



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08980/2017

THE IMMIGRATION ACTS

Heard at Field House
On 13 August 2018

Decision and Reason Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

LEI WANG
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford (for K and G Solicitors)
For the Respondent: Mr S Kandola (Specialist Appeals Unit)

DECISION AND REASONS

1. This is the appeal of Lei Wang, a citizen of China born 21 April 1981, against the decision of the First-tier Tribunal of 19 March 2018 dismissing her appeal, itself brought against the decision of the Respondent of 13 August 2017 to refuse her application for entry clearance as the spouse of her Sponsor, Sheng Li, a person with indefinite leave to remain in the UK.

2. The application was supported by a covering letter from the Appellant setting out her history of study and visits to the UK from 2003 onwards, the basis on which the financial requirements of Appendix FM were satisfied via the Sponsor's salary from March 2015 to February 2016, and explaining the background to their relationship.
3. They had met in 2007 and began dating in May 2008 whilst both were studying at London Southbank University. She subsequently worked in the UK with a post study visa. Mr Li's parents had decided he should remain in the UK to pursue his career, whilst Ms Wang pursued her career abroad, and their geographical remoteness made it difficult to maintain their relationship; eventually Ms Wang took the decision to end it. Mr Li married in 2012, though that relationship did not work out for him. They met each other again in Spring 2016, and for Christmas 2016, over which period Mr Li talked to her about his former wife who he had by now divorced. They quickly resumed their relationship and he proposed to her on 12 January 2017; they married on 24 March 2017 in Beijing.
4. The application was refused because the Entry Clearance Officer considered that the relationship was not established as genuine. Mr Li had previously informed the Home Office that he had had a child with his wife, born in 2013, and the fact that this child had not been mentioned in Ms Wang's application cast doubt on her knowledge of his personal circumstances. Furthermore, she had completed multiple entry visa applications to the UK in 2009, 2013 and 2016 on the basis that she was "single".
5. Grounds of appeal contended that Mr Wang had never fathered a child in the UK. The author noted the improbability that the divorce documents previously supplied would not have mentioned arrangements for a child, and took strong exception to the very suggestion, alleging that this itself a "false claim" by the decision maker. Further facts were provided: Mr Li had filed for divorce in September 2016 and the divorce was confirmed on January 2017. Supporting evidence included a letter from Xin Dawson who wrote that she and her husband Gary Dawson were mutual friends of Ms Wang and Mr Li, having known them since September 2004 and 2008 respectively. Mr Dawson had been a classmate of Mr Li from 2003 to 2005 at London Southbank. They had met Ms Wang through him and begun to know the couple very well. They had heard they had broken up some time after 2011 and learned that they were back together around Christmas 2016; they were aware of their subsequent engagement and marriage.
6. The Entry Clearance Manager was unswayed by those grounds, stating that information was available that the Sponsor had referred to a child from his former marriage at an interview on 2 February 2015 and that the supporting email messages and chat records were undated and untranslated; the

photographs supposedly showing the couple together were not themselves persuasive.

7. The First-tier Tribunal determined the appeal without a hearing. It noted that there was no supporting evidence, via a witness statement or otherwise, from the Sponsor. The emails and social media chat records were indeed untranslated, though not in fact undated; however the dates indicated that just three emails had been sent during an eight-day period in February 2012, from an account in the Sponsor's name, though their destination was not identified and absent accredited translation their contents were unknown.
8. The supporting letter from Ms Dawson did not identify when she learned of the couple's asserted reunion and did not state how often, for how long and in what circumstances she saw the Appellant, either alone or with the Sponsor. The photographs were of variable quality and most did not clearly show the Appellant and Sponsor together. The allegation of dishonesty aimed at the Entry Clearance Officer was extraordinary and had not been pursued via any formal complaint. Again, the Sponsor's failure to provide evidence himself on this vital point was notable.
9. In conclusion the Appellant had failed by some distance to establish that the claimed relationship was genuine and subsisting. Accordingly there was no genuine family life extant. In the alternative, the public interest justified the application's refusal as a proportionate response to the application given the need to protect the economic well-being of UK taxpayers and to maintain immigration control.
10. Grounds of appeal of 11 April 2018 contended the First-tier Tribunal had erred in law because
 - (i) There was a material error as to the allegation of the Sponsor having had a child with his former wife: no interview record to substantiate the Entry Clearance Officer's allegation had been provided, and following *MH Pakistan* [2010] UKUT 168 (IAC) "the Tribunal is entitled to conclude that a document not furnished ... is not a document upon which the Respondent relies; and that if there is reference to it in the Notice of, or Reasons for Refusal, the Tribunal is entitled to conclude that that reference no longer forms part of the Respondent's case."
 - (ii) Further matters than those relied upon by the Respondent's refusal letter had been raised by the First-tier Tribunal: the absence of evidence from the Sponsor, the lack of a certified translation of online chats, the alleged poor quality of the photographs adduced, and failings in the supporting letter from Ms Dawson;

- (iii) *Goudey* [2012] UKUT 00041 (IAC) had not been applied: that decision held that “Where there is a legally recognised marriage and the parties who are living apart both want to be together and live together as husband and wife, we cannot see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the Immigration Rules”. Accordingly the Appellant’s positive immigration history combined with the lack of substantiation of the allegation of the Sponsor having referenced a UK-born child meant there was no reason to doubt their relationship’s genuineness.
11. Permission to appeal was granted on 10 May 2018 on the basis that it was arguable that the wrong burden and standard of proof had been applied to the question of the UK-born child.
 12. A Rule 24 Response of 17 July 2018 argued that the Judge had directed himself appropriately and come to conclusions that were not irrational. There was no material unfairness given that the Appellant had elected for a “paper” hearing.
 13. Before me Mr Wilford developed the grounds with admirable concision. Mr Kandola accepted that there was a material error of law in the decision: the burden of proof was upon the Entry Clearance Officer yet no evidence substantiating the allegation regarding the information given by the Sponsor as to a UK-born child had been put forward.

Findings and reasons

14. Given Mr Kandola’s appropriately pragmatic stance I can be relatively brief. I accept that the decision is indeed flawed. Primarily this is because there is only one reason given by the First-tier Tribunal for disbelieving the core account as to the relationship’s genuineness, namely the Respondent’s assertion regarding the answer at interview regarding a UK-born child. True it is that other criticisms are made of the case put by the couple, but those reasons all turn on the inadequacy of the corroborative evidence to resolve the fundamental concern as to their credibility.
15. However, the sole independent reason for that concern is the very allegation that has not been substantiated by the Secretary of State. Rule 24(1)(d) of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides that

“when a respondent is provided with a copy of a notice of appeal, the respondent must provide the Tribunal with - ... any other unpublished document which is referred to in [the notice of decision] or relied upon by the respondent”.


16. Thus it can be seen that the essential reasoning of *MH (Pakistan)* remains relevant under the post-2014 Procedure Rules: there is a mandatory obligation to supply an “unpublished document”, that being a category of document into which the interview record claimed to support the Respondent’s case doubtless falls.
17. The common law, as well as the relevant Procedure Rules, would suggest the same result. As stated by Lord Maugham in *Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154: “Before a court, he who asserts something must prove it: ‘*Ei qui affirmat non ei qui negat incumbit probatio*’.”
18. If the decision maker fails to put forward evidence substantiating an assertion of fact, then the burden of proof is upon him to make good that assertion, at least where an Appellant actively contests the proposition, as was done clearly here. However, here the First-tier Tribunal effectively placed the burden of proof of disproving the Secretary of State’s assertion of fact on the Appellant and Sponsor. That was an error of law and, given its centrality to the matters in dispute, a material one.
19. Accordingly the decision below contains a material error of law and the appeal must be re-heard. A full re-hearing in the First-tier Tribunal is appropriate given that the errors in question go to the heart of the matter in question.

Decision:

The decision of the First-tier Tribunal contains a material error of law.
The appeal is remitted to be heard afresh in the First-tier Tribunal.

Signed:

Date: 7 September 2018



Deputy Upper Tribunal Judge Symes