IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06814/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th December 2015	**On 13th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MRS SADIF IQBAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aslam (Counsel)
For the Respondent: Mr P Nath (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against a decision to refuse her entry clearance as a spouse was dismissed by First-tier Tribunal Judge Lagunju ("the judge") in a decision promulgated on 19th March 2015. The Entry Clearance Officer made an adverse finding in relation to Section E-ECP (eligibility for entry clearance as a partner) of the Immigration Rules ("the rules") in a decision made on 17th April 2014. Having taken into account telephone bills, photographs of the wedding day on 27th February 2011 and money transfer receipts, the Entry Clearance Officer ("the ECO") was not satisfied that the evidence showed that

the appellant's relationship with her sponsor subsisted or that the couple intended to live together permanently in the United Kingdom.

2. In dismissing the appeal against that decision, the judge recorded briefly and took into account evidence given by the appellant's sponsor here and documentary evidence which included telephone cards. She took into account an earlier decision promulgated in May 2013, in which an appeal against earlier refusal of entry clearance was dismissed. The judge found that there was a paucity of evidence showing contact between the appellant and her sponsor between August 2011 and April 2014, although evidence did show contact after the decision to refuse entry clearance. Overall, the judge concluded that there was no reliable evidence that the appellant and her sponsor had an abiding interest in each other and went on to find that the couple were not in a subsisting relationship. She accepted that the sponsor visited Pakistan in January 2012 and May 2014 but found in relation to the former visit that the sponsor's oral evidence alone was insufficient to show that he spent time with the appellant on that occasion and, so far as the second is concerned, the judge found that this amounted to an attempt to create the appearance of a genuine and subsisting relationship.

3. In grounds seeking permission to appeal, it was contended that the judge erred in her approach to the earlier decision and failed to properly apply the "Devaseelan" guidelines. There were not adverse credibility findings in the earlier decision. Secondly, the judge failed to give any weight to evidence given by the sponsor's brother, there being no mention of this evidence in the decision. Thirdly, the judge overlooked important parts of the evidence, including telephone bills, and appeared to confine her assessment of the evidence to telephone cards relied upon.

4. Permission to appeal was refused initially but an Upper Tribunal Judge gave permission on 7th September 2015, the application having been renewed. In a rule 24 response prepared on behalf of the Secretary of State on 6th October 2015, the appeal was opposed on the basis that the judge's findings were open to her.

Submissions on Error of Law

5. Mr Aslam said that the bundle of evidence before the First-tier Tribunal was substantial. The case concerned a marriage contracted in February 2011. The judge only considered telephone cards, in relation to contact between the appellant and her sponsor, and not the mobile telephone bills that appeared in the bundle at pages 216 to 242. These were bills relating to June 2011. The judge's error was shown in the description of this part of the evidence as being the telephone cards "in isolation". A related point concerned the evidence of remittances of funds between 2011 and 2014, at paragraph 19 of the decision. Here the judge speculated that the money transfers were for the benefit of a relative, even though the receipts showed the appellant's name.

6. Similarly, the judge did not fully engage with the oral evidence before her. The sponsor's brother gave evidence but there was no mention of this in the

decision and no assessment. This suggested that no weight was given to the evidence and if the judge had intended to make such a finding, at the very least an explanation was required.

7. So far as the Devaseelan guidelines were concerned, the decision showed that the judge took as a starting point the earlier 2013 decision. However, in issue in that appeal were adverse findings by the overseas post regarding accommodation and maintenance but there was nothing putting the subsistence of the relationship in issue. The judge in the present appeal made an adverse credibility finding but the earlier decision contained no such finding. Instead, the judge on that occasion found that the evidence was not sufficiently clear but this was far from a finding that the appellant and her sponsor were dishonest or not credible witnesses. The judge made no findings regarding the marriage, this being hardly surprising as the subsistence of the relationship was not in issue. The judge in the present appeal misapplied the Devaseelan guidelines in finding the sponsor not credible. This error infected the way in which the evidence was approached.

8. Mr Nath said that the judge's assessment of the evidence regarding contact appeared at paragraphs 14 and 15 of the decision and the findings were open to her on the evidence. She was entitled to find that contact shown by WhatsApp messages were postdecision but not reliable evidence of contact between the parties to the marriage at any earlier stage. Mr Nath said that he accepted that the subsistence of the marriage was not in issue in the 2013 appeal but, overall, the judge approached the earlier decision correctly. The assessment of the visits in 2012 and 2014 was, again, properly made and open to the judge.

9. In a brief response, Mr Aslam said that the judge clearly took the May 2014 visit into account, without giving the visit the weight due to it. The speculation about the money transfers was not sustainable and illustrated the judge's approach to the credibility of the sponsor. Overall, the second application for entry clearance showed that the parties to the marriage had not given up. Nearly five years had passed since the marriage. None of the findings of fact could be sustained.

10. In a brief discussion about venue, should an error of law be found, both representatives agreed that the appeal should be returned to the First-tier Tribunal, in the light of paragraph 7.2 of the Senior President of Tribunal's Practice Statement of 2012, taking into account the extent of the fact-finding required.

Conclusion on Error of Law

11. As noted by the Upper Tribunal Judge who gave permission to appeal, it is clear from the judge's Record of Proceedings (at page 12) that the sponsor's brother gave oral evidence. He adopted a witness statement which appeared in the appellant's bundle at pages 88 and 89. He was cross-examined. Nowhere in the judge's decision is there any mention of this evidence. Paragraph 8 simply records that the sponsor adopted his witness statement

and was briefly examined and cross-examined. As the brother's evidence clearly bears on the subsistence of the relationship, and whether or not it is a genuine marriage, as is clear from his witness statement, the omission of any mention of that evidence is important. The judge may have had good reason to give the brother's evidence little weight but, at the very least, it should have been mentioned and assessed. Paragraphs 13, 15 and 16 record parts of the sponsor's evidence and lead to a conclusion, at paragraph 17, that the judge does not accept that the sponsor had contact with the appellant during a period of almost four years. There is nothing to show that the evidence of the other live witness was taken into account.

12. So far as Devaseelan is concerned, the judge directed herself that the earlier decision failed to be taken into account as a starting point. That was probably correct, although the subsistence of the relationship was not in issue in the earlier appeal because entry clearance had been refused on the basis that the requirements of the rules regarding accommodation and maintenance were not met. If the judge did properly direct herself to take into account the earlier appeal, at least in relation to the facts found about the marriage and the circumstances of the parties to it, paragraph 17 of the decision in the present appeal reveals a problem. In that paragraph, the judge said that she kept in mind the findings of the Tribunal in the earlier appeal and went on: "I similarly find that the sponsor is not a credible or reliable witness." Mr Aslam is correct in his submission that the earlier decision in fact contains no such adverse finding. The judge in the earlier appeal found that the appellant had not discharged the burden of proof and she expressly drew attention to contradictory evidence regarding the sponsor's employment and earnings but the extent of her adverse finding is shown at paragraph 18 of that decision where she found that she was not satisfied that the sponsor's employment history was as claimed, which in turn raised doubts as to his income. There is an important difference between finding a case not shown on the evidence, because that evidence is contradictory or confusing or is otherwise unclear, and, on the other hand, making a finding that a witness is incredible or unreliable.

13. So far as the evidence of contact is concerned, it is again correct that the documentary evidence included mobile telephone bills as well as telephone cards. The judge's finding that the cards appeared "in isolation" was inaccurate, albeit that the telephone bills related to a short period of time.

14. Overall, I find in relation to the first two grounds set out above, regarding the brother's evidence and the extent to which the earlier decision formed any sound basis for a finding that the sponsor was an unreliable witness, are made out and show errors of law. I am less certain that the omission of any mention of the telephone bills for the month of June 2011 amounts to a material error but that is academic.

15. The decision of the First-tier Tribunal is set aside and must be remade.

16. Both representatives agreed that the appropriate venue for remaking the decision is the First-tier Tribunal, in view of the extensive fact-finding that will

be required. I agree, having taken into account paragraph 7.2 of the Senior President's Practice Statement. The appeal will be remade in the First-tier Tribunal, in Birmingham, before a judge other than First-tier Tribunal Judge Lagunju.

Notice of Decision

The decision of the First-tier Tribunal is set aside; it shall be remade in the First-tier Tribunal at the Birmingham Hearing Centre, before a judge other than First-tier Tribunal Judge Lagunju.

ANONYMITY

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed Date

Deputy Upper Tribunal Judge R C Campbell