Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35324/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 June 2016	**On 29 July 2016**

Before

Mr H J E LATTER
(DEPUTY UPPER TRIBUNAL JUDGE)

Between

BEVI SUBROY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Khan, Counsel, instructed by Direct Access
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by appellant against a decision of the First-tier Tribunal issued on 29 October 2015 dismissing her appeal against the respondent's decision made on 27 August 2014 refusing her leave to

remain in the UK following representations made on her behalf dated 4 July 2014.

Background

2. The appellant is a citizen of India born on 15 April 1979. She married her husband, the sponsor, in India on 13 May 2007. It was an arranged marriage in that the sponsor's mother and aunt met the appellant and her parents and took her photographs back to the UK for the sponsor to look at and see if he liked her. He then travelled to India with his mother and met the appellant at her parent's house where she lived with her parents and two brothers. They were engaged and subsequently married.

3. The appellant successfully applied for entry clearance and entered the UK on 3 August 2007 with entry clearance as a spouse valid until 25 July 2009. On 23 July 2009 the appellant applied for indefinite leave to remain but this was refused on 8 July 2010 as the appellant was unable to meet the requirements of para 287(vi) of the Rules, failing to show sufficient knowledge of the English language and of life in the UK. There was no appeal against that decision. On 22 June 2011 she applied for leave to remain outside the Rules on compassionate grounds. That application was refused on 25 August 2011 with no right of appeal. A further application was made on 6 February 2012 for leave to remain as a spouse. That application was refused on 22 August 2012 again with no right of appeal. On 2 April 2014 the appellant was served with a notice that she was liable to detention and removal from the UK and on 4 July 2014 additional grounds and supporting documents were submitted on her behalf asking for the case to be reconsidered under Article 8.

4. The respondent considered the application under the Rules as amended but was not satisfied that the appellant could meet the requirements for leave to remain as a partner. She had failed to submit sufficient documentary evidence to show that she was in a subsisting and genuine marriage with her partner and was therefore unable to meet the provisions of E-LTRP1.6. The decision letter then considered whether she could meet the requirements for leave as a parent, something of a pointless exercise as the appellant had never asserted that she had children. It then went on to consider para EX.1 and, in particular, whether there would be insurmountable obstacles to family life with her partner continuing outside the UK in accordance with para EX.1(b). This provision could not in any event be met in the light of the finding that the appellant did not have a genuine and subsisting relationship with her partner, but the respondent found that there would not be insurmountable obstacles to family life with her partner continuing outside the UK. The appellant was unable to meet the private life requirements set out in para 276ADE(1) and it was the respondent's view that there were no exceptional circumstances requiring consideration of a grant of leave outside the Rules. Accordingly, the application was refused.

5. The appellant appealed against this decision and her appeal was listed for hearing on 5 October 2015. Her representative sought an adjournment as the sponsor could not be present as he had recently started probationary employment. The case was adjourned to 8 August 2015 when the appellant's representative indicated that his position was such that he had to withdraw his representation. The appellant applied for an adjournment but that was refused for the reasons set out in [2] of the judge's decision.

The Hearing before the First-tier Tribunal

6. At the hearing the appellant, the sponsor, the sponsor's mother and one of his sisters gave oral evidence, summarised at [6] – [14] of the decision and the judge referred to further documentary evidence at [15] – [16]. The judge was not satisfied that the marriage was genuine or subsisting. He accepted that the marriage had been arranged and that the sponsor had travelled to India to meet the appellant. They had not spent time alone together until they were married. There was inconsistent evidence from the sponsor and the appellant about how many times the sponsor went to India before they became engaged, the length of his stay, how many marriage ceremonies took place and whether they consummated the marriage in India or the UK. He found that generally the evidence of the sponsor's mother-in-law and his sister was more consistent with the evidence of the appellant than with that of the sponsor. He also noted that the sponsor left the hearing room as soon as his oral evidence was completed to return to his employment and commented that he did not observe any gestures of affection between the couple [17].

7. The judge also commented that it was not plausible that a married couple of eight years would not both know and agree on whether or not they used any contraception, there being discrepancies on this issue in their evidence. He said that apart from all four witnesses agreeing that the sponsor and appellant shared a bedroom, the evidence was inconsistent as to the sleeping arrangements of the other members of the family in the remaining two bedrooms before the sister's marriage in September 2015. He did not accept the explanation that there was in effect a state of "musical bedrooms" as part of their Indian culture to explain the inconsistencies about who slept where. He commented that another possible explanation for the discrepancies was that if the sponsor and appellant were not sharing a bedroom or the sponsor did not reside at the premises, the witnesses each had to scramble to come up with an answer to divide the occupants of the house other than the couple between the two remaining bedrooms [18].

8. Evidence had been produced from the pastor of the church they attended but that had not referred to the sponsor. The evidence of the sponsor residing at the house consisted mainly of n-power invoices and Nationwide bank statements in the joint names of the couple and there was no explanation why the npower account was in their joint names when the house was in fact owned by the sponsor's mother. He noted that aside

from cash or bank deposits and cash withdrawals the joint bank statements did not contain any evidence of wages being deposited or withdrawals in the form of direct debits, charges on debit cards or cheques which would more strongly indicate that the account was used as part of a shared life together.

9. He noted that the sponsor had been a student since 2011, a letter from the University for the Creative Arts (UCA) confirming that he had started a BA (Honours) Fashion Atelier course expected to end in May 2015. There were two letters generated at the request of the sponsor: one from Electoral Registration in 2012 responding to his enquiry to confirm that he was still at the same address and a second "To whom It May Concern" 2015 letter from UCA in respect of his studies.

10. The judge then considered a letter dated 16 June 2011 from the appellant's then representatives, Gill, in support of an application for further leave to remain based on a0rticle 8 which said:

> "The couple are living together in the UK. However, the couple are not on speaking terms. Mr Subroy is staying in the family home and giving no reason for why he is no longer communicating with his wife. Mr Subroy's mother is very upset. She fully supports her daughter-in-law knowing that she has always been a devoted wife and has tried to speak to her son who refused to answer any questions.
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> However, it is submitted that Mrs Subroy loves her husband dearly and believes the relationship is having problems at present but this is something she can sort out if she is allowed to continue to live in the UK."

11. It was submitted before the judge that the breakdown of the marriage was temporary. He noted that the appellant and the two female members of the family denied any estrangement whilst the sponsor agreed that the relationship was strained at the time but that they were still talking. The judge was not satisfied that the letter could be discounted as an error on the part of the representatives. He then said at [19]:

> "…Taking into account all of the circumstances of this case, I find that by 2011 (if not sometime before), the marriage had broken down, the sponsor was not willing to communicate with the appellant (although it may well be the case that both the appellant and the rest of the sponsor's family wanted the couple to reconcile and the marriage to succeed). There are two persons in any marriage and I am not satisfied that the appellant has or had the intention to live together with the appellant as husband and wife. He is in the invidious position where his mother who arranged the marriage and his five female siblings are very fond of the appellant. She is helpful to her mother-in-law and the family as well as a respected member of her church. Due to the material discrepancies in the evidence, I cannot accept as credible the assertions of each of the witnesses that the marriage is genuine and subsisting. I am not satisfied that the breakdown of the marriage documented by the appellant's representatives in 2011 was temporary or

that there was such a lasting (or any) reconciliation and that at the date of the hearing there was a genuine and subsisting marriage."

12. The judge therefore found that the appellant did not meet the requirements of Appendix FM including EX.1(b) as she did not have a genuine and subsisting relationship or marriage with her British partner or of para 276ADE(1). He was not satisfied that the appellant enjoyed a family life within article 8. Her close relationship with her adult sisters in-law and mother-in-law did not indicate any elements of dependency more than normal emotional ties and that any financial dependency was only due to the appellant's precarious immigration status. However, he found that there was private life and that there would be a significant interference with it if the appellant were to be removed to India. He noted that she had remained in the UK for more than six years after her visa had expired and three further failed applications. Whilst expressing considerable sympathy for her the judge was not satisfied that the facts supported a conclusion that the decision was disproportionate either in terms of private or family life.

The Grounds and Submissions.

13. In the grounds of appeal it is argued that the judge should have granted an adjournment as the appellant needed more than a few days to recover from being left unrepresented. With regard to the letter from Gill, he had failed to take into consideration the time gap since 16 June 2011. In the letter it was submitted that the breakdown was temporary and the judge should have given the benefit of the doubt on this issue. It was further submitted that the judge had completely overlooked that the appellant had been living in the same house, sharing a bedroom with her husband since her arrival. This was confirmed by all the witnesses apart from one who perhaps was confused by the issue in any event. The relevant issue was whether she and the sponsor shared the same bedroom not how the other bedrooms were being shared.

14. There had been questions about the use of contraception and the judge had failed to appreciate that when she had been asked that question, she had been very embarrassed and did not specifically respond. It was also illogical and subjective to assume that because they had not had children, the marriage was not subsisting. Insofar as there were inconsistencies about the date of the engagement, she felt there must have been a misinterpretation as it was inconceivable that she would have said that their engagement took place in September 2006. She felt that the determination indicated indifference on the part of the judge. The fact that the sponsor did not consider her presence or look at her on leaving overlooked the point that he was in a rush as he had recently been given employment with a firm of international repute. The fact that he attended the hearing showed that he cared for her as her husband.

15. The grounds further argue that the appellant has established family and private life in the UK and whilst she appreciated the need for immigration

control, she argues that the judge did not deal with the issues with due care and consideration. In considering proportionality the judge had failed to consider how she would be treated as a returning married lady. She would be shunned by a very conservative society and face total humiliation.

16. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal for the following reasons:

> "The appellant is unrepresented. It is arguable that the First-tier Tribunal Judge took into account matters that were not relevant – in particular the perceived lack of affection without putting such a matter to the appellant for explanation, the alleged discrepancy as to the date of the engagement and the intimate questioning that appears to have been conducted as to the couple's sexual intimacy and use of contraception. It is difficult to understand why some evidence was given more weight than others given the broad consistency of some of the evidence.
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> The appellant sought permission to appeal because of the lack of an adjournment and the short period of time that she was given from being notified that her legal representative was not able to represent her. This is not arguable but for the reasons given above I grant permission in any event."

17. Mr Khan referred me to the judgment of the Court of Appeal in Agho v Secretary of State [2015] EWCA Civ 1198. He submitted that the marriage had subsisted for almost eight years. It might well be that at points there were difficulties in the relationship but that did not mean that the marriage was not subsisting. The evidence from all the witnesses was that the parties were living under the same roof and sharing a bedroom. A number of sensitive matters had been raised at the hearing about whether or not the parties used contraception but such issues had to be set in the context of the evidence as a whole. Whilst such not conceding the appeal, Mr Walker accepted that there might be concerns about whether the judge had properly taken into account the length of the marriage and whether all relevant issues had been properly taken into account.

Assessment of whether there is an Error of Law

18. The substance of the grounds on which permission to appeal was granted are that the First-tier Tribunal reached a decision not properly open to it on the evidence, failed to take into account relevant matters such as the length of the marriage and the cumulative effect of the evidence of the witnesses or failed to give adequate reasons for the decision. The reasons the judge gave for finding that the appellant had failed to show that there was a genuine and subsisting relationship are essentially based on the discrepancies between the evidence of the appellant and the sponsor and the failure to deal adequately with the fact that the appellant's representative in 2011 had written to the respondent indicating that the parties were no longer on speaking terms.

19. Dealing firstly with the discrepancies in the evidence, the appellant said that they became engaged on 30 September 2006 whereas the sponsor said it was in December 2006, the appellant that the marriage had been consummated in India, whereas the sponsor said in the UK. According to the appellant, contraception had not been discussed and they did not use any during their entire married life whereas the sponsor said that they had discussed the pill and condoms, which he used. The appellant when asked about the letter of June 2011 said that the breakdown in communication referred to did not happen and she did not know why her representative wrote this. The sponsor said that there had been no breakdown in the marriage; the relationship had been strained but they had still been talking.

20. There clearly were discrepancies but the issue is the extent to which they undermine the evidence of the appellant and the sponsor about whether the relationship is subsisting when assessed in the context of the evidence as a whole. The appellant gave evidence that the sponsor had never asked her for a divorce and that they lived together in the UK in the same house and in the same bedroom. In the sponsor's evidence he said that it would be devastating for him if the appellant was returned to India and asked how he felt about the appellant, the sponsor replied that she was amazing and looked after them all [11]. In the appellant's witness statement she said that due to the sponsor's employment status and her immigration status, they had to put back the idea of having children and like any young couple, they had their ups and downs but the downs had never been strong enough to lead to a separation.

21. The letter of 16 June 2011 from Gill said that the couple were not on speaking terms but this was still in the context of the fact that they were said to be living together in the UK and that the appellant loved the sponsor dearly. She believed the relationship was having problems but that was something she could sort out if allowed to remain in the UK. The judge did not accept that this letter was written due to a misunderstanding by the representatives of the situation at the time and at the end of [19] he said that he was not satisfied that the breakdown of the marriage documented by the appellant's representatives in 2011 was temporary or that there was as such a lasting or any reconciliation. However, the letter did not go any further than saying that the couple were not on speaking terms, the sponsor was staying in the family home and giving no reasons why he was no longer communicating with his wife and that she believed that this could be sorted out and that their temporary problems would be resolved.

22. The factors identified by the judge and leading to the conclusion that the marriage was no longer genuine or subsisting were potentially at least capable of supporting such a finding but only in the context of an assessment of the evidence as a whole and in particular that of the sponsor who attended the hearing and gave evidence that the marriage

was subsisting and that it would be devastating for him if the appellant was returned to India, and also when asked if he would stay in the UK in such circumstances, he replied that it was a hard question but he would have to go to India, then saying that he did not know as he was born in the UK [11].

23. The judge noted that the sponsor left the hearing room as soon as his evidence was completed to return to his employment and that he did not observe any gestures of affection between the couple. This was not referred to again when the judge was setting out his findings but nonetheless it appears, having specifically referred to this, to be a matter to which he attached weight. It is not clear from the decision whether the sponsor had an opportunity of responding to what was the nub of the respondent's case that he was giving false evidence about the state of the relationship. In this context the judge did later comment that the sponsor was in the invidious position where his mother who arranged the marriage and his five female siblings were all very fond of the appellant but it does not appear that this was put squarely to the sponsor in his evidence.

24. In summary, I am not satisfied that the evidence tending to show that the marriage was not in fact subsisting was looked at in the context of the evidence from the witnesses that the appellant and sponsor were still married, legally at least, and there was consistent evidence that they continued to live under the same roof and share a bedroom. Further, the letter of 16 June 2011 has been treated as evidence that the marriage had broken down at that stage whereas it was evidence that the couple were not on speaking terms and having problems at that stage whereas the preponderance of the oral evidence at the hearing over four years later was that the parties were still together. Further, considerable caution must be exercised in drawing adverse inferences from demeanour such as the sponsor’s attitude to the appellant at the hearing and from answers to questions about intimate personal aspects of their relationship such as the use of contraception.

25. In summary, I am not satisfied that all relevant matters were taken into account by the judge in the assessment of the evidence or that he has given adequate reasons for rejecting of the core elements of the oral evidence of the witnesses, in particular that of the sponsor. At the hearing before me both representatives agreed that if there was an error of law, the matter should be remitted to the First-tier Tribunal for a full rehearing. I agree that this is the appropriate course to take.

Decision

26. The First-tier Tribunal erred in law and the decision is set aside. The appeal is remitted to the First-tier Tribunal for a full rehearing. There is no anonymity order made by the First-tier Tribunal.

Signed H J E Latter Date: 28 July 2016

Deputy Upper Tribunal Judge Latter