



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18596/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 7th August 2018

Determination Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR TOUHAMI GUEDDARI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr I Sram (Counsel)
For the Respondent: Ms H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge F Meyler promulgated on 13th February 2018, following a hearing at Stoke-on-Trent on 18th November 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant's Claim

2. The Appellant is a male, a citizen of Tunisia, and was born on 14th July 1993. He is married to Ms June Mary Kukk, who was born on 26th June 1954, and is the spouse of the Appellant. The Appellant appealed against the decision of the Respondent dated

27th June 2016, refusing his application to join her, as his sponsoring spouse, for settlement in the UK.

The Appeal Before Me

3. The basis of the appeal before me is that at the hearing before Judge Meyler, there was no issue raised in relation to the age difference between the Appellant (who was then 24 years of age) and the sponsoring spouse in the UK (who was then 64 years of age). The judge, whilst undoubtedly recognising that, “love knows no boundaries and that love may overcome a considerable age gap such as this” (paragraph 16) made the age gap between the Appellant and the Sponsor an issue for the first time. The Appellant, represented by well-known Counsel in the jurisdiction, had not come prepared to deal with this issue.
4. Ultimately, it was contended, that the reason why the judge took such a negative view of the relationship was because it had been viewed through the prism of the large age gap. The parties were married. Their marriage was recognised by the UK Government. It was contended that the judge had gone on to develop a different case.
5. In this respect, reliance was placed upon the decision in **JK (Conduct of Hearing) Côte d’Ivoire [2004] UKIAT 00061**. Here the Tribunal stated (at paragraph 43) that,

“It is wholly legitimate for the Adjudicator to ask his or her questions on issues of inconsistency, points raised in the refusal letter or matters which trouble the Adjudicator whether or not they are raised by the other party. What is important, however, in relation to those matters is that the Adjudicator should not develop a different case from that being presented by the other party or pursue his or her own theory of the case”.

On 14th June 2018 permission to appeal was granted by the Tribunal. In granting permission, it was observed that at paragraphs 17, 18, and 19, the judge appears to have treated the Sponsor’s age as a determinative factor, when this was not the case in the Respondent’s refusal letter. It was nevertheless the case that treating a matter which was not in dispute as a determinative factor gives rise to a procedural unfairness.

Submissions

6. At the hearing before me Mr Sram, had a carefully compiled skeleton argument, which also drew attention to the important case of **Goudey [2012] UKUT 00041**, and the case of **GA (Ghana) [2006] UKAIT 00046**. He also produced a full copy of the decision in **JK (Conduct of Hearing) Côte d’Ivoire [2004] UKIAT 00061**. Mr Sram then made the following submissions.
7. First, that a matter had been raised which was not a matter which the parties to the hearing had come to deal with, and this had happened after both representatives had completed their questioning of the Appellant, as is made clear by the judge herself at paragraph 17 of the determination.

8. Second, insofar as there were any issues of concern, the judge failed to put them to the Sponsor when she gave evidence. Third, the judge considered the photographs of the Appellant and the sponsoring spouse in the UK on Counsel's laptop and went on to conclude from this that, "I formed the view that the joint photos of the Appellant and the Sponsor did not seem very natural or comfortable" (paragraph 21). She failed to explain why this was the case. A statement of this kind should not have been unsupported by proper reasons.
9. Third, this was a case where the sponsoring spouse, Ms Kukk, "has visited Tunisia multiple times" (paragraph 7) and in her oral evidence confirmed that she goes three times per year "and stays for two weeks on each occasion. She most recently visited in June 2017" (paragraph 7). The judge failed to give her evidence the weight that it deserved given that no question was raised about her credibility.
10. Finally, the judge was unnecessarily sceptical of the nature of the relationship. Having stated that there were in this case "no serious or in depth discussion as to the age difference between the parties to this marriage" (paragraph 18), the judge then went on to be unnecessarily critical of the parties. For example, the Sponsor had expressed concerns about the cold Scottish weather, pointing out that she had to endure temperatures of minus five degrees at one stage. The judge observed that, "the Appellant seemed oblivious, ignorant or cavalier as to her suffering, in stating by reply that he too felt cold in 25 degrees" (paragraph 25). It is not necessarily the case, submitted Mr Sram, that the Appellant, who has no experience of cold weather in Scotland, was being ignorant or cavalier about his wife's suffering by stating that he felt cold in 25 degrees, given that he was from a country which sees far higher temperatures in North Africa.
11. For her part, Ms Aboni submitted that the judge had directed herself appropriately. She had asked the question whether this was a genuine and subsisting marriage. The judge did ask the Sponsor directly during the hearing how, it was in Tunisia for Tunisian men to marry other Tunisian women who were much older than them. The judge records that, "her reply was that there were many such examples" (paragraph 16). In the same way, whilst the judge accepted that there was a lot of postdecision evidence, such that both parties are "in touch daily", she was correct to say that prior to the date of the decision there were "no telephone or messaging records predating the decision" (paragraph 13). These were matters that the judge could properly take into account.
12. In the same way, whilst the judge accepted that the Sponsor spent two weeks on each visit to Tunisia, she was right to also add that, "there was no attempt to spend a longer period of time face to face, getting to know each other before the marriage and there was no attempt to cohabit or settle down together in Tunisia after the marriage" (paragraph 15). Insofar as there were other concerns that the judge had, these were not matters that needed to be put to the witness, because there were a matter of judgment for the judge herself.

13. In reply, Mr Sram submitted that postdecision evidence was relevant and it was not properly taken into account with a view to giving it the appropriate weight in a case which involved a legally valid marriage.

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision. My reasons are as follows.
15. First, and most importantly, this is a case where it is clear that the judge had “her own theory of the case”, which led her to “develop a different case from that being presented”, see paragraph 43 of **JK [2004] UKIAT 00061**. Given that this was the case, there was procedural unfairness to the Appellant.
16. Second, this is particularly the case given that the judge gave controlling and determinative weight to the age gap between the Appellant and the Sponsor. One example is where, as Ms Aboni has pointed out, the judge did ask the sponsoring wife, Ms Kukk, to explain whether she knew of other Tunisian women that were much older than Tunisian men, and her reply was that “there were many such examples”. The judge went on to say that, “I find that the Sponsor most likely misunderstood the question”. She stated that she was not persuaded that there would be many examples of Tunisian men “marrying Tunisian women 40 years older than them and no evidence was submitted in support of her assertion” (paragraph 16).
17. Third, and following on from this, the cases raised by Mr Sram are important cases in the jurisprudence relating to marriage. In **Goudey [2012] UKUT 00041**, the president of the Tribunal stated that the judge had imposed his own expectations of how a couple might conduct their relationship, by failing to appreciate the evidence that was presented so that the absence of texting (which was the issue there) did not show the marriage to be less than genuine. In the same way the case of **GA (Ghana) [2006] UKAIT 00046** only requires that there is a “real relationship” as opposed to a merely formal one of marriage which has not been terminated. Where there is a legally recognised marriage and both parties who are living apart would want to be together, and live together as husband and wife (which would appear to be the case certainly for the time that the Sponsor spent whilst visiting the Appellant in Tunisia), more cannot be required to demonstrate that the marriage is subsisting.
18. Fourth, and perhaps most importantly, the case of **OA and OA (Intention to cohabit: “intervening devotion”) Nigeria [2005] UKIAT 00026** was a similar case where the judge had held that the evidence of contact between the parties was mainly after the decision. The Tribunal went on to say that it was not satisfied that the judge

“Did regard the evidence of contact produced before him as a serious relevant issue in itself. Clearly what used to be called ‘intervening devotion’ must be as relevant as a matter of law to intention to live together as it used to be to a primary purpose; but, contrary to the position with for example the standard of proof in asylum cases, this has not for some time been Adjudicators’ daily fare, and we do not think we can assume that this Adjudicator did regard ‘intervening

devotion' as relevant to the main issue before him. If he had done so, then in our view he would have needed to deal with it in more detail than he did" (see paragraph 3).

19. What this amounts to is that in a case where the parties have known each other for a period of time, as is the case here, and there is evidence of regular visits by the Sponsor to Tunisia, of some three times a year, and where she has already visited "multiple times", and in a situation where there are Facebook records of calls, video calls and messaging between the Appellant and the Sponsor, such that they are "in touch daily", this evidence has to be treated "as relevant to the main issue".
20. Finally, this is a case where the credibility of the sponsoring wife, Ms Kukk, was not impugned, and Ms Aboni today accepted that the marriage was genuine from her point of view. If this is the case then the old case of **Saftar [1990] Imm AR 1**, by the Scottish Court of Session, in the days when the "primary purpose Rule" was an important cornerstone of British immigration laws, is relevant. In that case, the Scottish court reviewed all the leading cases to date, on the question of "intention" and concluded that the fact that once a person to the marriage does not see it as having an ulterior motive, must cast a flood of light on the intentions of the other to the intrinsic purposes of the marriage, which are normally to live together as man and wife. These are all matters that will need to be reconsidered again by the Tribunal as I remit the matter back to the First-tier.
21. Mr Sram, who conducted this appeal most professionally, submitted that I should say something about the fact that the large age gap of 40 years in this case is what it is. It is not something that the sponsoring wife can change. It is a given. In these circumstances, I ought to give a direction that it should not be held against the Appellant in any way. This is not something that I can do. All matters must be considered in the round and appropriate weight then be given to the evidence as it emerges in the judgment of the judge who is going to be the Tribunal of fact.

Notice of Decision

22. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to be determined by a judge other than Judge F. Meyler pursuant to practice statement 7.2(a) because the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing.
23. No anonymity direction is made.
24. This appeal is allowed.

Signed

Dated

Deputy Upper Tribunal Judge Juss

8th September 2018