Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/27410/2016
HU/24723/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons promulgated**
On 9 January 2019	**On 18 January 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AMTUL SALAM KHAN
KHAULA RIZWAN KHAN

(anonymity direction not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Donkersley - Solicitor with the Sheffield Citizens Advice.
For the Respondent: Mr M Diwnycz – Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellants appeal with permission a decision of First-Tier Tribunal Judge T.R. Smith, who dismissed their appeals. The appellants are citizens of Pakistan, a mother and daughter. An Entry Clearance Officer

(ECO) refused their applications to enter the United Kingdom to settle with their sponsor, the first appellant's husband and father of the second appellant, who is present and settled in the United Kingdom.

Background

2. The Judge notes the position of the family unit. At [16] it is recorded it was conceded the second appellant could not satisfy the requirements of the Immigration Rules either at the date of application or the date of the hearing before the First-Tier Tribunal as she is over 18. This is a human rights appeal in which the Judge was required to consider whether the appellants could satisfy the requirements of the Rules as part of the assessment of the article 8 ECHR claim.
3. The Judge sets out primary findings of fact from [23] of the decision under challenge.
4. The Judge sets out a number of concerns arising from the evidence including the sponsor providing no evidence to support the contention that contact between the sponsor and appellant's using WhatsApp occurred, despite such evidence being said to be reasonably obtainable [49], that no evidence was placed before the Judge of birthday cards, greeting cards, letters of affection or presents from the appellants to the sponsor or vice versa which the Judge claims would have been expected [52], and that no photographs from the appellants were produced which the Judge stated one would have expected to have been sent by the sponsor [53]. The Judge at [60] records there was no evidence of any form of financial support between the sponsor and appellants being sent over the years and the Judge did not find it credible that the appellants were wholly dependent upon money from the first appellant's, the sponsors eldest son, who was working as a missionary as claimed by the sponsor [61]. Further adverse findings are set out from [63] leading to a rejection of the claims under the immigration rules for both parties. The Judge considered thereafter article 8 ECHR. The primary finding being that the appellants had not established that family life existed between them and the UK-based sponsor. The Judge, in the alternative, considers the position from [103] concluding that the decision is proportionate.
5. The appellant sought permission to appeal which was granted by another judge of the First-Tier Tribunal. The grant of permission is in the following terms:

> "1. The Appellants seek permission, in time, to appeal against the decision of First-Tier Tribunal T R Smith (the Judge), posted on 18 June 2018, dismissing their appeals under Article 8 ECHR against the refusal by the Respondent to grant them further leave to enter the UK as the spouse (A 1) and daughter (A 2) of Mr Khan, the Sponsor.
>
> 2. There is arguable merit in Ground 1 because the Appellant's son was born on 8 October 1990 (see para [27]) and would therefore have been 28 years of age and 2008. The Judges factual finding at [61] is therefore arguably flawed, and arguably undermines in part the adverse credibility findings made against the Sponsor. It is arguable that this flawed

> factual finding (i) affected the assessment of the rest of the Sponsors oral evidence, where it could not reasonably have been supported by independent evidence; (ii) is capable of materially affecting the outcome of the appeal. Permission is granted on all grounds."

Error of law

6. Ground 1 referred to in the grant of permission asserts the Judge made a basic error of arithmetic and, as a result, incorrectly found the credibility of the sponsor to be affected. The appellant asserts the sponsor gave evidence in his witness statement, evidence in chief and in cross examination that the relationship between the family members was continuing with there being no evidence the relationship had ended; but that as a result of the circumstances of the family there had been limited contact. The Judge at [61] made the following finding:

> "61. I did not find it credible that the Appellants were wholly dependent upon money from the eldest son who was working as a missionary as claimed by the Sponsor. He was only born in 1990 so it is unlikely that he would receive an income before the age of 18 which would have been in 2018. Even if it was earlier, for example 2016, this still does not explain what the Appellants have survived upon. This leads me to the conclusion that the Appellants have some assets or other sources of income. I did not find the Sponsors open and honest on this point. In my judgement this damages the Sponsor's credibility."

7. A person born in 1990 will have reached the age of 18 in 2008 not 2018, undermining the basis of the Judge's conclusions as it is implausible that a person born in 1990 could have supported his mother and sister from the date claimed. There was no evidence to support the speculation regarding the existence of a secret income or to support the conclusion that the Sponsor had not been open and honest on this point. I find as a result of the unexplained error of mathematics the appellant has established arguable legal error.
8. Whether that error is material depends upon an examination of the second issue the Judge relied upon when finding the sponsor was not credible. This appears at [65] where the Judge writes:

> "65. Whilst I have noted the Sponsor claimed that Danish and his wife shared the family home, but did not get on with the Appellants, I did not accept his evidence is credible. This is inconsistent with his evidence that Danish is supporting the family. It is inconsistent with the First Appellant agreeing to her son and daughter-in-law moving into the matrimonial home. This is a further point that goes to the Sponsor's credibility."

9. The appellants assert this issue was not put to the sponsor by the Judge. The Judge did hear evidence to the effect that it was only the second appellant and her sister-in-law who did not get on, not her brother and sister-in-law. It is not made out there is material inconsistency between the claim the family in Pakistan are supported within the family

structure, even if some individuals do not get on. The appellant makes out that there was insufficient evidence to support the finding made by the Judge at [65] which appears to be based upon a misunderstanding of the evidence and an irrational assessment of the relationships within this family unit.

10. I find arguable legal error in both issues relied upon by the Judge to justify the adverse credibility findings. I find such errors material to the conclusion the appellant and sponsor are not credible witnesses.
11. The second ground refers to the finding at [52] of the Judge's expectation of certain documents set out being available; pleaded on the basis the Judge did not state why he rejected the sponsor's explanation for why there were no such documents set out at [40] and [42] of the sponsors witness statement, or what weight the Judge gave to the proof of telephone and email contact that had been provided. The grounds assert the Judge did not ask the sponsor at the appeal hearing why there was no financial support and no finding are made as to what the Judge made of the evidence of the sponsor of his periods of destitution in the UK from 2010 as an overstay when he slept in a shed or a garage and that he had subsequently, and for a long period, suffered from depression. From 2015 the sponsor was reliant upon State Benefits, had been unable to retain his belongings safely, and was not in a financial position to support the appellants. It is not made out from the evidence, and the Judge makes no reference to it in the findings, that the appellants and sponsor had never claimed that the sponsor had supported them.
12. A point raised in submissions was that the Judge does not set out why he thought that members of this family, with their religious and cultural heritage, would give presents of a particular type. There was no reference to any evidence regarding the "cultural norms" the Judge seems to rely upon which may be more appropriate to UK society rather than society within Pakistan. A number of communities within the world do not even celebrate an individual's birthday.
13. The Judge at [68] declares it to be curious that the first appellant obtained a visa to go on pilgrimages on at least 5 occasions, but no attempt was made by the appellants or sponsor to meet in a neutral country; without giving due consideration or specifying what weight was given to the fact the sponsor was destitute and lacked immigration status between 2009 - 2015 meaning he could not travel out of the United Kingdom. In 2013 the sponsor suffered a heart attack for which medical evidence was provided. In 2015 the sponsor was in receipt of State Benefits preparing for the family reunion application.
14. I find the Judge has erred in law to the extent that it cannot be found that the dismissal of the appeal for the reasons set out in the decision under challenge are sustainable. I therefore set the decision aside.
15. It was accepted by the advocates that the Upper Tribunal is in a position to proceed to remake the decision on the day. I grant the appellants application pursuant to Rule 15 (2A) of the Procedure (Upper Tribunal) Rules to enable the submission of the additional evidence contained in the appellants supplementary bundle.

16. I do not find on the basis of the material available that it is appropriate to make an adverse credibility finding against either the appellant or sponsor in this appeal. It is perfectly credible for the appellants in Pakistan to be reliant upon the male family member referred to in the grounds and to have done so for some time in light of the sponsor's situation.
17. In relation to the first appellant, Mrs Amtul Khan, the ECO refused the application pursuant to paragraph 352A the Immigration Rules on the basis he or she was not satisfied that the level of contact shown by the submitted evidence was sufficient to indicate that the marital relationship with the sponsor is genuine or ongoing and that it was not made out that the appellant and sponsor intend to live in the UK permanently or that their marriages subsisting.
18. The evidence now available shows that there has been frequent and regular contact maintained in the difficult situation set out in the evidence faced by this family unit. It is not disputed that the first appellant and sponsor are husband and wife. It is not disputed that they have maintained contact by whatever means are available to them. It is not made out that they are not credible. It is not disputed the sponsor has a depressive disorder which has made it difficult for him to order his life.
19. In *Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041(IAC)* the Tribunal held that (i) GA ("Subsisting" marriage) Ghana * [2006] UKAIT 00046 means that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted; (ii) Evidence of telephone cards is capable of being corroborative of the contention of the parties that they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question. It is not a requirement that the parties also write or text each other; (iii) Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant.
20. In *Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040(IAC)* the Tribunal held that (i) It is for a claimant to establish that the requirements of the Immigration Rules are met or that an immigration decision would be an interference with established family life. In both cases, the relevant standard for establishing the facts is the balance of probabilities; (ii) Post decision visits by a sponsor to his spouse are admissible in evidence in appeals to show that the marriage is subsisting: *DR (ECO: post-decision evidence) Morocco * [2005] UKIAT 00038* applied.
21. There is clear evidence that this is a subsisting marriage with contact being maintained between the relevant parties. In the absence of adverse credibility findings no countervailing factors arise generating suspicion as to the intention of the parties. I find when considering the evidence in the round that the first appellant has made out her case that she is able to satisfy the requirements of the relevant rule and

allow the appeal on human rights grounds on the basis that any interference with an established family life recognised by the finding under the Rules would not be proportionate to the legitimate aim relied upon by the respondent.

22. In relation to the second appellant, it is accepted this appellant cannot satisfy the requirements of the Rules. The ECO also considered the matter pursuant to article 8 ECHR, but the second appellant was unable to succeed given concerns raised in the refusal regarding the relationship between the second appellant and the sponsor; leading to a finding that article 8 (1) was not applicable. The ECO considers the matter in the alternative, if family-life had been established, concluding that the decision was proportionate.
23. The second appellant lives with her mother in Pakistan and is dependent upon family members there. It is accepted there is regular contact between the second appellant and her father, her sponsor in the United Kingdom. It is found there is no evidence of the second appellant having formed an independent life outside the family unit. Even though the second appellant is now an adult it is made out that family life recognised by article 8 exists on the basis the requisite degree of dependency over and above the normal ties that may exist between an adult child and her parents has been made out.
24. The Judge the First-tier Tribunal found there was no cogent evidence of dependency but this finding itself is flawed as there was clear evidence of the same in the evidence. The conclusion that the contact between the sponsor and second appellant was the normal ties and affection between a parent an adult child, even if true in relation to the sponsor, fails to consider the strong relationship of dependency between the first and second appellants. The statement in the First-tier Tribunal decision that the second appellants family life is centred around her mother and her brother is factually correct.
25. The issue in relation to the second appellant will be the proportionality of the respondent’s decision in light of the findings that have been made in the first appellant’s favour. The effect of that decision is that if the second appellants application is refused, whilst she will remain within her brother’s household in Pakistan, family life recognised by article 8 that she has with her mother will be severed when her mother joins the sponsor in the United Kingdom. I do not find it made out that the purpose of this application is other than family reunion and to enable the family unit to be rebuilt and continue together as normal families do.
26. It must also be borne in mind that the second appellant is a single woman on her own from a religious minority, the Ahmadi, with little access to financial resources other than those provided by her brother in a precarious situation, the evidence raising the possibility that her brother might be required to move due to his religious calling as a missionary. If this occurred it would not be culturally acceptable for the second appellant to live with the sponsor’s brother, the only available option.

27. Considering the evidence in the round and taking into account all relevant legal provisions, I find the respondent has not established to the required standard that the decision to exclude the second appellant from the United Kingdom is proportionate to the legitimate aim relied upon by the ECO.

Decision

28. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed on human rights grounds in relation to both the first and second appellants.**

Anonymity.

29. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 9 January 2019