



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23665/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 15 June 2018

Decision & Reasons Promulgated
On 19 June 2018

Before

Deputy Upper Tribunal Judge Pickup

Between

Arif Ali
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer

Respondent

Representation:

For the appellant: Ms A Hashmi, instructed by Nebula Law

For the respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Arif Ali, date of birth 4.4.93, is a citizen of Pakistan.
2. This is his appeal against the decision of First-tier Tribunal Judge Smith promulgated 1.11.17, dismissing his appeal against the decision of the entry clearance officer, dated 22.9.16, to refuse his application for entry clearance to join his British citizen spouse present and settled in the UK.
3. First-tier Tribunal Judge Ford granted permission to appeal on 9.4.18.

Preliminary Matters

4. At the appellant's request, made in September 2017, the appeal was listed and decided by Judge Smith on the papers before the tribunal and thus without oral representation or submissions. The appellant had submitted a bundle comprising 244 pages. I am satisfied from an examination of the tribunal's case file that no other bundle was on the file at the time of Judge Smith's decision.
5. Prior to the Upper Tribunal appeal hearing, the appellant's representatives submitted a new bundle under cover of letter dated 6.6.18, which purports to comprise an 'initial bundle;' a 'supplementary appellant's bundle;' and the application for permission with 'new evidence.'
6. At the outset of the hearing before me, Ms Hashmi raised a question about the alleged submission of a supplementary appellant's bundle to the FTT, allegedly comprising additional documents continuity of pagination pps 245 to 253. She produced a fax cover sheet, claiming that this proved that the supplementary bundle referred to should have been before the tribunal when making the decision in the appeal. The date on the fax cover sheet is difficult to read but appears to be 6.10.17.
7. I have carefully considered the fax cover sheet and whilst it does refer to a supplementary bundle in the appellant's case, I am far from satisfied that any such bundle was in fact sent to or received by the tribunal. The fax cover sheet does not confirm that the fax was successfully sent or received. Neither does it say how many pages there were, or ask for confirmation of receipt. Similarly, it is impossible to say from the fax cover sheet of what the supplementary bundle consisted. Ms Hashmi did not provide any witness, witness statement or even letter from the person claiming to have faxed the bundle to the tribunal on 6.10.17.
8. Ms Hashmi also submitted that the bundle had been sent to the Home Office at the same time as that alleged to have been sent to the tribunal, but did not produce any fax cover sheet of transmission to the Home Office. Mr Diwnycz searched the Home Office file and found no evidence that any such supplementary bundle had been received by the Home Office and there was none presently on the file. In addition, I note that in the grounds of appeal to the Upper Tribunal it is twice stated that evidence "now provided corroborate that she has visited her husband on 2 occasions and on the second occasion she took her baby with her." The way this is phrased rather suggests that the evidence in question, copies of the sponsor's passport, was only provided with the application for permission to appeal and not to the tribunal before the decision of Judge Smith.
9. The additional pages of the supplementary bundle now before the upper tribunal include what appears to be photocopies of the sponsor's passport. It is clear from the decision at [67] that Judge Smith expected to see but did not have a copy of the passport put before the tribunal to confirm whether and when the sponsor had visited Pakistan. It was in the absence of cogent supporting evidence of her claims noted at [68], that the judge was unable to take the birth of a child into account as evidence supporting a genuine and subsisting marriage. Clearly, had the additional evidence been available

to Judge Smith it would have some significant bearing on the findings in relation to subsisting marriage. As stated above, no such supplementary bundle is with the tribunal's case file and in the circumstances it is clear that it was not and could not have been considered by Judge Smith.

10. I find that the only appellant's bundle that was on the tribunal file at the time of the making of the decision of Judge Smith is that under cover of letter dated 4.9.17, but endorsed on the same page in handwriting, 'By hand @14:00 5/10/17.' It is not clear whose endorsement that is, but seems likely to have been that of a member of staff when the bundle was handed in by hand at reception at the tribunal. I also understand from enquiries made with the tribunal's administration that if received by hand at the front reception desk it would have then been taken 'upstairs' for linking and filing in due course in the tribunal file folder for the appellant. That is supported by the additional handwritten notation on the same page which I understand relate to the cupboard (10) in which the tribunal's case file was stored.
11. After the hearing I caused the tribunal's computer file log to be accessed to determine when and which documents had been logged as received on the appellant's case. I was shown that there is only one log entry within the entire record relating to the receipt of any bundle received on the appellant's behalf, which was one logged on 6.10.17. This was logged as a bundle but not as a supplementary bundle. In the absence of any other bundle being logged as received, going right back through the computer log history of the case, I reach the conclusion that although the appellant's 'initial bundle' was provided under cover of letter dated 4.9.17, it was not in fact delivered to the tribunal until the afternoon of 5.10.17 and must have been the bundle logged on the computer record on 6.10.17.
12. In all the circumstances, having considered the matter carefully, taking into account Ms Hashmi's submissions and the limited supporting evidence of the fax cover sheet, on the available evidence I reach the conclusion that the only bundle put before the tribunal at any time before the decision of Judge Smith must have been the bundle handed in on 5.10.17, which is the bundle containing 244 pages, without any passport copies. I accept that had a supplementary bundle including copies of the passport been sent to the tribunal but not seen by the judge, that would have amounted to an error of law in the making of the decision, even though not the fault of the First-tier Tribunal Judge. However, for the reasons set out above, I cannot be satisfied that any other bundle had been sent to the tribunal prior to the making of the decision in the appeal. Specifically, I cannot be satisfied that the appellant's representatives sent copies of the sponsor's passport to the tribunal, or the respondent, at any time prior to the promulgation of the decision of the First-tier Tribunal and, in fact, prior to the submission of the bundle prepared in June 2018 for the appeal hearing before the Upper Tribunal.

Error of Law

13. For the reasons summarised herein, above and below, I am not satisfied that there was any material error of law requiring the decision of the First-tier Tribunal to be set aside.

14. The application for entry clearance as a partner pursuant to EC-P 1.1 of Appendix FM of the Immigration Rules was refused on the basis that there was inadequate supporting evidence that the arranged marriage of 18.5.15 was genuine and subsisting. In addition, the Entry Clearance Officer was not satisfied that there was adequate maintenance to support the appellant and his spouse in the UK without recourse to public funds. The Entry Clearance Manager review on 24.11.17 upheld the refusal.
15. For reasons amply set out in the decision, Judge Smith found that the appellant had failed to show on the balance of probabilities that his was a genuine and subsisting marriage. On the other hand, the Judge found that the income was sufficient to exceed the income support level and that there was adequate accommodation. However, in light of the primary finding and after considering article 8 outside the Rules, the appeal was dismissed.
16. In granting permission to appeal, Judge Ford considered it arguable that the First-tier Tribunal Judge may have erred:
 - (a) Not accepting that the sponsor's baby is that of the appellant;
 - (b) Not considering the best interests of the child;
 - (c) Attaching weight to alleged non-disclosure to the benefits agency of financial assistance provided to the sponsor by her uncle.
17. None of those reasons are borne out in a careful consideration of the decision. At [68] the judge noted that the child was born on 11.10.16 and that the likely conception date was consistent with the sponsor's assertion that she was in Pakistan between January and April 2016. That was taken into account in the overall assessment of the evidence and referred to again at [72], noting that there was no supporting evidence that she was in Pakistan at the date of conception. I have dealt above with the issue of the copy of the sponsor's passport and am not satisfied that this was sent to or received by the tribunal prior to the decision of Judge Smith.
18. In relation to the best interests of the child, this begs the question as to whether the appellant is the father and whether the relationship is genuine and subsisting. The absence of a specific best interests assessment pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 is not material to the outcome of the appeal.
19. I have considered the other grounds of appeal but note that in two of the submissions at [5] and [7] they rely on the attempt to introduce post appeal decision evidence. Clearly, the appellant's representatives have misunderstood the basis upon which the Upper Tribunal can interfere with a decision, which is only on demonstration of an error of law. In large part, the grounds are a disagreement with the decision and an attempt to reargue the appeal, submitting that there is now adequate evidence that the marriage is genuine and subsisting. That does not amount to an error of law. I also reject as unfounded the assertion at [11] that the judge acted irrationally and that no reasonable tribunal could have come to the same decision.

20. The oral submissions of Ms Hashmi related to the assertion that the FTT had before it evidence in the form of photographs, text messages and WhatsApp communications which supported a genuine and subsisting relationship between the appellant and the sponsor. I accept that documents of this description are within the appellant's bundle. However, as Judge Smith pointed out at [65], the only photographs in the bundle were "wholly indecipherable." I agree fully with that description. I showed Ms Hashmi various pages of the appellant's bundle in which the figures in the photographs were completely blacked out by the photocopying process. Mr Diwnycz's bundle was of the same poor quality. It is impossible to see the features of any face except that of one child in one of the many photographs. Despite this, and for reasons which remains unclear to me, Ms Hashmi continued to submit that the photographs confirmed the identities of the persons in communication. She did not appear to accept that those put before the tribunal were "wholly indecipherable." The significance is that, as the judge pointed out in the decision between [61] and [64], whilst there was evidence of communication, s/he was unable to confirm the identities of both parties to the various types of communication evidenced in the bundle. Ms Hashmi made further and repeated submissions which also relied on the existence of photographs as confirmation of identity, despite those before the judge being practically useless photocopies.
21. The remaining oral submissions of Ms Hashmi appeared primarily to be disagreements with the decision of the First-tier Tribunal and did not identify any clear error of law. She also suggested that the judge should have known when referring at [60] to the absence of cards or letters between the sponsor and the appellant that there are "cultural difference." Nevertheless, it is clear from the judge's citation of Goudey at [64] that the judge recognised and took into account that evidence of a subsisting marriage did not require the production of particular evidence of mutual devotion and that it was not a requirement that the parties to a marriage should write or text each other. It is clear that the judge was assessing the evidence as a whole, in the round, as she was entitled to do, noting where supporting evidence that might have been expected was absent.
22. Ms Hashmi also made submissions which in essence addressed the weight of the evidence, which is a matter in fact within the province of the judge, suggesting that the judge gave undue weight to immaterial matters such as the undeclared income referred to at [70]. Ms Hashmi submitted that the issue did not lead to any adverse credibility finding, but I pointed out to her that at [71] the judge found the failure to disclose the additional income, which may have reduced the amount of state benefits she was entitled to, as highly relevant when considering the credibility of the sponsor's assertions as to the subsistence of the marriage, particularly where there was an absence of satisfactory supporting documentary evidence before the tribunal at the time the judge came to make the decision in the appeal. The sponsor's credibility was a crucial issue since the appeal turned on a number of inadequately supported assertions as to the nature and extent of the relationship.
23. Having carefully considered the decision as a whole, I am satisfied that the judge was entitled to point out both the absence of some supporting evidence and that some of

the supporting evidence which was produced either failed to identify the parties in correspondence or was otherwise of such poor quality that it was impossible to make such an identification. I am satisfied that the judge has made a fair and carefully assessment of all the evidence before reaching the conclusions, giving cogent reasons open to the tribunal for the findings and conclusions

24. Frankly, the application and appeal were made with entirely inadequate supporting evidence to discharge the balance of probabilities burden of proof on the appellant to demonstrate that this was a genuine and subsisting marriage, relying on unsupported assertions where the judge had reason to doubt the credibility of the sponsor. In the light of the judge's findings on the subsistence of the marriage, consideration of the circumstances on article 8 grounds outside the Rules could not have assisted the appellant.
25. For the reasons summarised above and below, I found no material error of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside.
26. If the appellant considers that there is now adequate evidence, it is open to him to make a further application taking care that the evidence is submitted in a form which can be intelligible to the tribunal.

Decision

27. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

As the appeal has been dismissed, I can make no fee award.



Signed

Deputy Upper Tribunal Judge Pickup

Dated