



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10062/2015  
HU/10078/2015  
HU/10081/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 14 March 2018

Decision & Reasons Promulgated  
On 11 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS ASMAA ABDALLA SALEM ELSAYED  
MISS N M S E M  
MASTER E M S E M  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms. B. Smith, counsel instructed by IR Immigration  
Law LLP  
For the Respondent: Ms. A. Brocklesby-Weller, Senior Presenting Officer

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**DECISION & REASONS**

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1. The First Appellant is a national of Egypt, born on 2.12.78. She applied for entry clearance, along with her two dependent minor children, born on 14.6.04 and 2.2.07, in order to join her husband and father of the children, Mr Mohamed Sabri Elmitwalli Magd. The applications were refused in a decision by the Entry Clearance Officer dated 8 October 2015. The basis for the refusal was that the Sponsor had relocated to the UK in 2007, having married a British national in February 2006 and had remained in the UK ever since and

whilst there was evidence of visits to Egypt there was no evidence that these had been to see the Appellants or that a marital relationship had been maintained with the first Appellant whilst the Sponsor was married to the British national. Whilst the first Appellant had given birth to British national twins in 2011, the Sponsor was still married to his British wife. The Sponsor and his British national wife divorced in March 2015 and the Sponsor and the first Appellant had married in Egypt in May 2015.

2. The Appellants appealed against this decision and the appeal came before First tier Tribunal Judge Carroll for hearing on 16 May 2017. In a decision promulgated on 2 June 2017, the Judge dismissed the appeal, finding that whilst it is not in dispute that the Sponsor is the father of the four children living with the first Appellant in Egypt, there is a real dearth of evidence to support the claim that the relationship between the Sponsor and the first Appellant is genuine and subsisting and that they intend to live together permanently.

3. An application for permission to appeal was made in time to the Upper Tribunal. The grounds in support of the application asserted that the Judge had erred materially in law:

(i) in failing to take into account relevant evidence and make findings on matters material to the case *viz* the Sponsor's evidence as to his relationship with his wife and the fact that he had been sending money and provided evidence of money transfers;

(ii) in fettering her discretion in her approach to a letter provided by the Sponsor's former British national wife, supporting the Sponsor's account;

(iii) in that her decision was irrational or unreasonable and against the weight of the evidence, based on a lack of photos, which are undated and because she was unable to determine the content of the electronic communication, despite the fact that the Sponsor gave evidence as to both.

4. Permission to appeal was granted by First tier Tribunal Judge Birrell in a decision dated 29 December 2017, on the basis that:

*"given the Judge accepted that the sponsor was the father of the 4 children of the Appellant and that they are legally married and there is evidence of money transfers albeit their relationship continued throughout his marriage to another woman the grounds are arguable."*

*Hearing*

5. At the hearing before me, I heard submissions from both parties. Ms Smith submitted that the key facts are relatively straightforward in that the Sponsor

is legally married; he has 4 children, two of whom are British Citizens. The complicating factor is the relationship with Carol Dacre, during which the relationship with his wife in Egypt continued and they continued to have children. The Sponsor's relationship with Carol Dacre deteriorated after the birth of the twins and the Judge needed to make a finding as to whether she accepted that. The only real issue is whether there is a genuine and subsisting relationship between the Sponsor and the Appellant. He was open and honest about the relationship. One child was born before he met Carol Dacre and one born after the marriage but conceived before and Carol Dacre was aware of this, as is set out in her statement.

6. Ms Smith submitted that there had been no consideration by the Judge of the impact of separation from the Sponsor on his children and this goes to the genuineness of the relationship. There were four money transfer receipts which are referred to at [19] by the Judge, who finds that they are not sufficient to show in themselves evidence of a subsisting relationship but she failed to consider evidence holistically and failed to consider relevant evidence.

7. In respect of Ground 2, the Judge attached no weight to Ms Dacre's letter because she did not attend to give evidence but this constitutes a fetter on her discretion in circumstances where she could have attached little weight to the evidence but did not.

8. In respect of Ground 3 and the issue of communication via social media and the photographic evidence, the Judge finds a dearth of evidence at [20] based on a lack of photos of the wedding at [16] and because she was unable to determine the content of electronic communication at [16]-[18]. The Judge makes much of fact that the electronic communication had not been translated, but this is the only consideration of the evidence and failed to take account of the quantity of communication nor emoticons, which do not need translation. The Judge failed to reach any conclusion as to whether or not there was frequent communication between the Sponsor and the first Appellant.

9. Ms Smith further submitted that the fact that there are no photographs of the legal marriage takes the matter no further as the fact of the marriage is not in dispute. The fact that the photographs that were submitted are not dated is not material as it is clear to see that the children have grown.

10. In her submissions, Miss Brocklesby Weller acknowledged that no rule 24 response had been submitted, however, her submission was that the Judge did consider all the evidence and make findings open to her. In respect of Ground 1, the Judge cited the Sponsor's witness statement to the effect that his relationship with the first Appellant never fizzled out; she deals with the letter of Carole Dacre, in respect of which she finds, sustainably, that there is

no evidence of her identity and that she did not attend the hearing and it was thus open to her to attach no weight to the letter. The Judge was alert to factual matrix at [15] of the decision.

11. The key issue before the Judge is whether there is a genuine and subsisting relationship. It was not disputed that the Sponsor has some relationship with his Egyptian wife but the issue is the level and it was open to the Judge to find there was a dearth of evidence. Contact between them could have been about the children as they both share this interest and there is a lacunae in the evidence. In respect of the financial evidence this only shows that the Sponsor is looking after his children as one would expect. It was not disputed that the Sponsor has travelled back to Egypt and one would expect him to but the question is whether he has a meaningful relationship with the Sponsor. At [17] the Judge deals with the fact that the electronic communication has not been translated and at [18] found that the nature and content of the relationship has not been made out. The issue is one of substance and the Judge at [20] did take a holistic appraisal of the evidence and made sustainable findings.

12. In her reply, Ms Smith submitted that the finding by the Judge at [20] is flawed and that the Judge could only make a holistic appraisal of the evidence if all the evidence is properly considered. At [12]-[13] it is recorded and the Judge recites the Sponsor's witness statement, but she does not make findings or conclusions upon it. The Sponsor did provide evidence about the relationship, both in his statements and his oral evidence and the photos and communication are sufficient for me to be satisfied that there is an error of law. At [14] in respect of the letter from Carole Dacre the Judge records that it is unsigned, however, the middle sentence of that paragraph acknowledged that there are emails between Ms Dacre and the legal representative showing the source of the statement and a copy of her passport details and therefore, it is not correct to say it was rejected on this basis but rather because of Ms Dacre's non-attendance.

*Decision in respect of an error of law*

13. I found a material error in the decision of First tier Tribunal Judge Carroll, essentially for the reasons set out in the grounds of appeal. In particular, I consider that the Judge erroneously failed to consider the evidence as a whole, including the fact that two children were born before the Sponsor left Egypt and two born during the subsistence of his marriage to Carol Dacre, after he came to the UK, which is clear evidence that he continued to have a sexual relationship with the first Appellant; the photographs which, although undated, clearly show the Sponsor with a woman and with children at different ages and on different occasions; the fact that there were money regular money transfers from the Sponsor to the first Appellant [AB 43-52]; the visits by the Sponsor to Egypt [AB148-153]; the fact that the Appellants

live in a property owned by the Sponsor and the evidence of communication by WhatsApp and Facebook messenger [AB 80-141]. Whilst this communication was not translated at the time of the First tier Tribunal hearing, it is apparent and I accept, that the names of the Sponsor and first Appellant are given in English showing that the communication was between the two of them. It is also notable that the couple exchange photographs, videos and some images of a romantic nature in English eg "I miss you" and hearts.

14. In respect of the letter from Carol Dacre, whilst it is a matter for the Judge what weight to attach to individual pieces of evidence, I find that it was an error of law to attach no weight to her letter simply on the basis of her non-attendance, given that there was correspondence between Ms Dacre and the Appellants' legal representatives confirming that the statement was hers and providing a copy of the details page of her British passport. In respect of the contents of the letter, dated 1 May 2017, it is clear that Ms Dacre was aware of the fact that the Sponsor had a partner and children in Egypt from the start of their relationship; that he continued to visit them as often as he could every year whilst they were married, however, that after the birth of his twins in 2011 she found it increasingly hard to accept that he had a partner and children in Egypt, which caused the breakdown of their marriage.

#### *Evidence*

15. I announced my decision at the hearing and proceeded to re-make the decision. Ms Smith handed up a supplementary bundle, which includes an translated extract from WhatsApp communication between the first Appellant and the Sponsor and a number of original documents for my inspection *viz*

(i) Colour photographs;

(ii) Six bank transfers made through HSBC in 2017 amounting to £1100;

(iii) Evidence of visits and flights to Egypt in 2017, most recently from 4-18.11.17 and before that from 31 August to 22 September 2017 and also in February 2017. I was informed that the Sponsor is next due to visit Egypt at the end of May for Ramadan but had not yet booked his flights. I was also informed that the Sponsor travels on a British passport and shows an Egyptian passport on entry to Egypt, so whilst there are stamps in his British passport, they are in Arabic and therefore, the better evidence is that contained in the on-line flight bookings.

(iv) Payslips and bank accounts;

(v) WhatsApp chats (untranslated) from November 2016 to March 2018;

(vi) Whats App calls from January 2017 onwards for over a year.

16. I heard evidence from the Sponsor, who adopted his witness statement dated 16 May 2017 and confirmed he continued to live in Stevenage at the same address.

17. In cross-examination by Ms Brocklesby-Weller, the Sponsor confirmed that he and the first Appellant had been in a relationship since 2001 and that he was still in a relationship with her when he met Carol Dacre in 2004. He confirmed that he left Egypt in 2007. When asked why he chose to leave the first Appellant and his child to come to UK, the Sponsor stated that he was in love with Carol and he joined her in the UK. When asked how the first Appellant felt about him leaving her and her child he said that the relationship was not very settled but she was upset. When asked if the relationship broke down after that, he said that he could not say it broke down because he continued to visit her. When asked if that was primarily to visit the children or the first Appellant he replied that it was to visit both. When asked how he would describe his relationship with the first Appellant he said that he loves her very, very much and considers her his wife and that this is his family. When asked what they talked about, he said life, love, children in that when you have kids you have a lot of stuff to talk about, normal stuff.

18. The Sponsor confirmed that his religious marriage to the first Appellant took place in 2003. When asked if the first Appellant had problems after he left, the Sponsor said that she was upset. When asked how the family and community treated her, the Sponsor said that she stayed in his property, a flat, all the time since 2003 and she continued to live there. He said that she did not have problems from the family or community.

19. There was no re-examination and no further witnesses were called to give evidence.

20. In her submissions, Ms Brocklesby-Weller adopted the refusal letter. She submitted that the evidence still does not demonstrate that the relationship is subsisting and that the WhatsApp messages do not show much of substance to demonstrate a relationship. When the Sponsor left Egypt in 2007 the relationship with the first Appellant was delicate, if it did not cease, however, she appreciated that children have been born subsequent to that.

21. In her submissions, Ms Smith adopted her skeleton argument. She submitted that the Upper Tribunal now had the benefit of the Appellant's statement in the supplementary bundle at page 1 and that this is important and is consistent with what the Sponsor says and the trajectory of the relationship. It may be unconventional and not traditional but this does not

mean that the relationship did not happen in the way maintained, consistent with what has been said by all the parties. She submitted that relationships are not straightforward all of the time and the issue is whether the relationship is genuine. Whatever happened previously, Ms Smith submitted it is clear now on the basis of the statements and supporting evidence that the relationship is genuine and subsisting. With regard to the WhatsApp messages, she submitted that weight can be placed on the quantity and fact there are extensive calls, as set out in the skeleton argument. She also drew attention to page 11 of the supplementary bundle which is an extract from WhatsApp dated 18.1.16-19.1.16 showing the messages start early in the morning and end late at night. She submitted that it is consistent with the fact that they are long term partners that one has these types of conversations and also joking and drew attention to one comment at 2.56 from the Sponsor where he writes: *"I miss you – your eyes – as usual you don't see it."*

22. Ms Smith relied on the Sponsor's evidence and that when he was asked how he would describe his relationship and what they would talk about he answered naturally. She submitted that the application and appeal process has been going on for some time and that the Sponsor was committed to pursuing the appeal process to bring his family to the UK, which also supports the genuineness of the relationship. In respect of the assertion that it is not credible that he left Egypt, Ms Smith submitted that this was not really central to the appeal in any event now, given that all the evidence stands and every time the appeal comes before the Tribunal there is more evidence. She asked that the appeals be allowed.

#### *Findings and conclusions*

23. Having considered the original documents [15. above refers] I informed the parties and the Sponsor that I was allowing the appeal. I now give my reasons.

24. The only issue before me is whether the relationship between the Sponsor and the first Appellant is genuine and subsisting and that they intend to live together as husband and wife: EC-P.1.1.(d) of Appendix FM (E-ECP 2.6 and 2.10). Due to the fact that the decision was made on 8 October 2015, the scope of the appeal is confined to whether or not the decision is a proportionate interference with the Appellants' Article 8 right to married and family life with the Sponsor. Post decision evidence can be considered so long as it does not constitute a new matter: *HH* ('conditional' appeal decisions) Somalia [2017] UKUT 490 (IAC).

25. Having heard the Sponsor give evidence, I find him to be a credible witness. Indeed, Ms Brocklesby-Weller did not seek to argue otherwise. Whilst the Sponsor may not have treated the first Appellant well in choosing to marry a British citizen in 2006 and leaving the first Appellant and at that

time, two children, in 2007 in order to travel to the United Kingdom to join his British wife, it is clear that at some stage the relationship between the Sponsor and first Appellant resumed (if, indeed, it had ceased) due to the fact that the first Appellant gave birth to twins on 12 September 2011 and it is accepted that the Sponsor is the father of these children who have consequently been recognised as British citizens.

26. I have considered all the evidence before me as to the subsistence of the marriage, which took place on 22 May 2015. I bear in mind that the relationship began in 2001 and a religious marriage took place in 2003, following which the first Appellant gave birth to the second and third Appellants. In addition to the evidence already referred to at [13]-[15] above, there is also evidence of the Sponsor paying utility bills – electricity and telephone – from 2011 to 2016 at AB 62-79 and an undated letter from Mr Abdelhalim Ibrahim Mohamed Habib, the first Appellant’s uncle, confirming that the Sponsor visits the Appellants twice a year and stays with them in the same house.

27. I have also taken into account a short statement from the first Appellant dated 13 March 2018 in which she states that she has been in a relationship with the Sponsor since 2001; that they have known each other since they were young and grew up in the same village and that their two eldest children were born before the Sponsor left Egypt. She further states that she knows that he met Carole in 2006 and he told her about the relationship but this did not affect their situation and they still continued to be with one another. I find this to be the case, not least because she gave birth to the third Appellant on 2.2.07, after the Sponsor had met and married Carole Dacre but before he left Egypt to join Ms Dacre in the United Kingdom.

28. The first Appellant further states that the Sponsor used to return to visit them every year after he left Egypt and that they kept in touch by phone and message when he was out of the country; he sent money to support them and he owns the house they live in. She states that they continued to have a personal relationship while he was married to Carole and she became pregnant again in 2010 and their twins were born in 2011. She further states that since he and Carole separated their relationship has become stronger as he is now only focused on her and the children.

29. I have also taken account of the extensive evidence of communication between the first Appellant and the Sponsor, in the form of WhatsApp messages and telephone calls and facebook messages. One extract has been translated and included within the supplementary bundle, which is illuminating in that I find the tone and content is consistent with the type of communication one would expect between parties to a long term relationship.



30. I find in light of all the evidence that the relationship between the first Appellant and the Sponsor is genuine and subsisting and that they intend to live together permanently as a couple and part of a family unit with their four children.

*Decision*

31. The appeals of all three Appellants are allowed on the basis that the decision of the Entry Clearance Officer dated 8 October 2015 constitutes a disproportionate interference with the Appellants' right to family life with the Sponsor, contrary to Article 8 of ECHR.

*Rebecca Chapman*

Deputy Upper Tribunal Judge Chapman

8 April 2018