Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01026/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8 October 2015	**On 26 November 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR THAMER SAIHOOD
(No anonymity order made)

Appellant

and

ENTRY CLEARANCE OFFICER – AMMAN

Respondent

Representation:
For the Appellant: Mr B Singh of Counsel, instructed by MTG Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1) This is an appeal against a decision by Judge of the First-tier Tribunal Charlton-Brown dismissing an appeal against the refusal of entry clearance. The appellant was refused entry clearance on 11 October 2013 to come to the UK as the spouse of Ms El-Wasety the sponsor in this appeal.

2) The appellant is a national of Iraq and, according to the appellant, he first met the sponsor in 1993 in Iraq but was unable to pursue a relationship with her. The

appellant married someone else but is now divorced. The sponsor came to the UK around 1997. The couple renewed their contact and were married in Sweden on 6 October 2010.

3) One of the grounds for refusing entry clearance was that in his application the appellant had failed to disclose that he had children from his previous marriage. The judge found that the appellant did not disclose in his application giving rise to the decision under appeal that he had 3 children, although he had disclosed this in a previous application. The appellant sought to explain that he had already given this information to the Entry Clearance Officer. The judge was not satisfied by this explanation.

4) The Entry Clearance Officer raised concerns about the validity of the marriage, seemingly because of the absence of satisfactory evidence regarding the appellant's divorce. At the hearing before the First-tier Tribunal the respondent no longer contested the validity of the marriage but maintained that the couple had not established that they were in a genuine relationship and intended to live with each other permanently as husband and wife.

5) The Judge of the First-tier Tribunal considered this issue. The judge noted that the couple were married on 6 October 2010 and that the sponsor last saw the appellant in November 2011. She explained that she had not been able to visit the appellant more recently because her health was poor and she was concerned about the security situation in Iraq. An issue was raised as to a lack of evidence of contact between June 2011 and August 2013. The sponsor claimed that she had been in contact with the appellant on a regular basis by phone calls and messages. The judge was referred to documentary evidence of these phone calls and messages but much of this evidence was in Arabic and was not translated. There were also phone cards but these did not show contact between the appellants.

6) The judge accepted that the marriage was legally valid but considered that the appellant had not shown that he was in a genuine and subsisting relationship with the sponsor. There were photographs showing the couple together but it was unclear when these were taken or where. The appellant indicated in his earlier application form that this was an arranged marriage and that he and sponsor were related outside marriage. Having regard to this the judge did not consider credible claims made by the appellant and the sponsor in their witness statements that there was parental disapproval of the marriage.

7) The judge further observed that there was no medical evidence indicating that the sponsor could not travel to meet the appellant. It was not necessary for them to meet in Iraq but they could meet in a neighbouring country, such as Jordan. The sponsor's evidence was that she still has close family members in Iraq, including her father.

8) At the time of the refusal decision the sponsor had failed to give a written undertaking to be responsible for the appellant's maintenance and accommodation. This was provided for the purpose of the appeal but, as the judge observed at

paragraph 18, this was after the date of the decision appealed against. This document was not in existence at the date of the refusal decision and no satisfactory explanation was given of why it had not been produced earlier.

9) The judge also considered the financial requirements of the Immigration Rules. The sponsor is in receipt of disability benefits. The bank statements she produced were, however, post-decision. The appellant claimed to be supported by his brother but to have approximately £9000 in a savings account. In his earlier application, however, he had stated that he had no savings. He further stated in his later application that he had always been in full time employment and had skills as a builder or gym teacher. The judge was not satisfied that the statements produced in relation to the appellant's savings were reliable.

10) A further issue before the judge of the First-tier Tribunal was that the appellant had not produced a certificate satisfying the English language requirements of the Immigration Rules. Although he had a certificate it was not by an approved English language test provider. At the hearing it was argued that the only test centre available to the appellant was in Erbil and it was too dangerous for him to travel there. It was submitted on behalf of the Entry Clearance Officer, however, that there were other British consulates in Iraq, in addition to Erbil, and that there was also the possibility of taking the test in Jordan. The judge found that it was not unreasonable to expect the appellant to have taken the appropriate test had he seriously wished to do so.

11) Based on these findings the Judge of the First-tier Tribunal was not satisfied that the appellant met the requirements of the Immigration Rules.

12) At the end of her determination, at paragraph 35, the Judge of the First-tier Tribunal moved on to the issue of Article 8. She observed that the Immigration Rules were generally to be regarded as a complete code and it was normally only in exceptional circumstances that human rights issues would be considered outside the Rules. It was submitted on behalf of the appellant at the hearing before the First-tier Tribunal, which took place in January 2015, that the decision of the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 985 went to the contrary. The judge found, however, that on the available evidence the appellant had not established the relevance of Article 8 issues to his claim. The judge did not consider that the couple had established what would normally be regarded as family life under Article 8. She did not therefore consider whether there would be any interference with family, or indeed private, life as a result of the refusal decision.

13) Permission to appeal was sought on a number of grounds of which only one was considered arguable. This was that the judge arguably erred in concluding that no family life existed between the sponsor and the appellant. On this basis only permission to appeal was granted.

14) In a rule 24 notice dated 24 June 2015 it was argued on behalf of the respondent that the circumstances surrounding the marriage were recited at some length in the

decision of the First-tier Tribunal and the conclusion reached by the judge with regard to the marriage was more than adequately reasoned.

Submissions

15) At the hearing before me Mr Singh submitted that the underlying issue was whether Article 8 was engaged. He pointed out that this was a valid marriage and he relied on the 1985 decision of the European Court of Human Rights in Abdulaziz. Family life existed on the basis of marriage even if the couple had not yet begun to cohabit. The judge wrongly described the Immigration Rules as a complete code and wrongly said that exceptional circumstances were required to look at Article 8 outside the Rules. This was contrary to MM (Lebanon), at paragraph 128. The judge should have found Article 8 was engaged and gone on to look at the second stage balancing exercise.

16) It was pointed out that after MM (Lebanon) the Court of Appeal had gone on to make a further decision in SS (Congo) [2015] EWCA Civ 387. Mr Singh responded that it was MM (Lebanon) that had been relied upon at the hearing before the Tribunal. The couple were lawfully married and Article 8 was engaged. They had met on three occasions. They had been together for a month in Sweden, then a further three months later in 2010, and then they had met again in Jordan in 2011.

17) Mr Singh acknowledged that even though the marriage was valid there was still an issue as to whether it was genuine. In this regard he referred to the application for permission to appeal at paragraph 13 and onwards. He relied on the case of Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 41 as to the test for a subsisting marriage. This did not require the production of particular evidence of mutual devotion before entry clearance could be granted. The judge had voluminous evidence before her including thousands of messages between four telephones. Not all of these had been translated but she could see the quantity of messages. In terms of Goudey there was no requirement that the parties wrote or texted to each other. The judge had dismissed the evidence without proper scrutiny.

18) For the respondent Mr Melvin relied on the rule 24 notice. The judge had found that the marriage was not genuine and subsisting. The position in relation to Article 8 was set out in SS (Congo). If the appellant could not succeed under the Immigration Rules then compelling circumstances had to be shown to succeed under Article 8.

19) In response Mr Singh referred again to the 1985 case of Abdulaziz. He referred also to the cases of Nagre and Gulshan and invited me to have regard to other decisions of the Upper Tribunal, although unspecified. He pointed out that this was not an appeal against deportation.

20) Mr Singh was asked, assuming the appeal was considered under Article 8, on what basis it would succeed. Again Mr Singh referred to the case law. He further submitted that the sponsor required care from the appellant for medical reasons and pointed out that she is in receipt of Disability Living Allowance.

21) Reference was made to section 117B of the 2002 Act as amended. Mr Singh responded that a full assessment should have been carried out in relation to the issue of whether it was proportionate to allow the appellant to join the sponsor in the UK. It was a disproportionate interference with their Article 8 rights for the couple to be separated. They had known each other for 20 years. Mr Singh further submitted that the sponsor's health was a compelling circumstance and this was demonstrated by a receipt of Disability Living Allowance at a higher rate. The couple could not continue their relationship outside the UK.

Discussion

22) It is clear that the judge misdirected herself in relation to Article 8 at paragraph 35 of the decision. She said that the Immigration Rules were to be regarded as a complete code but this proposition relates to deportation appeals, in accordance with MF (Nigeria) [2013] EWCA Civ 1192. It was not maintained in SS (Congo) that the rules are a complete code in relation to matters other than deportation. Similarly there is no test of exceptionality for consideration of Article 8 outside the Rules. In this regard Mr Singh correctly referred to MM (Lebanon) and, although this case was drawn to the attention of the judge, she does not appear to have followed it on this issue. The judge made her decision two months before judgment was handed down in SS (Congo) [2015] EWCA Civ 387. This decision makes it clear that there is no test of exceptionality to be satisfied before considering Article 8 but if a claim is to succeed under Article 8 outside the Rules then compelling circumstances have to be established.

23) Mr Singh argued that the judge was wrong to say that the appellant and the sponsor did not have family life together and therefore Article 8 was not engaged. Mr Singh's argument was that family life was established on the basis of marriage. It was argued for the respondent, however, that because the judge was not satisfied that the marriage was genuine and subsisting, it did not provide an adequate foundation for a finding that family life existed.

24) At the hearing before me Mr Singh sought to re-open the findings made by the judge in relation to whether the marriage was genuine and subsisting and argued that the judge had not properly considered the evidence. This argument goes beyond the argument on which permission to appeal was granted, although I accept that if there was evidence which the judge had disregarded or misconstrued then that would be capable in itself of amounting to an error of law.

25) The respondent's position appears to be that even though the judge misdirected herself about various matters at paragraph 35 of her decision, this would not be material if (1) the judge's finding in relation to the marriage not having been shown to be genuine and subsisting remained in place; and (2) there were no compelling circumstances outside the Rules on the basis of which the appellant could succeed under Article 8.

26) In relation to whether the marriage was genuine and subsisting, Mr Singh sought to rely on the case of Goudey. He submitted that in terms of this case there was no

particular evidence which must be produced to establish mutual devotion. He further submitted that telephone cards were capable of corroborating a contention by the parties that they communicated by telephone, even if such data could not confirm the particular numbers the sponsor was calling in the country in question. It was not required that the parties had also written to or texted each other.

27) These points are not in dispute. In relation to the question of whether a marriage is genuine or subsisting, however, each case will depend upon its own particular facts. Much will depend on the credibility and reliability of the evidence that is presented. If the parties to a marriage present evidence of their relationship which appears on the face of it to be credible and reliable and, as part of that evidence, produce telephone cards to show the extent of their communication, it is clear from Goudey that these telephone cards may be taken into account as supporting the evidence of the couple concerned. If on the other hand the parties produce evidence which contains a number of discrepancies affecting the credibility and reliability of the couple's stated intentions, then no quantity of telephone cards will necessarily satisfy the judge that notwithstanding the other discrepancies in the evidence the marriage should be accepted as genuine and subsisting. Essentially the argument that Mr Singh put to me was that whatever discrepancies the judge found in the evidence, she should have found that the marriage was genuine and subsisting because of the voluminous evidence of telephone contact, notwithstanding the lack of detail in that evidence about the numbers dialled and, indeed, the lack of translations of much of the evidence. Such an argument is not supported by any proposition drawn from Goudey, which refers to reliance on telephone cards "where there are no countervailing factors generating suspicion as to the intentions of the parties". It is for the judge to assess the evidence as a whole and to give reasons for accepting or rejecting the evidence. In doing so the judge is not required to look at every item of evidence and, in particular, is not required to have regard to documentary evidence which has not been translated.

28) At the hearing before the Upper Tribunal the appellant's bundle in the Tribunal's appeal file was incomplete. Mr Singh helpfully provided me with his own bundle so that I had a complete copy of the evidence in front of me. The appellant's bundle runs to some 403 pages, of which the last 43 pages are described as "evidence of correspondence". On looking at this evidence, I admit to sharing some of the difficulties of the Judge of the First-tier Tribunal. Much of the text, where it is legible, is in Arabic and has not been translated. I can see, for example, on page 379, that on 22 and 23 October 2013 the appellant and the sponsor appear to have had a number of telephone conversations. The longest of these conversations seems to have lasted over 44 minutes but on the record of this call, although the name of the sponsor is given, the name of the appellant is not. The name of the appellant is given on the record of earlier calls, as well as the name of the sponsor, and it is not clear why both names do not appear for the longest call. Indeed, it is not at all clear how this record has been generated and how it came to be presented as evidence. The judge's comments on this evidence, at paragraph 20 of the decision, seem to be an accurate reflection on the quality of the evidence. The judge's assessment was that this evidence did not assist her in making a finding that the marriage was genuine and

subsisting, having regard to the discrepancies she had already identified in other evidence. I consider that this was a finding which the judge was entitled to make. I am not satisfied there is a basis for finding that the judge did not give proper scrutiny to the evidence presented to her.

29) The same bundle of evidence contains a number of photographs. The judge commented on these at paragraph 22 of the decision. She pointed out that the appellant and the sponsor were well known to each other and, according to the appellant's earlier application form, they were related prior to marriage. The judge accepted that there was photographic evidence showing the couple together but she commented that it was unclear as to when or where these photographs were taken. The judge was not satisfied that the relationship between the appellant and the sponsor was anything more than a relationship between cousins.

30) The position is that notwithstanding all of the documentary evidence which was presented and the oral evidence of the sponsor, the appellant was unable to satisfy the judge that the marriage was genuine and subsisting. Once the judge had made this finding, based upon the evidence and for the reasons she gave, it would be extremely difficult for the appellant to succeed outside the Rules under Article 8 on the basis of his supposed private or family life with the sponsor. Regardless of the misdirections made by the judge in paragraph 35 of the decision, the appellant has failed to identify any disproportionate interference with private or family life which would lead to the appeal being allowed.

31) On this issue Mr Singh argued that the sponsor's health was a compelling circumstance. The appellant, however, did not seek to come to the UK in order to care for the appellant but in order to live permanently with her as her husband. If, as the judge found, the relationship between the couple was not genuine and subsisting, then the sponsor's disability needs would not amount to compelling circumstances justifying the appellant succeeding under Article 8.

32) The position is that the judge found that the appellant would not succeed under the Immigration Rules and, in particular, that the appellant had not shown that the relationship between him and the sponsor was genuine and subsisting. Having made this finding, the judge was entitled to find that Article 8 was not engaged, albeit that her self directions in relation to Article 8 contained a number of errors. The essential point, however, is that without a finding in favour of the appellant on the issue of whether the marriage was genuine and subsisting, then the Article 8 claim would not succeed outside the Rules.

33) Despite Mr Singh's not inconsiderable efforts to show that the Judge of the First-tier Tribunal did not properly scrutinise the evidence before her in relation to the marriage, for the reasons set out above I am not satisfied by Mr Singh's submissions on this point. The judge made a number of findings in respect of the relationship between the couple and these are supported by adequate reasons. It was for the Judge of the First-tier Tribunal to assess the quality of the relationship between the

couple and the appellant has not been able to show that the judge erred in law in making her findings on this matter.

Conclusions

34) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

35) I do not set aside the decision.

Anonymity

36) The First-tier Tribunal did not make an anonymity order. I have not been asked to make such an order and I see no reason of substance for doing so.

Signed Date

Upper Tribunal Judge Deans