to support a charge. In his first appeal statement the appellant averred that the escort agency provided companionship to users of the website. He considered that some girls were sent by competitors to cause trouble with his agency but this did not explain the similarities of the witnesses' evidence as regards his activities, conduct and behaviour. He said that the women were not permitted to offer any sexual services. The FTT pointed out that this statement was at odds with the evidence of a witness that they were expected to do so. The FTT did not accept that she was put up to this by a competitor and indeed no competitor had been identified by the appellant in any event. The appellant said he would in the past agree to take photographs of the female escorts but there was no explanation as to why he would take sexually explicit photographs of the type found in his camera. They would not have been needed to promote an agency providing merely companionship. Such photographs suggested he was providing sexual services to customers. At paragraph 86 the FTT said that she found the appellant's evidence that he was put up to giving a "No comment" interview by his solicitor to be disingenuous. If that were the case, he would have been advised to do so because it was in his best interests. The inference from such advice was that his account might incriminate him. We are somewhat uncomfortable with this paragraph in that not only does it involve an element of speculation but it might tend to indicate an inversion of the onus of proof and an undermining of the appellant's right to silence. Nonetheless, given the vast quantity of material available to the FTT we do not consider this to be material in the circumstances.

19. In oral argument Mr Canter said that the police conducted a detailed and thorough investigation in April 2015 and no charge resulted. There was support for the appellant's case as a whole. At paragraph 87 the FTT said that she gave little weight to the appellant's suggestion that the lack of any incriminating evidence on his computers and other electronic devices indicated he was not involved in controlling prostitution for gain. She said that the forensic examination of his computer and other devices appeared to have been limited to his e-mails. However, the CRIS said at page 32 that there were a number of forensic downloads. The FTT's conclusion that the examination was limited to e-mails was unsustainable. This vitiated her findings.

In our opinion this paragraph has to be read as a whole. The FTT went on to say that it was most unlikely he would have mentioned providing anything illegal in e-mails. But, more significantly, she said the following:

> "In any event, I do not consider the lack of forensic evidence is sufficient to counter the various witnesses' evidence, cited in the CRIS reports, to the effect that the appellant was engaged in running a prostitution business through his escort agency. The evidence on the issue in the CRIS reports, citing as they do various witnesses with personal experience of the appellant's own and his business activities, is sufficient to demonstrate that this is the case on the balance of probabilities."

In our view the FTT in that passage was proceeding on the basis that there was nothing to be found on any of the electronic devices. She found that even if that were the case the other evidence available to her was sufficient to demonstrate that the appellant was involved in controlling prostitution. While Mr Canter pointed out that she did not specify who these witnesses were, we are satisfied that when her findings as to the appellant's activities as a whole are considered, including what she says at paragraphs 54 and 55, as well as paragraphs 64 and 65, she was entitled to reach the conclusions which she did.

20. The last two matters are the alleged rape of a female over 16 years of age on 17 July 2015 and a sexual assault on a female on 23 December 2015. These two matters were added after the refusal letter, bringing the total number of allegations to 13. The first of these is dealt with at paragraphs 88 to 95 and the graphic details contained in paragraph 89 in particular provide an ample basis for the FTT finding at paragraph 95 that the appellant was engaged in controlling prostitution for financial gain. This complainant was a student who had been interviewed by the appellant and who had told her it was part of the interview process that she had sex with him. She knew of other females who had been treated in the same way and gave very detailed evidence to the police about the alleged rape. He told her about the types of sex she might be required to engage in with clients and showed her a list of terms or acronyms for different types of activity. She said the appellant threatened to kill her and said he was "unhinged, paranoid and hell bent on controlling the girls. He would always snap at them". She worked as a prostitute for him for about three weeks before realising she had caught a sexually transmitted disease from one of the clients. She did not report the rape at the time. At paragraph 90 the FTT noted that the appellant was arrested in January 2016 and provided a prepared statement to the effect that he had never had any sexual contact with the alleged complainant, with or without her consent; the allegation was false. He denied all the allegations in her statement and answered "No comment" to a lengthy series of questions at interview.

The matter was reviewed by a Detective Inspector who decided not to take it further, having concerns about whether the rape was sufficiently made out from an evidential point of view. The reasons for that are set out at paragraph 91.

At paragraph 93 the FTT noted that "The appellant does not address this matter in his appeal statements or his oral evidence."

Mr Canter said that this was wrong. In his supplementary statement he said, at paragraph 6 that:

> "The second incident relates to a report that was made against me in July 2015. I did not have any sexual contact with this person and she did not go on to work as a prostitute for me. I would emphasise that no further action was taken against me."

Mr Canter criticised the FTT for not taking account of this supplementary statement.

In our opinion, however, there is nothing in this. The supplementary statement in essence adds nothing to what is recorded at paragraph 90. The FTT knew perfectly well what the appellant's position was and also knew that no action was taken against him. The error at paragraph 93 is immaterial.

21. A similar complaint was made by Mr Canter in relation to the December 2015 matter. This was an alleged sexual assault on a female said to have occurred at the appellant's home address. It is dealt with between paragraphs 96 to 98. It appeared that the complainant attended his flat for an interview, having previously worked as an escort. Shortly after her arrival the appellant made advances to her, which she rebuffed. He tried to kiss her and she punched him on the face. The appellant called the police and, unaware of his background, accepted at face value his account that he had been assaulted. He asked that the complainant be removed from the premises, which infuriated her. Despite her explanation the police took no action. On return to the station the officer learned of the appellant's previous history and this led him to believe the complainant's account. They spent the next few days trying to redress the situation with the complainant, without success. She would not engage with them and as a result no further action was taken against the appellant.

At paragraph 98 it was said that the appellant had not addressed this issue in his evidence for the appeal. She went on to say that the appellant would have received the respondent's refusal decision before this event took place and would have been aware of the respondent's decision to refuse his application because of the previous allegations. This would explain his decision to call the police when he was rebuffed by the complainant. He would have appreciated that the complainant might report the assault to the police and that this would reflect badly on him, given his previous history with the police. She accepted the complainant's account, which was similar to that of other complainants before her.

22. As a matter of fact, the appellant did address the issue in the supplementary statement to which we have referred. In paragraph 5 thereof he said the following:

> "The first stems from an incident on 23rd December 2015 when I called the police to make a complaint of assault. The statement contains a summary of my account of the incident which is correct. The woman attacked me after I told her that I could not help her by providing her with work as a prostitute. I reject

what is said by DI Smithson 2nd page of PC Balderston's statement at page 628 of the bundle) (sic) and emphasise that no further action was taken against me."

23. Mr Canter said there was no reference to this at all in the judgment but paragraph 97 sets out the account which he gave to the police and the FTT's failure to notice what is in essence a repetition of it in his supplementary statement is immaterial. When PC Balderston's statement was examined by us it was apparent that the FTT had had regard to it, given the markings on it, and indeed that is reflected in her findings at paragraph 97.

Credibility Findings

24. At paragraph 37 of his skeleton argument Mr Canter said that the judge made it clear that she did not believe that the appellant and his wife were credible witnesses (paragraph 100). She gave reasons for this but some of the reasons did not stand up to scrutiny and therefore vitiated the conclusion. The appellant had said that he lived together with his wife since his marriage and that was not necessarily inconsistent with his wife spending significant amounts of time staying at her mother's house. The FTT had thought that it was inconsistent. Further, the appellant's evidence that there was no room for him at his wife's parents' house was not necessarily inconsistent with the appellant's wife initially hiding the marriage from her parents and then later informing them and the parents not being happy about it. We do not consider that there is any force in these criticisms. The FTT was entitled to find that these were inconsistencies, although other judges might not have done so.

Failure to Follow Policy Guidance

25. This ground was similar to ground 1. It was argued at the hearing of the appeal before the FTT that the decision did not give any weight to the fact that the appellant was married to a British citizen and that this was not in accordance with the respondent's published guidance on the application of the long residence requirements which appear in the document "Guidance – Long Residence – Version 13.0 (8 May 2015)". At page 39 of this document it states the following:

> "You must take an applicant's strength of connections into consideration in cases when you are considering refusing on other relevant points under paragraph 276B(ii). You must consider whether an applicant's connections with the UK would weigh against refusal.
>
> The family life a person has in the UK must be taken into account in assessing the strength of their connections to the UK. **This may be particularly strong if they are married to or have established a similar relationship with a settled person.** The person may have other close relatives settled in the UK. The strength and closeness of the relationship will determine how strong a factor this may be. Similarly, if a person's close relatives are not in the UK, this may call into question the strength of the person's connection to the UK."

The FTT had found, at paragraph 109, that the appellant's family life was "limited" but that it was accepted that the appellant was married and that the marriage was genuine and subsisting. The respondent was obliged by her policy to take this into account in reaching her decision on long residence and the judge was obliged to take account of this in her decision. Reference was made again to the case of SF (Albania).

Mr Jarvis's position was that this challenge was without merit. The guidance to the decision maker was just that and there was no requirement in the guidance or in the law for the SSHD to detail every element of this consideration in their Reasons for Refusal Letter. On appeal it was for a judge to consider the relevant Rule schemes and make findings of her own on the requirements. Equally, there was no longer any power for the judge to expressly find that the SSHD's decision was not in accordance with the law. Additionally, the guidance was in discretionary terms and not expressly binding on the judge in any event. The judge's reasoning at paragraph 110 was lawful and clear. The particular nature of the relationship had to be taken into account and she did that. It was wholly unsurprising that the judge should come to the conclusion which she did.

26. The judge found, at paragraph 110, that the relationship was a shallow one, while the marriage was genuine and subsisting. The appellant's wife gave inconsistent evidence about it. The couple had rarely, if ever, lived together. Their evidence about their relationship was wholly unreliable. The documentary evidence of their contact during the two-and-a-half years the appellant's wife was in prison was notable for its irregularity. Personal contact and phone calls were few and far between. This did not suggest a close relationship. Even now they did not live together full-time. The fact they had had so little contact over the years and that they had limited contact now suggested that the relationship was not a close one and that they lived separate lives, albeit their marriage was genuine and their relationship was subsisting. These are findings to which the FTT was entitled to come. In any event, the nature of the relationship between the parties was something which the FTT was entitled to explore in considering the appellant's human rights claim. She was entitled to reach her own conclusions on the matter, whatever was said in the guidance. In any event, in our opinion, the appellant's case insofar as it is based on human rights grounds does not in fact get off the ground. It is very weak indeed.

Insurmountable Obstacles

27. It was pointed out by Mr Canter that at paragraph 111 the FTT found that there were no insurmountable obstacles to the appellant's and his wife's family life continuing if he had to return to Bangladesh. Her task was to assess whether or not there were "insurmountable obstacles" that might prevent family life from continuing. She had become distracted by her findings on the quality of the family life. In one part of the appellant's wife's evidence (which the judge appeared to accept) she said that the relationship was "a lot better than before". Even if the family life between the couple was "shallow" a decision which meant that the two would be in different countries would prevent family life from continuing. Visits would not be possible because her

criminal licence which prevented her from leaving the UK did not expire until 2019. The judge should have considered that.

28. In the first place we found this argument to be distinctly unattractive. The implications of it were that a couple who required to leave the UK for one reason or another but who had not committed any offences would just have to go. On the other hand, if one of the partners had committed an offence which led to imprisonment and release on licence then they would be entitled to stay until the licence had expired. We do not consider that this is what the references to "insurmountable obstacles" in the Rules are designed to cater for. There are public policy considerations which weigh heavily against the argument. Mr Canter, we think, recognised this but nonetheless argued that this was a matter which the FTT should have considered.

29. In the second place, however, we agree with Mr Jarvis's submission that this matter does not arise at all. The FTT had found that the appellant did not meet the suitability requirements (S-LTR.1.6.) and therefore he was precluded from taking any benefit from Appendix FM (see R-LTRP.1.1.(c)(i) and R-LTRP.1.1.(d)(i)). EX.1. was not a freestanding provision. The whole argument about insurmountable obstacles was a "red herring". We agree.

30. Looking at the matter in the whole, we agree with Mr Jarvis's submission that, with a few minor exceptions which we have noted, the decision of the First-tier Judge was meticulous and admirable in its application of the law and assessment of the often complex evidence. She followed the approach in **Farquharson**. The complaints about the judgment were semantic and, in our opinion such errors as were shown to exist were immaterial. The evidence that the appellant committed the sexual assaults and was controlling prostitution, in particular, was overwhelming and we do not consider it remotely feasible that another judge considering it would have reached a different conclusion. Not only was the judge entitled to find that the individual complaints had the "ring of truth" about it as she said on some occasions, but when the evidence was considered in the round there was a clear pattern of similar facts showing the appellant's temper, his reaction when he was crossed, and his sexual predations. While some of these did not amount to criminal offences, even on the basis of the evidence which was accepted, many of them did, at least on the balance of probabilities. Obviously there were a number of dissimilarities as well in the conduct but that is only to be expected.

31. At paragraph 99 the FTT said the following:

> "Taking the CRIS entries as a whole, excluding the alleged offence for which no CRIS report has been provided, together with the various reports of the witnesses and complainants (again, excluding those which are unsupported by CRIS), I am satisfied that the appellant has been running an escort agency as a front for the control of prostitution for gain. In the vernacular, he is a pimp. The consistency of the evidence, from various sources, with regard to his actions in the course of interviewing prospective workers, his photographic naked interviewees, his posting of photographs of naked girls on the internet, his possession of sexually

> explicit photographs on his camera, his threats to kill and harm individuals and their property together suggest a man with a very short temper and no respect for vulnerable women who have appealed to him for work. This is a man who is a serious threat to women, particularly those who are vulnerable or needy. His conduct and character put vulnerable women at risk."

This is a finding which she was perfectly entitled to make and which was plainly supported by the evidence.

32. At paragraph 100 and 101 the FTT set out various criticisms of the evidence of the appellant and his wife. In paragraph 101 she said the following:

> "Generally, I find the evidence of the appellant to be evasive, vague and designed to confuse. He prevaricated in his responses and failed to answer many questions directly. He has been selective in extracting certain parts of the CRIS reports which he considers favour his appeal. He has not provided a positive case as regards each of the allegations against him. In most cases he simply relies on the fact the police took no further action against him. That said I bear in mind it is for the respondent to demonstrate the appellant's conduct is such as to justify the refusal."

There can be no suggestion, in light of that, that in considering the totality of the evidence, she was not alive to the fact that it was for the respondent to make out the case, despite what she said about the "No comment" interview.

Notice of Decision

33. We find that there is no error of law in the decision of the First-tier Tribunal. The appeal is accordingly refused.

34. No anonymity direction is made.

Signed:

pp LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)

Date: 14 December 2018