Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01966/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2019	**On 26 September 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SARABJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Saini, Counsel, instructed by Cameron Clarke Lawyers
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision dated 5 October 2018 of First-tier Tribunal Judge Brewer which refused the Article 8 ECHR appeal of the appellant.

2. The appellant is a citizen of India, born on 21 June 1983. He claims to have arrived illegally in the UK in 2003. On 16 June 2011 the appellant underwent a Sikh marriage to a British national. On 19 September 2012 the couple registered the marriage.

3. On 15 November 2016 the appellant made an application for leave to remain on the basis of his marriage. The respondent refused the application on 16 January 2017. The appeal came before First-tier Tribunal Judge Brewer on 20 September 2018.

4. In a bundle provided approximately two days prior to the hearing and at the hearing before Judge Brewer, the appellant raised new evidence. In a witness statement dated 17 September 2018, the appellant maintained that his wife's family had forced her to leave him and go to live with them in Wales and that he had been unable to contact her. Secondly, he maintained that an EEA national was pregnant with his child and that although they were not a couple, he asserted a family life with the unborn child.

5. The First-tier Tribunal dealt with these matters as follows:

> "18. The basis of the appellant's appeal became somewhat convoluted, for reasons I shall refer to below. In short, at the outset of the hearing the appellant stated that he had made a woman who is not his wife pregnant and therefore says that he has family life with his wife, RK, and 'putative' family life with his unborn child. I shall return to this below."

and

> "22. Before turning to the facts I have found I turn to the basis of the appeal. At the outset of the hearing Mr Saini introduced a number of new documents which he said showed that the appellant had impregnated a lady who I shall refer to as M. The appellant provided a supplementary witness statement in which he says that he has become close to M, they slept together, and she is expecting his child in November 2018. M was not present and provided no witness statement. The documents provided by Mr Saini in relation to this contained no evidence that M is pregnant, if she is pregnant, by the appellant.
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> 23. We discussed this, and the parties agreed that the matter raised was a new matter and that I could take it into account with the consent of the respondent pursuant to Section 85(5) of the 2002 Act which is an imperative: The Tribunal **must not** consider a new matter **unless** the Secretary of State has given the Tribunal consent to do so. The respondent did not so consent.
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> 24. Mr Saini then asked for an adjournment so that the respondent would have time to consider the new matter. However, the respondent's position was that given M is an EEA national the new matter is essentially a wholly new application given that if M is due to give birth with the appellant's child in November, she became pregnant in or around February 2018, despite which there has been no new application and no concrete evidence that the appellant is the father. The respondent would not consider the new claim as a new matter in the present appeal but would obviously consider a fresh application.
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> 25. Given the discussion I rejected the application for an adjournment and the hearing proceeded."

6. The appellant objects to the refusal to adjourn. The adjournment should have been granted in order to allow for more evidence to be obtained about the EEA national and her pregnancy and for the respondent to consider whether to consent to that new matter being admitted as part of the appeal. The grounds also objected to the FTTJ providing insufficient reasoning for the refusal to adjourn; see paragraph 14 of the grounds.

7. Following the provisions of Section 85 of the Nationality and Immigration Act 2002, Judge Brewer had to decide whether he was able to "consider" the new material as part of the appeal. In line with the guidance of Mahmud (S.85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC), paragraph 23 shows that the First-tier Tribunal properly determined that the new evidence was a new matter. The appellant accepted before Judge Brewer that he was seeking to admit a new matter and that the consent of the respondent was required for that new matter to be admitted following Section 85(5) of the 2002 Act.

8. As recorded in the final sentence of paragraph 23 of the decision of Judge Brewer, the respondent did not consent. The provisions of s. 85(5) of the 2002 Act are mandatory:

> "(5) But the Tribunal **must not** consider a new matter unless the Secretary of Status has given the Tribunal consent to do so. (my emphasis)"

Where the respondent did not consent, Judge Brewer was prevented from considering the new evidence on the pregnancy of the EEA national. Put another way, he had no jurisdiction to consider the new material about the EEA national.

9. If the appellant objects to the Home Office Presenting Officer refusing consent and preventing the First-tier Tribunal from considering his new evidence about the EEA national, his remedy is not via this statutory appeal but judicial review. That is clear from paragraph 2 of the head note of Quaidoo (new matter procedure process) [2018] UKUT 0087 (IAC) states:

> "2. If an appellant considers that the decision of the respondent not to consent to the consideration of a new matter is unlawful, either by reference to the respondent's guidance or otherwise, the appropriate remedy is a challenge by way of judicial review."

10. Before me, the appellant clarified that this was not the basis of his challenge. Rather, jurisdiction having been settled by the respondent's refusal to consent, it was still open to Judge Brewer to adjourn in order for the appellant to provide further evidence about the EEA national and her pregnancy. His decision not to do so was unlawful and unreasoned.

11. I did not find that submission was capable of showing an error of law in the decision of Judge Brewer not to adjourn. He was being asked to adjourn for further evidence on a matter over which he had no jurisdiction. By making the adjournment application the appellant was asking for more time to reformulate or add to his new evidence in the hope that the respondent might make a different decision on consenting to admit the new matter. Judge Brewer was under no obligation to grant

an adjournment on that basis. On the contrary, he acted wholly correctly and in line with the overriding objective to hear cases fairly and justly in refusing to adjourn for the appellant to provide further evidence on a matter over which the First-tier Tribunal had no jurisdiction. He provided reasons in paragraph 25, stating that the respondent's position was clear and it was not appropriate to adjourn for the issue to be looked at again where that was so.

12. Paragraph 16 of the grounds maintains that the First-tier Tribunal also erred in failing to consider the application for a further new matter to be admitted, that matter being the threat of harm from the appellant's family or his wife's family in India where they were from different castes. This submission can be dealt with relatively briefly where the materials show that this was not a new matter before the First-tier Tribunal. It was raised as part of the original application for leave to remain. The respondent addressed it in the refusal letter, on page 6 of 8 finding that the claim to fear harm on return to India had no basis where the appellant had "provided no evidence to corroborate these claims". Further, the First-tier Tribunal went on to address the claim of harm on return to India in paragraph 50 of the decision, finding it had no merit.

13. I therefore found that the appellant's first ground of challenge had no merit.

14. The appellant's second ground, set out in paragraphs 33 to 40 of the written grounds, challenges the findings of the First-tier Tribunal on the Article 8 ECHR claim and, in particular, on the evidence of the appellant having been forcibly separated from his wife by her family. The written grounds, not elaborated by Mr Saini at the hearing, are, in my view, only a disagreement with the decision and not capable of showing irrationality or perversity in the reasoning of First-tier Tribunal Judge Brewer who considered the Article 8 ECHR claim thoroughly in paragraphs 27 to 48 of his decision.

15. Paragraph 40 of the grounds maintains that the First-tier Tribunal failed to give weight to the evidence of a Consultant Psychiatrist, whose report included a disclosure from the appellant's wife that she had been sexually abused by a sibling. The grounds are misconceived in suggesting that the First-tier Tribunal did not accept that this part of the report or that the wife may have been subject to abuse within her own family. The findings of Judge Brewer in paragraph 47 of his decision show the opposite, the judge accepting that the wife disclosed this matter to her GP in 1998. It was open to the First-tier Tribunal to find it unlikely that the appellant's family would have reacted to this allegation in 2017 by "abducting" the appellant's wife where she had reported the allegation to her GP some 10 years earlier. That finding was open to him. The evidence did not oblige the judge to accept the appellant's claim that he had been forcibly separated from his wife who was being in some way mistreated by her birth family.

16. Further, the First-tier Tribunal gave wholly cogent reasons for placing little weight on the evidence of Ms Bilkhu of Jeena, a community organisation, who had assisted the appellant in trying to find his wife. The judge identified in paragraph 45 that Ms

Bilkhu had no psychological or psychiatric qualifications and placed little weight on her evidence where she stated that I oral evidence that "her insights are based on the fact that she "*reads people*" well". The First-tier Tribunal was not obliged to accept her evidence at its highest and the grounds merely seek to state otherwise.

17. For all of these reasons I did not find that the decision of the First-tier Tribunal disclosed an error on a point of law and it must therefore stand.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed:  Date: 24 September 2019

Upper Tribunal Judge Pitt