**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/03398/2020**
**Ce-File Number: UI-2022-000584**

**THE IMMIGRATION ACTS**

**Heard at Field House IAC**
**On the 23 November 2022**

**Decision & Reasons Promulgated**
**On the 08 February 2023**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**
**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**IG**
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms S Akinbolu, counsel instructed by JML Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

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Introduction

*1.* This is the appellant's appeal against the decision of First-tier Tribunal Judge Parkes, promulgated on 11 October 2021. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 8 April 2022.

Anonymity

*2.* While no anonymity direction was made previously, we agree that it is appropriate to make such a direction given the nature of the behaviour of which the appellant complains.

Background

*3.* The appellant was granted leave to enter the United Kingdom as the spouse of N on 27 March 2018. He arrived in the United Kingdom on 8 April 2018, with leave to enter until 3 January 2021. On 16 December 2018, the appellant's leave to remain was curtailed to end on 22 February 2019 as the Home Office became aware that the relationship was no longer subsisting. On 21 February 2019, the appellant applied for indefinite leave to remain as a victim of domestic violence. That application was refused, in a decision dated 22 May 2019, a decision which was upheld on administrative review and in a pre-action protocol response. Following the appellant's request for judicial review of the decision, his application was remitted to the Home Office for reconsideration.

*4.* On 12 February 2020, the respondent refused the appellant's application for leave to remain in the UK under D-DVILR.1.3 of Appendix FM as well as paragraph 276ADE of the Rules. In summary, the respondent considered the appellant's claim to be a victim of domestic violence to be vague and to lack supporting or corroborating evidence from an independent or impartial source. The claim under paragraph 276ADE was found not to meet any of the requirements of the Rules. In particular, the respondent noted that the appellant was a young man who had lived for the majority of his life in Pakistan and who could continue his private life there. It was not accepted that there was any evidence of exceptional circumstances which would render the decision to refuse a breach of the appellant's rights under Article 8 ECHR.

The decision of the First-tier Tribunal

*5.* Following the hearing before the First-tier Tribunal, the judge found that the marriage entered into by the appellant was never 'genuine or subsisting.' Alternatively, the judge found that the relationship ended at the point that N told the appellant that she had been made to marry him and was in love with someone else, which was a fortnight after his arrival in the United Kingdom. The judge accepted that the appellant experienced 'unpleasant, humiliating and distressing events' but found that this was not the cause of the breakdown but followed the failure of the marriage and as such he could not meet the requirements of the Rules. The judge

further found that the decision to refuse leave to remain did not breach the appellant's right to a private life on any other basis.

The grounds of appeal

*6.* In the first of the two grounds of appeal, it was argued that the First-tier Tribunal erred materially by imposing a requirement into a domestic violence settlement application which did not exist, namely that the marriage must be "genuine and subsisting" at the relevant time.

*7.* It was further argued that as the judge appeared to accept the credibility of the appellant and his witnesses as to the events set out in their witness statements, the appeal ought to have been allowed.

*8.* Permission to appeal was granted on the basis sought, with the judge granting permission making the following comments.

> The judge (Judge of the First-tier Tribunal Parkes) arguably erred by finding that it was necessary for the appellant, in order to be eligible for leave as a victim of domestic violence, to have been in a genuine and subsisting relationship with his partner. Arguably, there is no such requirement in section DVILR.

*9.* The respondent's Rule 24 response, received on 13 May 2022, opposed the appeal on the following basis.

> The rules E-DVILR.1.3. require the appellant to show that the relationship with their partner broke down as the result of domestic abuse. The point that the judge at the FTT was making was that there never was a real, subsisting, relationship. It was clear from the evidence that the appellant's partner never accepted the relationship and clearly therefore, even if there was "domestic abuse" this was not the cause of a break down in the relationship

The hearing

*10.* We heard submissions from both representatives which are summarised here. Ms Akinbolu relied on her skeleton argument. She confirmed that the sole issue was the judge's use of the term 'genuine and subsisting' at [10] of the decision and argued that this brought in an additional element which was not included in the relevant Immigration Rule. That element was a factor in obtaining leave to enter as a spouse but not for qualifying for settlement on domestic violence grounds. A party being forced into a marriage could be a strong piece of evidence of domestic violence, albeit that was not the case here. The appellant's evidence was that he married his spouse in Pakistan, had a relationship there and obtained a visa believing that he had a genuine relationship. It was not until after he came to the UK that he discovered that his wife was not of the same mind. The appellant continued to work at the marriage, sought advice from relatives but the marriage ended when his wife made him leave the matrimonial home.

*11.* Ms Akinbolu emphasised that the domestic violence began before the appellant was made to leave, in the form of text messages which made threats and demanded money as well as the retention of the appellant's passport. At [16] the judge appeared to accept that the appellant suffered domestic violence, albeit it was not a detailed assessment. It was a matter of a marriage unravelling, during which the appellant continued to work on it. The judge was wrong to conflate the issues of whether the marriage was genuine and subsisting with the reason for the marriage breakdown by finding that because it was never a genuine marriage it broke down the second the appellant entered the United Kingdom.

*12.* In response to a question from the panel as to the appellant's account of events, it transpired that the appellant's witness statement was missing from the stitched bundle. Ms Akinbolu agreed to send it by email, albeit it had not arrived by the end of the hearing.

*13.* Mr Whitwell relied upon his amended skeleton argument. His overarching submission was that the appellant and respondent read the decision differently. The respondent's review at the First-tier stage concluded that the marriage did not break up as a result of domestic violence. It was not a forced marriage, but a relationship where the wife was not "into it," and therefore they had split up. There was no finding of domestic violence by the judge. Mr Whitwell agreed that whether the marriage was genuine and subsisting was an immaterial matter for leave under the domestic violence provisions and at some stage the appellant's relationship was indeed considered to be genuine and subsisting or a grant of leave to enter would not have been made under Appendix FM. Mr Whitwell also referred to page 20 of the respondent's guidance titled Victims of Domestic Violence and Abuse version 15.0 published on 24 November 2021 to emphasise that the judge had not erred in considering the nature of the appellant's relationship. As for the second ground, the judge found as fact that the relationship had not broken down owing to domestic violence. Furthermore, the judge did not find that the marriage was never subsisting. The judge noted the factual circumstances at [22], as part of his human rights consideration, stating that the unpleasant behaviour the appellant experienced was 'subsequent' to the breakdown of the marriage. The cause of the split being that the appellant's wife did not want to continue a relationship with him. As for the claim that the appellant's passport was retained by his spouse, the SET-DV application form the appellant completed stated that he was able to provide it. In addition, in the same application, the appellant stated that he saved the cost of the application fee of over £2,000, which had infuriated his spouse. This was not evidence to support that the appellant's money was kept by his spouse.

*14.* Mr Whitwell contended that the appeal was a perversity challenge. While the evidence of domestic violence before the judge was consistent, there was no independent witnesses, only those to whom the appellant gave a narrative. We were invited to dismiss the application. In the alternative, Mr

Whitwell informed us that the respondent would wish to cross-examine the appellant and make submissions on the evidence on remaking.

*15.* In reply, Ms Akinbolu submitted that the judge made a clear finding at [16] that the appellant suffered harassment, distress, and humiliation as he and his witnesses had claimed. None of that was challenged by the respondent. The Guidance recognised that retaining a passport, forcing people to give money, threats by a spouse and others constituted domestic violence. This all came to light when the appellant applied for replacement documents on 9 November 2018. Ms Akinbolu relied on *NA (Pakistan)* [2009] UKAIT 00019 at [41] with reference to looking at the causes of a marriage breakdown.

*16.* Ms Akinbolu argued that it was relevant that the relationship ended when the appellant's wife announced that she was having a baby with her partner (not the appellant) and made him leave the house. The purpose of the domestic violence Rules is to prevent a person staying in a relationship to protect their immigration leave, having given up a life elsewhere to further family life in the United Kingdom. The judge was wrong to allow the question of whether the relationship was genuine and subsisting to colour the remainder of the evidence.

*17.* Ms Akinbolu contended that the appellant met the requirements of the Rules, and this was dispositive of the public interest meaning his appeal ought to have been allowed under Article 8, applying *TZ (Pakistan)* [2018] EWCA Civ 1109.

*18.* At the end of the hearing, we reserved our decision on the error of law, pending receipt of the appellant's witness statement.

Decision on error of law

*19.* To succeed in his human rights appeal, the appellant had to show that he met the requirements to be granted indefinite leave to remain in the UK as a victim of domestic abuse as set out in Section DV-ILR of the Rules. Those requirements are as follows:

> *(a) the applicant must be in the UK;*
>
> *(b) the applicant must have made a valid application for indefinite leave to remain as a victim of domestic abuse;*
>
> *(c) the applicant must not fall for refusal under any of the grounds in Section S-ILR: Suitability-indefinite leave to remain; and*
>
> *(d) the applicant must meet all of the requirements of Section E-DVILR: Eligibility for indefinite leave to remain as a victim of domestic abuse.*

*20.* The eligibility requirements of Section E-DV-ILR are:

> *E-DVILR.1.2. The applicant's first grant of limited leave under this Appendix must have been as a partner (other than a fiancé(e) or proposed civil*

*partner) of a British Citizen, a person present and settled in the UK, a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., D-LTRP.1.1., or D-LTRP.1.2. of this Appendix, or as a partner of a refugee granted under paragraph 352A, and any subsequent grant of limited leave must have been:*

*(a) granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen, a person present and settled in the UK, a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., D-LTRP.1.1. or D-LTRP.1.2. of this Appendix; or*

*(b) granted to enable access to public funds pending an application under DVILR and the preceding grant of leave was granted as a partner (other than a fiancé(e) or proposed civil partner) of a British Citizen, a person present and settled in the UK, 3 a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., DLTRP.1.1. or D-LTRP.1.2. of this Appendix; or*

*(c) granted under paragraph D-DVILR.1.2.*

*E-DVILR.1.3. The applicant must provide evidence that during the last period of limited leave as a partner of a British Citizen, a person present and settled in the UK, a person with refugee leave, or a person in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), under paragraph D-ECP.1.1., DLTRP.1.1 or D-LTRP.1.2 of this Appendix, or during their only period of leave under paragraph 352A, the applicant's relationship with their partner broke down permanently as a result of domestic abuse."*

*21.* As can be seen from the Rules, there is no requirement that the relationship has to be genuine and subsisting after leave to enter as a spouse has been granted. It was argued before us that the judge imported this additional requirement into his consideration of the appeal, that being that the relationship between the appellant and N was not genuine and subsisting. Reliance was placed on what the judge said at [10] of the decision and reasons which we set out below.

*In the course of submissions I raised with Ms Mair the point that if the relationship had failed before there was any domestic violence or abuse the requirements of the Immigration Rules would not be met. The fact that an Appellant may be legally married is not sufficient, in addition there would have to be a genuine and subsisting relationship to break down and that the behaviour complained of could be a consequence of the failure of the relationship not the cause.*

*22.* The judge also makes use of the phrase 'genuine and subsisting' at [12].

*The Appellant's subsequent history of being excluded from marital life, ultimately with the boyfriend being invited to the house when he was there and with his wife giving birth to the boyfriend's child is consistent with there being a marriage in legal terms only. The evidence of what*

> *he was told within a fortnight or so of his arrival is clear evidence that the marriage was only ever legal in form and was not at any stage a genuine or subsisting marriage.*

*23.* In the light of the guidance given by the Court of Appeal at paragraph [77] of *KM* [2021] EWCA Civ 693, we recognise that judicial restraint should be exercised when examining the reasons given by the First-tier Tribunal Judge for his decision and that it should not be assumed too readily that the judge misdirected himself.

*24.* We do not accept that the judge was imposing an additional requirement. While it might have been preferable if the judge had used different terminology when setting out his findings on the chronology of events, it is plain to us that the judge was applying his mind to the description of events put forward by the appellant.

*25.* We have noted the content of the Guidance for Home Office caseworkers relied on by Mr Whitfield, particularly the section at page 20 which gives a list of factors to take into account when assessing the evidence provided by an applicant. Those factors include the timing of the application, the length of the relationship before the application was made and the fact that the relationship broke down during the very early stages of the probationary period may not be an adverse factor. The judge cannot be justly criticised for considering similar aspects of the appellant's case.

*26.* It is the case that the judge accepted the account provided by the appellant and his witnesses was as described at [16] of the decision. We therefore examine the chronology of events, as set out by the appellant in his witness statement dated 19 January 2021. In it, the appellant states that he married N in Pakistan during February 2017, and he mentions that there was a delay in him being able to apply for entry clearance because N was '*not forthcoming'* with documents.

*27.* Ultimately, entry clearance was granted on 27 March 2018 and the appellant arrived on 8 April 2018. In his witness statement, the appellant gives the following account of what happened immediately after his arrival.

> *2.6 After my arrival, N never looked happy with me. After some days, N admitted that she was forced by her mother to marry me. She however, loved someone else, who was not accepted by her mother. The family wanted a husband for N from Pakistan who they could dominate and control; however, N was in a relationship with another British man.*

*28.* The judge, at [13] interpreted this evidence as being an indication that the marriage '*was not a relationship in any meaningful sense of the word; ie it was not genuine and subsisting*.' However, at [14], he reaches an alternative finding, stating '*If I am wrong on that then at best it lasted no longer than the point when the Appellant was told that his wife, legally speaking, had been made to marry him and that she was in love with someone else.'*

*29.* The aforementioned passages and the decision, taken as a whole demonstrate that the judge reached a clear finding that the relationship between the appellant and N broke down, at the latest, a few days after he arrived in the United Kingdom. According to the appellant's witness statements, the unpleasant behaviour he experienced from N and his mother-in-law occurred after that breakdown.

*30.* We reject the submission that the relationship broke down only at the point the appellant left the matrimonial home which was some months after his arrival in the United Kingdom. The appellant's written evidence, at 2.10 of his statement, that N '*never allowed me to get close to her as she was deeply committed in her different relationship*.' That realisation occurred prior to the unparticularised incidents relied upon by the appellant later in his witness statement. There is simply no support for the view that the relationship lasted anything more than a few days, at most, as the judge rightly found.

*31.* It follows that we find no material error of law occurred in relation to the first ground.

*32.* It was further argued that the appeal ought to have been allowed because the judge accepted the appellant's account, that he was subjected to domestic abuse. The difficulty with this argument is that the judge made no finding that the marriage broke down owing to domestic abuse and as such the appellant was unable to meet the requirements of the Rules. Furthermore, the judge made no finding that the appellant was a victim of domestic abuse at any stage. What the judge accepted was what he said at [16]:

> The events that followed his wife's announcement that she had been made to marry him and was in a relationship with someone else were unpleasant, humiliating and distressing and I accept that the Appellant has suffered as he and the witnesses described

*33.* The judge took those findings into consideration in his proportionality assessment and in reaching his decision to dismiss the appeal and was entitled to conclude, for the reasons given, that his circumstances were not compelling, to the extent that a grant of leave outside the Rules would be justified.

*34.* Lastly, we find that there is no inconsistency with the judge accepting the account provided but not making a finding of domestic abuse. The behaviour complained of by the appellant in his witness statement began after the marriage breakdown and mainly concerned being made to do chores, spending his earnings on N and the household and arguments taking place. In addition, N made no secret of her devotion to her British partner and invited him into the home in the appellant's presence. The appellant's written evidence was that prior to leaving the former matrimonial home he would, on occasion, refuse to do chores, that he saved his money notwithstanding demands for money and that he argued with N and her mother, to the extent that N asked him not to argue in the

presence of her child. We consider that the judge did not err in describing these instances as 'unpleasant, humiliating and distressing' rather than domestic abuse.

*35.* We conclude that the judge made no material error of law.

## Decision

**The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.**

**The decision of the First-tier Tribunal is upheld.**

## Direction Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed: T Kamara Date: 1 December 2022
Upper Tribunal Judge Kamara

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is “sent’ is that appearing on the covering letter or covering email**