IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18774/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2021	**On the 19 April 2022**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR SHANE ORLANDO MCKINSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Jaufurally of Callistes Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Aldridge promulgated on 3 November 2020 dismissing his appeal against a decision of the Secretary of State to refuse him leave to remain in the United Kingdom. The application he had made was for limited leave to remain on the basis of his relationship, initially with his former partner but latterly (and this was treated as a new matter resulting in the supplementary decision letter), on the basis of his relationship with his current partner, Ms Campbell-Chambers who is a serving member of

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the British Army. Ms Campbell-Chambers has a son who was at the time of the appeal 17 years of age.

2. The appellant's case is that he and Ms Campbell-Chambers intend to marry and the application was made for leave to remain on that basis. It is said that the relationship is subsisting and the requirements of the Immigration Rules were met.

3. The Secretary of State's case is that the requirements of the Rules are not met in that the appellant did not meet the requirements of E-LTRP.1.1 and that was for two reasons, first, that the relationship had not been of sufficient duration to amount to him being a "partner" of a British citizen as defined in GEN.1.2 and also that the appellant could not be a fiancée or proposed civil partner as he had not been granted entry clearance as that person's fiancé or proposed civil partner set out in E-LTRP.1.12.

4. The Secretary of State concluded that the relationship was not subsisting or genuine, there being no evidence of the appellant and Ms Campbell-Chambers residing together. The Secretary of State also concluded that the requirements of paragraph 276ADE(1) were not met and that there were no other reasons why it would be disproportionate to remove the appellant from the United Kingdom.

5. The judge heard evidence from the appellant and his partner. The judge also had before him a bundle of material prepared in support of the appeal by the appellant's solicitors. The judge set out at paragraphs 28 to 30 of his decision why he did not accept that the appellant was in a genuine and subsisting relationship with his partner. He then dealt with the requirements of paragraph EX.1, concluding that if there was no genuine and subsisting relationship, then that exceptions requirement could not be met. He also concluded there was no other basis on which the appellant could be granted leave outside the Rules.

6. The appellant sought permission to challenge the decision on the grounds that the judge had erred in concluding that the relationship was not genuine and subsisting, that his reliance on the lack of evidence of communication such as messages, cards, letters and so on did not justify a finding that the relationship was not genuine and subsisting nor did the lack of evidence from other relatives nor indeed was the reference to a discrepancy in how much time the appellant and the partner stay together.

7. Permission was granted by First-tier Tribunal Judge Keane on 18 December 2020, Judge Keane noting that the judge was arguably importing his own notion as to what constituted living together and also was seemingly according weight to his own notion as to the evidence which the appellant should fairly present and was arguably introducing a requirement that the appellant corroborate his own claims of fact with other evidence, adding had the judge not relied on arguably irrelevant considerations the judge might well have found that the appellant and the sponsor were a party to a genuine and subsisting relationship.

8. The problem the appellant faces, as I pointed out to both representatives at the outset of the hearing, is that there does not appear to be any basis on which the appellant could meet the requirements of the Immigration Rules even if what he said about the relationship were accepted. That is because for a number of reasons to which I will turn in due course; and, as Mr Jaufurally fairly conceded, if the requirements of the Rules are not met, then there are no factors or evidence produced in this case capable of justifying a finding that, having had regard to the factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 , the public interest in maintaining immigration control which includes a system of immigration control would be outweighed.

9. I pause there to note that there are a number of factors about the decision of Judge Aldridge which give me concern. In the circumstances of the pandemic, which was prevalent at the relevant time, it is difficult to see how a relatively minor discrepancy over what percentage of the time the couple spent together which is in effect one of perception a is a difficult basis on which to sustain a finding that the relationship was not genuine and subsisting but, and I have not been provided with any proper explanation for this, there was a lack of evidence of the relationship in terms of text messages, emails or for that matter letters of support from family, who I accept exist in this country, in support of the appeal. It is not for me to speculate why that is and why the appeal was prepared on that basis. The difficulty is, however, that irrespective of whether that finding of fact was vitiated by an error of law the appellant could not have succeeded under the Immigration Rules for the following reasons.

10. First, whilst I accept that a fiancé can be a partner as defined in GEN.1.2, that is not the whole of the issue. That is because, under the Immigration Rules, in order to obtain leave to *remain* as opposed to leave to enter as a partner the Rules make it clear that the applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner. That is not so here; the appellant was not granted entry clearance as Ms Campbell-Foster's fiancé. Further, in this case the appellant could not meet the immigration status requirement at paragraph E-LTRP.2.1 to 2.2 because he only had leave as a visitor.

11. In these circumstances, there is no basis on which it could be said that the appellant could meet the requirements of the Immigration Rules. That is important in the light of **TZ (Pakistan)** as in effect if an appellant does meet the requirements of the Immigration Rules, then that is to all intents and purposes, unless there is some other intervening event such as fraud, a sufficient basis to show that the Article 8 requirements are met. In this case the appellant did not and could not on any view meet the requirements of the Rules and, as is accepted, there is no other basis on which it is said removal would be disproportionate.

12. The appellant made an application which, even when varied to be based on his relationship with Ms Campbell-Chambers could never have succeeded under the Immigration Rules for the reasons I have given.

13. Accordingly, although I consider that the finding that the relationship was not subsisting is vitiated by an error of law; it is somewhat odd to have in effect concluded, that a serving member of the British forces would have colluded in an application for leave on a false basis.

14. However, given that the Immigration Rules cannot be met in this case, there was no arguable basis on which the appeal could be allowed and for that reason I conclude that the error of law in this case was not material as it could not have affected the outcome, given the difficulty there would have been in showing that the public interest in the maintaining of immigration control was not outweighed in this case, given the relatively short duration of the relationship and the fact that there would appear to be no reason why the appellant could not return to Jamaica and make an application to return and accordingly, for these reasons I dismiss the appeal.

15. It is however open to the appellant to return to Jamaica to make a proper application for entry clearance to rejoin his partner.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I set it aside.

No anonymity direction is made.

Signed Date 29 April 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul