Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07263/2014

THE IMMIGRATION ACTS

Heard at Glasgow
on 28 April 2015

Determination issued
On 1 May 2015

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

M R S HASSANE

Appellant

and

ENTRY CLEARANCE OFFICER, EGYPT

Respondent

Representation:
For the Appellant: Ms K Dingwall, of Ethnic Minorities Law Centre, Glasgow
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Egypt, born on 6 April 1980. On 7 April 2013 he applied for entry clearance for settlement in the UK as the fiancé of Brenda Ann Gatherer, his sponsor.

2. The Entry Clearance Officer refused his application by notice dated 6 May 2014, referring to Appendix FM and paragraph EC-P.1.1 of the Immigration Rules. The Entry Clearance Officer was not satisfied that the appellant's relationship with the

sponsor was genuine and subsisting, that he intended that they should live together permanently in the UK, or that he was seeking entry to the UK to enable his marriage to take place.

3. By determination promulgated on 17 December 2014 a panel of the First-tier Tribunal comprising judges J C Grant-Hutchison and M Porter dismissed the appellant's appeal against that decision. At paragraph 22 the panel was "not persuaded that the appellant had an intention to form a genuine subsisting relationship with the sponsor, albeit we had no reason to doubt the sponsor's intentions."

4. The appellant appeals to the Upper Tribunal on the following grounds:

…

3 The FtT has erred in its assessment of whether the appellant's relationship with the sponsor is genuine and subsisting by misunderstanding the facts of the case, by failing to give material evidence the proper consideration and by imposing an unjustified expectation of specific actions and behaviours, thereby failing to take the available evidence into proper consideration.

Misunderstanding the Facts

4 The FtT held that the appellant and sponsor's relationship was not genuine as there was no discussion between them as to how the appellant would care for the sponsor in the UK: see determination at 23:

> "We also noted the contents of the brief statement produced by the appellant which appeared to focus on the meeting between the parties in 2012 and on the appellant's health problems, but otherwise was not informative about the nature of any potential future relationship. In particular there was no reference as to how the appellant envisaged being able to care for the sponsor or what care might involve."

5 Although the appellant's sponsor suffers from Multiple Sclerosis there is no suggestion that she currently requires any additional care or that the appellant would require to provide such care. The FtT therefore erred in concluding that such care would be necessary and as such that a lack of discussion on the matter would indicate that their relationship is not genuine or subsisting.

Failure to properly consider material evidence

6 The FtT also erred in concluding that a lack of evidence in relation to the appellant and sponsor's future intentions, as the appellant has shown that the couple have made definite plans for the future of their relationship (in accordance with section 3.1(VI) of the Immigration Directorate Instructions) by providing proof of the provisional booking for their marriage ceremony (see determination at the FtT at 19.) Furthermore the sponsor discussed in her statement that she and the appellant intend to live together permanently in the UK with the appellant's youngest daughter. The FtT has erred in concluding that there was no evidence of the reality of the appellant's intentions.

Misapplication of the legal test

7 The FtT has misapplied the provisions of the Immigration Rules in concluding at 23 that it is; "essential for the appellant to work in the UK" as the maintenance requirement under the Immigration Rules was accepted by the respondent has having been met. As such the FtT has erred by relying on its incorrect conclusion that the appellant must work to decide that the relationship is not genuine.

8 The FtT has also failed to apply the correct legal test in assessing the genuineness of the relationship by imposing its own view of how the parties should reasonably be expected to conduct their relationship with regards to the involvement of the sponsor's eldest daughter. In doing so the FtT failed to correctly evaluate the evidence that was submitted. Reference is made to *Goudey* (subsisting marriage-evidence) Sudan [2012] UKUT 00041(IAC) at 10-12:

> "In our judgement the judge has mis-directed himself as to the weight to be attached to the total documentation relation to the telephone calls … The judge was therefore imposing his own view of how the parties could reasonably be expected to conduct their relationship as opposed to evaluating the consistent and supported evidence that was before him as to how they actually did.
>
> Everything else is neutral in this case. There is no evidence of lies, poor immigration history or deception. There is some evidence of financial sponsorship though the judge was entitled to be unimpressed by it for the reason he gave the absence of receipts is not a factor that goes to the discredit of the application.
>
> Accordingly we find that there has been an error of law in the assessment of this case and whether the requirements of the Immigration Rules had been met. It may be that the Entry Clearance Officer and the judge considered that the requirement to show a "subsisting marriage" imposes some significant burden to produce evidence other than that showing that there was a genuine intention to live together as man and wife in a married relationship. If so we conclude that that is an error of law. The authority of GA ("Subsisting" marriage) Ghana * [2006] UKAIT 00046; [2006] Imm AR 543 only requires that there is a real relationship as opposed to the merely formal one of a marriage which has not been terminated. Where there is a legally recognised marriage and the parties who are living apart both want to be together as husband and wife, we cannot see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the Immigration Rules."

9 The FtT concluded that the sponsor's daughter should have been involved in the sponsorship of the appellant at 23:

> "Finally we noted the absence of involvement in the apparent relationship on the part of the sponsor's elder daughter, whom we would have expected to have been concerned in her mother's well-being."

10 The sponsor's daughter does not live with her and there is no evidence to suggest that this lack of involvement relates to the genuineness of the appellant's

relationship with his sponsor. There is no evidential basis for concluding that the reasons for the absence of involvement in the sponsor's eldest daughter relate to the substance of the sponsor and appellant's relationship.

11 The FtT also concluded that the appellant and sponsor should have met on further occasions as well as in 2012, despite recognising the limitations of the sponsor's ability to travel. This issue is discussed by the FtT at 22:

> "We accepted that the sponsor was restricted in her ability to travel, due to her health problems, her family circumstances and her financial position which was dependant on Social Security Benefit, although she had been able to travel to Abu Dhabi in 2012. However, we considered that the appellant, who was in apparent good health, could have visited the United Kingdom at any stage between 2012 and 2014 or made arrangements to meet with the sponsor elsewhere at a mutually convenient location, nearer to the sponsor's home country."

12 This conclusion goes beyond the relevant respondent guidance which was lodged in the appellant's bundle and discussed in the appellant's submissions but was not considered in the FtT's determination. The guidance states that visiting one another is a positive factor in favour of the relationship being genuine but that "the fact that an appellant has never visited the UK must not be regarded as a negative factor".

13 This conclusion <u>also</u> fails to properly take into account the financial circumstances of the appellant. The FtT found at 18 that:

> "The appellant worked in the Abu Dhabi Pipe Factory from 4 October 2004 until 2 June 2013 when he returned to Egypt. He has worked on his father's farm since that date without receiving any pay."

14 This suggests that the appellant is unlikely to have had the financial means to travel to any third country from 2 June 2013. It is an error of law to substitute the appellant's actual circumstances with the FtT's expectation that further physical contact should be present in order for a relationship to be genuine and subsisting.

Conclusion

15 Considering the extensive evidence relating to the contact between the parties and the further evidence provided in relation to their physical contact, it is submitted that the couple have demonstrated that on the balance of probabilities their relationship is genuine and subsisting and the appellant intends to come to the UK in order to get married to his sponsor.

5. Ms Dingwall made submissions expanding upon the grounds as follows, identifying 6 points:

(i) The panel misunderstood the evidence, which did not show that the sponsor requires additional care or that the appellant would need to provide such care. The parties' lack of discussion of that issue was not adverse. The panel hypothesised and went beyond any relevant legal test.

(ii) The appellant had shown the future intentions of the couple through provisional booking of their marriage ceremony and their intention to live together in the UK with the appellant's younger daughter. Although the younger daughter did not give oral evidence and had not met the appellant in person, there was evidence of regular contact by skype. The panel wrongly considered that there was no evidence of the reality of the appellant's intentions.

(iii) In saying at paragraph 23 that it would be "essential for the appellant to find work in the UK" the panel overlooked that the maintenance requirement under the Rules was met and he did not need to show that he would find work.

(iv) The panel went wrong by applying its own expectation of how a relationship should be conducted. They noted the absence of involvement of the sponsor's older daughter, but she is an adult who lives independently. The absence of such evidence was insignificant. The panel's duty as explained in *Goudey* was to evaluate the evidence before them. Marital relationships may be genuine whether or not approved by wider family members.

(v) The panel went wrong by founding on the absence of further meetings between appellant and sponsor. There was no requirement for them to have met again. The panel at paragraph 22 accepted that there were restrictions on the sponsor's travel. The respondent's guidance (which the appellant had put before the panel) indicated that lack of visits was not adverse.

(vi) The panel's observations on lack of visiting also failed to take account of the circumstances of the appellant, although they had been set out in paragraph 18. As he was working on his father's farm without pay it was unlikely he would have the means to visit the sponsor, so the panel should have noted also the restrictions upon him.

6. Summing up, Ms Dingwall said that the extent of error in the determination was such that it should be set aside. On all the evidence which had been presented it should be found that the appellant made out his case on the balance of probability. The determination should be reversed.

7. Mr Matthews in response said that it was always difficult to assess whether a relationship is genuine, even when oral evidence is heard from both parties, and more so when one is absent in another country. However, it was a factual question on which a tribunal had to make up its mind one way or the other. The conclusion reached was within the scope of the panel. To set it aside, the appellant had to show more than mere disagreement. It was not suggested that this was a decision which no Tribunal could have reached. It might be that another judge or panel could have decided the other way, but there was no material inadequacy in the panel's reasoning. On the particular points raised, Mr Matthew submitted as follows:

(i) There was evidence that the sponsor was in receipt of Disability Living Allowance, including the higher rate care component. She suffers from

multiple sclerosis, which is unfortunately a degenerative condition. Her future health and care needs would be an obvious point of interest and discussion. This was not an irrelevant factor. At paragraph 23, the panel made no more of it than they were entitled to do.

(ii) The Rules at Appendix FM paragraph E-ECP.2.8 require that entry is sought to enable the marriage to take place. Paragraph 19 records that the parties had made provisional plans, which later required to be cancelled. That is simple narrative. The panel does not go on to develop it into a negative point.

(iii) There is no legal requirement to show that the appellant could find work. The application did not have to meet maintenance requirements due to the sponsor's receipt of benefits. However, if he did not intend to work then he planned to live on the sponsor's benefits. The evidence which he did provide was scanty. It included no reference to working. The panel was entitled to find it curious that he did not say anything about it. He proposed to establish a household with his wife and one of her daughters, so it would be normal to expect some information about how he proposed to contribute to the household's support.

(iv) There is no requirement to show that wider family members approve of and support a relationship, but it would be usual to expect some indication of an attempt to integrate with the spouse's family. The matter could not go very far, but the panel's comment was not much more than a passing one.

(v) The appellant and sponsor met only once, in 2012, for only 10 days. The Tribunal did not find the sponsor unable to travel, only that there are restrictions. The evidence appeared to have been that she found the heat in Abu Dhabi oppressive. There was nothing to show that the appellant could not visit her in the UK or in another more convenient and congenial country. The Tribunal was entitled to take the lack of further contact into account.

8. Finally, Mr Matthews said that the burden of proof was on the appellant to show that there was a genuine and subsisting relationship. The evidence he submitted was patchy and insubstantial and invited the adverse conclusion reached. The determination did not err, or at least did not err to such extent as to justify it being set aside. If the decision were to be remade, Mr Matthews agreed that there was no need for further hearing or submissions. Everything to be said on either side had been put forward.

9. In reply Ms Dingwall said that although the Presenting Officer argued that the lack of involvement of the older daughter was not given much weight, the determination only rehearsed the various factors taken into account against the appellant, without explaining the respective weight given to each one. The panel should not have made anything at all of that aspect of the evidence, but should have given weight to the evidence of contact ongoing with the younger daughter, with whom the couple planned to reside, and of the intention to marry. Although much was made of the

lack of further visits, the meeting in Abu Dhabi was in 2012 and the application leading to these proceedings was made in April 2013, less than a year later. To expect evidence of additional visits within that relatively short period was unreasonable.

10. I reserved my determination.

11. The challenge is essentially to the adequacy of the panel's reasoning. Paragraphs 22 and 23 of the determination set out the adverse factors which led to the decision:

    (i) There was online contact for over 2 years, but only one brief physical meeting, in 2012.

    (ii) The sponsor was restricted in her ability to travel, but she was able to go to Abu Dhabi. The appellant could have visited the UK at any time from 2012 to 2014 or they could have met in another mutually convenient location.

    (iii) The appellant's statement focused on the meeting in 2012 and on [the sponsor's] health problems but not on the future nature of the relationship. In particular, the future care of the sponsor was not envisaged, which was adverse to an enduring and substantive relationship "and did not confirm the reality of the appellant's intentions."

    (iv) The appellant had work experience but there appeared to have been no discussion between the appellant and sponsor regarding work he might seek in the UK, where "it would be essential for the appellant to find work … given that his sponsor was unable to work due to severe health problems and reliant solely on benefits."

    (v) Finally, the panel noted the absence of involvement of the sponsor's elder daughter "whom we would have expected to have been concerned in her mother's well being."

12. In my opinion, the panel was entitled to make its observations on lack of discussion about the sponsor's potential future care needs. There is nothing in the Rules which calls for that specific type of evidence, but in the nature of the case this was a matter relevant to assessing the nature of the relationship, as the panel had to do.

13. There is nothing in the point about specific wedding plans. The panel did not find this adverse. In any event, the arrangements were at the instance of the sponsor, and the panel's doubts were not about her intentions, only those of the appellant.

14. The nearest the panel may have come to error is in the remark that it would be essential for the appellant to find work. However, this has to be read in context of the evidence as a whole and of the preceding sentence of the determination. This is another obvious matter which might be expected to be of some importance to both parties. The panel was entitled to find it odd that the parties appeared to have given it no consideration.

15. There is no need to establish that wider family members support a relationship. Again, however, this is an obvious matter which one would expect to be contemplated in a genuine relationship. There is nothing wrong with the panel saying that they would have expected the sponsor's older daughter to be concerned about her mother's well being. Any panel might have expected the parties to deal with this in her evidence, eg by leading evidence from her; by explaining that she was supportive; or that she took no interest; or that she disapproved, but that was something to be lived with. I do not think the panel gave this any more significance than it merited.

16. As to the extent of meetings, the grounds seek to explain this partly by the appellant's lack of means, but there was no evidence on that matter. It did not necessarily follow from what the panel was told that he was impecunious. Ms Dingwall countered with the observation that the period without a meeting was less than a year up to the date of application, but the panel noted that there was no meeting up to the date of the hearing on 2 December 2014. Again, the panel was entitled to give this some weight.

17. The weighting of the various factors is very much a matter for the panel. Ms Dingwall complained that it was not made clear which factor carried the most weight, but this is not an exercise of arithmetical precision. The panel gave a number of reasons. It is fairly clear that some carried more weight than others, but the question is whether as a whole they justify the outcome.

18. The appellant's case has been pressed as strongly as it properly could be on the evidence available, both in the First-tier Tribunal and in the Upper Tribunal. However, reading the determination fairly and as a whole, he has not shown that the determination is a less than legally adequate explanation to him of why the panel found that evidence to fall short of proving his case. The case may have been a close one, and other judges might have come down on the other side, but there is no error of law which would entitle the Upper Tribunal to interfere.

19. The determination of the First-tier Tribunal shall stand.

28 April 2015
Upper Tribunal Judge Macleman