



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/07245/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 14 March 2018

**Decision & Reasons
Promulgated
On 09 April 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

A R

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance and not represented

For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Kosovo, born in 1989. He made an application for entry clearance as a partner on 30 December 2015. That application was refused in a decision dated 17 February 2016. The respondent refused the application on the basis that the appellant had not demonstrated that the relationship between him and his sponsor/partner (whom I shall identify as SR) and to whom he was married, was a genuine and subsisting relationship. The application was further refused in terms of the accommodation requirement of the Immigration Rules ("the Rules"), a matter which was ultimately conceded on behalf of the respondent. That

is no longer an issue. It was further refused because the appellant had not provided evidence sufficient to meet the English language requirement of the Rules with reference to paragraph E-ECP.4.2. He did provide an English language test certificate but it was from a provider that was no longer approved.

2. His appeal came before First-tier Tribunal Judge Caswell at a hearing on 8 May 2017. Judge Caswell dismissed the appeal, concluding that the genuineness of the relationship had not been established by the appellant. She also concluded that he was unable to meet the English language requirement of the Rules. She dismissed the appeal on Article 8 grounds as well. It appears that there was a previous decision to refuse entry clearance but that decision is not within the papers before me and was not able to be provided today. Nothing however, is said to turn on that decision.
3. Permission to appeal against Judge Caswell's decision was granted by a judge of the First-tier Tribunal on the basis that it was arguable that Judge Caswell had erred in her assessment of the genuineness of the relationship because she took into account points that were not raised in the respondent's decision. It was also said in the grant of permission that it was arguable that Judge Caswell had failed to give reasons as to why the English language certificate was not sufficient to meet the English language requirement. Lastly it was said to be arguable that Judge Caswell had not undertaken a proper assessment of the best interests of the sponsor's grandchildren who, at the date of the hearing, were aged between 11 and 15 years. The children's mother was not living with them and there was a residence order in favour of the sponsor.
4. The appellant was born in 1989. The sponsor was born in 1957. Therefore, at the date of decision the appellant was 26 years of age and the sponsor was 57 years of age. There is therefore, an age gap of about 30 years. Judge Caswell found that that was a significant matter that told against the genuineness of the relationship. She also concluded that the appellant being Muslim and the sponsor being a Christian was also a significant matter.
5. In her conclusions she said that although on behalf of the appellant the *sponsor* had shown that there was a genuine and subsisting marriage and that the parties intended to live permanently together as husband and wife, the question was whether that was true of the appellant. She referred to the sponsor's evidence to the effect that she was a sensible person who had been trusted by the authorities to bring up her three grandchildren and that she would not have introduced those children to the appellant if she had not been sure of his intentions. Judge Caswell nevertheless pointed out that it appears that the relationship was established at a vulnerable point in the sponsor's life, her previous partner of 31 years having recently died of motor neurone disease.
6. Furthermore, it appeared from her oral evidence that she had not enquired sufficiently, or at all, into the reasons why the appellant, who she

described as a strange younger man from Kosovo, would suddenly appear on her Facebook page with a friend request. It appears that her Facebook settings were such that anyone could access it and apparently the sponsor was unaware of the possibility that the appellant might have been looking on Facebook for someone to sponsor him as a partner to come to the UK. At paragraph 21 of her decision she said as follows:

“In the papers before me there was nothing from the Appellant dealing with the important 32 [year] age gap between the parties, the fact he cannot have children of his own with the sponsor, and the fact they are of different religions. Even in the statement of the sponsor, those matters are not addressed. The sponsor told me that her daughter knows about the marriage and supports her, but there was no evidence from the daughter, either in writing or as a witness in the hearing. There was no evidence from the Appellant’s family in Kosovo to confirm the marriage is a genuine one from his side. The sponsor has visited Kosovo numerous times, including the children, in the five years since the marriage, and has been welcomed by the Appellant and his family, but this is not inconsistent with the marriage being a device by which he hopes to come to the UK. On the evidence before me he is not in high earning employment, lives with his parents, and the sponsor has been sending him money with which to take his English test, and for general spending. She herself is not a wealthy woman, her income deriving from income support and disability living allowance, as well as child benefit and child tax credit.”

7. Next, at paragraph 22, Judge Caswell referred to the evidence of contact between them being limited, stating that there was nothing substantial in the phone records and the Facebook evidence being very slight. She referred to photographs of the appellant and the sponsor getting married in Kosovo, and photographs on other occasions, but she concluded that overall the evidence was insufficient to show that this was a genuine and subsisting marriage and that the appellant intended to live permanently with the sponsor and her grandchildren, as her husband. Apart from the photographs, there was evidence before Judge Caswell of some money receipts, phone bills and letters from the local authority in relation to accommodation.
8. In relation to the complaint about Judge Caswell having taken a point against the appellant which was not identified to the appellant, I am not satisfied that it has any merit. Whilst it is true that the issue of the age gap and the difference of religion were not identified in the respondent’s decision, the genuineness of the relationship patently was. Furthermore, it seems to me to be plain that where one has an age gap of 32 years that is a matter that needs to be addressed by the parties to the relationship if they are asserting that it is a genuine relationship.
9. Those observations aside, it is clear that in the evidence that the sponsor gave before Judge Caswell the issue of the age difference was raised, the sponsor having been asked about it in cross-examination, as can be seen from paragraph 7 of her decision where she said that the sponsor’s evidence was that there is a 32-year age gap but neither of them was concerned about it.

10. Although I consider that the issue is not so stark in terms of the differences in their religions, that nevertheless was a factor that Judge Caswell was also entitled to take into account. The sponsor's evidence was that although there was that difference, it had never been an issue for them.
11. On the issue of not being able to have any children between them, the sponsor said that the appellant's attitude was that they have three children anyway (presumably a reference to the sponsor's grandchildren in respect of whom she has a residence order).
12. Furthermore, as part of the respondent's submissions summarised at paragraph 17 of Judge Caswell's decision, the issues of the substantial age gap and the difference in religions were raised, amongst other matters that were said to indicate a lack of genuineness of the relationship.
13. It is also significant that the appellant was legally represented before Judge Caswell. At no point does it appear that any objection was raised about any of these issues having been raised at the hearing with the sponsor in cross-examination, and there was no objection to the respondent's submissions on those points. Thus, the significant point is that no complaint was made about these matters having been raised at the hearing as opposed to in the decision. I am entirely satisfied that Judge Caswell's conclusions on the issue of the relationship were conclusions that were open to her.
14. That puts into context the other arguments in relation to the best interests of the children and the English language certificate. So far as the English language certificate is concerned, it is not disputed that the appellant was not able to provide an approved English language certificate at the date of the decision. In the grounds of appeal he said that an English language certificate would follow shortly.
15. Paragraph E-ECP.1.1 and E-ECP.4.1 indicate what the requirement is for an English language certificate to be produced in order for the appellant to be able to succeed in the application for entry clearance as a partner.
16. Paragraph FM-SE is the section that deals with specified evidence and at paragraph D it is made clear that the evidence needs to be provided with the application. The English language certificate that is relied on that was in fact provided to the First-tier Tribunal and which did apparently comply with the technical requirements of being from an approved provider, was not provided at the time of the application. Looking further at whether there was any requirement for the respondent to verify the certificate or to make further enquiries of the appellant in terms of why it was not produced at the time of the application, what can be described as the evidential flexibility requirements have no application. The question of verification is not to the point. The fact of the matter is, the appellant did not produce the specified evidence at the date of the application which is what he was required to do.

17. It could be said that in considering Article 8 in its wider context Judge Caswell ought to have taken into account that there was before her a relevant English language certificate. However, she would have been bound to conclude that nevertheless the appellant was not able to meet the requirements of the Rules in that respect because the English language certificate was not provided at the time of the application. The failure to meet the requirements of the Rules would have been a significant matter for her to have taken into account under Article 8 in its wider context. So, even if the English language certificate ought to have been taken into account by Judge Caswell in her assessment of Article 8, and even it could be said that she was in error in not doing so, any such error is hardly material. More importantly, it is immaterial in the light of her sustainable assessment of the lack of genuineness of the relationship.
18. Lastly in terms of the best interests of the children, I consider that Judge Caswell need have done nothing more than she did at paragraph 27 where she said as follows:

“In addition, considering the best interests of any relevant children, there are three children living with the sponsor as their primary carer, one at least of whom has some particular difficulties. I do not find that it would be in their best interests to have living with them, even for a short time, a man whom I have found (despite his claims in the application form and grounds of appeal) not to have shown he is in a genuine and subsisting marriage with that primary carer.”
19. On no basis could it be said that Judge Caswell could have come to any other conclusion in terms of the best interests of the children in circumstances where she found that the relationship was not a genuine one. The best interests of the children are patently not compromised in any way at all by the appellant not living with the sponsor in circumstances where the relationship was not a genuine one; quite the contrary. Accordingly, in this respect also there is no error of law in Judge Caswell’s decision.
20. Summarising, I am not satisfied that Judge Caswell’s decision involved the making of an error on a point of law in any respect. Her decision to dismiss the appeal on all grounds therefore stands.

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

Because this appeal involves children, 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 his or the sponsor’s 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.

