IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/12429/2014
OA/12413/2014
OA/12418/2014
OA/12420/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th September 2015	**On 30th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

SM (FIRST APPELLANT)
A (SECOND APPELLANT)
SA (THIRD APPELLANT)
SO (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – ABU DHABI

Respondent

Representation:
For the Appellants: Mr A Moran, Representative
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are citizens of Syria. Their case is as follows: The first Appellant who I shall refer to as the Appellant was born on 20th November 1983. The second, third and fourth Appellants are her children born 1st January 2011, 1st January 2005 and 1st January 2004 respectively. Their father is ZA a citizen of Syria who has been recognised in the United Kingdom as a refugee ("the Sponsor"). The Sponsor and Appellant are married to each other.

2. The Appellants appealed against decisions of the Respondent dated 16th September 2014 to refuse them entry clearance to the United Kingdom as the spouse of a refugee in the case of the Appellant and the children of a refugee in the case of the second, third and fourth Appellants pursuant to paragraph 352A of the Immigration Rules. Their appeals were allowed at first instance by Judge of the First-tier Tribunal Davies sitting at Manchester on 24th March 2015. The Respondent appeals with leave against Judge Davies' decision and the matter therefore comes before me to decide whether there is an error of law in Judge Davies' determination such that it falls to be set aside and the matter reheard. If there is no error then his decision will stand. Notwithstanding that, for the sake of convenience I will continue to refer to the parties as they were known at first instance.

The Explanation for Refusal

3. In the application for entry clearance the Appellant and Sponsor stated they had been married since 2002. The Respondent's concerns were raised by the Sponsor's immigration history. He had entered the United Kingdom as a visitor in 2004 and overstayed. He had then purported to marry a Polish national and on that basis had been given a residence card as the husband of an EEA national. The Respondent accepted that the Sponsor had lived with the Polish citizen until November 2011. The EEA national returned to Poland in or about February 2012 but no evidence of the dissolution of that marriage was supplied with the Appellants' application for entry clearance. Thus any further marriage was potentially bigamous. The Appellant and Sponsor's marriage was not registered until 2009 and the children's birth certificates were not registered until some time after their respective dates of birth.

4. The Appellant and Sponsor had kept in contact via modern means of communication and the Appellant had been visited in Syria by the Sponsor as indicated by the stamps in the Sponsor's passport. The Appellant produced photographs of her wedding to the Sponsor and several photographs taken in Egypt where the Sponsor had visited the Appellant and the children. The Appellant had made five previous applications to visit the United Kingdom between 2006 and 2012 which were all unsuccessful. In none of those applications had she mentioned the existence of the Sponsor and had named her husband as another person. The Respondent was not satisfied that the Appellant had demonstrated that she was in a genuine and subsisting marriage with the Sponsor as there was a lack of evidence of intervening devotion.

The Proceedings at First Instance

5. Before the Judge at first instance it was submitted on behalf of the Respondent that there was evidence of dishonesty in the appeal. The Appellant had lied when making a visa application in 2007 when she had said that her fiancé was the Sponsor's brother as opposed to the Sponsor. The Respondent urged upon the Judge that he should find the Appellant was not in a genuine marriage and the Appellant and Sponsor were not telling the truth about their relationship on the basis that they had not told the truth previously.

6. At paragraph 29 of his determination Judge Davies began his findings. He wrote:

> "It is clear in this appeal that both the Sponsor and the principal Appellant have lied in relation to applications they have made to enter the United Kingdom as visitors. That is an unfortunate fact but it does not mean in relation to the present appeal that on the basis of their dishonesty the appeal should be dismissed. I find that although the Sponsor claims to have married a Polish national and on that basis obtained a residence card confirming his right to reside in the United Kingdom that marriage was not a valid marriage. It was a bigamist marriage because the Sponsor who was domiciled in the United Kingdom at the marriage was already married to the principal Appellant and that marriage had not been dissolved. It may well be that the Sponsor had never had a genuine relationship with a Polish national but had claimed to have married a Polish national in order not to be removed from the United Kingdom. If that was his intention he succeeded because he obtained, albeit by questionable means, a residence card."

7. The issue before the Judge was whether he could find as a fact that the Appellant and Sponsor were in a genuine marriage. At paragraph 31 the Judge found that to be the case stating:

> "I am able to find on the balance of probability that the Sponsor and the principal Appellant are in a genuine and subsisting relationship of man and wife and that they intend to live together permanently upon the principal Appellant being granted entry clearance to come to the United Kingdom."

8. The Judge gave his reasons why he came to that finding stating:

> "Evidence of my findings comes from the birth of the Sponsor and the principal Appellant's youngest child which I accept was conceived during a visit the Sponsor made to Syria. Despite the births of the two eldest children not being registered at the time I am prepared to accept that they are genuinely the children of the Sponsor and the principal Appellant. Evidence has also been put before me to indicate that the Sponsor spent some eight and a half months with his wife and children in Egypt and that is further evidence of the genuineness of their relationship. I have read and considered in its entirety the skeleton argument submitted by the principal Appellant's representative which succinctly sets out the basis of the case of the principal and other Appellants. The principal Appellant can satisfy me it is more probable than not that she is in a genuine and subsisting relationship with her Sponsor. I also find it is more

> probable than not that the other Appellants are children of the Sponsor and principal Appellant. Those are the only issues upon which I have to make findings in this appeal because having made those findings it is clear that the Appellants are entitled to entry clearance to the United Kingdom for family reunion with a person who has been granted refugee status.

The Onward Appeal

9. The Respondent appealed this decision arguing that it was not open to Judge Davies to dismiss the marriage of the Sponsor to the EEA citizen as an invalid marriage. Given the credibility issues raised by the Respondent it was not open to the Judge to make a finding that the marriage between the Appellant and the Sponsor was a valid one. Both the Sponsor and the Appellant had lied in relation to applications they had made to enable the Appellant to enter the United Kingdom as a visitor. The Judge's assessment was subjective and failed to objectively consider the intention disclosed by the Appellant's actions. She wanted to come to the United Kingdom and sought to bolster her claim by providing false information. The Appellant had employed deception by submitting false information. The Judge had failed to provide any reason for finding that the two eldest children were the children of the Sponsor and the Appellant.

10. The application for permission to appeal came on the papers before Designated Judge Campbell on 1st June 2015. In granting permission to appeal he wrote that

> "The application is finally balanced but it is arguable that the adverse findings regarding deception by both the Appellant and her Sponsor are so clear that the Judge's favourable conclusion regarding their relationship was insufficiently reasoned."

11. The Appellants' representative responded to the grant of permission in a reply under Rule 24 on 19th June 2015. Under the heading "My Findings" the Judge had noted he had read and considered in its entirety the Appellant's skeleton argument. The inference must be that that he meant he accepted the Appellant's case in full as presented in that skeleton argument. No adverse credibility findings had been made in respect of the four supporting witnesses who gave evidence to the Judge. They had confirmed that as far as they were aware the Appellant and Sponsor were in a genuine and subsisting relationship. The inference must again be that that evidence was accepted in its entirety by Judge Davies.

12. Dealing with the specifics of the Respondent's complaint in the grounds of appeal the reply noted that the date of marriage between the Appellant and Sponsor was stated in their family booklet issued by the Syrian Civil Register Office. The Judge must have relied on that date to make his findings that the marriage to the EEA citizen was potentially bigamous. The Judge's finding that the Sponsor lived with the Appellant for eight and a half months in Egypt was evidenced by the Sponsor's exit and entry stamps in his passport. Those dates were never questioned by the Sponsor in the refusal notice or by the Presenting Officer at the hearing. The

deception in the previous visit visa applications was made known to the Judge when he himself had asked for copies of the Appellant's previous visit visa applications (which have not apparently been supplied by the Respondent in the entry clearance bundle). The Judge having thus made himself aware of this issue went on to consider all the evidence in the round and was entitled to reach the findings he did. The reason for the delay in registration of the births had been dealt with in the skeleton argument to which the Judge referred in his determination. In any event the Appellants had now commissioned a DNA test report to prove that their family relationship was as claimed. In the event that the matter proceeded further the Tribunal would be invited to consider this evidence. The Respondent could not show any error of law in the determination.

The Hearing Before Me

13. At the hearing before me the Presenting Officer argued that there was an absence of reasoning in certain parts of the determination. In the light of the previous deception the Judge's findings that the Sponsor was telling the truth about his relationship with the Appellant would have to be much better reasoned. Although Designated Judge Campbell had referred in the grant of permission to the Respondent's application being finally balanced the Respondent's view was that a finding of error of law should be made in the Respondent's favour.

14. For the Appellant it was argued that there had been a very full discussion before the Judge at first instance on the implications of the previous deception. In particular although not referred to by the Judge in his determination there had been a full discussion of the effect of paragraph 320(11) of the Immigration Rules. Paragraph 320(11) states that where an applicant has previously contrived in a significant way to frustrate the intentions of the Immigration Rules by using deception in an application for entry clearance etc. and there are other aggravating circumstances such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process the entry clearance should normally be refused. Thus paragraph 320(11) is a discretionary ground.

15. In this case it was argued that whilst the first part of paragraph 320(11) might have been said to have been met the second part of the sub-paragraph was not met as there were no aggravating circumstances as referred to in the paragraph. Mr Moran on behalf of the Appellants reiterated that there was in existence DNA evidence to prove relationship an issue which had been taken by the Respondent in the refusal notices. It was pointless not to concede that there had been deception in the past but the Judge had considered the matter very carefully to the extent of hearing the appeal over the course of two days (putting the matter back for further enquiries to be made). It was open to the Judge to find the reason why the Sponsor had been in Egypt for eight and a half months was to be with the Appellant and the Appellant's

appeal could not be dismissed simply on the basis that there had been deception in the past. The Judge had to look at the situation as it was now.

Findings

16. The issue in this case is whether the Judge made an error of law in coming to the conclusion that he had before him a genuine and subsisting marriage between a recognised refugee and his wife a citizen of Syria. The Judge found that there was such a genuine and subsisting marriage and that the four children of the Appellant were also the children of the Sponsor. In those circumstances given the Sponsor's status the appeals fell to be allowed.

17. The principal argument for the Respondent is that there has been deception by both the Appellant and the Sponsor in the past. The problem for the Respondent is that that of itself is insufficient. In order that the Immigration Rules are compliant with Article 8 in cases such as this previous deception is not of itself an automatic bar. Paragraph 320(7A) of the Immigration Rules does provide that entry clearance is to be refused as a mandatory ground where false representations have been made or false information has been submitted but that is in relation to the application under consideration not in relation to a previous application.

18. The Judge found as a fact that false information had not been supplied to him in relation to this application. That meant that the only basis on which the application could be refused was on the discretionary basis under paragraph 320(11). The difficulty that gave rise to was that the aggravating circumstances which bring paragraphs 320(11) into play were not present in this case. The Sponsor was not entitled to be issued with a residence card on the basis of an alleged marriage to an EEA citizen. He on his own case was already married to the Appellant and of course had he made that known to the Home Office he would not have been granted the residence card. He had thus used European law for fraudulent purposes. However his status in the United Kingdom now is not dependent upon the Immigration (European Economic Area) Regulations 2006 but is on the basis that he is a recognised refugee. At no point was it argued before Judge Davies that that status should be enquired into further. In short the only issue before the Judge was whether he could accept what he was now being told by the Appellant and the Sponsor as to their relationship.

19. The Respondent's challenge in this case is thus a reasons based one. It is not necessary for a Judge to set out each and every piece of evidence put before him in arriving at his conclusions. The Judge had evidence to indicate that the Appellant and Sponsor were married and had children together. I do not take into account the DNA evidence which the Appellant says is now to hand since I am only considering the error of law stage. Nevertheless I consider that the Judge's findings in this case are adequately if concisely reasoned. Simply because the Appellant and Sponsor had lied in the past did not mean that they were lying now. At the end of the day the decision on whether the Appellant could show on the balance of probabilities she

was in a genuine and subsisting marriage was a decision for the Judge to take. The Respondent's grounds of appeal are in truth no more than a disagreement with the result.

20. The Sponsor had used deception in the past in order to be able to live in the United Kingdom but such deception by one who is ultimately recognised as a refugee is in many ways no different to the person who unlawfully smuggles themselves into the United Kingdom deliberately evading immigration controls. If that person is ultimately recognised as a refugee their conduct, even if it might come within Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (with potential damage to their present credibility), is still a refugee with the rights that go with that status. I have summarised above the submissions made to me by the Appellants' representative (see paragraphs 14 and 15) and I find that they do meet the objections to the Judge's decision taken by the Respondent.

21. The end result may appear to be somewhat unsatisfactory; that someone can deceive the system and obtain a benefit. However that is not to look at the matter correctly. The Sponsor as a recognised refugee is entitled to bring his wife and children into this country without consideration of his financial means by virtue of his refugee status. The Respondent was evidently prepared to accept that the Sponsor was indeed a citizen of Syria and given the present conditions in that country it is not surprising that the Sponsor should be entitled to refugee status. His abuse of EEA law and the Appellant's attempted deception of the Respondent by failing to mention that she was married to the Sponsor are not in themselves reasons to dismiss the Appellants' appeal.

22. They were a factor to be taken into account in assessing whether the Appellant and Sponsor gave the Judge correct evidence and Judge Davies did that by indicating that he accepted the Appellant's skeleton argument and other matters. I agree with Designated Judge Campbell that the argument that better reasoning should have been given in the determination was a finally balanced one. It would have been preferable for Judge Davies to have given a more detailed explanation of why he found the way he did given the obvious concerns which the Respondent had in this case and the need in those circumstances for the Respondent to understand why a couple who had over a period of years practised deception on the UK authorities should nevertheless win their appeal. However for the reasons I have given I find that Judge Davies just about crossed that threshold and therefore the Respondent cannot show an error of law in the determination such that it should be set aside. I therefore dismiss the Respondent's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to allow the Appellants' appeal against the Respondent's decision to refuse entry clearance.

Respondent's appeal dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed this 29th day of October 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

Judge Davies declined to make a fee award. In my view that was entirely proper given the history of this case and the way that the evidence emerged I do not disturb that finding.

Signed this 29th day of October 2015

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Deputy Upper Tribunal Judge Woodcraft