Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01703/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 04 December 2014	**On 11 December 2014**

Before

The President, The Hon. Mr Justice McCloskey and
Deputy Upper Tribunal Judge Holmes

Between

HAWA BIBI

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:

Appellant: Ms F McCrae (of Counsel), instructed by Halliday Reeves Solicitors
Respondent: Mr J Kingham, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant is a citizen of Afghanistan, now aged 19 years. Her appeal originates in a decision of the Entry Clearance Officer, Islamabad (the "*ECO*") dated 20 December 2013, whereby her

© CROWN COPYRIGHT 2014

application for entry clearance to the United Kingdom for the purpose of family reunion was refused. Her ensuing appeal to the First-tier Tribunal (the "*FtT*") was dismissed. She appeals with permission to this Tribunal.

Decision of the ECO

2. The decision of the ECO states, firstly, that the Appellant's application for "*family reunion entry clearance*" was considered under paragraph 352A of the Immigration Rules. This provision of the Rules specifies the requirements to be satisfied by a person seeking leave to enter or remain in the United Kingdom as the spouse or civil partner of a refugee. They are as follows:

> "*(i) the applicant is married to or the civil partner of a person who is currently a refugee granted status as such under the Immigration Rules in the United Kingdom; and*
>
> *(ii) the marriage or civil partnership did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; and*
>
> *(iii) the applicant would not be excluded from protection by virtue of Article 1F of the* [Refugee Convention] *if he were to seek asylum in his own right; and*
>
> *(iv) each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage is subsisting; and*
>
> *(v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.*"

The ECO's refusal decision was based on an assessment that the Appellant is not married to her sponsor, a person with refugee status in the United Kingdom. The decision was articulated in these terms:

> "*You claim that you are married to your sponsor, however the circumstances around your marriage are not clear. You state that you were in a relationship before your sponsor left Afghanistan and were engaged on 02 June 2006. To demonstrate this you have provided an engagement certificate. I note that the date on this certificate is 01 February 2011, suggesting that you obtained this document some years after your engagement. You have not provided any other evidence, such as original documents, to demonstrate that you were married or in a relationship at this*

> *time as claimed. Furthermore, ……….. you claim to have been married in Pakistan on 01 February 2011, around two years after your sponsor left Afghanistan. You have not provided any evidence, such as a marriage certificate or photos* [sic]*, to demonstrate you married as claimed.*"

This assessment gave rise to the conclusion that the Appellant had failed to provide satisfactory evidence that she was married to her sponsor or that they had been in a relationship prior to his departure from Afghanistan. The requirements of paragraph 352A(i) and (ii) were, therefore, not satisfied.

Decision of the FtT

3. The First-tier Tribunal (the "*FtT*") dismissed the Appellant's appeal. As recorded in the determination, the evidence which it considered included the testimony of the sponsor, who claimed that the partners had become engaged in 2006 when they were aged 16 and 13 years respectively. He asserted that they had undergone a marriage ceremony in 2011. The determination further records:

> "*He …………. claimed that, in his asylum proceedings, he had not mentioned that he was married or engaged because he was only engaged ….. he also suggested that toothache and a headache had an affect* [sic] *on his interview. Since 2011, the Appellant had been living with his family in accordance with tradition. He had visited her again in 2013, during which time she conceived their child and the baby was born recently. He said that he was in contact with his wife on a daily basis through Skype and by telephone.*"

The sponsor further claimed that the engagement ceremony in 2006 took the form of a "Nikah". He acknowledged that there were no photographs of the asserted 2011 marriage ceremony and that he did not know the name of the Mullah who conducted same. He asserted that he remained in Pakistan for two months following this ceremony. In evidence, he produced a document professing to be the original "Nikah" certificate. He accepted that he had left Afghanistan in 2009.

4. The FtT decided as follows:

(i) The parties were married in 2011, as claimed.

(ii) There is a child of the marriage.

(iii) The marriage is subsisting.

(iv) However, paragraph 352A(ii) was not satisfied, since their marriage postdated the departure of the sponsor from Afghanistan for the purpose of seeking asylum.

Notably, the Appellant's representative was asked by the FtT to address the clear evidence of both parties to the marriage that between 2006 and 2011 they considered themselves engaged, not married. In response, he submitted that both had wrongly interpreted the effect of the 2006 ceremony. The Judge rejected this submission. His key finding was expressed in the following terms:

> "*…. I am not satisfied that the Appellant has shown, on the balance of probabilities, that the 2006 Nikah was sufficient for the parties to have contracted a valid marriage.*"

The appeal was dismissed accordingly.

APPEAL TO THIS TRIBUNAL

5. The grant of permission to the Upper Tribunal is focused on [11] of the determination of the FtT, which is in the following terms:

> "[The Appellant's representative] *made no submissions to me under Article 8. It was not suggested in the Appellant's skeleton argument that she could meet the requirements of Appendix FM of the Rules and no compelling circumstances were identified to warrant consideration of Article 8 on conventional grounds. In all of the circumstances, I could not allow the appeal on human rights grounds.*"

Permission to appeal was granted in the following terms:

> "*The grounds ….. maintain that the Judge erred in law by failing to consider the Appellant's appeal on human rights grounds outside of the Rules …*
>
> *Given the Judge's finding that the couple had a subsisting marriage ….. and taking into account that Article 8 was raised in the Appellant's skeleton argument, it is arguable that the Judge's failure to give any consideration to Article 8 amounted to a material error of law.*"

Permission to appeal was granted accordingly.

6. On behalf of the Appellant, Ms McCrae acknowledged that the key passage in the decision of the FtT is that reproduced in [5]

above. Ms McCrae had no instructions as to whether, at the hearing, there had been, in substance, a concession by the Appellant's former representative relating to the Article 8 ground. Her submission mirrored the terms of the grounds of appeal. She did not develop any argument as regards materiality.

7. Issue was joined between the parties in the Rule 24 Notice on behalf of the ECO, in the following terms:

> "*...... It is accepted that Article 8 was .... properly raised in the Appellant's skeleton argument and as such it fell for the Judge to determine all matters relied on in the grounds. In this regard the Respondent will submit that had the learned Judge considered the Article 8 appeal, he would have been bound to have found that the decision on Article 8 was not disproportionate in all the circumstances of the case.*"

This suggested that the issue to be determined by this Tribunal is one of narrow dimensions, which we formulate thus: was the acknowledged error of law on the part of the FtT, consisting of its failure to address and determine the Article 8 ECHR ground of appeal comprehensively, material? However, the argument advanced by Mr Kingham was (in terms) that, properly construed, [11] of the determination indicated that the Article 8 ground of appeal had indeed been considered by the FtT and was rejected.

Conclusion

8. We elicited from both representatives confirmation that there is no dispute about the statement at the beginning of [11] of the determination. Had this been contentious, it should properly have emerged in the grounds of appeal, where it is not mentioned. From this starting point, our first conclusion is that what the Judge records bears all the hallmarks of a realistic and unavoidable concession, namely that the Article 8 ground, while alive on paper (per paragraphs 18 – 20 of the grounds of appeal), had no genuine prospect of succeeding. As we observed, at every tier of the legal system, issues frequently crystallise when cases are listed for hearing. In the cold light of the courtroom, extravagant, hopeful and speculative pleadings frequently dilute or disappear altogether. In practice, in the field of immigration and asylum, this is rarely accompanied by any formal late amendment of the grounds of appeal. We are satisfied that this is what occurred in the present case. Accordingly, based on this analysis, it was not incumbent on the Judge to determine the Article 8 ground, as it was no longer being actively advanced.

9. Further, and in any event, we are satisfied that the Judge did indeed address his mind to the Article 8 ground. This assessment

follows from the clear statement in [11] of the determination that (a) there was no suggestion that the Appellant could satisfy the relevant requirements of the Immigration Rules and (b) further, "*…. no compelling circumstances were identified to warrant consideration of Article 8 on conventional grounds*". In argument, Ms McCrae acknowledged, frankly, that this discrete passage presented a difficult hurdle for the Appellant to overcome. Given our analysis, the grant of permission to appeal implodes.

10. Finally, in the further alternative, the appeal cannot succeed on the freestanding ground that if neither of the conclusions rehearsed above is tenable, the Appellant's Article 8 case could not, viewed in the most favourable light and at its absolute zenith, have succeeded in any event. Given the applicable principles, which are now well settled, it was on any showing doomed to failure, come what may. Stated succinctly, Article 8 ECHR does not entitle this couple to settle as man and wife in the United Kingdom.

Decision

11. It follows that we dismiss the appeal and affirm the decision of the FtT.

Bernard McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 04 December 2014