Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02379/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 6 October 2015	**On 20 October 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

EMADA ADAM ABAKER MOHAMED

Appellant

and

ENTRY CLEARANCE OFFICER – ABU DHABI

Respondent

Representation:
For the Appellant: Miss V Delgado of Cardiff Immigration Services
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sudan who was born on 1 January 1985. On 4 October 2013, she applied for entry clearance under para 319L of the Immigration Rules (HC 395 as amended) to settle in the UK as the spouse of the sponsor, Ahmad Abdul Rahman Abaker, who is a recognised refugee in the UK.

2. On 15 January 2014, the Entry Clearance Officer refused the appellant's application. The ECO was not satisfied that the appellant and sponsor had met as required by para 319L(ii) or that they intended to live permanently with each other and that their marriage was subsisting as required by para 319L(iii).

The Appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal.

4. In a determination promulgated on 6 January 2015, Judge Britton dismissed the appellant's appeal under para 319L. Like the ECO, Judge Britton was not satisfied that the appellant and sponsor had met or that they intended to live together permanently and that their marriage was subsisting. However, he allowed the appellant's appeal under Art 8 of the ECHR.

The Appeals to the Upper Tribunal

5. Both parties appealed to the Upper Tribunal.

6. The Secretary of State's grounds argue that the judge had erred in law in allowing the appellant's appeal under Art 8 on the basis that he had done so on facts that post-dated the ECO's decision contrary to s.85A(2) of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002").

7. On 17 February 2015, the First-tier Tribunal (UTJ Martin) granted the Secretary of State permission to appeal.

8. In addition, the appellant sought permission to appeal against the judge's decision to dismiss the appeal under the Immigration Rules. The grounds challenge the judge's adverse factual findings on the basis that he failed properly to take into account post-decision evidence relating to contact between the appellant and sponsor contrary to the approach set out in Naz [2012] UKUT 0040 (IAC) and Goudey [2012] UKUT 00041 (IAC).

9. The appeal was initially listed before me on 24 June 2015, however I adjourned the hearing as no decision had been made on the appellant's application for permission to appeal.

10. Subsequently, on 8 July 2015 the First-tier Tribunal (Judge Pooler) granted the appellant permission to appeal on the basis that it was arguable that the judge had failed properly to consider post-decision evidence and had required the appellant to produce specific evidence of contact prior to the decision.

11. On 14 July 2015, the ECO filed a Rule 24 notice submitting that the judge's decision was properly open to him including his finding that the post-decision meeting of the sponsor and appellant in October 2014 in Egypt was arranged specifically as a result of the ECO's refusal.

12. Thus, the appeal came before me.

The Hearing

13. At the hearing, Miss Delgado represented the appellant and relied upon a skeleton argument submitted at the previous hearing which reflects the appellant's grounds of appeal. In essence, she made three arguments.

14. First, she submitted that the judge had failed to take into account the whole of the evidence including evidence of contact prior to the ECO's decision dating from March 2013. This, Miss Delgado submitted, included the evidence post-dating the decision, namely that the appellant and sponsor had met in Egypt between 1 October 2014 and 28 October 2014 and as a result of that meeting, the appellant had become pregnant. Miss Delgado pointed me to the relevant evidence in the appellant's bundle in relation to those matters.

15. Secondly, Miss Delgado submitted that the judge had been wrong to take into account that the appellant had failed to produce documentary evidence of contact before 2013 including photographs of the sponsor and appellant together before their marriage. She submitted that it was not necessary for the appellant to produce specific evidence. There was the evidence of the parties together with the other evidence of contact.

16. Thirdly, Miss Delgado raised a point not addressed in the grounds nor indeed in her skeleton argument based upon the Secretary of State's guidance on "Spouses: SET03" published on 13 November 2013 at para 13 which states that:

> "If, after an initial refusal on the grounds of not having met, the couple can satisfy the ECO that a meeting in the sense of 'making the acquaintance of' has since taken place, the ECO must review the original decision and consider whether refusal is still maintained.
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> This review can take place after an appeal has been lodged ...."

17. Miss Delgado submitted that in the light of the evidence concerning the appellant and sponsor meeting in October 2014 in Egypt, the ECO had failed to apply this guidance by reviewing his original decision and conclusion that they had not "met" as required by para 319L(ii).

18. In relation to the ECO's appeal in respect of Art 8, Miss Delgado accepted that if the judge's findings in relation to the Immigration Rules stood, then the appellant could not succeed under Art 8 based upon the post-decision facts.

19. On behalf of the ECO, Mr Richards accepted that post-decision evidence was capable of throwing light on a matter at the date of decision in applying the Immigration Rules. He submitted, however, that the judge had taken that evidence into account but had simply found it not to be persuasive. The judge had found that the meeting in October 2014 was contrived given the ECO's refusal based, in part, on the fact that they had

not met. Mr Richards pointed out that the judge had taken into account that the sponsor had not sought to visit the appellant earlier despite having a valid travel document, namely a Sudanese passport issued to him on 15 February 2012. Mr Richards submitted that the judge was entitled to find that the appellant and sponsor had not met and had not established that their marriage was subsisting and that they intended to live together permanently. Those findings were adequately reasoned and were not irrational.

20. In relation to the decision under Art 8, Mr Richards submitted that that decision was wholly, and wrongly, based upon post-decision facts, namely the meeting in October 2014 and the fact that the appellant had become pregnant. The judge was, Mr Richards submitted, not entitled to take those matters into account by virtue of s.85A(2) of the NIA Act 2002.

Discussion

21. The basic facts are not in dispute. The sponsor left Sudan in 2006 and came to the UK where he claimed asylum and was granted ILR on 16 June 2014. On 16 December 2011, the appellant and sponsor married by proxy.

22. The appellant and sponsor claim that they are first cousins (which the judge did not accept) and that they came from the same area in Sudan, and had attended school together.

23. It is also accepted that the sponsor and appellant met in Egypt between 1 October 2014 and 28 October 2014 where, as a result, the appellant became pregnant: the sponsor being the father.

24. Before the judge, the sponsor gave oral evidence and a statement was produced. The sponsor's evidence was that he had left Sudan in 2006 and travelled via a number of countries before arriving in the UK in September 2008. He had had limited contact with his parents and he only started contact with his wife after they were married. In October/November 2011 the sponsor's father asked him by telephone if he was happy to marry the appellant. The sponsor agreed and it was decided that his brother should stand in for him as proxy. The sponsor's evidence was that he first spoke to his wife on the day that they were married. He used calling cards, Viber and Skype to keep in contact with her. There was evidence before the judge of financial support but the only evidence of contact between the appellant and sponsor (apart from what he said in his oral evidence) dated from March 2013.

25. In his evidence, the sponsor said that he had first obtained a travel document valid from 11 July 2009 until March 2014. His Sudanese passport was issued on 15 February 2012.

26. The sponsor explained in his evidence that the reason why he and the appellant had not travelled to meet one another earlier than October 2014

was that the sponsor was enrolled in an English language course for one and a half years. He also said that his travel document did not allow him to go to Sudan and when it was renewed he needed some time to arrange a visit and he had not visited Egypt early as there were lots of things to arrange.

27. At paras 17-21 the judge considered the evidence and reached his adverse findings as follows:

> "17. It is accepted that the sponsor cannot travel to Sudan. The appellant and sponsor entered into an arranged marriage by proxy.
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> 18. In the appellant's skeleton argument it was pointed out that the sponsor applied for a Home Office travel document to travel to Egypt on 29 September 2014. What the skeleton argument failed to point out was that the sponsor had previously been granted a travel document from 11 July 2009 to 5 March 2014. It was not a case of the sponsor having to wait for a travel document before travelling to Egypt to see the appellant. Further the appellant's Sudanese passport is valid from 15 February 2012 to 14 February 2017 (page 23 of the appellant's bundle). I find there is no satisfactory reason why the appellant and sponsor could not have met in Egypt from 15 February 2012. The sponsor is employed and was in a position to fund the appellant and his travel to and stay in Egypt in 2012.
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> 19. Further there is no satisfactory evidence why the appellant and sponsor could not have met in Egypt before October 2014. It is noted it was only after the ECO in the refusal notice dated the 15 January 2014 stated that there was no evidence of the appellant and sponsor having met that the appellant and sponsor went to Egypt. It is accepted that post decision visits by the sponsor are admissible to show the marriage is subsisting and to throw light on circumstances in contention but the evidence was not in existence at the time of the decision as they had not travelled to Egypt until October 2014.
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> 20. The sponsor's explanation for the delay in seeing the appellant was that the appellant had to take English language courses that lasted for about $1^1/_2$ years. However, as Mr Howells on behalf of the respondent pointed out at the hearing the appellant would not have been attending her English language courses for 52 weeks of the year. There would have been times between terms when the appellant could have found time to travel to Egypt to meet the sponsor. Also there is no documentary evidence of contact between one another before March 2013. There is evidence since March 2013 of contact between the sponsor and appellant. No photographs showing the sponsor and the appellant together before the date of their marriage have been produced. I find if there had been contact before the date of the marriage, documentary evidence would have been produced. The sponsor said that phone cards were used before the date of marriage. I accept that evidence of telephone cards is capable of being corroborative of the parties being in communication with one another. Also it is not necessary for the parties also to write and text each other. However as the sponsor and appellant claimed to have both lived in Al Fashir, are cousins and they went to the same school, there would be evidence of the appellant and sponsor together before the date of marriage.

> 21. Therefore on the evidence before me I am not satisfied that the sponsor and appellant are cousins as claimed. Even if they are cousins I am not satisfied they had met before 2014. I find that the parties to the marriage by proxy on 16 December 2011 had not met. I am not satisfied at the date of decision the parties to the marriage intended to live permanently with one another and the marriage was subsisting".

28. Miss Delgado drew attention to the final sentence in para 19 where, she submitted, the judge had accepted that post-decision visits were admissible to show the marriage was subsisting but had then, in effect, rejected it as it was not in existence at the time of decision because the visit to Egypt was in October 2014. Further, the judge had not fully taken into account the evidence of contact since March 2013.

29. By virtue of s.85A(2) of the NIA Act 2002 in an appeal against a refusal to grant entry clearance:

> "... the Tribunal may consider only the circumstances appertaining at the time of the decision".

30. It was common ground that evidence appertaining to the date of decision even if it related to post-decision events was admissible if it cast light upon facts at the date of decision (see DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 0038). Evidence of post-decision visits and more generally of "intervening devotion" is admissible as evidence that a marriage is subsisting (see DR and Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040 (IAC)). Evidence of phone calls or other contact falls within this category (see Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC)).

31. In my judgment, Judge Britton did not fail to take into account all the relevant evidence. He specifically referred to the evidence "since March 2013 of contact between the sponsor and appellant" (see para 20 of the determination). Further, the appellant specifically relied on the fact that the appellant and sponsor had met in October 2014 and that as a result the appellant had become pregnant (see para 14 of the determination). Judge Britton specifically reminded himself that evidence of contact, for example through phone cards, was capable of supporting the appellant's claim (see para 20 of the determination).

32. It is clear to me that the Judge recognised the relevance of post-decision events in para 19 – in the passage to which Ms Delgado referred me – and his comment was simply that it could not have been taken into account by the Entry Clearance Officer: he was not saying he should ignore it. That would be inconsistent with other parts of his determination.

33. Reading the determination as a whole and fairly, I am unable to conclude that the judge failed to take all the relevant evidence as required by the case law into account.

34. Further, I do not accept Miss Delgado's submission that the judge erred in law by observing that the sponsor and appellant had produced no photographs before the date of their marriage and no documentary evidence of contact between them before March 2013. The appellant's case was, at least in part, that they had known one another as children growing up in the same area. The judge's observation was no more than one born of common sense, namely that in assessing the totality of the evidence the absence of documentary evidence prior to March 2013 was a relevant factor.

35. The judge gave a number of reasons why he did not accept that the sponsor and appellant could not have met earlier than they did. Despite having a travel document from July 2009 and a Sudanese passport valid from 15 February 2012, the sponsor and appellant had not met until over two years later in October 2014. The judge was entitled to reject the explanation offered by the sponsor which, primarily, was that the appellant had undertaken an English language course which had occupied her for one and a half years and so could not visit or meet the sponsor.

36. In my judgment, the judge's reasoning was adequate, having had regard to all the evidence, and his finding that the appellant and sponsor had not established that at the date of decision their marriage was subsisting or that they intended to live together permanently.

37. For those reasons, the judge was entitled to find that the appellant had failed to satisfy the requirement in para 319L(iii).

38. As regards the requirement that they had "met", the only evidence before the judge was that they were cousins, had lived in the same area and had gone to school together. They had not seen one another since the sponsor left Sudan in 2006.

39. The requirement to have "met" is not a requirement that they should have met in the context of their marriage (see Meharban v ECO, Islamabad [1989] Imm AR 57). However, it is not sufficient that the parties met when both parties were infants and so could not be said to have "made one another's acquaintances" (see Raj v ECO, New Delhi [1985] Imm AR 151).

40. Whether it was established that they had "met" was a question of fact. The judge was entitled to find, in my view, on the limited evidence before him that the appellant and sponsor had not established on a balance of probabilities that they had "met" despite the fact that they claimed to live in the same area, were first cousins and had attended the same school. There was no supporting evidence and the judge was entitled to conclude, in effect, that they had never "made the acquaintance" of the other in the sense required by the word "met" in para 319L(ii). It cannot be said that the judge's finding was irrational or perverse on the basis of the evidence.

41. For that reason also the appellant failed to meet the requirements of para 319L.

42. Turning now to Miss Delgado's final submission made for the first time at the hearing, she cannot in my judgment establish that the ECO's decision was unlawful, relying upon the guidance in SET3.13. Even if the ECO should have reviewed the original decision in the light of the subsequent evidence that the appellant and sponsor met in October 2014 in Egypt, failure to follow that guidance would not make the original decision challenged in this appeal unlawful. Rather, that submission would, if successful, support a public law challenge by way of judicial review against the ECO for failing to make a further and new decision. That failing cannot, in any way, reflect upon the legality of the decision already made.

43. For these reasons, the judge did not err in law in dismissing the appellant's claim under the Immigration Rules, namely para 319L.

44. Turning now to the ECO's appeal, the judge dealt with Art 8 at para 22 of his determination as follows:

> "22. In relation to Article 8 the respondent has not dispute albeit nearly 3 years after the marriage by proxy that the appellant is pregnant. The appellant went to Egypt on 1 October 2014 and left on 28 October 2014. It was confirmed by the appellant she was pregnant on 4 November 2014. It is accepted the appellant cannot travel to Sudan to be with the appellant. It is unrealistic for the appellant to live anywhere other than Sudan or the United Kingdom. The sponsor is in full time employment in this country. A young child should be brought up by both parents preferably. In the circumstances of this case it will be an interference with the appellant and sponsor's family life to live apart. I find it would not be proportionate not to allow the appellant to join the sponsor under Article 8 of ECHR".

45. The fact that the judge was considering whether the ECO's decision breached Art 8 did not entitle the judge to consider post-decision events not relevant to the decision to refuse entry clearance at the date of that decision, namely 15 January 2014. At that date, the appellant and sponsor had not met and the appellant was not pregnant. Those matters were not matters "appertaining to the date of decision" within s.85A(2) of the NIA Act 2002 and consequently the judge was not entitled to consider them in applying Art 8. Given his factual findings in relation to the Immigration Rules, namely that, in effect, the parties' marriage was not genuine at the date of decision, the appellant had no proper claim to enter the UK on the basis of Art 8 relying on any family or private life.

46. Consequently, the judge erred in law in allowing the appellant's appeal under Art 8 based upon inadmissible post-decision facts.

Decision

47. For the above reasons, the judge erred in law in allowing the appellant's appeal under Art 8 of the ECHR. That decision is set aside and I remake the decision dismissing the appellant's appeal under Art 8.

48. Accordingly, the ECO's appeal to the Upper Tribunal is allowed.

49. The First-tier Tribunal did not err in law in dismissing the appellant's appeal under the Immigration Rules, namely para 319L. That decision stands.

50. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee award is payable.

Signed

A Grubb
Judge of the Upper Tribunal