Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/12138/2012

THE IMMIGRATION ACTS

Heard at Newport **Determination Promulgated**
On 22 July 2013 **On 11 September 2013**

Before

Mr C M G Ockelton, Vice President
Upper Tribunal Judge Grubb

Between

NILUFA BEGUM

Appellant

and

THE ENTRY CLEARANCE OFFICER, DHAKA

Respondent

Representation:

For the Appellant: Mr T Ahmed, of Universal Solicitors
For the Respondent: Ms Emily Martin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Bangladesh. She appealed to the First-tier Tribunal against the decision of the respondent on 21 May 2012 refusing her entry clearance to the United Kingdom as the spouse of Mohamed Shamsul Hoque, a British citizen. The Entry Clearance Officer had refused the application because he was not satisfied that the parties to the marriage intended to live together permanently as husband and wife, or that adequate maintenance or accommodation would be available. In the First-tier Tribunal the matter came before Judge Malins. She heard oral evidence

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from the sponsor, and examined the documentary evidence. She also took the view that the appellant had failed to establish that her relationship with the sponsor was a genuine one, or that she would be adequately accommodated and maintained without recourse to public funds.

2. The appellant sought permission to appeal to this Tribunal. Permission was granted on the basis that it was arguable the judge had made speculations and had misunderstood the evidence. In particular, it was suggested that the judge ought not to have considered whether the marriage was "loving", but only whether it was genuine; and that conclusion reached by the judge about one of the documents going to maintenance was one which, in fairness, the appellant or her representatives ought to have the chance to comment on. Thus the matter came before us.

3. We have to say that the judge's determination causes us considerable concerns. She based her findings on a conclusion that the evidence before her was not worthy of credit, giving the following reasons:

> "8. **<u>My Findings: Credibility</u>**
>
> I did not find the appellant to be a credible witness because there are key sections in all the evidence here, which I am unable to accept. These I set out below:
>
> (a) **<u>The Nature of the Marriage</u>**
> I am unable to accept that this marriage subsists in the way which has been judicially defined because:
>
> (i) the sponsor not once told me in oral evidence that he misses his wife or indeed has any feelings for her. There is a bare assertion on page 2 of his four page witness statement that "*we are in a close marital relationship as any ordinary couple …*" yet – the sponsor has not felt moved to visit his wife since the parties married one month after meeting – now two years and three months since;
>
> (ii) the sponsor's witness statement also contains the sharp observation "*clearly if our marriage is not subsisting I would have no reason to part with my hard earned money on a regular basis*", having said that he sends remittances to the appellant. This is inconsistent with a loving relationship;
>
> (iii) more crucially, the appellant's immigration history reflects adversely upon him in this particular appeal sponsoring a spouse settlement visa;
>
> - the Home Office granted the sponsor indefinite leave to remain in 2010 (VAF 8.2.12) which was in fact six years after he lost the very basis upon which he had entered and then remained in the UK. The sponsor must therefore have made a dishonest application to the Home Office;
> - leave was granted on 14th February 2010;
> - less than one month later, on 10th May 2010, the appellant's passport was issued, no doubt having been applied for immediately;
> - around four months after this, the sponsor travelled to Bangladesh to meet his newly arranged second bride. I note

that this marriage was not arranged until after the UK passport was obtained rather than – as might have been expected – rather sooner after his divorce six years previously.

Looking at the overall picture set out in this subparagraph in the round, I am not able to find it more probable than not, that this marriage was unrelated to the matter of the UK visa and that accordingly, it is more probable than not, that the marriage is not now (and never was) "subsisting" in the necessary sense.

(b) The appellant's employer is claimed to be Rosehurry Limited in the application. However –

(i) I am unable to accept the veracity of the purported "notice of coding" from HMRC in evidence as, amongst a number of textual infelicities, the body of the Notice contains seven references to ROSEHURRY LIMITED. Notices of coding do not refer to employers in the way presented;

(ii) the notice of coding is not signed in the space provided;

(iii) the notice of coding fails to give a fax number and gives the claimed telephone number opposite the word "Phone" – not "Telephone" or the more usual abbreviation in such communications "Tel";

(iv) the tax code given in the notice of coding is entirely different from that given in the P45 put in evidence which is dated only six months later;

(v) the appellant has put in evidence nineteen separate pay slips. Each one shows a gross income of £182.40 and a net income of £169.59 to the same penny in both cases. Each of the nineteen pay slips records 30 hours exactly as having been worked.
Such uniformity is not plausible. Pay slips frequently vary. Most employees work disparate numbers of hours a week – hence the point of being paid an hourly rate in each of the nineteen weeks. I reject the evidence that the appellant worked precisely 30 hours in each of nineteen weeks;

(vi) if the appellant is stated to be paid by BACS by definition, this will show in the appellant's bank statements. No such credits are shown in the bank statements in evidence.

For the above reasons and in the above circumstances, I reject the appellant's evidence to have been employed as claimed.

(c) **<u>Accommodation</u>**

(i) the property register at the Land Registry and the copy tenancy agreement both show the owners of the property as Shilpi Begum and Rubia Begum; however

(ii) the copy accommodation letter sent to the ECO stating that the appellant can be accommodated at the given address, purports to come from Bilal Ahmed and Shilpi Begum as occupiers of the property;

(iii) the surveyors' letter to the ECO in evidence failed to note the names of the owners or occupiers of the premises. It does however state that in January 2012, the property was occupied by the sponsor, two other adults and three children and comprised three double bedrooms, a kitchen, a bathroom and toilet, and one living room.

The evidence here is unsatisfactory and in any event, the appellant and sponsor would have to share a bathroom and kitchen with another family. In those circumstances, they would probably be entitled to seek rehousing from the council.

(d) **The Sponsor's Previous Marriage**
The fact that the sponsor was unable to state one word as to why his marriage to his first wife in respect of which, he himself had emigrated, had failed, detracts from his overall credibility.

9. **Conclusions**

The very detailed reasons which I have set out in making my credibility finding, have in fact taken my determination one step further, as they themselves, must be determinative of the result of the appeal.
By a wide margin, I am unable to find on the balance of probabilities, that the marriage between the sponsor and the appellant is subsisting. I am also unable to be satisfied upon the issues of maintenance and accommodation, although in the case of the latter, mindful of the low threshold, the matter is more finely balanced.
I find that the ECO was entirely correct in this decision under the law and the Immigration Rules and that furthermore, he gave the application full consideration in every respect. Like him, I am unable to be satisfied under paragraph 281(iii), (iv) and (v) of the Immigration Rules.
As I have found there to be no subsisting marriage, Article 8 can have no application. Both the limbs of the appellant's appeal must fail.

10. **Rider**
I should mention here in the interests of justice that it is to be hoped that the UK Border Agency will closely look into the basis upon which the sponsor obtained his UK citizenship in 2010: whether or not it was properly based upon his having been granted indefinite leave to remain at a time when he was married".

4. There are demonstrable errors under each of the first three heads. So far as concerns the nature of the marriage, the judge made a clear error of fact of paragraph 8. As the documents before her made perfectly clear, the sponsor was not granted indefinite leave to remain in 2010: he was granted indefinite leave to remain in 2002. The conclusions as to the Sponsor's conduct that she drew from her mistake were falsely damaging to him and clearly influential in her overall conclusions as well as the (unmentioned) "Rider".

5. So far as concerns the evidence of maintenance, sub-paragraphs (i)-(iii) appear to depend on her own expertise in relation to a notice of coding. We do not know why she drew the conclusion she did: the notice of coding does not look different from notices of coding with which we as taxpayers are familiar; and we think there is a great deal of justice in the suggestion that, given that an issue as to the genuineness of the document had arisen in her mind, she should not have reached the conclusion she did without allowing the matter to be properly investigated. If she did have expertise in notices of coding, it is surprising that she drew conclusion (iv): the reason

why the tax code given in the notice of coding is entirely different from that given in the P45 dated only six months later is that the P45 refers to a different tax year.

6. So far as concerns accommodation, the final sentiment in the judge's observations appears to be an assumption she makes about the law. Her apparent doubts about the owners and occupiers of the property could have been resolved by a study of a letter from the owners, dated 24 January 2013, which was before her. We should say, incidentally, that we have no idea what the judge meant by referring to the "low threshold" in relation to accommodation. The standard of proof that she should have been applying was that of the balance of probabilities.

7. In the circumstances, it is not surprising that permission to appeal was sought and granted. The determination is riddled with errors. They are errors of law because they demonstrate that the judge was failing to do her job properly.

8. We have considered the evidence again. There was no application to adduce further evidence before us. As we indicated at the hearing, our view is that the evidence in relation to maintenance and accommodation was of a nature that would have caused the appeal to be dismissed in any event.

9. In relation to maintenance, there was a clear conflict of evidence between the sponsor's account of his alleged wages, and the documents supporting it. The Entry Clearance Officer's reasons for refusal read, in part, as follows:

> "Your sponsor claims to work for Rosehurry Ltd earning net income of £169.59 per week. You have shown wage slips as evidence of your sponsor's employment. I note that the pay slips show it paid by BACS however the bank statements you have submitted show no deposits from Rosehurry by the BACS method. I also note that your sponsor makes regular deposits of £182.00. These deposits are more than your sponsor is paid. No explanation has been given to demonstrate the origin of these funds".

10. Those concerns remain unanswered. Without wanting to open again the question of the reliability of the sponsor's tax documents, it is, to say the least, very surprising to see that a sponsor who claims to be paid just over £182.00 gross per week, amounting to £169.59 net, and whose employer records that he is paid by the BACS, should not be able to provide other evidence of any payments of £169.59, but instead gives evidence of manual deposits of almost exactly the gross amount of his income. The Entry Clearance Officer's doubts about the credibility of this evidence were entirely justified, and were clearly expressed. As the judge's determination makes clear, those doubts remained by the end of the hearing, and they remain still. There is simply no good reason why the evidence of the appellant and the sponsor on this point should be regarded as credible: it certainly cannot all be true.

11. The same comment appears to us to be merited in relation to accommodation. The evidence adduced with the purpose of showing the genuineness of the sponsor's access to accommodation proves too much: it is a lease by which he is granted a

tenancy of the entire property at which he lives. That is wholly inconsistent with the evidence that he has one room there. Again, they cannot both be true. The document that has legal effect (the lease) appears to show that the evidence of the sponsor and his alleged landlord's is not correct.

12. This appeal cannot succeed on the evidence before the Entry Clearance Officer, the First-tier Tribunal or us, and we set aside the judge's determination, including her findings on the nature of the marriage, and her "Rider", and substitute a determination dismissing the appeal because the appellant cannot meet the maintenance and accommodation requirements of the rules. In that context, and because a new application may well be made, we reach no conclusion on the nature of the marriage or the intention of the parties to live together permanently as husband and wife. The First-tier Tribunal's conclusions on that issue have been set aside, and whatever view we reached would not affect the outcome of the appeal.

13. For the reasons we have given, the appellant's appeal is dismissed.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 23 August 2013