Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/24202/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2019	**On 14 November 2019**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MRS MARVETTE ULANDA BOOTH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – SHEFFIELD

Respondent

Representation:

For the Appellant: Ms. Miranda Butler, Counsel, instructed by Ashraf Law
For the Respondent: Ms. Julie Isherwood, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Lloyd-Smith ('the Judge') sent to the parties on 28 May 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant her entry clearance as the spouse of a person present and settled in this country was dismissed.

2. Upper Tribunal Judge Reeds granted permission to appeal on all grounds.

Anonymity

3. The Judge did not issue an anonymity direction and the representatives made no request for such direction at the hearing.

Background

4. The appellant is a national of Jamaica who sought entry clearance in September 2018 to join her husband, Mr Deon Booth, in this country. Mr Booth is settled for the purpose of the Immigration Rules. The couple first met at high school in Jamaica and contact was resumed in adulthood. They were married in Jamaica on 19 May 2018.

5. The respondent refused the application by means of a decision dated 19 November 2018. It was decided that the appellant did not meet all of the eligibility requirements of Section E-ECP of Appendix FM and further that no exceptional circumstances arose. An Entry Clearance Manager accepted that the sponsor had provided a copy of his decree absolute in relation to his first marriage and so was content to accept that the marriage between the appellant and sponsor was valid. However, the initial decision to refuse entry was maintained.

> *'The grounds of appeal state that the ECO failed to consider the trips made by the sponsor to Jamaica, however evidence of travel is not sufficient to show the sponsor visited the appellant on the visits and therefore does not prove the relationship is genuine and subsisting.*
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> *It is noteworthy that the appellant has failed to address the concerns raised by the ECO that there is no evidence of contact or communication between the sponsor and appellant by phone/email etc. prior to June 2018 and this is still the case. The appellant has just resubmitted the same WhatsApp chat messages that do not contain messages of substance to indicate a genuine relationship. Accordingly I am not satisfied that the relationship is genuine and subsisting.*
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> *I have considered under paragraphs GEN 3.1 and GEN 3.2 of Appendix FM as applicable, whether there are exceptional circumstances in the appellant's case which could or would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for the appellant or the appellant's family. Following a thorough assessment of the appeal I am satisfied that there is no basis for such claim.'*

Hearing Before the FtT

6. The appeal came before the Judge sitting at Manchester on 21 May 2019. The sponsor attended and gave evidence. The Judge made a number of adverse credibility findings and refused the appeal on human rights grounds.

Grounds of Appeal

7. The appellant's grounds of appeal raise two discrete challenges. The first is detailed at [2]:

> *'The First-tier Tribunal did not approach the issue of whether there was a genuine and subsisting relationship between the First Appellant and the Sponsor in accordance with GA ("Subsisting" marriage) Ghana* [2006] UKAIT 00046, Goudey (subsisting marriage – standard of proof) Sudan [2012] 00041 (IAC) and Naz (subsisting marriage – sufficiency of protection) Pakistan [2012] UKUT 00040 (IAC).'*

8. The second ground identifies several errors of fact. It is asserted that by misinterpreting relevant evidence and erring in fact the Judge's decision is unsafe.

9. In granting permission to appeal UTJ Reeds observed, at [2] and [3]:

> *'The grounds challenge the findings made by the FtTJ that this was not a genuine or subsisting marriage. Whilst the FtTJ made no reference to the relevant jurisprudence relating to the issue of where this was a genuine and subsisting marriage (see Goudey (subsisting marriage-evidence) Sudan [2012] UKUT 00041 and Naz (subsisting marriage-standard of proof) Pakistan [2012] UKT 00040), it is arguable that the FtTJ failed to apply those principles when assessing the evidence.*
>
> *It is also the position that the FtTJ arguably misunderstood parts of the evidence as set out in relation to the findings at paragraph 20(a)–-(c). As the grounds set out, the letter at A4 did not say the marriage took place on the 13 May but gave evidence that was consistent with the marriage taking place on the 19 May 2018 and the grounds challenging the findings at 21 and 22 are also arguable.'*

10. No Rule 24 response was filed by the respondent.

The Hearing

11. Both representatives at the hearing before me confirmed that the parties considered the Judge's decision to be flawed by legal error such that it should be set aside.

Decision on Error of Law

12. I informed the parties as a preliminary matter that I considered two further 'obvious' grounds of appeal arose upon consideration of the Judge's decision. I observe that it is reasonable to expect professional representatives to set out appeal grounds with an appropriate degree of particularity and legibility and the Tribunal should be hesitant in forensically examining the decision to identify grounds beyond those advanced by a professional representative. However, there remains a duty to consider the points that are 'obvious': see *R v Secretary of State for the Home Department, ex parte Robinson* [1997] 3 WLR 1162. The Tribunal enjoys a power to consider any other point arising from a decision if the interests of justice so require. In this matter I am satisfied that two additional grounds arise: one consequent to the application of a repealed

statutory provision and the other a failure to apply the guidance offered by the Equal Treatment Bench Book.

13. The erroneous application of a repealed statutory provision is identifiable in the Judge's assessment as to the relevant date of consideration as to evidence:

> *'Under section 85(4) of the 2002 Act an appeal under section 82(1) and 83 the Tribunal can consider evidence about any matter which it thinks is relevant to the substance of the decision including evidence which concerns a matter arising after the date of decision. However, section 85(4) of the 2002 Act is now subject to the exceptions contained in section 85A, which was brought into force by section 19 of the UK Borders Act 2009. Pursuant to exception 1, in appeals against the refusal of entry clearance or a refusal of a certificate of entitlement under section 10 the Tribunal 'may consider only the circumstances appertaining at the time of decision'.'*

14. Section 85A of the Nationality, Immigration and Asylum Act 2002 was repealed by Schedule 9 of the Immigration Act 2014 as from 20 October 2014 and the relevant saving provisions are not relevant to this appeal. As the appellant enjoys a right of appeal on human rights grounds against the respondent's decision she enjoys the benefits provided by Section 85(4) of the 2002 Act, namely that the Tribunal may consider any matter it thinks relevant to the substance of the decision, including a matter arising after the date of decision. Though the Judge did look at post-decision evidence it is wholly unclear as to whether any weight was given to it in light of the Judge's erroneous observations at paragraph 7. In such circumstances the Judge materially erred in law by precluding consideration of evidence postdating the respondent's decision of 19 November 2018.

15. The second ground arises in respect of an issue that arose during the course of the hearing, namely that the sponsor is dyslexic. Indeed, his evidence is recorded in the record of proceedings as being that he has 'really poor' dyslexia. The Judge observed, at [20]:

> *'There were also other aspects of the evidence which I found to be inconsistent:*
>
> *(a) the sponsor was asked to provide the names of the appellant's children. He hesitated before giving the name Dejon, when asked to spell that he wanted to look at a document in his wallet because he claimed to be dyslexic. He was asked to try without the aide-memoir. The daughter was said to be called Zana and he said that she lives with the appellant. The application form has their names as Dejour and Zonae (R). It may be that he struggles with spelling but his need to refer to notes, when coupled with the other findings has affected my overall assessment of his credibility.'*

16. The appellant's grounds of appeal complain:

'It is stated that the sponsor asked to see an aide memoir when asked about the names of his stepchildren, although he stated he is unsure of the spelling he confirms he did not ask to look at any aide memoir at any time during the hearing.'

17. The concern arising from the identification by the sponsor that he is dyslexic is wider than the stated ground of appeal. The sponsor was asked to spell the names of his two stepchildren, and he sought to produce a paper document upon which the names were written. This was the aide-memoir. This action, namely seeking to refer to the note, has been adversely relied upon by the Judge as to credibility in circumstances where the Judge made no express reference to the Equal Treatment Bench Book, February 2018 edition. Upon being informed that the sponsor was dyslexic, and this was not contested by the respondent at the hearing, the Judge was on notice that the sponsor suffered from a specific learning difficulty and should properly have made simple and relevant enquiries as to how such difficulty impacts upon his functioning. As noted at page 305 of the Bench Book dyslexia often manifests itself as a difficulty with reading, writing and spelling. The core challenges however are the rapid processing of language-based information and weaknesses in a short term and working memory. The Bench Book reminds the judiciary that by adulthood many dyslexic people have equipped themselves with an array of coping strategies diverting some of their energy and ability into the operation of these systems and thereby leaving themselves few extra resources to call upon when they have to deal with situations that fall within their areas of weakness. As a result of these difficulties inconsistencies and inaccuracies may occur in their evidence. The guidance expressly observes that difficulties arising with dyslexia includes: 'mistakes with routine information, e.g. giving the names of their children.'

18. The Judge not only made an adverse finding on a personal inability arising from the sponsor's specific learning difficulty, despite having been made aware as to the nature of such difficulty, but she was critical of him at the hearing for seeking to rely upon a coping strategy, namely his having written the names down. The concern with the approach of informing the sponsor that he could not rely upon his aide-memoir is not limited to the adverse approach taken to the developed coping strategy but also adds to a failure by the Judge to observe the adverse impact of the approach taken towards the sponsor in a court setting. The Bench Book confirms at page 306 that persons with specific learning difficulty may experience a build-up of stress, struggle to cope with a roomful of strangers in unfamiliar settings and feel panic resulting in the urge to provide any answer in order to get the proceedings over with as quickly as possible. The Judge in this matter, having been informed by the sponsor that he had grave difficulties with dyslexia, failed entirely to take steps to ascertain the impact of such concern upon his evidence and also to ensure that stresses and strains arising within the hearing were limited. Rather, she asked him to act without his coping mechanism, required him to proceed to spell the names of his stepchildren in a court setting and subsequently gave no consideration as to whether this request increased his stress and anxiety consequent to his learning difficulty before making an adverse finding.

19. The sponsor cannot be criticised for not informing the Tribunal as to his learning difficulty sooner. Many people are embarrassed by such difficulty and are unaware that the justice system is sympathetic and understanding as to such vulnerability. It is unfortunate that the appellant's legal representatives did not establish the sponsor's vulnerability prior to the hearing but such failure does not adversely impact upon the appellant's present appeal because once the Judge was notified as to the existence of a learning difficulty she was required to act with procedural fairness. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 is clear that the Tribunal has to ensure that parties fully participate in proceedings and this extends to witnesses called to give oral evidence on behalf of a party. A Judge is expected to act flexibly when an issue as to vulnerability arises during the course of a hearing. As noted by the Bench Book, at [23]:

> *'Judges should identify a situation in which a person may be at a disadvantage owing to some personal attribute of no direct relevance to the proceedings, and take steps to remedy the disadvantage without prejudicing another party.'*

20. I am satisfied that the failure of the Judge to consider the sponsor to be vulnerable consequent to his dyslexia adversely flowed into her general assessment of his credibility. The Bench Book details at page 305 that a person with specific learning difficulty may possess several difficulties including:

- A weak short term memory.
- Difficulty remembering what they have just said.
- A poor working memory - this shows itself as the inability to:
  - Retain information without notes.
  - Hold on to several pieces of information at the same time.
  - Listen and take notes.
  - Cope with compound questions.
  - Difficulty carrying out instructions in sequence.
- Inefficient processing of information which could relate to written texts, oral responses or listening skills – there may be a delay between hearing something, then understanding it, and then responding to it.
- Difficulty presenting information in a logical sequential way.
- Difficulty writing letters and reports.

- Difficulty distinguishing important information from unimportant details.

21. The Judge took no steps to address the nature and extent of the learning difficulty with the sponsor nor to carefully identify concerns that he may have in appearing before her that could adversely impact upon his ability to provide suitable evidence in the Tribunal setting. Rather, she proceeded to be critical of his evidence as to the WhatsApp messages after having required him to work through several of them in the appellant's bundle and having read them to address their contents. The Judge should have been immediately aware when subsequently being informed by the sponsor that he was dyslexic that she was required to take steps to assess the impact of such condition upon not only the evidence to come but also the evidence already presented, particularly in circumstances where she had required him to read and then to address documents in a court setting. Overall, the failure to consider the sponsor to be vulnerable and to apply the guidance offered by the Equal Treatment Bench Book is a material error of law and the decision of the First-tier Tribunal should be set aside.

22. It is appropriate that I further observe that the Judge materially erred in law as to her finding as to an inconsistency, at [20(b)], between the undated letter from Pastor Lincoln Dennis referring to the marriage of the appellant and sponsor taking place on 19 May 2018 and a letter of support from a cousin stating that the marriage took place on 13 May 2018. The Judge noted that this was 'not an inconsistency one would expect if the marriage was genuine'. The letter from the relative confirms that she attended the wedding on 19 May 2018. The reference to 13 May 2018 is with regard to the date she flew to Jamaica and this is confirmed by the entry stamp in her passport. This is a clear error of fact and in light of the finding as to inconsistency it is a material error of law. A further material error of law is identifiable at [21] of the decision where the Judge speculates that she placed little weight upon the video of the wedding because:

> *'The video that was played showed a very limited number of guests in attendance at the ceremony. There were several bridesmaids (8) and partners but there were only about 8 people that could be seen in the audience. Considering the sponsor said that his family live in Jamaica, as do the appellant's, one would have expected a far larger ceremony if their intentions were genuine. The submission that because there was a cake, the setting was beautiful and they shared a passionate kiss is not one I find has weight. The couple would have known that such evidence would be required and many staged marriages occur. If there was more evidence to support the subsistence of their marriage and contact between them then I may have had less reservations about the video evidence but when added to the other areas of concern I place little weight upon the evidence and do not find that it addresses the concerns raised in the Refusal letter.'*

23. There is no set minimum figure as to the number of wedding attendees required to establish the genuineness of a marriage for immigration

purposes. Domestic law requires that the marriage must be conducted by a person or in the presence of a person authorised to register marriages in the district and that the marriage must be entered in the marriage register and signed by both parties, two witnesses, the person who conducted the ceremony and, if that person is not authorised to register marriages, the person who is registering the marriage. Consequently, a lawful marriage in this country only requires two other persons other than the officiate to attend. There was no evidence before the Judge that any other minimum requirement was established in Jamaica. The Judge simply entered into unlawful speculation as to how many people should attend a wedding before it could be considered to be genuine and so materially erred in law.

Remaking the decision

24. As to the re-making of this decision I note the fundamental nature of the material errors identified and observe the submissions made by both Ms Isherwood and Ms Butler that clear findings of fact will have to be made when this decision is re-made. Both representatives advocated that the appeal should be remitted to the First-tier Tribunal. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal that reads as follows at paragraph 7.2:

> 'The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

25. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has enjoyed no adequate consideration of her appeal to date and has not yet had a fair hearing.

26. The sponsor will be expected to file evidence as to his medical condition, namely dyslexia, and the parties will further be expected to draw the Tribunal's attention to relevant sections of the Equal Treatment Bench Book.

Notice of Decision

27. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 28 May

2019 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

28. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than Judge of the First-tier Tribunal Lloyd-Smith.

29. No findings of fact are preserved.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 11 November 2019