Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01110/2016

THE IMMIGRATION ACTS

Heard at Field House
On: 29 March 2019

Decision and Reasons Promulgated
On: 17 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

SAMYA YAHYA TIMAN MUSTAFA
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss F Shaw, Counsel, instructed by Citadel Immigration Lawyers
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought on behalf of the appellant, having been given permission by First-tier Tribunal Judge Keane on 16 February 2018.

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2. In short, this appeal concerns a refusal to grant entry clearance to the appellant as the spouse of a refugee.

3. The decision appealed against was made on 2 December 2015. That original decision was based upon the limited evidence of contact between the sponsor and the appellant; and that their relationship was not subsisting and that they did not intend to permanently live together.

4. The appellant appealed on the grounds that there was ample evidence of contact between them as a couple and that they enjoyed a genuine and subsisting relationship, rendering the decision both disproportionate and, as a result, an interference with their family life.

5. The appeal was listed before First-tier Tribunal Judge Robertson on 26 June 2017. He found that the relevant family reunion requirements of the Immigration Rules, in particular para 352A (iv), were not satisfied:

> 352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse civil partner of a refugee are that:
> …
> (iv) each of the parties intends to live permanently with the other as his or her spouse civil partner and the marriage is subsisting; …
> [*Rules cited as at the time of 2015 decision*]

6. Having considered the evidence, Judge Robertson found that there were a number of inconsistencies in the account he had been given; and accordingly found that the couple were not in a subsisting relationship and did not have an intention to live together permanently. The judge further found the decision was both proportionate and in the public interest.

7. In seeking permission to appeal, it was advanced: first, that the judge had failed to give reasons for findings on material matters; and second, the judge had made a mistake on the material facts, which could be established by objective evidence. The first argument rested on the suggestion that the sponsor's credibility had previously been accepted in full by the Secretary of State and it therefore made it more likely that he was telling the truth about his wife, something that was not recognised in the decision. The second ground was more factual in its basis, suggesting that the sponsor had not been in contact with the appellant because she did not have a phone; that the sponsor could not provide evidence of communication due to lack of funds; that there had been regular contact since 2014, which was material; that the decision went against the substantial evidence provided; and that it was accepted that there had been regular contact between the sponsor and the appellant during the time he was in the UK, notwithstanding any delay in submitting the application (the full grounds of appeal are set out in the tribunal's bundle).

8. In granting permission to appeal, Judge Keane indicated that the grounds disclosed an arguable error of law, which may have led to a different outcome, in particular that the

judge had arguably failed to accord adequate weight to the considerations of the appeal before rejecting the sponsor's evidence that he was party to a genuine and subsisting marital relationship with the appellant.

9. The respondent opposes this appeal, firstly, on the ground that the judge directed himself appropriately; and secondly, that the judge considered all of the evidence and reached properly reasoned findings, open to him on that evidence, including the inconsistencies that he identified, which undermined the credibility of the sponsor's evidence.

10. It is against that background that this matter was listed before me.

11. The judge at first instance made a series of discernible findings of fact:

i. The appellant is a national of Sudan, born 2 January 1988.
ii. The appellant and her sponsor met in 2006.
iii. They were married on 15 September 2010. The appellant is the sponsor's wife.
iv. In November 2011, the sponsor left his wife in Sudan.
v. In September 2012, the sponsor arrived in the UK.
vi. On 5 July 2013, the sponsor was granted asylum in the UK.
vii. It was after the grant of asylum in 2013 that he called his mother's contact number at the family home.
viii. The sponsor commenced work in the UK in January 2015.
ix. The application for entry clearance was submitted in September 2015.
x. There was evidence of regular contact between the appellant and the sponsor in the form of Whatsapp records from 2014; and the sponsor provided some financial support to the appellant by way of money transfer.
xi. On 2 December 2015, she appealed the decision of the entry clearance officer to refuse to grant entry clearance as the spouse of a refugee.
xii. The couple met up in Egypt (in 2017).
xiii. The appellant has subsequently made a second application for entry clearance (outcome unknown).

12. Counsel asks me to find a material error of law in the judge's determination, and then asks me to remake the decision on the basis of the evidence supplied and fresh evidence submitted before the Upper Tribunal hearing.

13. The material error of law is focused on what are said to be clear contradictions in the decision. The example I was given was paragraph 14, where the judge accepted that since 2014 the evidence suggested the couple had been in regular contact and that the sponsor had provided some financial support. It was suggested that those factors supported the credibility of the sponsor, in circumstances where the same judge had in the same decision found him not to be credible.

14. While I understand the point, the fact that the judge accepted evidence in one regard, but rejected it in another is not necessarily inconsistent. Appeals such as this have a myriad of factors. It is within the judges remit to identify the parts of the evidence which he or she accepts, but equally to identify which parts of the evidence that he or she does not accept. In conducting such a balancing exercise, the judge is entitled to come down on one side or the other. That does not mean a judge is being inconsistent. On one view, it demonstrates the judge is being fair. The judge sets out the matters that he found against the appellant, and then included the factors that appear to favour the appellant/sponsor's account.

15. It is apparent from the judge's determination that the matters against the appellant outweighed those in favour. I would have been more alarmed had the judge not dealt with the matters that were accepted. It is notwithstanding those factors that this appeal was refused.

16. In my judgement, Judge Robertson was entitled to question the account he had been given about the time that the appellant and the sponsor had lived together. He found the sponsor to be unclear in this regard. It was a discrepancy that was not resolved in evidence. Further, it appears to me to be both reasonable and rational to look at the amount of contact the sponsor and the appellant had after 2011 and up to 2014. He notes that his mother had a contact number and this was, on one account, where the appellant was living for a time. The lack of contact between the appellant and the sponsor over a period of 2 ½ years between November 2011 and April 2014 was a relevant consideration the judge was entitled to take into account in balancing whether this was a subsisting marriage where the parties intended to live permanently together. Further, the delay in submitting the application did have some relevance to the nature of the decision the judge was being asked to make. The judge was not satisfied with the explanation for the delay.

17. I do not intend to reopen the facts, but it appears to me that the judge was applying the correct legal test and appropriately had in mind whether the marriage was subsisting and whether they intended to live permanently together. The burden was on the appellant in this regard. The judge identified the relevant factors that led him to make the decision he did. A judge is not required to deal with every aspect of the evidence or give reasons for their reasons.

18. While it was suggested to me that the common-sense view was that they were in a subsisting marriage and were intending to live together, that was not directly the issue before me. The judge had already made a finding of fact about that in the tribunal below. I was considering whether or not there had been an error of law in that finding. That another judge may have come to a different conclusion on those facts is secondary to whether or not this judge has come to an adequately reasoned decision that is correct in law.

19. The second contradiction I was asked to consider was that the judge had found they were married, but then doubted whether it was a subsisting relationship. Once again, I can find no contradiction. People can be married or go through the ceremony of marriage, but

that does not mean that they are in a subsisting or (on the amended Rules) a genuine and subsisting relationship. Nor does it follow, as was suggested, that 'as a result of their genuine and subsisting relationship, it was obvious that they intended t live together permanently'. I simply do not accept that, but more importantly, the fact-finding tribunal below did not accept that.

20. The judge had reason to doubt the account given and has explained why. I would not seek to go behind that unless there was good reason for doing so. I cannot say that the judge gave insufficient weight to the various factors or competing considerations in this matter. It appears to me that the judge conducted a fair balancing exercise, had the advantage of seeing and hearing from the appellant and sponsor, and then came to a rational and reasoned conclusion.

21. The jurisdiction of the Upper Tribunal in this regard is confined to dealing with material errors of law (Tribunals Courts and Enforcement Act 2007, s 12). Mere disagreement with the outcome at first instance or an appeal that proceeds on the basis that the appellant would like a second bite at the cherry to re-argue the facts will seldom be sufficient unless a material error of law can be sustained first. In the instant matter, the determination makes adequate findings of fact, is sufficiently reasoned, and correctly applies the law.

22. Permission was not given on any other ground, so for the above reasons, I dismiss this appeal.

23. For completeness, I was asked to admit further evidence, pursuant to rule 15(2)(A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the basis that had I set aside the decision below, I may have been re-deciding this appeal.

24. In the event, I do not reach that point, but for the avoidance of doubt I was less than satisfied that that additional evidence would have made any material difference. While I understand that the appellant and sponsor maintain that they now have a daughter, there was no birth certificate or other document confirming parentage, and any such change could be dealt with by way of a second or further application.

NOTICE OF DECISION

The appellant's appeal is dismissed.

The decision of the First-tier Tribunal is confirmed.

Signed

Date: 12 April 2019

Deputy Upper Tribunal Judge Sutherland Williams