



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/09537/2015**

Appeal Numbers:

H

U/09538/2015

THE IMMIGRATION ACTS

Heard at Field House

On 31st August 2017

**Decision & Reasons
Promulgated
On 1st September 2017**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**SAMSUN NAHAR RINA
NURJAHAN SADIA IVA
(ANONYMITY DIRECTIONS NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Miah of Counsel

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Ross promulgated on 25 May 2017 in which the Appellants' appeals against the decisions to refuse their applications for entry clearance dated 25 June 2015 were dismissed.
2. The Appellants are nationals of Bangladesh born on 4 January 1975 and 10 December 1997 respectively. They are mother and daughter who applied

for entry clearance to the United Kingdom to join Mr Ali Roufique, (the "Sponsor") their husband/father who is a British Citizen.

3. The Respondent refused the application on 25 June 2015 on the basis that the spousal and parental relationships claimed were not accepted.
4. Judge Ross dismissed the appeals in a decision promulgated on 25 May 2017 on the basis that he did not accept that the First Appellant and the Sponsor were in a genuine and subsisting relationship; that neither Appellant could satisfy the requirements of the Immigration Rules for a grant of entry clearance and there would be no interference with family life which would continue in the same way as it had done since 2004.

The appeal

5. The Appellant appeals on 4 grounds which can be taken together as follows. First, that the First-tier Tribunal did not approach the issue of whether there was a genuine and subsisting relationship between the First Appellant and the Sponsor in accordance with Goudey (subsisting marriage - standard of proof) Sudan [2012] UKUT 00041 (IAC) and Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 00040 (IAC); making a flawed assessment of credibility and using that as determinative of the issue. Secondly, that the First-tier Tribunal failed to give sufficient reasons for the finding that there was no genuine and subsisting relationship despite factual findings that indicated that there was. Secondly, that the First-tier Tribunal applied the wrong standard of proof in basing findings on suspicion and one adverse credibility finding to determine the issue of whether there was a genuine and subsisting relationship.
6. Permission to appeal was granted by Judge Holmes on 6 July 2017 on all grounds and in addition, it was noted that the Judge appeared to have accepted all of the necessary ingredients for the existence of family life between the Second Appellant and the Sponsor but concluded there was none..
7. At the hearing, Mr Miah relied on all grounds of appeal and respectfully relied upon the reasons of Judge Holmes granting permission to appeal; emphasising that in light of the factual findings which indicated a genuine and subsisting relationship and family life, there were insufficient reasons given to support the findings to the contrary in dismissing the appeal.
8. On behalf of the Respondent, Mr Tarlow submitted that the issue of whether there is a genuine and subsisting relationship was an exercise of fact finding for the First-tier Tribunal and the findings made were open to Judge Ross, specifically that the accepted evidence of visits to Bangladesh and financial maintenance were for the benefit of the Sponsor's daughter and not indicative of a genuine and subsisting relationship. In paragraph 14 of the decision, sufficient separate consideration was given to right to respect for family life of each Appellant and sustainable reasons were given for the dismissal of the appeals on human rights grounds.

Findings and reasons

9. In relation to the relationship between the First Appellant and the Sponsor, Judge Ross accepted (in paragraphs 9 to 11 of the decision) that the couple married in 1996 and were living together until 2004 when the First Appellant was unable to return to the United Kingdom. It was further accepted that the couple had three children together, that the Sponsor had visited Bangladesh in 2007, 2008, 2010, 2011, 2013, 2015 and 2017, there were photographs of the family together in Bangladesh and that there was evidence of financial support from the Sponsor in 2014 and 2015. The sole reason given in paragraph 11 for the finding that there was no genuine and subsisting relationship was an adverse credibility finding against the Sponsor who was found to be unable to credibly explain why no application for entry clearance had been made between 2004 and 2015 for his wife to join him in the United Kingdom. The accepted evidence was found to be consistent with the Sponsor visiting and supporting his children in Bangladesh rather than his wife and that the application was made in 2015 only to provide an opportunity for the Second Appellant to obtain a British passport before she became an adult.
10. The issue of whether a marriage is genuine and subsisting is a fact sensitive one which requires an assessment of not only whether there is a valid marriage which formally continues but also whether there is a real relationship in which there is a genuine intention to live together as man and wife (see in particular Goudey). In GA ("Subsisting" marriage) Ghana [2006] UKAIT 00046, the Upper Tribunal held that where there is a legally recognised marriage and the parties who are living apart both want to be together and live as husband and wife, the Tribunal could not see that more would be required to demonstrate that the marriage is subsisting.
11. The First-tier Tribunal did not refer to any of the case law on genuine and subsisting relationship, nor has it approached determination of the issue in the way set out in those cases. It is for the First Appellant to show, on the balance of probabilities, that she is in a genuine and subsisting relationship with the Sponsor and given the accepted evidence in support of that (of the marriage, children, past cohabitation, visits and financial support), it was irrational for Judge Ross to conclude, on the correct standard of proof, that the marriage was not genuine and subsisting due to what essentially amounted to suspicion of why an application for entry clearance was not made sooner. This is particularly so when the Sponsor's evidence did include an explanation as to the late timing of the entry clearance application because he wanted the children to be educated in Bangladesh, which is not referred to at all in the decision of Judge Ross. The First-tier Tribunal materially erred in law in the assessment of whether the First Appellant was in a genuine and subsisting marriage with the

Sponsor and failed to give adequate reasons for the finding that there was no such relationship.

12. In paragraph 14 of the decision, separate consideration was given by Judge Ross to the Appellants' right to respect for family life under Article 8 of the European Convention on Human Rights. In respect of the First Appellant, he concluded that as there was no genuine and subsisting marriage, no family life had been established either between her and the Sponsor. That finding is unsafe in light of the material error of law identified above.
13. As to the Second Appellant, in paragraphs 9 to 11 of the decision, Judge Ross accepted that she was the Sponsor's daughter and that the Sponsor had been visiting Bangladesh to see her and had provided financial support to her. However, in paragraph 14 of the decision, he did not find that the Second Appellant had established family life with her father, the Sponsor, for the purposes of Article 8 of the European Convention on Human Rights. This fails to acknowledge that family life for the purposes of Article 8 is presumed between a parent and minor child and in any event is contrary to the accepted evidence and findings as to their contact and parental support. Whether or not visits can be maintained may go to an assessment of proportionality (which Judge Ross did not purport to do) but is not relevant to the existence of family life at all nor as to whether there is any interference with it given the positive duty to promote family life. The First-tier Tribunal materially erred in law in the assessment of the appeals under Article 8 as to whether family life had been established and whether there was an interference with such family life and therefore erred in failing to go on to consider the remaining questions for an Article 8 assessment as set out by the House of Lords in Razgar v Secretary of State for the Home Department [2004] UKHL 27, specifically whether the refusal was a disproportionate interference with the right to respect for family life.
14. The Appellants' appeal against the decision of Judge Ross is allowed for the reasons given above and their appeals are remitted to the First-tier Tribunal for a de novo hearing.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal for a de novo hearing before any Judge other than Judge Ross.

No anonymity direction is made.

Signed



Upper Tribunal Judge Jackson
2017

Date 1st September