Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23002/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 5 March 2019	**On: 26 April 2019**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GODLIVES [N]

Respondent

Representation:
For the Appellant: Ms S Jones, Senior Presenting Officer
For the Respondent: Mr G Strestha, instructed by Mirach Solicitors

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Secretary for the Home Department. For the sake in convenience, I will refer herein to Mr [N] as "the claimant".

2. The claimant is a citizen of Nigeria, born in 1972. He lawfully entered the United Kingdom on 7 September 2012 with leave to enter as the partner of a person present and settled here, such leave expiring on 23 October 2014. On 06 November 2014, the claimant made a human rights

application, seeking to remain indefinitely in the United Kingdom. That application was refused by way of a decision dated 16 September 2016.

3. The claimant's subsequent appeal to the First-tier Tribunal was allowed on Article 8 ECHR grounds by First-tier Tribunal Judge T Jones, in a decision promulgated on 23 March 2018 – the hearing having taken place on 5 February 2018.

Permission to Appeal

4. The Secretary of State's grounds of appeal in support of the application for permission assert as follows:

> "The First Tier Tribunal has allowed the appeal of the Appellant finding that his relationship with a British Citizen is genuine and subsisting. The FTTJ found the Appellant and his alleged spouse to be witnesses of truth. It is submitted that this finding is in complete opposition to the remarks of the Judge at the hearing and the conduct of the appeal.
>
> Attached to these grounds are the minute of the Home Office Presenting Officer that refer how the appeal progressed. It is noted that the FTTJ warned the Appellant he would be required to take an oath due to the appalling inconsistencies in his testimony, and that the FTTJ even offered to allow the Appellant's representative to withdraw.
>
> It is respectfully submitted that the Respondent is unable to understand how it is that an Appellant who was warned he would be required to take an oath as the evidence he was giving was so utterly inconsistent, and that the Representative was advised that he could withdraw if he wished, has subsequently been found to be a witness who was open and plausible and whose testimony stood up to test. It is submitted the determination of the First Tier Tribunal bears no resemblance to the manner in which the hearing was conducted and to the serious concerns raised by the judge himself at the hearing.
>
> It is submitted that it is notable that little if any of the evidence of either Appellant has been recorded in the determination, and the FTTJ has failed at any point to identify why that evidence was so consistent."

5. Permission to appeal to the Upper Tribunal was granted in the following terms by FtT judge Buchanan, in a decision dated 29 June 2018:

> "2. Grounds of Appeal contend inter alia "… the determination of the First-Tier Tribunal bears no resemblance to the manner in which the hearing was conducted and to the serious concerns raised by the judge himself at the hearing… the FTTJ has failed at any point to identify why that evidence was so consistent."
>
> 3. In the Decision at [27], the FTTJ concludes "I found that a number of issues raised have been explained quite plausibly and openly by the appellant, who has outlined his knowledge of his wife's children and her family to the best of his ability, though he was extremely nervous at times."
>
> 4. It may be arguable that there are inadequate reasons given for allowing the appeal where the "number of issues" are not

specified; and where the test of "best of his ability" may not explain why the burden of proof has been met.

5. For these reasons, it is arguable by reference to the Grounds of Appeal that there has been material error of law in the Decision. I grant permission to appeal. In doing so, I do not restrict the scope of issues which may be argued at appeal."

6. It is prudent to observe at this stage that despite the assertions in the grounds there was no 'minute' attached to the application for permission to appeal. As a consequence, the Upper Tribunal emailed the Home Office Presenting Officer's unit on 29 October 2018, identifying the fact that the minute was missing. This email did not elicit a response.

Discussion and Decision

7. It was not until the day of the hearing before the Upper Tribunal that Ms Jones, on behalf of the Secretary of State, sought to introduce the evidence which was promised in the grounds of appeal. The minute, which is signed by Ruqaya Suleiman Mohamed and dated 06 February 2018 i.e. the day after the hearing before the FtT, reads as follows:

> "…Cross:
>
> The app was so inconsistent that IJ even told the rep he would understand if he would want to withdraw his representation. The app was lying about the number of kids he had, the name of the children's mother, their ages, etc. The sponsor did not remember what she said during the interview such as you accompanied her to NGA, when the app came to the UK to live with her, how many kids he had. IJ threatened to put them both under oath due to the blatant lies.
>
> 100% sure it will be dismissed"

8. No explanation has been provided as to why this minute was not produced earlier and, in particular, why there was no response to the Tribunal's email of 29 October. The claimant's representatives had not had an opportunity to consider the terms of the minute prior to the hearing.

9. Not content with seeking to rely on one document that had not been provided prior to the hearing, Ms Jones also sought to rely on a such second such document, which she asserted to be a record of the proceedings before the FtT authored by the Presenting Officer. The document was not accompanied by a witness statement identifying the circumstances in which it was made, indeed there was no evidence confirming that the document even purported to be a record of the proceedings. Whatever the document maybe, and whenever it may have been made, the one thing that it is not is a verbatim record of what was said in the claimant's hearing before the FtT. At its highest, it is a document summarising the events at the hearing before the FtT and, in particular, the answers given by the appellant and his wife to unknown questions. Most strikingly the document does not obviously contain any reference to the purported interjection of the FtT judge of the type

identified in the minute referred to in the preceding paragraph. No explanation has been provided for this.

10. As a consequence of the late production of the aforementioned evidence, I invited Mr Strestha's submissions as to whether I should allow it to be adduced. After taking instructions, Mr Strestha indicated that the claimant was content for the documents to be admitted and happy to proceed immediately. This was not, however, to be taken as an admission that the documents were of assistance in demonstrating that the FtT's decision contained an error of law. In these circumstances, I admitted the documents.

11. Turning then to the initial task before me i.e. to determine whether the FtT's decision contains an error of law.

12. At the core of the Secretary of State's appeal is a claimed absence of adequate reasoning in the FtT's decision given, what is said to be, the significant disparity in the evidence given by the claimant and his wife. This submission is fuelled by the contents of the presenting officer's minute and supported, it is said, by the contents of the record of proceedings authored by the presenting officer.

13. Any analysis of the adequacy of the FtT's reasoning must be undertaken in its proper context, which includes how the Secretary of State put his case before the FtT.

14. In her closing submissions before the FtT, the presenting officer relied upon the terms of the SSHD's decision letter [21]. It was submitted, in particular, that there was little cohesion between the information provided by the claimant and that provided by his wife during the course of interviews undertaken by immigration officials in 2015. The decision letter highlights the following, what are said to be, discrepancies between answers given by the claimant during his interview and those given by his wife:

    (i) The decade in which the claimant's wife arrived in the UK and the reason why the she was granted British Citizenship;

    (ii) The name of the claimant's UK based sister

    (iii) When the claimant last spoke to his family in Nigeria;

    (iv) The circumstances of the claimant's second meeting with his wife in 2007 and the exact month in 2007 that the 'relationship started';

    (v) The year the claimant returned to Nigeria thereafter;

    (vi) Where the claimant proposed to his wife;

    (vii) Whether the claimant and his wife travelled together to the marriage ceremony.

15. In addition, it is asserted in the decision letter that the claimant did not know where in Nigeria his wife was born. It was further observed that he had children born to another person during the time he was allegedly in a relationship with his wife. Of the claimant's wife, it was said that she did not know that the claimant was in the UK on a visit visa when they met in 2007, nor did she know how often or when the claimant had contact with his children.

16. The abovementioned points were clearly not lost on the FtT because it said as follows in summarising the SSHD's case:

> "6. The Respondent refers to paragraph 287(a)(ii). This states that the applicant is still the spouse or civil partner of a person he or she was admitted or granted an extension of stay to join and marriage or civil partnership is subsisting.
>
> 7. With this in mind, the Respondent notes the claim that the Appellant is in a genuine and subsisting relationship with [DK]. The representatives then instructed advised on 18th February 2015 that the Appellant had temporarily left the family home at Jansons Road N15 to move to Park Avenue N15, London. On 2nd April 2015, the representatives wrote to advise that the Appellant had returned to Jansons Road. The reason he had left temporarily was due to his partner's children visiting and the house was overcrowded. Given this, the Secretary of State was not adequately satisfied that the relationship was genuine and subsisting and invited the parties to the marriage to a marriage interview at Liverpool on 15th May 2015.
>
> 8. It is said that in the course of that interview, following responses, the Secretary of State was not satisfied that the relationship was genuine and subsisting. The Respondent then goes on to cite some differences as between the Appellant's responses and questions and that of his wife as regards the background of Ms [K]'s family and how she obtained British citizenship.
>
> 9. The Appellant confirmed that he knew his wife had been born in Nigeria but could not say where. He said that he knew his wife had a sister in the UK called Rose. Ms [K] said that the Appellant had a sister in the UK called Louise, but she did not know if the Appellant contacts his parents or family back home. She "thinks" he speaks to his mother but could not say when he had last contacted her.
>
> 10. As regards how they had met, information was given by both that they had met at Ms [K]'s birthday party, a few days later they exchanged numbers and a relationship commenced. The Appellant had said that the relationship started within a few days of the party in July 2007, Ms [K] said this was more likely August or September 2007, and she was not aware how the Appellant came to be in the UK at the time of the meeting, whereas the Appellant had confirmed he had entered as a visitor with a valid visa.
>
> 11. The Appellant said he had gone back to Nigeria in 2007-2008 before the visa expired, but Ms [K] said that the Appellant had

returned in November 2009 because his (the Appellant's) father had passed away.

12. A number of questions also followed in connection with children that they have. It is submitted that all of these points submit that the relationship is not genuine and subsisting. A copy of interview is available within the bundle of papers."

17. The claimant and his wife each gave written and oral evidence before the FtT, both adopting witness statements drawn on 30 January 2018. The FtT observes, at [15], that the witnesses were extensively cross-examined and that they gave similar answers to each other when asked where they had met and in what circumstances, this being despite the fact that they were recalling events going back to 2007. Evidence was also given in relation to the children, and an explanation provided as to why there were a number of withdrawals from a bank in Wood Green rather than the home area in which the claimant purported to live.

18. As already indicated, the FtT allowed the claimant's appeal on the basis that the SSHD's decision leads to a breach of Article 8; the core finding in relation to which was the genuine and subsisting nature of this relationship with his wife. The reasons for this decision are, for the most part, to be found within paragraphs 25 to 32 of FtT's decision, which read as follows:

"25. The burden of proof is with the Appellant and the standard of proof is the civil standard.

26. On the totality of the evidence and applying the appropriate standard, I find for the Appellant in terms of the appeal and that the Appellant and his wife are in a genuine and subsisting relationship for the purposes of the Immigration Rules cited by the Respondent above.

27. I make such finding because; I have heard both the Appellant and his wife extensively cross-examined and have to say that the upshot of that was, if anything, I could understand that the passage of time memory may fade as to whether somebody met in July 2007 or August/September 2007 when describing their relationship ten years on.

28. I found that a number of the issues raised have been explained quite plausibly and openly by the Appellant, who has outlined his knowledge of his wife's children and her family to the best of his ability, though he was extremely nervous at times.

29. His wife explained when she did not know things and also sought to deal tactfully with the issue concerning the Appellant not seeing his children, it being a difficult matter to discuss and that is why her knowledge as to his children is very limited.

30. I found that I could attach little weight to the suggestion made that an analysis of the Appellant's cash withdrawals near his sister's in Wood Green in 2015/16 would suggest that he was living there and not with his wife. I found the Appellant withstood close cross examination on the matter and I accepted what he said against the appropriate standard. The parties themselves had openly explained, when asked, that there had been a short

period of time when Ms [K]'s children had visited and he, effectively, had gone to an address not very far away for a short period, returning. There is ample evidence of utility bills, bank statements relating to Mr [N] being at the same address as Ms [K].

31. Applying the appropriate standard, and in all of the circumstances, for these reasons, having seen and heard the parties, who I felt stood up well to extensive, careful and probing cross-examination, it is such that I find for them.

32. Following the decision in **Mostafa [2015] UKUT 00112 (IAC)**, when considering the appeal, brought as it must under human rights provisions, it can be said following this decision there can be "little offence" in terms of the public interest being addressed (in terms of the Respondent's lawful and legitimate aim of effective immigration control) if the Immigration Rules are met. In these circumstances it is such that I find that they have and when determining the human rights appeal, I accordingly find that the proportionality balance following this decision-making falls in favour of the Appellant rather than Respondent."

19. The FtT's initial task was to consider the evidence before it as a whole and come to a conclusion - on the appropriate standard - as to whether the relationship between the appellant and his wife is subsisting (it being said to now be of some 12 years standing) - see paragraph 287(a)(ii) of the Immigration Rules relied upon by the SSHD at page 1 of the decision letter.

20. The FtT had the benefit of hearing the claimant and his wife give oral evidence. It viewed such evidence in the context of the available documentary evidence, which included copies of the records of interview and a significant number of other documents referring to the names of either the clamant or his wife and the address that each was purportedly living on specified dates since 2013.

21. The FtT was undoubtedly entitled to take account of the fact that part of the evidence given by the claimant and his wife related to events which took place in 2007 or shortly thereafter, and that the memory of such events would have faded as a consequence of the passage of time. The FtT accepted that the couple provided plausible explanations for a number of the discrepancies raised by the SSHD and it was not required to spell out the approach it took to each and every alleged discrepancy and assertion of implausibility. The FtT did identify that particular consideration had been given to the evidence dealing with the discrepancies relating to the children, and also the evidence as why the claimant had made cash withdrawals near to his sister's home in Wood Green in 2015/16 rather than near the home he purportedly shared at that time with his wife – the explanations being accepted. In short, looking at all of the evidence in the round the FtT concluded that the appellant had made out his case that his relationship with his wife is genuine and is subsisting.

22. The reliance by the SSHD on events which took place during the course of the hearing is misplaced. It is not asserted that there was unfairness towards the SSHD at the hearing before the FtT, nor is it claimed that the purported events which took place at the hearing led to any procedural unfairness – Ms Jones specifically accepting that this was so at the hearing. In any event, the SSHD has chosen not produce witness evidence in relation to such claimed events and the two documents that have been belatedly produced are of little assistance for the reasons highlighted above. The SSHD has not sought to put forward evidence of specific discrepancies in the couple's oral evidence which it is said the FtT did not address, indeed not only is there no evidence to support such a contention but the SSHD has not even sought to identify such discrepancies by way of submissions. As already indicated, the record of proceedings authored by the presenting officer before the FtT (if that it what it is) has numerous deficiencies. It is not known whether it was made contemporaneously and, even if it is to be assumed that it was, it does not obviously record the entirety of the evidence given and does not refer to the purported interjection of the FtT judge identified in the minute dated a day after the hearing.

23. In the particular circumstances of this case, I conclude that the SSHD has not established that the reasoning in the FtT decision is so inadequate so as to amount to an error of law. The SSHD knows why he lost the appeal, that is because the FtT believed the core of the evidence given by the claimant and his wife as to the nature of their relationship. The FtT's conclusion was not irrational given the evidence available to it.

24. I therefore dismiss the SSHD's appeal. The decision of the FtT stands.

Notice of Decision

The Secretary of State's appeal is dismissed.

Signed:

Mark O'Connor
Upper Tribunal Judge O'Connor Date: 26 April 2019