Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: **HU/05573/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34	**Decision & Reasons Promulgated**
On 25 November 2020	**On 3 December 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MUDASSAR MUNIR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This decision has been made on the papers, under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008, further to directions issued by the Upper Tribunal on 18 September 2020.

2. The appellant is a national of Pakistan born on 4 August 1988. He arrived in the United Kingdom on 17 April 2011. On 18 June 2013 he married Shabana Hussain McMackin, a British citizen. On 21 November 2018 he made a human rights claim on the basis of his family life with his wife, but the claim was refused on 8 March 2019.

3. The appellant's claim was refused on the grounds that it was not accepted that he could meet the requirements of Appendix FM or paragraph 276ADE(1) of the immigration rules on the basis of his family and private life, and that there were no compelling circumstances justifying a grant of leave outside the immigration rules. The respondent did not accept that the appellant had a genuine and subsisting relationship with Ms McMackin, owing to various

inconsistencies in their evidence given at a marriage interview on 27 February 2019.

4. The appellant appealed against that decision. His appeal was initially listed for hearing on 17 June 2019 and the appellant and his wife attended that hearing. The record of the marriage interview was not available at that time, but the hearing proceeded nevertheless and the appellant gave oral evidence before the judge, First-tier Tribunal Judge Morris. It appears from the Tribunal's record of proceedings that there was an objection by the appellant's representative to the Home Office Presenting Officer's cross-examination. Following an adjournment for lunch, it transpired that the Home Office Presenting Officer had left the Tribunal to go to hospital. As a result, despite the objections made by the appellant's representative, the judge adjourned the proceedings and directed that the appeal be heard afresh on another day.

5. The appeal then came before First-tier Tribunal Judge Hussain on 8 October 2019, but there was no appearance by or on behalf of the appellant. A previous adjournment request, made on medical grounds, had been refused and the appellant's representatives had then requested that the matter be determined on the papers. Judge Hussain heard submissions from the respondent and then dismissed the appeal in a decision promulgated on 14 November 2019. In so doing he concluded that the appellant's relationship was not a genuine and subsisting one, that the requirements of the immigration rules were therefore not met and that the decision was a proportionate one and did not breach the appellant's Article 8 human rights.

6. Permission was sought by the appellant to appeal the judge's decision to the Upper Tribunal, on three grounds: firstly, that the judge had not acted fairly as he had heard submissions from the respondent despite the request having been made for the appeal to be determined on the papers and that he had failed to take account of the previous, adjourned hearing at which the appellant and his wife had attended; secondly, that the judge had wrongly considered that the burden of proof lay upon the appellant despite there being an allegation of deception; and thirdly that the judge had failed to consider that the majority of the appellant's and his wife's evidence had been consistent.

7. Permission was granted by Designated First-tier Tribunal McClure on 22 May 2020.

8. The case was reviewed by the Upper Tribunal due to the circumstances relating to Covid 19. In a Note and Directions sent out on 8 October 2020, Upper Tribunal Judge Allen indicated that he had reached the provisional view that the question of whether the First-tier Tribunal's decision involved the making of error of law and, if so, whether the decision should be set aside, could be made without a hearing. Submissions were invited from the parties.

9. Neither party has responded to the Tribunal's directions and the time limits therein have expired. There is therefore no indication as to whether either party objects to the error of law matter being determined on the papers. It seems to me that, given the view I have taken below in relation to the error

of law, there is no reason why the matter cannot be determined without a hearing and I do not consider that either party is prejudiced if I do so.

10. It is quite apparent to me that the judge's decision cannot stand, albeit not solely for the reason given in the grant of permission. Whilst permission was granted on the second ground, in relation to the burden of proof, the decision made by Judge McClure did not specifically restrict the challenge to that ground. It seems to me that the most concerning part of the judge's decision is raised in the second part of the first ground, at [3] and [4] of the grounds, which Judge McClure did not address.

11. Although it is the case that the appellant requested a papers determination of his appeal, and whilst I agree with Judge McClure that [2] of the first ground has no merit, [3] and [4] of the first ground nevertheless properly state that the judge failed to have any regard to the first, adjourned hearing. Although Judge Morris, at that first hearing, directed that the following hearing would be a *de novo* hearing, and although the appellant and his wife chose not to attend that hearing, the fact remains that they did attend the first hearing and the appellant did give evidence and was cross-examined, and that he objected to the hearing being abandoned because the presenting officer had left the building. Failing to take that into account is a significant omission for the judge to have made in his decision, when holding against the appellant the fact that he had requested a papers determination. It also seems to me that there is merit in the third ground, in that the judge's adverse credibility findings are very short and focus on the inconsistent evidence without assessing the evidence as a whole and taking account of the positive aspects of the evidence.

12. It may be that the judge would have reached the same decision if he had assessed the evidence as a whole, given the nature of the discrepancies and inconsistencies the respondent had identified in the refusal decision, and it may also be that the appellant could not succeed in his Article 8 claim either within or outside the immigration rules even if the relationship was found to be genuine. However, the fact that the judge simply dismissed the appellant's case without giving full consideration to the evidence is, in my view, a material error of law, such that his decision cannot stand.

13. Accordingly, I find that the judge's decision is not sustainable and I therefore set it aside. The appropriate course is for the matter to be remitted to the First-tier Tribunal to be heard *de novo* before a different judge.

DECISION

14. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and the decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard afresh before any judge aside from Judge Hussain.

Signed: S Kebede
Upper Tribunal Judge Kebede

Dated: 25 November 2020