Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/24125/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 June 2014	**On 3 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS NAZMA BEGUM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Miah of Counsel
For the Respondent: Mr Laurence Tarlow, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING NO MATERIAL ERROR OF LAW

Introduction

1. The appellant is a Bangladeshi national who was born on 1 January 1987.

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2. The appellant applied for entry clearance to the UK to join her husband, a British citizen, on 8 July 2012. That was refused on 8 November 2012 for reasons given by the ECO. The appellant appealed to the First-tier Tribunal and that matter came before Judge of the First-tier Tribunal Beg (the Immigration Judge) on 28 October 2013. Her determination was promulgated on 6 November 2013.

3. The appellant appeals to the Upper Tribunal with the permission of Upper Tribunal Judge Macleman given on 24 April 2014. That was the second application for permission, the first being unsuccessful before First-tier Tribunal Judge Colyer. Judge Macleman thought it was at least arguable that the Immigration Judge had failed to consider evidence in relation to the English language test certificate which he could have considered and also had not fully explained his conclusion in paragraph 6 that the marriage between the appellant and the sponsor was not "genuine and subsisting".

The Hearing

4. At the hearing I heard submissions by both representatives. Mr Miah submitted that the ECO had been wrong not to consider evidence in the form of a certificate (at page 50 of the bundle submitted by the appellant's representatives on 11 October 2013). He pointed out that Section 85(2), the Nationality, Immigration and Asylum Act 2002 permitted the ECO to consider circumstances appertaining to the date of the decision. His second criticism of the decision of the ECO related to his failure to properly consider the evidence. This, he said, supported the conclusion that his client was in a genuine and subsisting relationship with the sponsor, who was 60 years her senior. The Immigration Judge had applied the "primary purpose Rule," rather than the test which was espoused in the case of **Goudie** **[2012] UKUT 00041 (IAC)**.

5. In addition, I was referred to a number of transfer receipts which were before the First-tier Tribunal which tended to indicate a degree of support for the appellant.

6. In response Mr Tarlow submitted that the ECO had only received the English language certificate shortly before he determined the application. He doubted that the marriage was genuine and subsisting. The ECO was entitled to take into account the substantial age difference between the appellant and the sponsor. His decision was sustainable before the First-tier Tribunal and the Immigration Judge had not erred in law in finding that the appellant was in fact coming to the UK to care for the sponsor in old age.

7. By reply Mr Miah submitted that the sponsor did not need care at the present time and that a reasonable judge applying the correct criteria to the case would have reached the view that this marriage was genuine and subsisting in July 2012 when the application was made. I was invited to find no material error of law in the circumstances.

8. Both sides appeared to agree that in the event I did find a material error of law I would be able to remake the decision without the need for a fresh hearing.

9. At the end of the hearing I reserved my decision as to whether there was a material error of law.

Discussion

10. The appellant is a Bangladeshi national, born on 1 January 1987. She wishes to come to the UK to join her sponsor, Mohammed Jabd Ali a British citizen born on 3 February 1927.

11. The two principal reasons for refusing entry clearance were:

    (1) that the appellant did not meet the requirement for an English language test;

    (2) the marriage between the appellant and the sponsor was not genuine and subsisting. In particular, it was not credible having regard to the age difference between them and the purposes for which the sponsor had stated he required the appellant to enter the UK.

12. When the appellant completed her notice of appeal against the decision of the ECO she requested an oral hearing but I see that this was subsequently changed by a letter dated 3 September 2013 from her solicitors, Kingdom. That letter appears to suggest that she wished for the appeal to be determined on the papers, although it is not clear. That is the manner in which the Immigration Judge ultimately decided the appeal.

13. The first set of grounds of appeal against the Immigration Judge's decision did not find favour in First-tier Tribunal Judge Colyer but Upper Tribunal Judge Macleman considered it at least arguable that the Immigration Judge's reasoning in relation to the English language qualification and in relation to the genuine and subsisting nature of the relationship between the appellant and the sponsor was inadequate. The Upper Tribunal Judge refers to the fact that the refusal was incomplete in the copy supplied but that he had seen a complete copy in the appellant's bundle.

14. The ECO was entitled to strictly apply the requirements of the Rules. Thus, the failure to meet the English language test requirement, although apparently trivial, is nevertheless a proper basis for refusal.

15. Following First-tier Tribunal Judge Colyer's refusal to grant permission the appellant prepared expanded grounds of appeal dated 7 April 2014. These state:

    (1) That the Immigration Judge was entitled to look at any evidence appertaining to the date of the decision and was not limited to evidence that was only

available at the date of that decision following the case of **DR Morocco [2005] UKIAT 00038**. Therefore, the Immigration Judge was entitled to take into account a certificate dated 5 September 2012 which showed that the appellant had the necessary English language skill.

(2) The Immigration Judge had accepted that the marriage between the appellant and the sponsor was valid under the laws of Bangladesh. In the circumstances there was "a presumption of marriage" which was supported by case law. Unless there are "countervailing factors" which generate suspicion the Immigration Judge ought to have accepted the relationship was genuine and subsisting, particularly, having regard to the fact that the ordinary civil standard of proof applied.

(3) Further, or alternatively, the Immigration Judge had failed to consider whether an Article 8 based claim could succeed if the situation was not adequately catered for by the Immigration Rules.

16. In relation to these grounds, the Immigration Judge copied out the entire refusal of entry clearance by the ECO which included a recital of the relevant Rule (paragraph 281(i)(a)(ii) of HC 395). That requires the appellant to show she had an English language test certificate in speaking and listening skills from an approved English language test provider. Secondly, she had to show that the marriage between herself and the sponsor was a genuine and subsisting one of man and wife.

17. The ECO noted that the letter from AES Institute stated that the appellant "would submit" a City and Guilds certificate but no such certificate was produced at the date of the application (7 July 2012). In the circumstances she did not meet the necessary requirement.

18. Secondly, the marriage certificate showed that the appellant was married to the sponsor on 26 September 2010. Although some photographs have been produced it was not clear that a marriage ceremony had actually taken place. The marriage, which was an arranged one, did not appear credible given the age difference. Furthermore, the appellant had produced a letter from the sponsor's doctor stating that he intended to go to Bangladesh to seek out a person to "look after him after his wife's death in December 2009". There was no provision in the Immigration Rules to admit a relative or friend to the UK for the purposes of caring for the sponsor in old age. A letter from Chrisp Street Health Centre suggested that the sponsor required increasing levels of medical care and this was the true reason for the appellant's application. Additionally, there were no insurmountable obstacles to continuing such family life as had been formed between the appellant and the sponsor abroad.

19. The criticisms identified by Upper Tribunal Judge Macleman go to the reasoning, rather than the substance of the decision taken by the Immigration Judge. As I understand the appellant's evidence before the First-tier Tribunal, she admitted that she did not have the "listening part" of the English language test that was required

(see paragraph 9 of her skeleton argument before that Tribunal). Additionally, it is not only the problem that the certificate postdated the decision of the ECO, but also the fact, based on the Immigration Judge's findings at paragraph 3, that the appellant had not in fact completed the reading and writing elements of the test. Therefore, the certificate produced was not a relevant one for the purposes of the Immigration Rules. It appears she did not satisfy this requirement.

20. More significantly, the Immigration Judge clearly found the age difference between the appellant and the sponsor was such as to make the subsisting nature of the marriage between the appellant and the sponsor questionable. She also found that there were other factors in the case which undermined the contention that this was a straightforward relationship between husband and wife. There was clear evidence in the form of the GP's letters describing the sponsor's state of health, especially the letter dated 7 July 2012, to the effect that the sponsor suffered from a number of health problems, some of them serious. He required a helper. The Immigration Judge was entitled to conclude that the reason given by the sponsor for the need for the appellant to come to the UK (to help him in his old age) was not a reason covered by the Immigration Rules.

21. Therefore, this was not a case like **Goudie [2012] UKUT 00041** in which there were "no countervailing factors". There were countervailing factors here because the appellant's own evidence suggested that she was not coming to the UK for the purpose of living with the sponsor in an intimate relationship of marriage. Rather, she was coming to the UK for the purposes of caring for him in old age.

22. Some of the criticisms of the Immigration Judge appear, at first sight at least, to have been justified. For example, the Immigration Judge did not refer to any visits by the sponsor to the appellant in Bangladesh. However, given the flawed nature of the application for entry clearance I am satisfied that were this evidence to have been considered it would not have made any material difference to the outcome. The Immigration Judge was entitled to conclude that this was not a genuine application based on the appellant's marriage to the sponsor.

23. In the circumstances, given the Immigration Judge had found that limited contact between the appellant and sponsor in a relationship of convenience for the purposes of caring for the sponsor in his old age, clearly the appellant had not established any private or family life of such quality that the respondent's decision would amount to unlawful interference contrary to the ECHR. In the circumstances, the ECO was entitled to deal with the Article 8 application cursorily and the Immigration Judge was not bound to give it substantial consideration in her determination.

Decision

24. For these reasons I find that the decision of the First-tier Tribunal does not contain any material error of law. Accordingly, that decision stands.

25. No anonymity direction and no fee award was made and there is no appeal against those decisions.

Signed Dated

Deputy Upper Tribunal Judge Hanbury