Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15511/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Tuesday 25 May 2021	**On Monday 14 June 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

J S
[Anonymity direction made]

Appellant

-and-

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the Appellant: Ms C Bayati, Counsel instructed by Amirthan & Suresh solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this appeal involves protection issues, I consider it is appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

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DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge O'Keeffe promulgated on 26 August 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 20 August 2019 refusing his human rights claim. That claim was made in the context of an application for entry clearance to join his wife who is settled in the UK. I refer to his wife hereafter as the Sponsor. The Sponsor is recognised as a refugee in the UK, having been found credible in her claim to be of interest to the Sri Lankan authorities. The Appellant's case includes claims that he too has been and is of interest to those authorities. For that reason, I have continued the anonymity direction made by the First-tier Tribunal Judge.

2. The Judge pointed out that there was no evidence before her from the Appellant ([30] of the Decision). She did not accept as explanation for that omission that the Sponsor was unable to make contact with the Appellant due to safety concerns. Based on that absence of evidence, the Judge did not accept that it had been shown that the relationship between the Appellant and Sponsor was genuine and subsisting. She therefore concluded that the Appellant did not meet the Immigration Rules and that Article 8(1) was not engaged.

3. The Appellant's grounds are not numbered. In summary, they are as follows:

(1) The Judge has erred by failing to assess the current circumstances against the findings of UTJ Chalkley who had determined the Sponsor's appeal in 2016. In particular, it is asserted that the Judge failed to have regard to the accepted evidence and history in that appeal about the risk which contact with the Sponsor would cause.

(2) The Judge made a material error of fact in stating that the Sponsor had not referred to having contact with the Appellant via the Appellant's mother's phone (as well as through the Sponsor's mother's phone). That error said to be made at [27] was one of the reasons why the Sponsor was not found to be credible in relation to her inability to contact the Appellant.

(3) The Judge erred in her consideration of the evidence about a trip made by the Sponsor and her mother to India in 2017. It is said that the Judge has misunderstood or ignored relevant evidence.

(4) The Judge erred in her consideration of the evidence about contact by the Sponsor with the Appellant's parents in Sri Lanka. It is said that this was contact by the Sponsor's mother and not the Sponsor.

(5) There is a minor point made about the Judge's comment that the Sponsor had said that her barrister did not advise her that a statement from the Appellant should be provided. It appears

suggested that it was the solicitor who did not so advise her and that he did so because he was aware of the risks to the Appellant if the Sponsor were to contact him.

(6) The Judge erred by placing reliance on the Sponsor's mother's willingness to make a statement as undermining the reasons why the Appellant had not done so. It is pointed out that it is the Appellant who has previously been detained and is said to be at risk.

4. Permission to appeal was refused by First-tier Tribunal Judge Parkes on 28 September 2020 in the following terms so far as relevant:

> "... 3. It is not disputed that the conversations shown on the phone evidence had not been translated and in those the Judge could not have placed any weight on the evidence submitted. The evidence recorded in the decision at paragraph 21, and not challenged, was that the Appellant had returned to Sri Lanka on the decision of 'their parents' i.e. a decision of both the Appellant's and Sponsor's parents. In those circumstances the Judge was entitled to find that the account was not as claimed given the role of the Sponsor's mother who had travelled to India despite her role in the Appellant returning to Sri Lanka. The absence of evidence from the Appellant was an obvious feature, it is not clear why witness statements from the Appellant's representatives had not been put before the Judge and it is not an error to decide a case on the evidence presented. In the circumstances the grounds are a disagreement with findings that were open to the Judge on the evidence available.
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> 4. The grounds disclose no arguable error of law and permission to appeal is refused."

5. On renewal of the application for permission to appeal to this Tribunal, permission was granted by Upper Tribunal Judge Bruce on 14 November 2020 in the following terms:

> "1. At issue in this application for refugee family reunion was whether the marriage between the Appellant and Sponsor was genuine and subsisting, as required by paragraph 352A(v) of the Immigration Rules. The Respondent, and now the First-tier Tribunal, had found a paucity of evidence demonstrating that the couple had maintained contact with one another between 2011 and 2019.
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> 2. I have considerable sympathy with the assessment of Judge Parkes that the grounds read much like a disagreement with the findings of the First-tier Tribunal. I am nevertheless prepared to grant permission on the ground that it is arguable that set against the background of Judge Chalkley's findings, the Tribunal should have weighed in the balance the evidence that there had been *some* degree of contact, albeit that the substance of much of that contact remained opaque for the reasons rehearsed in the grounds. The grant of permission is not restricted."

6. Judge Bruce gave directions for a remote hearing to deal with the error of law. So it is that the matter came before me to determine whether the

Decision contains an error of law and, if I so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

7. The Respondent filed a Rule 24 reply to the appeal on 26 March 2021, resisting the appeal in the following terms:

> "… 2 The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately. The judge gave full consideration to the facts in the appeal. The judge was aware of the sponsor's account that no statement had been taken, but also took into account the fact that the appellant had maintained contact with her own family and that of her husband's. It is not considered credible that if the appellant had fears regarding contact with her husband that they would not equally apply to her own family or that of her husband.
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> 3. It will be argued that if there were such difficulties it would have been open to the appellant to seek an adjournment on the grounds that they were having difficulties taking instructions/ obtaining a statement. There was no evidence before the judge regarding the solicitors attempts to obtain a statement, as such it was not an error of law for him to find against the appellant in the absence of a statement from him and unspecified alleged safety concerns, given the fact the sponsor has had contact with him since his return to Sri Lanka without incident."

8. The hearing took place remotely via Microsoft Teams. There were no technical difficulties affecting the conduct of the hearing. I had before me a core bundle of documents including the Respondent's bundle, the Appellant's bundle as before the First-tier Tribunal (running to 65 pages) (hereafter referred to as [AB/xx]) and the skeleton argument filed for that hearing as well as a bundle of the witness statements filed by the Respondent for that hearing being the statements filed in the Sponsor's appeal.

DISCUSSION AND CONCLUSIONS

9. At the outset of the hearing, Mr Clarke accepted that there was an error of law in the Decision. As he pointed out, the Appellant has raised a number of issues in the grounds. He accepted that there was an error only in relation to paragraph [5] of the grounds (as summarised by me at [3(2)] above). I accept his concession is rightly made for the following reasons.

10. At [27] of the Decision, the Judge said this:

> "The sponsor said the appellant had contacted her a few times on her phone when she was in India. Her explanation as to why she could not provide evidence of that contact was that she had given her mother her old phone and had the details deleted in a phone shop. The sponsor claimed that since returning to the UK, she had contact with the appellant on her new phone. The sponsor claimed that she had been in contact with the appellant on her mother's phone. **In oral evidence before me the sponsor said she had spoken with the appellant on his mother's phone. She made no mention of contact via her mother in law in her statement.**"

[my emphasis]

11. The Sponsor dealt with contact via other's phones at [13] and [16] of her statement at [AB/4] as follows:

> "13. My husband and I continue to be in contact via my mother's phone on IMO and Viber. **Sometimes we make contact on my in laws' phone**. He continues to live in a fearful environment. We have been married since 2011 and to date we continue to struggle to be able to have free and open communication without fear.
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> …
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> 16. Further, in terms of providing evidence of our contact, our contacts are on IMO and Viber on my mother's phone only. These messages are limited and private. Most of my chats are deleted immediately by my husband in my mother's phone for his own and my mother's safety as he continues to be in fear for his life. **In March 2019, he had a phone for his use for Visa purposes. This was his mother's phone. He used it between April 2019 and August 2019. We were in contact on that phone for a short period and then he returned the phone to his mother. So, I have provided the details I have from our communication during that time."**

[my emphasis]

12. As Mr Clarke submitted and I accept, the Judge has failed to notice that evidence. She has used what she saw as a discrepancy between the Sponsor's oral and written evidence as reason to doubt the truth about the contact between the Sponsor and the Appellant. Whilst on the face of it, the Judge's comment might appear trivial, it is not. The issue in this appeal is whether the Appellant and the Sponsor are in a relationship which subsists. The Judge found against the Appellant on that issue due to the lack of evidence from the Appellant said to be due to difficulties of contact and the lack of evidence of continuing contact between the Appellant and the Sponsor. The Judge did not accept as credible the Sponsor's evidence about those difficulties. The reason given at [27] is one of those which led to that finding.

13. As Mr Clarke submitted and I accept this is a mistake of fact made by the Judge which amounts to an error of law. Put another way, the Judge has failed to take into account relevant evidence (in terms of what is said in the statement) or has taken irrelevant factors into consideration (as to the discrepancy). Either way, I accept that the mistake of fact discloses an error of law.

14. I also accept that the error, whilst involving only one of the reasons given by the Judge for not finding the lack of contact to be credible, is one which is capable of making a difference. As I have already pointed out (and as Mr Clarke accepted), the level of contact is a crucial issue in this appeal. I have some sympathy (as did Judge Bruce) for the position in which Judge O'Keeffe was placed and with what was said by Judge Parkes about the evidence in this appeal. However, the paucity of the evidence is explained by the Sponsor. As Mr Clarke put it, that explanation may or may not

ultimately be found to be credible, but it had to be considered on an accurate assessment of all the evidence put forward.

15. I would in any event have found an error of law based on the ground which I have summarised at [3(1)] above. Although I accept that the Judge makes reference to UTJ Chalkley's decision at [20] to [22] of the Decision she does so only to note that the Sponsor was found to be credible in her own appeal, and that the relationship was accepted to be subsisting at that time. As the Judge points out at [22] of the Decision that was in 2016. I accept of course that this does not mean that the Judge had to accept that the relationship was subsisting in 2020.

16. There is however a further aspect of relevance of Judge Chalkley's decision and that is his findings about the risk to the Sponsor and the Appellant in Sri Lanka. Understandably given the context, those mainly concern the interest of the Sri Lankan authorities in the Sponsor. However, the Judge did accept that the Sri Lankan authorities took an interest in the Appellant due to his links with the Sponsor and that he was put on reporting conditions. What he says about the Appellant's disappearance has of course to be read with subsequent events and evidence about the Appellant's whereabouts. The findings made in Judge Chalkley's decision are, however, therefore potentially relevant to the credibility of the evidence about current risk of contact. That decision therefore needed to be considered in that context.

17. For the foregoing reasons, I am satisfied that there is an error of law in the Decision. The Decision therefore falls to be set aside. As I have pointed out, the credibility of the Sponsor's explanation for the lack of evidence about contact and the contact itself is central to the issue in this appeal which is whether the relationship is subsisting. For those reasons, the credibility findings need to be re-made in their entirety. It is for that reason inappropriate to preserve any of the findings made.

18. Although there are limited issues in this appeal, there will need to be entirely fresh findings of fact made. The appeal will be starting again from scratch. For that reason, it was agreed by both representatives that it would be appropriate to remit the appeal to the First-tier Tribunal for redetermination. I concur with that position.

CONCLUSION

19. For the foregoing reasons, I conclude that there is an error of law disclosed in the Decision. I do not preserve any of the findings. I therefore set the Decision aside in its entirety. For the reasons set out above, it is appropriate for the appeal to be remitted to the First-tier Tribunal as all factual findings will need to be made afresh.

DECISION

The Decision of First-tier Tribunal Judge O'Keeffe promulgated on 26 August 2020 involves the making of an error on a point of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge O'Keeffe.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 27 May 2021