IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04968/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 11th March 2016	**On 13th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS MAMAMUDA HAPPY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Bhachu of Counsel
For the Respondent: Mr T Wilding, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh born on 10 November 1990. She appeals against the decision of the First-tier Tribunal (the FtT) to dismiss her appeal both under the European Economic Area Regulations 2006 (2006 Regulations) and on human rights grounds.

2. Upper Tribunal Judge Lindsley gave her permission to appeal the decision of the FtT because he was satisfied that the grounds disclosed arguable errors of law. Specifically:

   (1) It was arguable that the appellant had not used deception of such character as fell within the guidance issued on the point in cases such as **Shen (proving dishonesty) [2014] UKUT 00236**. The Secretary of State bore the burden of proving such an allegation. The appellant had produced evidence from an agent who had responsibility for completing the application on the appellant's behalf. The Immigration Judge noted that in paragraph 19 of his decision that the evidence had only been received on the day of the hearing when the issue of deception had been raised in the refusal letter many months previously. Judge Lindsley considered it to be at least arguable that the Immigration Judge should have given the respondent an opportunity to apply for an adjournment if she objected to the evidence of the agent on the grounds that it was procedurally unfair. However, it was noted that the respondent had not done so. It was arguably wrong of the Immigration Judge not to attach due weight to that evidence as a consequence of his lateness.

   (2) Secondly, Judge Lindsley criticised the Immigration Judge for not considering the leading authority of **Goudey** which was relevant to establishing whether there was a genuine and subsisting relationship between the appellant and the sponsor. This was to be decided at the date of the decision. Thirdly, whilst it was accepted that the appellant did not meet the requirements of the Immigration Rules, and particularly Appendix FM of those Rules, it was nevertheless arguable that the other errors identified by Judge Lindsley impacted that on the assessment under Article 8 of the ECHR. It was noted, in particular, that the appellant's failure to satisfy the requirements of the Rules related to the absence of an appropriate English language test certificate (see paragraph 20 of the decision).

3. Judge Lindsley considered that the parties should be ready to proceed immediately with the remaking of the decision if an error of law were found. To that end the appellant was to serve any evidence on which she relied to the effect that the relationship between she and her husband was genuine and subsisting at the date of the decision (27 February 2014). Judge Lindsley also directed that Paul Evans, a community psychiatric nurse and care coordinator at Dudley and Walsall Mental Health Partnership NHS Trust, should be asked to clarify in writing whether he witnessed telephone calls between the appellant and the sponsor at or around the time of the decision, whether he viewed the marriage as genuine and subsisting and whether it would be reasonable from a medical perspective to expect the sponsor with the appellant in Bangladesh.

Background

4. The appellant planned to arrive in the UK on 20 February 2014 and reside with the sponsor Ansar Uddin, who was born on 31 December 1980 and is a British citizen living in [the] West Midlands, UK.

5. On 27 February 2014 the application for entry clearance as a partner under Appendix FM of the Immigration Rules was refused by the Entry Clearance Officer (ECO). The ECO considered the application under paragraph EC-P.1.1 of Appendix FM but decided that the application had not been truthfully completed. It stated that the appellant had not been refused a visa for any country including the UK in the previous ten years. However, the ECO noted that the appellant had made an application at the Dhaka entry post to join his mother which was refused on 29 August 2006. A copy of that refusal is attached to the ECO's decision. It is noteworthy that that refusal also draws attention to a failure to disclose his previous immigration history in relation to a previous application for a visa, a change to his date of birth and a submission of a different passport to the previous application. Additionally, the respondent in the 2006 application had not been satisfied as to the documents evidencing the appellant's finances. Accordingly, the respondent considered it correct to consider the earlier refusal notwithstanding that it was more than ten years from the date of his present application. It caused the respondent to question the credibility and reliability of the statements made by the appellant in support of this application. The application was therefore refused under the above paragraph of Appendix FM. That paragraph dealt with suitability requirements.

6. The ECO also refused the application under ECP.-P.1.1(d) of Section E-ECP (eligibility for entry clearance as partner). This was on the basis that there was nothing to suggest that the appellant and his sponsor had enjoyed regular contact with each other. The appellant had submitted handwritten letters but these were described by the ECO as "a self-serving". There was no evidence in his view that any of them were posted and no evidence of any recent communications between the appellant and the sponsor. Accordingly, the sponsor was not satisfied as to the subsisting nature of the relationship. The appellant had claimed to marry the sponsor in March 2010 but the ECO was not satisfied that the relationship was genuine and subsisting and that the parties intended to live together permanently within EC-P.1.1(d) of Appendix FM.

7. Finally, the ECO was not satisfied that the appellant met the English language requirements of Appendix FM (E-ECP.4.2). Specifically, paragraph GEN1.6 requires an English language test within the Common European Framework with a provider approved by the UKBA. The respondent had not satisfied the academic qualifications required. He had submitted an ESOL entry level certificate in both speaking and listening to English from the City and Guilds but the ECO was not satisfied the documents submitted showed that the appellant had the necessary efficiency in speaking and listening into English. The documents

submitted did not reliably demonstrate that he had the stated qualification.

8. The appellant's representative completed an appeal form (IAFT-2) dated 1 April 2014. This stimulated a review by the Entry Clearance Manager (ECM).

9. The ECM pointed out that the appellant was issued with a free re-test in his English language but appeared not to have taken advantage of that. Accordingly, the ECO had been justified in refusing based on his English language ability. Unfortunately, the ECM was not given a full set of grounds of appeal. This appears to be because representatives invariably follow the practice of not including their grounds in relevant form as is required. Nevertheless, I have seen an email dated 18 December 2013. The ECM went on to consider the case on the merits. He was satisfied that the decision was proportionate to a legitimate aim (maintaining effective immigration control) and that no evidence had been supplied from the appellant or sponsor that they would not be able to live in Bangladesh where the sponsor had been born. It appeared that the appellant had chosen to enter an arranged marriage with the sponsor and the respondent's decision did not result in unjustifiably harsh consequences for the appellant or her family. There were no exceptional reasons why the family had an inherent right to decide where they wished to form their private or family life. It was open in all the circumstances for the sponsor to go to Bangladesh. The ECM's decision is dated 20 October 2014.

The Appeal Proceedings

10. At the appeal the appellant was represented by Counsel and the respondent by a Presenting Officer. The Immigration Judge heard evidence from the sponsor, who claimed that he needed 24 hour-a-day care. He claimed in evidence that due to his "mental state" he was unable to return to Bangladesh. Nevertheless, he calls his wife "three or four times a week" and had documentary evidence from an organisation called "Tango". However, the Immigration Judge observed, in paragraph 10 of his decision, that the "call records" only indicated contact between the sponsor and the appellant after the date of decision. It seems that the only communication between the two has been by telephone. Apparently the sponsor would write letters but would throw them away so that they never got to the appellant. Only two were produced in the bundle of documents before the Immigration Judge. The sponsor had not sent money in the recent past at the date of the hearing (7 January 2015). The sponsor gave evidence that with regard to the "original application" this had been filled in by an agent who had made a mistake answering the question (at question 26 of the application) "have you been refused entry to the UK in the last ten years?" "No". This, the sponsor accepted was untrue. However, the error was only identified when the sponsor contacted the solicitor to try and correct it.

11. The appellant then called the sponsor's niece to give evidence. She adopted her witness statement but added that in addition to the contact described by the sponsor the appellant and sponsor spoke via telephone and Skype. She describes the separation between husband and wife as being negative.

12. It was pointed out in cross-examination that no birthday cards have been produced, as one would expect to see between husband and wife. The sponsor was said to have suffered from mental health problems since around 2008.

13. The Immigration Judge determined that the error on the application form had indeed been deliberate. That the Immigration Judge did not accept the explanation by the sponsor that the agent had been responsible for this error even though a fax was placed before the Immigration Judge dated 15 December 2014 timed 11.05 (i.e. after the official start time on the day of the hearing). The Immigration Judge appreciated the incidence of the burden of proof in alleged deception cases (i.e. it was on the respondent) but the explanation offered by or on behalf of the appellant was unsatisfactory. The failure to explain the appellant's previous immigration history did not meet the basic level of plausibility. The respondent had discharged the burden of proof in this case.

14. Next the Immigration Judge considered Appendix FM and specifically E-ECP.4.2 of that Appendix. In terms of the required English language test certificate, the appellant had been offered an opportunity to take a free re-test but she had not taken advantage of this. The ECO had been justified in drawing adverse inferences from this failure.

15. It was not accepted that the relationship was genuine and subsisting and the "Tango records", produced to support the claim that such a relationship existed, post-dated the decision. The respondent had not been able to give helpful evidence herself and the Immigration Judge felt justified in drawing adverse inferences from the lack of concrete evidence of contact between the appellant and the sponsor in the form of telephone bills, telephone cards, letters, birthday cards, anniversary cards etc.

16. The Immigration Judge also dealt with the sponsor's ill-health, noting that he was capable of flying to Pakistan (should this be Bangladesh?) and taking part in the wedding ceremony. There has been no attempt by the appellant to come to the UK in the four years between their marriage and the application being made. There was no evidence of any money transferring between the two parties to the relationship and noted that the medical evidence from Mr Evans (referred to above) did not refer to a subsisting marriage between the parties but noted that "any positive, loving relationship in Mr Uddin's life does increase the potential for longer term stability but this distant relationship has not embedded the normal development of marriage". The Immigration Judge was of the view that the evidence obtained was unreliable and a significant motive behind the

application was for the appellant to come to the UK to act as the sponsor's "carer".

17. Accordingly, the Immigration Judge dismissed the appeal both under the Immigration Rules and on human rights. He found there was no genuine and subsisting relationship considered that Article 8 fell with this decision.

The Hearing

18. At the hearing I heard submissions by both representatives.

19. Ms Bhachu sought to maintain that the decision was contrary to the Immigration Rules and the ECHR.

20. The respondent submitted that I should look at the facts at the date of the decision. The respondent relied on the case of **AS (Somalia)** and said that the appellant could not raise the issues which had not been dealt with in the grounds of appeal. The grounds of appeal specifically state that the marriage was genuine and subsisting, that the Immigration Judge's assessment of it had been contrary to case law and that the deception issue had not been fully explained.

21. Ms Bhachu then submitted there were compelling and exceptional reasons for deciding the case outside the Immigration Rules. In any event, she said, Appendix FM was satisfied. The Immigration Judge had accepted that the parties were married (paragraph 21 of his decision). There was evidence of contact and the case did not fall within the principle enunciated by **DR (Morocco) [2005] UKAIT 00038**. Following the case of **Goudey** no particular quality of evidence was required and the corroboration had come from the sponsor's niece. Sufficient weight had been attached to the statements by witnesses and by the sponsor himself that he and his wife enjoyed a good relationship.

22. Ms Bhachu then dealt with the suitability requirements. The agent had produced a witness statement, albeit on the day of the hearing, to confirm his error. It was consistent with the evidence. This evidence was not properly considered by the Immigration Judge.

23. It was also questionable whether the Immigration Judge had properly considered Article 8. The sponsor's ill-health was an exceptional and compelling reason why the sponsor could not continue his private life or family life with the appellant in Bangladesh.

24. The respondent said by reply that the appellant's representatives had not engaged with the issue about the date of decision being crucial and there was a glaring inconsistency on the application for entry clearance. Mr Wilding confessed not to understand the logic of Judge Lindsley's grant of permission but it was incumbent upon the appellant to prove her case. There has been earlier applications which had not been referred to on the present application and deception was plainly made out. There was high threshold to surmount before establishing that the respondent would

unlawfully interfere with the appellant's private or family life but in any event family life could continue abroad. There was nothing exceptional or compelling about this case.

25. I allowed Ms Bhachu a last word. She said that the burden rested on the respondent to show that adverse credibility findings should follow from the falsely completed application form. Post-decision evidence was "highly material in this case" and it ought to lead the Tribunal to a different decision than that reached by the Immigration Judge.

26. At the end of the hearing I reserved my decision as to whether or not there was a material error of law.

Conclusions

27. The first point to make is that where an appeal is made against an immigration decision consisting of a refusal of entry clearance then by virtue of Section 82(2)(b) and Section 85A (2) of the Nationality, Immigration and Asylum Act 2002 (found in Phelan and Gillespie 8th Edition (not the 9th Edition) at pages 300-303) the Tribunal may only consider evidence of the circumstances appertaining to the time of the decision. "Tribunal" is defined by Section 81 of that Act as the First-tier Tribunal. Accordingly, the Immigration Judge was correct to dismiss post-decision evidence.

28. The Immigration Judge was also correct to dismiss the appeal on the grounds that the appellant failed to meet the suitability entry clearance requirements of Section S-SEC, EC.-P.1.1(c) of the Immigration Rules (Appendix FM). The appellant appears to have made an application to join his mother in the UK which was refused on 29 August 2006. It is noteworthy that not only did the appellant not truthfully complete the application he made 23 December 2013 by answering the question about previous applications in the negative when it should have been answered in the positive, but there had also been an earlier refusal on a similar basis. It appears that the appellant applied for a visit visa in August 2000 but was refused. In that application the appellant falsely stated his date of birth was 11 April 1989 when in fact his claimed date of birth is 10 November 1990. This, apparently, resulted in a refusal of both that application and an application by the appellant's mother, which also contained inaccurate or untruthful information. The decision in 2006 was also refused.

29. The Immigration Judge was entitled to treat this as a serious matter and the explanation given that the appellant had relied on an agent was rightly rejected by the Immigration Judge. The evidence from the agent consisted of a letter faxed to the Tribunal after the start of the hearing on the day of the hearing. The appellant had had many months to prepare his case and, with respect to Judge Lindsley, the Immigration Judge was entitled to reject that evidence. It was not necessarily in accordance with the overriding objective of trying cases justly and proportionally to invite the

respondent to apply for an adjournment. The assertion(s) by Mr Islam in that fax that that he "wrongly (answered) question number 26 … (by) answer(ing) no instead yes" would be difficult for the respondent to counter in any event. In my view the Immigration Judge was entitled to attach little or no weight to this evidence.

30. It is said that the sponsor's poor state of mental health is said to make this case an exceptional and compelling one which should be considered outside the Immigration Rules. However, the evidence consists of a letter from a psychiatric nurse, which makes no comment on the state of healthcare in Bangladesh. Furthermore, the sponsor has lived on his own since his marriage to the appellant in 2010, a period of four years at the date of the decision. His long term prognosis was described as "good" by Mr Evans, a psychiatric nurse, as long as he continued with his "recovery plan". Mr Evans could not comment on "the potential benefits of having his wife with him". This evidence hardly suggested an exceptional case at all and the Immigration Judge in my view was entitled to reject it. The Immigration Judge fully considered Article 8 in the context of the Immigration Rules as, in the light of recent authorities, he was required to do. However, he rejected the evidence from the appellant and Mr Evans about the sponsor's mental health problems considering that they were self-serving and that a significant motive behind the sponsor's evidence was his desire to have a carer. The sponsor had not clearly formed a family life with the appellant given the Immigration Judge's clear findings that there was no genuine and subsisting relationship between the appellant and the sponsor. Even if there were such a relationship, as the Immigration Judge also indicated, this could continue in Bangladesh. There were in truth no exceptional or compelling reasons in this case and the Immigration Judge was right to reject this part of the appellant's case also.

31. At the heart of the Immigration Judge's decision was a clear and sustainable finding that the appellant had not established to the required civil standard concrete evidence of contact between him and the sponsor. I take on board the low quality of evidence demanded, but the matter had been carefully considered by the ECO at the correct date (the date of decision). The absence of telephone cards, birthday cards and such like was telling particularly in the context of someone found by the Immigration Judge to be in need of health care. Accordingly, the decision that the appellant was not in a genuine and subsisting relationship with the sponsor was one that was open to him in all the circumstances.

32. Therefore, having carefully considered the arguments advanced on behalf of the appellant I am satisfied that the findings were open to the Judge of the First-tier Tribunal on the evidence he heard. The judge applied the correct burden and standard of proof at the date of the decision and reached a conclusion which was open to him.

Notice of Decision

The appeal against the decision of First-tier Tribunal is dismissed.

No anonymity direction or fee award was made by the First-tier Tribunal and those decisions stand.

Signed Date

Deputy Upper Tribunal Judge Hanbury