Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08907/2017**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 24th October 2018	**On 7th November 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AMINA BEGUM
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Kamar, Solicitor advocate instructed on behalf of the Appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals, with permission, against the decision of the First-tier Tribunal (Judge Gumsley) who, in a determination promulgated on the 23rd April 2018 dismissed the appeal of the Appellant against the decision of the ECO to refuse entry clearance as a partner on the 30th December 2015. Mr Kamar appeared on behalf of the Appellant. There had been no application made either before the FTTJ for an anonymity order and no grounds were relied upon before the Upper Tribunal.

2. The Appellant is a citizen of Bangladesh. She married the sponsor on the 28th February 2014 and made an application for entry clearance as a partner under Appendix FM of the Immigration Rules on the 8th October 2015.

3. The application was refused in a decision made on the 30th December 2015. The reasons given for refusing the application can be summarised as follows. The

Entry Clearance Officer (hereinafter referred to as the "ECO") considered the application under paragraph EC-P.1.1 of Appendix FM of the Immigration Rules. The ECO considered the basis of the application which was for the Appellant to settle in the United Kingdom with her husband but was not satisfied that the relationship with the sponsor was genuine and subsisting for the following stated reasons: –

- "in your application, you state that you met in Bangladesh on 21/2/2014, and you got married within a week on 28/2/2014. I must be satisfied that you intend to live with your sponsor permanently as husband and wife once you are in the UK.

- I note your sponsor is 18 years older than you and is a divorcee. Such marriages are culturally unusual to occur in Bangladesh were it to be an arranged marriage. However, you have provided no satisfactory evidence or even any indication of where your relationship began and in what circumstances or how your relationship progressed to the stage of marriage.

- Your sponsor's visit to Bangladesh when you got married in 2014 is the only time that you have met him in person. You have therefore met each other on only one occasion in the course of the relationship which you state has been in place for approximately two years. Your sponsor is a British citizen who has been issued with a Visa to India; there appears therefore to be no restrictions on his ability to travel between the United Kingdom and India to meet you. The lack of contact between you is not consistent with that of a couple in a genuine and subsisting relationship.

- In your application form, you state that you live together in Bangladesh for a period after marriage. However, the photographs you have submitted only appear to show you together at the wedding ceremony and a staged photography session. You have not submitted any other evidence of time that you spent together after your marriage, and this leads me to doubt that you have a genuine subsisting relationship.

- Given all of the above, I am not satisfied that you relationship the sponsor is genuine and subsisting, or that you intend to live together permanently in the UK. I therefore refuse application and paragraph EC – P.1.1 (d) of Appendix FM of the Immigration Rules (E – ECP.to.6 and 2.10).

4. Thus the application was refused. It is common ground that the Appellant submitted an appeal in time on 29 January 2016. However as the judge stated at paragraph [6] for reasons that are not made clear, the application was lost in the system and it was after enquiries were made that a further appeal was submitted on 21 August 2017 which in the circumstances was allowed to proceed.

5. There was an ECM review undertaken on the 14th February 2018 which considered the documentation submitted with the appeal noting "call track record, for photographs, passport copies, and call card copies." It was noted that the

Appellant provided chat records and phone calls as evidence that the parties were in contact and the marriage was subsisting but the ECM considered that the chat record was dated but did not identify the recipient or the caller. In regard to the phone cards, they again did not identify the caller or the recipient. The photographs appeared to be of the Appellant and the sponsor at an engagement or wedding function rather than photos post wedding over a series of time. The ECM considered that the documents did not establish the relationship was subsisting. The ECM noted the error regarding the Appellant and the sponsor visiting each other in India (when it should have been Bangladesh). However the ECM considered that there was nothing to prevent the sponsor from visiting the Appellant in Bangladesh. Having considered the additional documentation, the ECM upheld the decision to refuse the application.

6. The Appellant's appeal against the Respondent's decision to refuse entry clearance came before the First-tier Tribunal (Judge Gumsley) on the 3rd April 2018. In a determination promulgated on the 23rd April 2018, Judge Gumsley dismissed the appeal on human rights grounds, having considered that issue in the light of the Appellant's compliance with the Immigration Rule in question.

7. The Respondent appealed against that decision and permission was granted by the First-tier Tribunal (Judge Simpson) on the 18th June 2018.

8. Thus the appeal came before the Upper Tribunal. The Appellant was represented by Mr Kamar and the Respondent by Mr Diwnycz, Senior Presenting Officer.

9. Mr Kamar submitted that the judge erred in law in reaching his decision to dismiss the appeal. He submitted that there was sufficient evidence to demonstrate that the relationship was genuine and subsisting and that the judge had ignored the evidence that had been provided. When asked to identify what evidence the judge had ignored when reaching the overall decision, Mr Kamar identified that the judge had ignored the wedding photographs, the phone calls for a two-year period and a statement from people who had attended the wedding and that on the passport the Appellant was named as his spouse and vice versa. He also submitted that the judge failed to take into account the remittances and made reference to documentation that he had been handed by the sponsor. He was not able to say when those remittances may have been sent or whether they were provided to the Respondent for the application or for the appeal. He noted that the bundle submitted on behalf of the Appellant was "very brief" but could not say whether those documents had been omitted from the bundle. The judge had made reference to one money transfer dated January 2016 (see [25 vi].

10. He further submitted that when reaching the findings of fact set out at [25 (i)-(xii)] the judge was demanding evidence that was unreasonable to expect the Appellant and the sponsor to provide and that as the judge had accepted that they were legally married, the marriage was subsisting. There was telephone evidence which showed that they had had contact and this was sufficient to meet the requirements that this was a genuine subsisting marriage (relying on the decision of Goudey

(subsisting marriage – evidence) [2012] UK UTI 011 (IAC) and that there were no countervailing factors.

11. He submitted that the judge failed to take into account the sponsor's financial circumstances when reaching his decision that the sponsor had not sought to visit the Appellant in Bangladesh (see finding at [25(iii)]. In particular that the Appellant had spent all his money on the wedding and was in low-paid work. The judge's assessment was therefore unreasonable. Furthermore the judge failed to give sufficient weight to the photographs as photographs are usually taken at weddings. He further submitted by reference to the finding at (viii) that the sponsor statement was very short that it looks as if the statement had not been well drafted and that it was clear that the bundle had not been properly prepared. He stated that his instructions from the sponsor were that he was not told by the solicitor that he needed a witness statement.

12. As to the finding at (x) he submitted that the sponsor's evidence was plausible and they are legally married. He submitted that it was insufficient to dismiss the appeal. He made reference to the delay and that the appeal was reinstated in 2017 and that if the appeal have been heard in 2016 there would be no gaps in the evidence. This was a point the judge had not considered. In any event, Mr Kamar submitted that if the evidence was missing he could have asked the sponsor to provide the evidence and granted an adjournment if crucial evidence was missing.

13. He submitted that the refusal letter made reference to India whereas the Appellant lived in Bangladesh. Thus he submitted that the judge did err in law in reaching his decision and that if the decision was set aside new evidence could be provided to demonstrate that the relationship was genuine and subsisting.

14. Mr Diwncyz relied upon the rule 24 response which was filed on 13 September 2018. In that response it was submitted that the judge directed himself appropriately and that the grounds of appeal were a disagreement with the findings that were rationally open to the judge on the evidence. In particular, as there was a direct challenge to the relationship between the Appellant and the sponsor, it was legitimate to expect a statement from the Appellant dealing with this issue and at [15] the judge was clearly postulating in the absence of a statement whether evidence could be given in another way. In this context the rule 24 response also made reference to the grounds in which it was asserted that such a statement could not be provided because the Appellant is illiterate. However the Respondent queried how she would pass the English language requirement in the light of that disclosure.

15. The response went on to state that it was open to the judge to find at [25 x] that the Appellant's account was not credible on the basis of the Appellant would have been six years old and the sponsor left to come to the UK but it was his evidence that he knew before he left and kept in touch with thereafter. It was open the judge to find that was implausible.

16. In summary, the rule 24 response submitted that the decision by the FTTJ was measured and balanced with the judge giving limited weight to certain factors and submissions which had been made on behalf the ECO (see [25(vii)].

17. In his oral submissions Mr Diwnycz submitted that the judge had only considered one money transfer because there were no other remittances other than one dated January 2016. The judge had properly considered all of the evidence and dealt with the issues for and against the Appellant and was entitled to find that due to the paucity of the evidence concerning the relationship and a complete absence relating to the future plans of the couple, that the marriage was not genuine and subsisting or that they intended to live together permanently.

18. By way of reply, Mr Kamar submitted that having taken instructions on the issue raised in the rule 24 response at the hearing from the sponsor, that the solicitor had misunderstood the sponsor and that it was not the Appellant who was illiterate but the sponsor. He reiterated that there was a material error of law in assessing the evidence. He accepted that certain evidence would have been provided but that the sponsor and the Appellant were never asked to provide the evidence by the solicitors and that looked like a plausible explanation given the small bundle that had been provided.

19. At the conclusion that submissions I reserved my decision which I now give.

20. I have carefully considered the respective submissions made on behalf of each of the advocates. The issue set out in the decision letter related to whether the relationship between the Appellant and the sponsor was genuine and subsisting and whether there was an intention to live together permanently. In the written grounds and in his oral submissions, it was submitted on behalf of the Appellant that the judge failed to give adequate reasons for reaching the conclusion that the parties had not demonstrated that the relationship was genuine and subsisting. In particular, Mr Kamar relied on the written grounds in which it was submitted that it was unreasonable to expect certain evidence to be provided and also that the judge ignored the evidence that in fact was before him.

21. I have carefully considered the written grounds and the grant of permission alongside the oral submissions of the parties. Having done so, I am satisfied that the decision of the judge does not demonstrate the making of an error of on a point of law. I shall set out my reasons for reaching this conclusion.

22. As to the evidence before the judge, he had the opportunity of hearing the sponsor give evidence and in the decision set out the summary of that evidence at [17 – 23]. In addition to this the judge made reference to the documentary evidence throughout the decision.

23. Having considered the evidence the judge set out his findings of fact at paragraph [25 (i)-(xii)]. Those findings can be summarised as follows:-

- he was satisfied that there was a legal marriage but that the marriage must exist in substance as well as in a legal form.

- He was satisfied the telephone records showed that there was regular contact for one year between the beginning of 2015 and the beginning of 2016. There was no evidence of contact between 2010 – 2014 a time when it was said by the sponsor that he was in contact with the Appellant two or three times a day for four years. There was no evidence of contact in 2014 or post the beginning of 2016.

- Whilst accepting the costs involved in visiting Bangladesh (and see paragraph 19), there was no visit by the sponsor between 2010 and 2014 to see the Appellant. Similarly there was no visit from 2014 to 2018. The judge found the explanation given by the sponsor that he was putting his affairs in order for years prior to marriage and then again for two years between marriage and the application seem to be "wholly unconvincing".

- The judge did not accept the submission made by the Respondent as to the differing ages of the parties and found that the age gap was of no significance.

- There was only one written communication put in evidence sent in April 2014. The judge took into account the decision of Goudey (as cited) and that there was no requirement that the parties write or text each other but in this case there was effectively no evidence of any contact of any kind for seven of the eight years of "courtship" or marriage.

- The only evidence financial support was one money transfer dated January 2016. The judge stated that he would have expected to see more evidence of financial assistance in a genuine and subsisting relationship with the Appellant who at the time of the application was not employed.

- The judge gave no weight to the Respondent's submission that the wedding photographs appeared posed. However despite the Appellant and the Respondent living together after their marriage in 2014 there were no other photographs of their time together. The judge gave that only limited weight.

- The sponsor statement was very short and was lacking in detail in particular there was a complete absence of any detail of any future plans the couple had. There was similarly a complete absence of any statement from the Appellant or application to seek to introduce evidence from her in any other way. There was no evidence as to how the relationship started, the communications with between her and sponsor, and their plans intention. Given the importance of the matter the sponsor's accounted spoken to her and so that was sufficient as far as he was concerned, the judge found to be "unconvincing".

- At (x) the judge found the evidence provided by the sponsors to why and how he had chosen the Appellant's wife to be implausible in a number of ways.

- He also considered the timing of the recent visit to be coincidental with the timing of the appeal hearing. The judge considered the expense the sponsor said he had to expend to go to Bangladesh and the years he suggested he had to organise matters and save money to enable them to travel but he had only stayed for less than three weeks and in the light of having not seen his wife for 4 years and in the light of the photographs the judge found that that was an attempt to create evidence of a relationship that was, in reality, not subsisting or genuine.

- The answers given by the sponsors to why he would not want to live in Bangladesh made no reference to his wife at all. The judge found this to be "telling".

24. Mr Kamar submitted in reaching those findings are judge ignored evidence and in particular the wedding photographs, telephone calls and the remittances. It is plain in my judgement that the judge did not ignore any of that evidence. In respect of the photographs, the judge expressly considered them at [vii]. In the Respondent's decision letter it had been stated that the photographs appeared to be posed. However the judge fairly considered that they were wedding photographs and the Respondent's point had no merit and did not take it as a point against the Appellant. However it was open the judge to find that there were no other photographs of the couple together despite the evidence that they lived together in 2014 for a period of time. The judge, in any event, gave that only limited weight.

25. As the evidence telephone contact, the judge set out his consideration of the evidence at [ii]. Whilst he was satisfied that the telephone records showed regular contact between a number attributed to the Appellant and to the sponsor, it was open to the judge to find that the contact was limited to one year between the beginning of 2015 and the beginning of 2016. There was no evidence of contact between 2010 – 2014. Whilst it was submitted that the parties did not marry until February 2014, it was open to the judge to consider the documentary evidence in the context of the sponsor's own evidence concerning the relationship. In particular, the sponsor had given evidence stating that he had been in contact with the Appellant 2-3 time per day for four years but the judge found no evidence of contact in 2014 or post the beginning of 2016.

26. Whilst it is submitted that the judge failed to consider the timeline of the appeal, I do not consider that that undermines the findings that were made by the judge. It is common ground that the Appellant made the application on 8 October 2015 and the decision letter was dated 30 December 2015. The parties were married on 28 February 2014. However when the appeal was submitted in January 2016, it was not until enquiries were made and further appeal allowed to proceed in August 2017 that it then came before the court. As the original application was made in October 2015, it was open to the judge to consider the evidence concerning contact between 2010 – 2014 and in particular the evidence from the sponsor who expressly stated that he had been in contact with the Appellant for 2 to 3 times per day for 4 years. It was open the judge to find that in the light of that evidence there

was no supporting evidence of contact in 2014. Again looking at the chronology, irrespective of the later appeal, the judge found that there was no evidence of contact after the beginning of 2016 either. The appeal was heard in 2018 and it was clear from the decision letter that the issue of the genuineness and subsistence of the marriage was the central issue and that it was therefore open to the parties to provide any evidence that they thought relevant. It is important to remember that the burden of demonstrating that this was a genuine and subsisting relationship lay on the Appellant on the balance of probabilities.

27. It was not simply the lack of contact relating to the telephone calls. The judge also took into account that there had been no visits made from 2014 – 2018 save for a recent visit made in February/March 2018. It is submitted on behalf of the Appellant that the judge failed to consider the sponsor circumstances and the "economic constraints" when reaching that finding of fact. However the judge expressly did consider the issue of the sponsor's circumstances and his explanation which is set at [19] and [25 (iii)] in relation to the costs involved in visiting Bangladesh. It was open to the judge to consider the sponsor's explanation as to the delay in visiting the Appellant which was stated to be on the basis that he needed to put his affairs in order. The judge found that the explanation given during his evidence to be one that he described as "wholly unconvincing". That was a finding that was open to him to make.

28. Mr Kamar also made reference to the remittances. At the hearing he made reference to a number of other documents which he said were remittances sent by the sponsor to the Appellant. At first he submitted that they were before the ECO but the judge had made no reference to them but that later stated that he could not say when they had been produced but that they had not been put before the judge. It is plain from reading the determination that they had only been one money transfer dated January 2016 in the documentation before the FTTJ (see finding at [25 (vi)]. This was exhibited in the Respondent's bundle. The judge considered the documentation at [14] and made reference to the Appellant's representative considering that there would have been further information submitted at the time of the original application but he was unable to say what the information was. The judge noted that if there was such further information neither the Appellant or the Respondent seem to be in possession of it. It does not appear that this evidence was sent with the appeal as the ECM set out what evidence had been produced and no reference was made to the remittances. The burden of proof is upon the Appellant. It was therefore open to the judge take into account the lack of financial remittances in the circumstances.

29. Mr Kamar also submitted that it was unreasonable the judge to make a criticism of the lack of evidence in the sponsor's witness statement at [25(viii)]. In my view, there was nothing unreasonable in the judge making reference to the lack of cogent evidence from the sponsor. The witness statement provided was short and lacking in detail. Given the issue relating to the genuine nature of the relationship and the subsistence of it, it was open to the judge to consider that the witness statement failed to set out any real evidence to support the factual account of their relationship. Whilst Mr Kamar appeared to be submitting that this may have been

the solicitors fault on the basis that the case did not look well prepared, there has been no evidence put before the Tribunal that this is the case; there has been no evidence given of any complaint made against the solicitors in question by either the Appellant or the sponsor.

30. Furthermore, it is wrong in my view to consider this issue without considering the other findings that were made. The Judge also observed that there was no statement of evidence whatsoever from the Appellant (see [25 (ix)]. In this respect the written grounds at paragraph 4 made reference to the judge failing to take into account the practicalities of the Appellant giving evidence and states "the IJ has also failed to consider that the Appellant herself speaks Bengali and is illiterate, also having never been in employment, so she would be unlikely to be in a position to provide a witness statement, as is often the case in entry clearance appeals." It is clear from the judge granting permission that she considered the Appellant's stated lack of literacy to give the grounds "arguable force". However in the Rule 24 response, the Respondent raised the point that that was inconsistent with the requirements of the Appellant have passed the English language requirement at standard A1. In any event the application form set out at question 83 that she had met the English language requirement in ESOL. Having taken instructions, Mr Kamar submitted that the solicitors when drafting the grounds had misunderstood the evidence and that it was not the Appellant who was illiterate. If that is the case, the submission made in the written grounds could not succeed on the basis as it is now conceded that the Appellant is not illiterate. However I have considered the alternative submission made that the judge placed too higher weight on the fact that she had not provided evidence herself. Entry clearance appeals are by their nature conducted without the Appellant being in the United Kingdom. I take into account that there is no requirement that an Appellant provide a statement but it is important to remember that the burden of proof remains on the Appellant to set out the factual matters upon which the application is based. It is often the case that witness statements are often provided by Appellants from overseas and even if they have difficulties speaking or writing English, statements can be taken in their first language and translated and certified for the use in proceedings. In this particular appeal it was open to the judge to find that there was a complete absence of any statement and that he would have expected some evidence from the Appellant, setting out how the relationship started, the communications between herself and the sponsor and their plans and intention. As the central issue was the genuineness and subsisting nature of the relationship, it was open to the judge to find that the sponsor's account that as he had spoken to her and so that was sufficient, was "unconvincing". Thus it was not simply the absence of a statement but that it was the absence of evidence that went to the issue that the judge was having to decide. It is also clear that the judge did not simply rely on the absence of a document but considered it in the light of the sponsor's explanation.

31. Mr Kamar also challenges the finding of fact set out at [25(x)] on the basis that it was not relevant to the issues. However it was open to the judge to consider the evidence given by the sponsor as to how the Appellant and his wife had met and married. He properly took into account the documentation which showed that

they came from the same village. However the judge had the opportunity to hear the sponsor's oral evidence as to how he had come to know the Appellant when he was in Bangladesh and how he had kept in contact with her when he moved to the United Kingdom. The judge gave his reasons as to why he did not accept that evidence and it was open to him to reach the conclusion for the reasons set out at (X) that he was not satisfied that the sponsor was telling the truth and therefore it was an issue that undermined his general credibility.

32. The judge had the opportunity to hear the oral evidence of the sponsor as well as considering the documents and that evidence to be the subject of cross-examination. In this context I remind myself of the importance of oral evidence**.**

33. In the well-known case of Piglowska v Piglowski [1999] UKHL 27, Lord Hoffmann said this:

> "...the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. ..."

Then there is a quotation from his own decision in Biogen Inc v Medeva Ltd [1997] RPC 1:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

34. The judge had the opportunity to consider all of the evidence in light of the issues raised. He properly considered the case law set out at [25 (v)] and the decision of Goudey, and properly noted that it was not disputed that there was a legal marriage but that he had to be satisfied on the balance of probabilities that this was a genuine and subsisting relationship. He took into account the case law that there was no requirement the parties to text or write to each other and he distinguished the case on its facts because whilst telephone calls might be sufficient to discharge the burden of proof this is subject to there being no countervailing factors generating suspicion. It is clear from the facts as he found them to be that there were such countervailing factors.

35. Furthermore I find no merit in the grounds where it is stated that the judge considered it from a Western perspective. The judge expressly directed himself at [13] when considering the issues that he must consider the issues in light of cultural differences and the individual preferences as to lifestyles. He was also mindful of the fact that it was difficult to prove intentions and the genuineness and the subsistence of the relationship. Consequently the judge properly

considered the evidence on its totality and reached findings that were open to him on the evidence that was before him.

Decision:

The decision of the First-tier Tribunal does not disclose the making of an error of law; the decision of the FTT dismissing the appeal shall stand.

Signed Date: 26/10/2018

Upper Tribunal Judge Reeds