Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00212/2017

THE IMMIGRATION ACTS

Heard at Glasgow	Decision & Reasons Promulgated
on 21st November 2018	On 12th December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

MAXIME [N]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr J Bryce, Advocate, instructed by Gray & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal McGavin dismissing an appeal on human rights grounds.

2. The appellant is a national of Cameroon. He applied for entry clearance as the partner of a refugee and the father of her three children. The Judge of the First-tier Tribunal found there was no credible evidence of the appellant having lived with members of the family in Cameroon or of contact with

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them after they came to the UK. The refusal of entry clearance was not disproportionate.

3. Permission to appeal was granted on the grounds that the Judge of the First-tier Tribunal had arguably not given adequate reasons and had arguably erred in her approach to the traditional marriage entered into by the appellant and his partner in Cameroon.

Error of law

4. Mr Bryce addressed me on the question of whether the Judge of the First-tier Tribunal erred in law. I am grateful to Mr Bryce for his written submission, on which he relied. Mr Bryce pointed out that although the Tribunal's jurisdiction was restricted to considering whether there was a breach of the Human Rights Act, in accordance with Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 the Tribunal should look at the Immigration Rules before Article 8. Mr Bryce referred to paragraph 352A of the Immigration Rules, which provides for family reunion by a person who currently has refugee status. He pointed out that the appellant's partner, having been a refugee, became a naturalised British citizen on 30th October 2018. She was not a British citizen at the time of the application or the respondent's refusal decision.

5. Mr Bryce than pointed out that the respondent's decision was dated 25th November 2016, which was the day after a Statement of Changes to the Immigration Rules, HC667, amended paragraph 352A on spouses of refugees by combining it with the provisions for partners of refugees previously contained in paragraph 352AA.

6. Mr Bryce submitted that the Judge of the First-tier Tribunal did not give adequate reasons for her decision, particularly when considering whether the appellant was a family member of the sponsor. It was accepted by the respondent that the couple had three children together. There were letters from the children showing contact with their father but the judge stated at paragraph 30 she would not attach any weight to these letters. The judge made this finding after she had already found at paragraph 26 that the appellant did not form part of the sponsor's family unit before her flight from Cameroon. The children were born over a four and a half year period, in 1998, 2000 and 2002. It was difficult to see how the appeal could have been refused if properly reasoned.

7. Mr Govan agreed that the changes to paragraph 352A were made the day prior to the respondent's decision. This meant that the appellant had either to show the existence of a valid marriage or a relationship akin to marriage which had subsisted for two years. The refusal decision did not accept the existence of a marriage but there were the three birth certificates for the children. There was an unexplained delay by the appellant in seeking entry

clearance and no evidence of contact in this period except in the form of untranslated messages. The judge did not find the sponsor's evidence credible and was entitled to reach the conclusions she did.

8. I indicated that I had serious concerns about the decision of the Judge of the First-tier Tribunal. There was no clear or coherent structure to her reasoning. She had not asked the right questions as to the requirements of paragraph 252A which had to be met, and as a result of failing to identify the correct issues the judge reached a decision which was not supported by adequate reasons. The judge did not ask whether the appellant and the sponsor had been living together in Cameroon for two years or more in a relationship akin to marriage. The judge did not ask, if there was such a relationship, whether it was subsisting and what the intentions of the couple towards each other were. The judge paid scant regard to the couple having had three children together over the course of more than four years, which was evidence from which the existence of a relationship akin to marriage might have been inferred. The judge did not appear to appreciate the relevance of this evidence to the questions she should have been addressing. I was satisfied that the Judge of the First-tier Tribunal had erred in law by failing to give adequate reasons. Her decision would be set aside and re-made.

9. Mr Bryce drew to my attention an application under rule 15(2A) to admit further evidence. This comprised a letter dated 1st August 2012 from Gray & Co and an affidavit of the same date by the sponsor, which, Mr Bryce contended, provided a complete answer to the question of why the appellant did not apply for entry clearance earlier, as well as supporting the pre-flight relationship.

10. I allowed this further evidence to be admitted. I informed the parties that I intended to re-make the decision and adjourned the hearing until the afternoon. This would provide an opportunity for submissions on behalf of the parties and, if so advised, the sponsor might tender herself for cross-examination.

Evidence

11. The hearing was resumed in the afternoon. The sponsor appeared as a witness. She adopted her witness statement dated 12th December 2017. In response to a question from Mr Bryce she said she had started living with the appellant a year after her first child was born in early August 1998. They had continued to live together until the sponsor left Cameroon in 2011. Their household consisted of the appellant and sponsor, their three children, the sponsor's mother, the sponsor's sister, now deceased, and the sister's daughter.

12. The sponsor said that since arriving in the UK in 2012 she had kept in touch with her family. She obtained a phone within a few days of being housed at

the YMCA. It was much cheaper for the appellant to phone her from a cyber café in Cameroon. They used Skype. More recently her oldest child had worked part time in a cafe and used her earnings to buy he father a smart phone. This was taken out to Cameroon about two and a half years ago by someone the appellant knew. The appellant and sponsor now communicate by WhatsApp.

13. The sponsor was asked about the appellant's delay in seeking entry clearance. He said he did not have a passport. Later he explained he had said this so as not to worry her. Her mother could not travel. She could not walk and needed the sponsor's niece to help her. When the niece was approaching 18 the appellant told her to get a passport and go to the UK. The appellant found a girl of he same age to help with the sponsor's mother. The sponsor said her mother is now able to walk with a stick and has a girl called Victoria who is paid to help look after her. This allows the appellant to come to the UK.

14. The sponsor was cross-examined by Mr Govan. She answered questions from him about where her partner had been living. Mr Govan asked why the printout of WhatsApp messages lodged in evidence had not been translated. The sponsor said she had been asked to provide these messages. They were in French and she had not thought about having them translated. Mr Govan asked the sponsor if she had anything to show she and the appellant had lived together. The sponsor replied that the children were growing up and they knew who they had lived with. They had lost everything in their home in Cameroon and she still had no knowledge of the whereabouts of her older brother.

15. The sponsor was asked about her mother's condition. The sponsor said her mother had had a heart attack. When the sponsor was kidnapped the people came to the house. They kicked the sponsor's mother and took the sponsor out of the house. The sponsor's partner told her that her mother could not walk because her knee was injured in this attack. The sponsor said the people carried on hitting her mother after they took her out of the house. She asked them not to hit her mother.

16. Mr Govan referred to medical evidence stating that the sponsor's mother had a deep vein thrombosis. No reference was made to an injury or a heart attack. It was pointed out that there was no evidence on the possible causes of a deep vein thrombosis.

17. Mr Govan turned to the question of whether the sponsor's relationship with the appellant was continuing. The sponsor pointed out again that it was mainly her partner who called her. From Cameroon he could spend all day on the phone to her for the equivalent of £1.

18. The sponsor was asked about the marriage contract she had produced. She was asked why it was handwritten. The sponsor explained that this was normal for traditional marriages. The sponsor was asked whose idea it was for the children to write letters about their contact with their father. The sponsor said it was her idea. She asked the children to write in English, not French. This was to provide evidence of having lived together. They lost all their property when the sponsor was kidnapped.

19. Mr Govan asked the sponsor if she had wanted the children to write letters as evidence and not because they were in regular contact with their father. The sponsor replied that the children miss their father. Her eldest had called her at the hearing centre today to ask what was happening. When they misbehaved her children told her that if their father was here he would understand. Even her niece had never known any other father.

Submissions

20. In his submission Mr Govan relied on the respondent's refusal letter. Some clear issues about the evidence had been raised by the ECO. There were specific requirements in paragraph 352A, looked at through the prism of the Rules, in accordance with Mostafa. It was not disputed that the appellant was named as the children's father on their birth certificates but there were still the questions of whether the appellant and the sponsor had been living together and whether their relationship was subsisting. There was a lack of evidence to support the assertions in the witness statement.

21. For the appellant Mr Bryce pointed out that the sponsor had arrived in the UK on 27th January 2012 and was granted asylum on 24th February 2012. There was no appeal and therefore no copy of the asylum interview had been produced. In her witness statement the sponsor said she had given her partner's name at her substantive asylum interview. The respondent had not produced the interview record to refute this claim. The account the sponsor gave in her asylum claim had been accepted as reliable and true. Her house had been broken up so there was no paperwork. The appellant had run away. Mr Bryce pointed out that the appellant and the sponsor had had three children together in the course of four and a half years. The paternity of the children was not disputed. There were letters from the children as evidence of an ongoing relationship. The sponsor's evidence was compelling.

22. Mr Bryce turned to the newly produced evidence in the form of a letter and affidavit. This showed the existence of a relationship both pre-flight and subsisting. The sponsor had explained why there were no phone bills. She needed the appellant with her to look after their teenagers. She intended to live permanently with the appellant. The appellant should have been given entry clearance under the Rules. In terms of Mostafa, where there was compliance with the Rules it would be disproportionate to interfere with the appellant's right to private and family life. The appeal should be allowed.

Discussion

23. The credibility of the appellant's and sponsor's evidence is in dispute. In the refusal decision of 25th November 2016 the respondent contended that the sponsor did not mention the existence of her partner at her screening interview. However, it is stated in the sponsor's witness statement that the sponsor did refer to the appellant at her subsequent asylum interview. Mr Bryce pointed out that a copy of the interview record had not been produced by the respondent to refute this claim. The sponsor further stated that she was asked at her screening interview if she was married but not the name of her partner. She explained at her screening interview that her marriage was a traditional one and was told by the interviewing officer that it was only a legal marriage which would be recognised. The interviewing officer treated has as unmarried.

24. I accept the sponsor's explanation of why her relationship with her partner was not recorded at her screening interview. I accept also that she referred to her partner at her asylum interview. Her credibility is not damaged by her relationship with her partner not having been included in the record of the screening interview. I note in addition that in the sponsor's affidavit of 1st August 2012 she referred to her relationship with her partner.

25. It was accepted by the respondent that the appellant was named on the three birth certificates of the couple's children. The respondent considered, however, that there was no satisfactory explanation of why the appellant did not apply for entry clearance at the same time as the children.

26. It was acknowledged that the sponsor's explanation for her partner not applying for entry clearance when the children did has changed. The sponsor originally said it was because her partner did not have a passport. It transpired that her partner was concealing from the appellant the poor state of her mother's health and her mother's need for care, particularly in relation to her mobility. The appellant and the sponsor's niece were caring for the sponsor's mother and could not leave her. When the niece was approaching 18 an application for entry clearance was made for her. The appellant then employed a girl to help care for the sponsor's mother. The mother is now better able to walk and the appellant is able to leave her in the care of her employed carer.

27. I can understand that the appellant was reluctant to reveal to the sponsor the full extent of her mother's disability. The sponsor was unable to assist her mother and the appellant felt it was his duty to stay and care for the mother until further arrangements could be made. I accept that this explains why the appellant did not apply for entry clearance at an earlier stage.

28. The remaining credibility issue raised in the refusal decision related to continuing contact between the appellant and the sponsor. According to the respondent there was no satisfactory evidence of this. Phone cards were produced but these were considered to be of limited evidential value.

29. In her evidence before me the sponsor explained that the appellant used to telephone her from a cyber café in Cameroon because this was considerably cheaper that the sponsor telephoning from the UK. Later the appellant was given a smart phone and the couple were able to communicate by WhatsApp. Numerous printed sheets of WhatsApp messages were lodged but, as Mr Govan pointed out, these had not been translated from French into English. When the sponsor was asked about this in cross-examination she indicated she did not know these should have been translated. In this matter the sponsor was entitled to rely upon her representatives. I do not consider that any blame should be attached to the representatives in this regard. There may be various reasons why a document is not translated. There may be issues of time or expense, particularly where the evidence is as voluminous as it is here. It may be that the existence of the document is of more importance than the content.

30. In relation to the WhatsApp messages I take the view that it is their existence which matters rather than their detailed content. This is not a case where it seems probable that the couple have never been in a genuine relationship. They have three children together. The couple have to show their relationship is continuing and even in their untranslated state the WhatsApp messages constitute relevant evidence directed towards this end.

31. At the hearing Mr Govan raised the issue of whether the children had been directed to write letters about their relationship with their father. The sponsor admitted that she had told the children to write these letters. She added that she had done this so the children would know to write the letters in English rather than French, which was the language in which they would normally communicate with their father.

32. I do not consider it at all surprising that the children would need some encouragement or supervision to write letters to be produced as evidence, particularly when the letters had to be in a different language from the one which they would normally use with their father. I do not think the letters lose their evidential value because the sponsor initiated the writing of them.

33. A further issue which was raised at the hearing was why the appellant and the sponsor had so little documentary evidence of their life together in Cameroon. The sponsor explained that when men arrived at their home and she was kidnapped the house was broken up and documents were lost or destroyed. Given that the sponsor then fled from Cameroon and was granted refugee status in the UK I see no reason not to accept this explanation.

34. The sponsor gave her oral testimony in a direct and straightforward manner. Mr Bryce rightly cautioned me against assessing credibility on the basis of demeanour. He pointed out, however, that the sponsor's asylum claim had been accepted by the respondent and she had been granted refugee status about a month only after her arrival in the UK. The sponsor is not someone who has been found previously to lack credibility.

35. The sponsor gave evidence before me. Her evidence is supported by such documents as are available, principally in the form of her children's birth certificates, the sponsor's affidavit of 1st August 2012, her children's letters, and the WhatsApp messages. I have considered the issues raised on behalf of the respondent for questioning the credibility of parts of the evidence. I accept that satisfactory explanations have been given in respect of these matters. Accordingly I accept the appellant and sponsor's evidence with regard to their relationship as credible.

36. In order to satisfy the relevant provisions of paragraph 352A the Immigration Rules the appellant needs to show that he and the sponsor were in a relationship akin to marriage which subsisted for at least two years before the sponsor left Cameroon. The appellant no longer seeks to show that his traditional marriage to the sponsor should be recognised as valid in law and doe not need to do so if the couple can satisfy the requirements to show the existence of an unmarried partnership. In addition the appellant needs to show that the relationship is genuine and subsisting and that it is the intention of both the sponsor and himself to live together permanently.

37. The birth certificates of the children go a long way to establishing the existence of a relationship akin to marriage. As the respondent points out, children may be conceived without a relationship akin to marriage. In the evidence in this appeal, however, I have not found any reason not to accept the couple's evidence that they were in a relationship akin to marriage and lived together in Cameroon with their children and other family members for at least ten years.

38. It is the evidence of the sponsor and the children that this relationship is continuing. I have accepted this evidence as credible, for the reasons set out above. It is the intention of the couple to resume living together on a permanent basis if entry clearance is granted and I have found their evidence credible.

39. This appeal is made not under the Immigration Rules but under Article 8. Looking at the circumstances through the lens of the Immigration Rules, where the appellant satisfies the requirements of the Rules it is difficult to envisage how the public interest will outweigh the interference with the appellant's Article 8 rights arising from the refusal of entry clearance. In

terms of Mostafa, it does not necessarily follow from the fact that the Immigration Rules are satisfied that an appellant should succeed under Article 8. In this appeal, however, there are no other countervailing factors to set against the family life of the appellant and sponsor and, most importantly, their three children. It was pointed out that the sponsor has recently become a British citizen and therefore is no longer a refugee. However, she was a refugee at the time not only of the respondent's decision but also of the decision of the First-tier Tribunal. I am re-making the decision of the First-tier Tribunal and giving the decision which that tribunal should have given, which is to allow the appeal under Article 8. The refusal of entry clearance in these circumstances constitutes a disproportionate interference with the appellant's right to respect for his private and family life.

Conclusions

40. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

41. The decision is set aside.

42. I re-make the decision by allowing the appeal.

Anonymity

The First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction and do not consider such a direction to be necessary.

Fee award (N.B. This is not part of the decision.)

Although the appeal is allowed this is only after the hearing of evidence and the resolution of factual issues in dispute. I make no fee award.

M E Deans 6th December 2018