IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000193

First-tier Tribunal Nos:
HU/55361/2021
IA/13456/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6th July 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

EUNICE ACHIAA YEMANG
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Adophy, Counsel
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

Heard at Field House on 9 June 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Moan (the judge), promulgated on 16 December 2022, by which she

dismissed the Appellant's appeal against the Respondent's refusal of a human rights claim.

2. The Appellant is a Ghanaian citizen who arrived in the United Kingdom on 19 December 2020 having been granted entry clearance as a spouse of a British citizen, Mr Frederick Buor (the Sponsor). On arrival, she was stopped by Immigration Officers and questioned about her circumstances, as was the Sponsor. Following this, the Immigration Officers were not satisfied with the information provided and the Appellant was detained. Her leave to enter was consequently cancelled. The Appellant then made a human rights claim on 4 January 2021 which was eventually refused on 7 September of that year. The refusal was based on a number of factors including:

   (a) the Appellant's possession of a crib sheet containing basic information about the Sponsor;

   (b) inconsistencies in the information provided by the Appellant and the Sponsor;

   (c) the withdrawal of sponsorship by the Sponsor;

   (d) the fact that a biometric residence permit, which had been issued in error, had not been returned to the Respondent;

   (e) non-disclosure by the Appellant of the fact that her mother resided in the United Kingdom.

   The Respondent asserted that the Appellant's relationship with the Sponsor was not genuine and subsisting and that she did not meet the suitability requirements in respect of Appendix FM.

3. At the time of the Respondent's refusal decision, the Appellant was pregnant with the Sponsor's child. After her appeal was lodged with the First-tier Tribunal she gave birth to the couple's child who, it appeared, was a British citizen by virtue of the Sponsor's status.

The judge's decision

4. Having set out much of the history and reasons for the Respondent's refusal already discussed, at [13] the judge concluded that the birth of the child constituted a "new matter" and that the Respondent had not consented to this being considered on appeal. In the same passage the judge stated that she would not ignore the birth "insofar as that event factors into my assessment of their [the couple's] relationship". The judge went on to set out in some detail what were in her view the numerous significant problems in the Appellant's case. These problems related to the various matters highlighted by the Respondent in her refusal decision. It is quite apparent that the judge was deeply unimpressed by the evidence. Following her analysis the judge reached the following material conclusions:

   (a) the Appellant's relationship with the Sponsor was not genuine;

   (b) the couple's marriage in 2019 was one of convenience;

   (c) the Appellant had provided false information or failed to disclose material information in a previous application (which can only have related to the application for entry clearance made in December 2020);

   (d) the Appellant had failed to adequately explain why she had not returned the erroneously-issued BRP;

   (e) the Appellant's claimed relationship with the Sponsor had been "deceitful from the start";

   (f) the existence of the apparently British citizen child was not a free-standing issue in the appeal because it constituted a "new matter";

(g) in all the circumstances it was "entirely reasonable and proportionate" for the Appellant to return to Ghana.

The grounds of appeal and permission

5. The numbering of Mr Adophy's grounds of appeal are somewhat difficult to follow, but, as agreed at the hearing, they can be summarised as follows: firstly, the birth of the child was not a "new matter" and the judge was wrong to have found otherwise; secondly, the judge was wrong not to have exercised her jurisdiction to consider the birth of the child (the second ground is clearly linked with the first); thirdly, the judge had placed the burden of proving that the marriage was not one of convenience on the Appellant; fourthly, the judge was wrong not to have considered the relevance of the newborn child (again, this ground is dependent on the first); and fifthly, the judge had failed to properly evaluate the evidence before her.

6. Permission was granted by First-tier Tribunal Judge Boyes. Following the grant of permission no Rule 24 response was provided by the Respondent.

The hearing

7. I received concise submissions from Mr Adophy and Mr Whitwell for which I am grateful. These are a matter of record. I do not propose to summarise them here, but will instead deal with relevant aspects when setting out my conclusions.

8. At the end of the hearing I reserved my decision.

Conclusions

9. In general terms, appropriate restraint should be exercised before interfering with a decision of the First-tier Tribunal, particularly where the findings being challenged have involved the consideration of a variety of

materials, hearing live evidence, and reaching evaluative judgments based upon that evidence.

10. In the present case I am satisfied that there are no material errors in the judge's decision.

Grounds 1, 2 and 4

11. I group these three grounds together because it is plain that they are interlinked. If the judge had been entitled to find that the birth of the new child constituted a "new matter" and given that the Respondent had expressly refused consent (in a letter dated 10 August 2022), the judge was precluded as a matter of jurisdiction from considering the child as a free-standing factor going to the Appellant's Article 8 case.

12. Contrary to Mr Adophy's submission, I conclude that the judge was plainly entitled to find that the birth of a British citizen child constituted a "new matter" for the purposes of section 85(6) of the Nationality, Immigration and Asylum Act 2002, as amended (the 2002 Act). It represented a significant new factual matter which was capable of having a direct bearing on a ground of appeal relied on by the Appellant. Leaving aside any other possibilities, it potentially permitted her to rely on section 117B(6) of the 2002 Act, which in turn could have permitted her to succeed in her appeal on that basis alone.

13. Mr Adophy's submissions failed to recognise the import of these new circumstances. Indeed, whilst he cites the case of Mahmud (S.85 NIAA 2002 – 'new matters') Iran [2017] UKUT 00488 (IAC) in his grounds, he failed to appreciate what the Upper Tribunal said at [31] to the effect that the birth of a British citizen child was almost a paradigm example of a "new matter". The grounds of appeal come nowhere near indicating any error of law on the judge's part.

14. The judge did not err in her conclusion as to the existence of a "new matter" and the Respondent had refused consent. This precluded the judge from considering the child as a discrete issue in the Article 8 appeal.

15. I note here that the Appellant had had a potential remedy if she was unhappy with the Respondent's refusal of consent. The case of Quaidoo (new matter: procedure/process) [2018] 00087 (IAC) makes it clear that the appropriate course of action would be to challenge that refusal of consent by way of an application for judicial review. Such a remedy could have been sought notwithstanding the pending appeal. It would have been open to Mr Adophy to seek an adjournment of the appeal until a judicial review had been concluded. This course of action was not taken.

16. In light of the above grounds 1, 2 and 4 are not made out.

Ground 3

17. I accept that the Respondent's reasons for refusal letter and review did not state in terms that the Appellant's marriage to the Sponsor was one of convenience or a sham. However, it was clear that the Respondent did not accept the relationship to be genuine and subsisting. In the first instance, I conclude that whilst the judge did use the phrase "marriage of convenience" in [23] and [29], she in fact found that the relationship was not genuine and subsisting: [29] and [30]. It was for the Appellant to demonstrate that the relationship was genuine and subsisting and on the evidence the judge was plainly entitled to conclude that the burden had not been discharged.

18. Alternatively, even assuming that the judge's reference to "marriage of convenience" entailed placing the legal burden on the Respondent, I am satisfied that on the evidence before her and her analysis of it, the judge did indeed find, expressly or at least by clear

implication, that the burden had been discharged. For example, at [32] the judge stated:

> "The crib notes and inconsistent accounts in those initial interviews provide sufficient evidence for me to conclude on the balance of probabilities that this at the time of the marriage and her entry in the UK, it was entered into for convenience".

19. On a fair and sensible reading of that passage in the context of everything else said before and after, this amounts to a finding that the Respondent had shown that the marriage was one of convenience only.

20. In the further alternative, even if I were wrong about that, the judge's findings on the evidence would on any rational view have permitted the Respondent to discharge the burden of showing that the marriage was one of convenience. The evidence against the Appellant was, in truth, overwhelming.

21. Ground 3 fails.

Ground 5

22. I make it clear here that Mr Adophy's grounds did not include an irrationality/perversity challenge. In my view, and consistent with what has been said in a number of cases over time, if a party wishes to assert irrationality/perversity they should do so in terms. Procedural rigor (which includes fairness to the other party) requires this. Mr Adophy did not make an application to amend the grounds. Even if he had, I would have refused it, it being way too late in the day.

23. In any event, ground 3 has no merit. The judge considered all of the evidence and was clearly entitled to find as she did. She noted that the Sponsor had not made a complaint in respect of him being allegedly coerced by Immigration Officers into withdrawing his sponsorship (which was a very serious allegation indeed). She noted his evidence that his legal representatives had made such a complaint, although Mr Adophy accepted that evidence of this had not been before the judge. It is clear

enough from, for example, [24]–[32] that the judge simply did not accept the combined evidence of the Appellant and the Sponsor as regards the withdrawal of sponsorship and all other material aspects of the Appellant's case. There was plainly no obligation on the judge's part to simply accept the Sponsor's assertion that he had been intimidated into withdrawing his sponsorship, as apparently asserted in Mr Adophy's grounds.

24. The judge found that the Sponsor's evidence suffered from additional problems such as in relation to his children in the United Kingdom and this was part and parcel of the assessment of the evidence in the round. In short, the judge was entitled to find that both the Appellant and the Sponsor had been deceitful.

Other matters

25. It is of some note that certain aspects of the judge's decision have not been the subject of any challenge. In particular, there is no challenge to the judge's findings that the Appellant should have, but did not, return the BRP, or to her finding that the Appellant had provided false information, or failed to disclose material information, when making her entry clearance application (that information related to the presence of her mother in the United Kingdom). The judge was clearly entitled to conclude that these matters counted against the Appellant and triggered suitability issues in respect of the relevant Immigration Rules. Finally, in light of the judge's assessment of the evidence as a whole it was quite clearly open to her to conclude that it was proportionate to remove the Appellant to Ghana.

Anonymity

26. There is no basis for an anonymity direction and I do not make one.

Notice of Decision

27. The decision of the First-tier Tribunal did not involve the making of an error of law. That decision stands.

28. The Appellant's appeal to the Upper Tribunal is accordingly dismissed.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 16 June 2023