Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02521/2019 (V)
HU/02524/2019 (V)
HU/02523/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Monday 7 December 2020	**On 17 December 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS SAMMAR [M]
AHMED [N]
ALI [N]

Appellants

-and-

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the Appellant: Mr J Dhanji, Counsel instructed by ATM Law Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against the decision of First-tier Tribunal Judge Housego promulgated on 7 October 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellants' appeals against the Respondent's decisions dated 23 January 2019 refusing their human rights claims made in the context of applications to join their husband/father, Mr Najeeb [A] ("the Sponsor"). The Sponsor has been granted leave to remain in the UK following a successful appeal against a refusal to grant him

asylum. The applications made by the Appellants are therefore ones for family reunion within the Immigration Rules ("the Rules") as the Sponsor's family members.

2. The Appellants are a mother and her two sons, currently aged twenty-four years and seventeen years (eighteen years in January 2021) respectively. They are all nationals of Pakistan as is the Sponsor.

3. The Sponsor came to the UK in 2005 with a highly skilled migrant visa. He sought indefinite leave to remain in that category in 2010 which was refused and his appeal against that refusal was unsuccessful. He overstayed after 8 February 2011. An application to remain on human rights grounds (Article 8) was refused and certified on 7 May 2011. He claimed asylum on 27 May 2014 and was granted leave to remain on that basis, following a successful appeal, on 25 June 2014.

4. The Appellants came to the UK in December 2005 as the Sponsor's dependents. They remained for one year but then returned to Pakistan for personal reasons. They visited the Sponsor in 2010 for three months shortly before his application to remain was refused but again returned to Pakistan. They have since remained living apart from the Sponsor.

5. The Sponsor entered into a relationship with a British citizen in 2012. It is his evidence that his wife, the First Appellant, has forgiven the transgression and that the Appellants wish to come to the UK now to join him as they are in a genuine and subsisting relationship. The Sponsor says that his relationship with his wife and children is continued via the telephone. He uses a landline for that purpose. The Sponsor also relies in this regard on the funding which he provides to his family in Pakistan. It was accepted that the Sponsor does send money to Pakistan.

THE DECISION

6. The Judge heard oral evidence from the Sponsor and the First Appellant's brother who also lives in the UK ("the Witness"). There was no evidence from the Appellants.

7. The Respondent disputed that the Sponsor was in a genuine and subsisting relationship with the Appellants. This was the main issue which the Judge had to resolve although the Sponsor also asserted that the Appellants were at risk in Pakistan due to his preaching at Speakers Corner in the UK which he said had led to threats against him which he had reported to the police. This appears to have been the underlying basis for his asylum claim.

8. The Judge accepted that the Appellants were the wife and sons of the Sponsor. He accepted that the marriage was a legal one and that the Sponsor was the biological father of the Second and Third Appellants. However, he did not accept that the Sponsor remained in regular contact which he claimed ([40] of the Decision). Although he accepted that the Sponsor sent money to Pakistan (about £700 per month), and although he accepted that this was "consistent with a relationship", he did not accept that it "was sufficient on its own". He concluded that this was in the form of maintenance for the children, in the same way as many estranged parents no longer in

a subsisting relationship would provide ([44] of the Decision). Although the Judge accepted that the Sponsor and his wife could have put behind them the extramarital affair, he did not accept that this was shown to be the case on the evidence ([43] of the Decision).

9. The Judge also noted inconsistencies between the evidence of the Sponsor and the Witness which the Judge found to undermine the Sponsor's evidence. The Judge noted that the Witness was apparently unaware that the Sponsor claims to be bisexual. Although the Judge accepted that the Sponsor wanted the Appellants to come to the UK, he concluded that "[t]here is not the evidence before [him] to show that, on the balance of probabilities, they want to come to the UK to join him".

PERMISSION TO APPEAL AND PROCEDURAL BACKGROUND

10. The Appellants' grounds of appeal are lengthy, unstructured and discursive. I will therefore deal with those when I turn to consider the way in which the appeal was presented orally.

11. Permission to appeal was refused by Designated First-tier Tribunal Judge McClure on 24 January 2020 in the following terms:

> ".. In a decision promulgated on 7th October 2019 Judge Housego dismissed the appellants' appeals against the decisions of the respondent to refuse the appellants' entry clearance to the UK as the spouse and children of a person in the UK with refugee status. The appellants were seeking to rely upon paragraphs 352A and 352D of the Immigration Rules and article 8 family life.
> The lengthy grounds of appeal challenge the approach of the judge to the facts of the case. It is suggested that the judge has misunderstood the evidence with regard to the use of the telephone and shown bias by referring to the sponsor's bisexuality and his affair otherwise with a woman post his wife leaving him. It is claimed that the judge has drawn the wrong conclusions from the evidence and failed to follow the guidance in the case of Goudey.
> The grounds of appeal are in the main a disagreement with the findings of fact made by the judge. The allegation of bias is not made out. The judge has given valid reasons for finding that there was not a subsisting marriage and that the best interests of the minor were to remain in the status quo.
> Re Ahmed [N] he is and was at the time of the application an adult, now aged 23, and therefore does not meet the requirements of 352D. He had not lived with the sponsor for over 8 years.
> Re Sammar [M] she had lived with the sponsor in the UK but was refused leave to remain in 2010 and voluntarily returned to Pakistan. As referred to the refusal letter noted that the sponsor in his screening interview in 2014 sated that the first appellant had left him at least three years before because of his religious beliefs and taken the children with her to Pakistan. The appellant had chosen to separate from the sponsor and has lived for at least 9 years away from the sponsor in Pakistan. The sponsor has had a relationship with a woman in that time. Whilst taking account of the limited evidence of contact in the intervening period, telephone and maintenance, in the circumstances the judge was entitled to find that there was no subsisting marital relationship with the first appellant.

> Re Ali [N] he had been living in Pakistan with his mother and brother, as a separate family unit for over 8 years. Again the judge was entitled to find that the appellant's best interest were to remain with his family in Pakistan.
> The judge has properly considered all of the evidence presented and given valid reasons for the decision reached. There is no arguable material error of law. The application is refused."

12. On renewal of the application to this Tribunal, permission was granted by Upper Tribunal Judge Kamara on 16 March 2020 in the following terms so far as relevant:

> "..2. It is at least arguable that the First-tier Tribunal misdirected itself by failing to apply the approach to assessing evidence of a subsisting marriage set out in Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC). All grounds may be argued."

13. By a Note and Directions dated 8 April 2020, UTJ Bruce indicated her provisional view that the error of law issue could be determined on the papers pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The parties were invited to make submissions on that course.

14. The Respondent filed written submissions on 11 May 2020 seeking to uphold the Decision. The Appellants filed a "Reply" dated 18 May 2020 addressing the Respondent's submissions and clarifying their position. In essence, the Appellants submitted that permission to appeal was sought on a single ground "namely that it was arguable that the FTTJ misdirected himself in law when determining whether the First Appellant had adduced sufficient evidence to prove that her and the Sponsor's relationship was subsisting; specifically, that the FTTJ failed to properly apply the approach to assessing evidence of subsisting marriage advised by the Upper Tribunal in *Goudey (subsisting marriage – evidence) Sudan* [2012] UKUT 00041 IAC" ("Goudey").

15. Directions were subsequently given by UTJ C Lane on 6 July 2020 that the error of law issue should be determined at a remote hearing. He also gave directions for the filing of skeleton arguments and any Rule 15(2A) notice with further evidence. The Appellant filed a skeleton argument dated 27 July 2020. The Respondent continues to rely on her earlier submissions. There has been no application to adduce any further evidence.

16. In addition to the various submissions to which I have had regard, I also had before me the bundle of documents which were before the First-tier Tribunal to which I refer as necessary as [AB/xx].

17. The hearing before me was conducted via Skype for Business. Other than a minor difficulty with me joining the hearing at the outset, there were no technical difficulties and both parties confirmed that they were able to follow the proceedings throughout.

18. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

19. Mr Dhanji's oral submissions may be categorised as a complaint, first that the Judge failed to adopt the correct legal approach in a case such as this following the Tribunal's guidance in Goudey and, second, that the Judge had in any event either failed to give adequate reasons for his finding that there was not a subsisting relationship or that the Judge's finding in that regard was not open to him on the evidence for reasons which I expand on below.

20. Ms Everett in response pointed out that the Respondent had taken issue with whether there was a genuine and subsisting relationship between the Sponsor and, in particular, the First Appellant. She submitted that, in light of that starting point, the Judge did not have to undertake the exercise set out in Goudey all over again. It was sufficient for the Judge to go directly to what were considered to be the factors militating against a finding of a genuine and subsisting relationship and to consider whether, notwithstanding the finding that there is still a legal marriage, the relationship was nonetheless no longer subsisting.

21. The starting point for Mr Dhanji's submissions is what is said by the Tribunal in Goudey. The passages relevant to my consideration are as follows:

> [Headnote]
> "i) GA ("Subsisting" marriage) Ghana * [2006] UKAIT 00046 means that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted.
> ii) Evidence of telephone cards is capable of being corroborative of the contention of the parties that they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question. It is not a requirement that the parties also write or text each other.
> **iii) Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant**."
>
> "10. In our judgement the judge has mis-directed himself as to the weight to be attached to the total documentation relating to the telephone calls. Whilst it is true that this documentation does not of itself prove that the sponsor has been speaking to his wife as opposed to someone else in the Sudan, the material gives corroborative support for the wife's account in the entry clearance application and the appellant's testimony in the appeal. It is clear that a great many telephone calls have been made using the telephone cards during the period of the relationship. This is substantial support for the proposition that they conducted their relationship by telephone. It is improbable that all this communication was with someone else rather than the person who the sponsor has married and wants to bring to the United Kingdom. Parties who intend to conduct a relationship by telephone do not also have to demonstrate that they conduct a relationship by written correspondence in order to show that they intend to live together as man and wife. The suggestion that they may have texted each other is speculation on the judge's part. As we understand the position it would be more expensive to text and the telephone cards cannot be used for that purpose. The judge was therefore imposing his own view of how the parties could reasonably be expected to conduct their

> relationship as opposed to evaluating the consistent and supported evidence that was before him as to how they actually did.
>
> 11. **Everything else is neutral in this case**. There is no evidence of lies, poor immigration history or deception. There is some evidence of financial sponsorship though the judge was entitled to be unimpressed by it for the reason he gave the absence of receipts is not a factor that goes to the discredit of the application.
>
> 12. Accordingly we find that there has been an error of law in the assessment of this case and whether the requirements of the Immigration Rules had been met. It may be that the ECO and the judge considered that the requirement to show a "subsisting marriage" imposes some significant burden to produce evidence other than that showing that there was a genuine intention to live together as man and wife in a married relationship. If so we conclude that that is an error of law. The authority of GA ("Subsisting" marriage) Ghana * [2006] UKAIT 00046; [2006] Imm AR 543 only requires that there is a real relationship as opposed to the merely formal one of a marriage which has not been terminated. **Where there is a legally recognised marriage and the parties who are living apart both want to be together and live together as husband and wife**, we cannot see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the Immigration Rules."
>
> [my emphasis]

22. Before turning to the Decision, I need to say something about the facts of Goudey. Although I accept that the headnote in that decision provides general guidance which applies to all cases, each case is of course fact specific. The sponsor in Goudey was originally a Sudanese national who formed a relationship with another Sudanese national in 2008 when he was living in the UK and she in Sudan. The sponsor was recognised as a refugee and subsequently acquired British nationality. Thereafter, the sponsor travelled to Egypt in 2010 to meet with his wife and an application was made for entry clearance whilst the couple were in Egypt. There was evidence of telephone contact dating back to 2008 although it could not be confirmed that the number called was that of the appellant. The sponsor also provided evidence of remittances to his wife although there was no evidence of receipts. The judge in that case appears to have thought that, where the parties had not lived together previously, that was reason to require more formal evidence of intention in order to demonstrate that they intended to do so in the future. He found against the appellant on the basis that there was no confirmation in the evidence of the person being telephoned and therefore no evidence, such as texts, to show that communication was between the appellant and sponsor. The judge also found an inconsistency in the evidence as to why the parties were not in written communication. There was though evidence from the appellant in the application as to the manner of contact which was consistent with the evidence of the sponsor.

23. As I have already indicated, in this case, the Judge accepted that the marriage between the Sponsor and the First Appellant was a legal one and that the Sponsor is the biological father of the Second and Third Appellants. Those findings appear at [39] of the Decision. The Judge also accepted, as I have already noted that the Sponsor's extra-marital affair in 2012 (when the Sponsor cohabited with another woman) was "certainly capable of being a matter the couple could put behind them." ([43] of the Decision). The Judge did go on however to point out that there was "no evidence that this has occurred other than the assertion of the sponsor." The Judge accepted at [44]

that the evidence as to money transfers was consistent as between the Sponsor and the Witness (the First Appellant's brother) but concluded that this was "not sufficient on its own, when considered as part of the evidence as a whole" ([44] of the Decision).

24. The Judge's finding that there was not a genuine and subsisting relationship therefore turns on what is said at [40] to [42] of the Decision as follows:

> "40. The sponsor provided no evidence of calls or contact with the appellants, other than a handful of calling cards. There was no call history from the landline he said that he used, which begs the question as to why there were calling cards at all (raised in the hearing and not dealt with). The brother in law used WhatsApp with no difficulty at either end, so the sponsor's account that he did not as it was problematic was not correct. The sponsor had no photographs of the appellants, which they were able to send to the witness. There was nothing from any of the 3 appellants in support of the appeals. The sponsor did not know much about the education of his sons. He was very hesitant about what O levels the younger had taken and what he was doing now, and about the University course of the older.
> 41. The sponsor had not made application, on his own account, from 2014 to 2018. He said he could not afford to do so, but says also that he was sending £700 a month to Pakistan to maintain the appellants. While that may have drained him of funds, if he wanted to make an application doubtless he could have sent a little less and saved it, or asked his brother in law to help his sister. However he did not need a large sum as I note that the application (in R2) did not attract a fee, being an asylum family reunion application, which means that this has little credibility.
> 42. The witness knew very little about the sponsor. He did not know of his bisexuality. He did not know of the affair until recently, although the sponsor said that he had lived with the woman for 6-7 months. He said that he did not speak much about personal things with his sister. She had told him that the sponsor sent money and it seemed enough for her. He was doubtless a truthful witness, but his evidence was not of much assistance, given that he knew little about the key issue in the appeals."

I did not understand Mr Dhanji to dispute the factual basis underlying any of the reasons; simply whether the Judge could reasonably draw the conclusion he had from the evidence.

25. The other relevant passage is, therefore, the conclusion drawn by the Judge at [45] of the Decision, based on his findings as follows:

> "45. The sponsor doubtless wants the appellants to come to the UK. There is not the evidence before me to show that, on the balance of probabilities, they want to come to the UK to join him.
> 46. The 2nd appellant is at University, and has a home with his mother and brother. He has evinced no wish to come to the UK and disturb his University education.
> 47. The 3rd appellant is cared for by his mother, is being educated and is maintained by the sponsor. The duty under S55 Borders, Citizenship and Immigration Act 2009 is not breached by the decision under appeal.
> 48. The 2nd and 3rd appellants are not much in contact with the sponsor and their family life is not adversely affected by the decisions under appeal. This is a continuance of the status quo that was chosen by the sponsor at least from 2014-2018.

> 49. The appellants have lived in Pakistan since 2010, without threat or attack. There were hostile text messages sent to the sponsor in the UK, but no consequence (or likelihood of consequence) for the appellants in Pakistan".

I point out, in that regard, that, unlike Goudey, the appeal in this case was and could only be on human rights grounds. That said, the factual finding as to the subsistence of the relationship and therefore the ability to meet the Rules is clearly central to the Article 8 issue.

26. As Ms Everett pointed out, the appeals are against the Respondent's decisions and it is therefore appropriate also to set out the Respondent's reasoning. The Respondent's reasons for refusing the applications (of the First Appellant with the Second and Third Appellants as her dependents) are as follows:

> "The information provided by yourself and your sponsor has been considered to determine if the requirements of the Immigration Rules have been met. In reaching this decision, which has been made on the balance of probabilities, the following points have been noted:
> - You have applied for Family Reunion in order to join your spouse Najeeb [A] in the UK. I note that you have previously been issued entry clearance as the dependent of your spouse. Home Office records show that you were refused leave to remain in September 2010 and that you subsequently voluntarily departed the UK.
> - It is noted that on May 15th 2014, during a screening interview your spouse stated that he had not seen you for 'three years' and had been in a relationship with a British citizen for 6-7 months, and that she had subsequently left him. Your sponsor has further stated in his Witness Statement (undated) and statement of oath (page 12) that he has experienced domestic problems with his ex-wife (named as being yourself) after revealing his religious beliefs, he claims that you left him and took his children away from him (WS page 7). Paragraph 352A of the Immigration Rules states the following:-
> 'each of the parties intends to live permanently with the other as his or her spouse civil partner and the marriage is subsisting'
> - You have submitted a statement regarding marriage written by your sponsor dated 14 December 2018, in which he claims your relationship is genuine and subsisting. It is noted that in this statement your sponsor has stated that he informed you of his relationship with another woman, you accepted his apology and are now together again. You have stated within your affidavit that you continuously kept in touch with your husband after you left the UK, however no mention has been made by yourself of his previous relationship with another woman which took place when you were still married.
> - The evidence you have submitted in support of your claim that your marriage is genuine and subsisting consists of money transfer invoices; however, as you claim to have 2 children together it cannot be assessed that these funds were intended for you and were not to support your sponsors children.
> - Additionally, Home Office records show that you left the UK in 2010 along with your two sons due to the death of your father. However, it is unclear why you waited 5 years after leaving to re-join your spouse and make an initial application for family reunion, which was later refused. Additionally, given that your sponsor has had at least one other relationship since your departure which has not been acknowledged by yourself, I am not satisfied that your marriage remains

> subsisting. Therefore, I am not satisfied that you meet the requirements of **paragraph 352A(v)**."

27. Although there is mention in the refusal of an affidavit provided from the First Appellant, that does not appear to be in the bundles before me and nor can I see any reference to it in the lengthy list of documents said to have been before the Entry Clearance Officer. The extent of the evidence which was before the Judge, from the Appellants themselves is confined to what is said in the First Appellant's application under "Additional Information" as follows:

> "Please note that my husband Najeeb [A] went to England on 6th of August 2005 on HSMP visa and we joined him in December 2005. We stayed with him one year as his dependent and a further application was made for the extension of HSMP visa which was granted until 2010. However due to personel [sic] circumstances we had to move back to Pakistan. further before our HMPS visa was due to expire in June 2010 me and my two children visited the sponsor for three months and then we went back."

A similar wording (adapted to the circumstances) appears in each of the Second and Third Appellants' application forms. Even that may not be evidence from the Appellants themselves as the forms were not completed by the Appellants themselves, were submitted electronically and appear to have been lodged from a Post Office in Wembley. The forms were completed by E K Mahmood who, it appears from the appeal forms, is a legal representative working for Nationwide Law Associates in the UK and therefore presumably instructed by the Sponsor. I do not draw any adverse inference from that position (and more importantly neither did the First-tier Tribunal Judge) but it does underpin the finding by the Judge as to lack of evidence of intention from the First Appellant in particular. The First Appellant would have been well aware that the Respondent took issue with the genuineness of the relationship between her and the Sponsor and no explanation is given for the lack of evidence from her.

28. I begin by noting that the skeleton argument submitted by the Appellants for the First-tier Tribunal hearing at [AB/15-20] makes no mention of Goudey. Of course, that is not and could not be determinative of whether the Judge should have had regard to the guidance. It may though be a reason why the Judge did not consider it necessary to refer to the case. The skeleton argument is structured in much the same way as Ms Everett submitted that the Judge had approached the issues; that is to say from the starting point of the Respondent's reasons for refusing the applications.

29. Whether or not that was the right approach, I do not accept Mr Dhanji's submission that the Judge's approach is in any way at odds with the guidance in Goudey. Read as a whole, the headnote in that case merely indicates that, where there is a legal marriage, there is no need to require other evidence as to the subsistence of the relationship, unless there are countervailing factors which give rise to a suspicion that there might not be. In Goudey, the only question mark about the relationship appears to have been that the relationship between the sponsor and the appellant had been formed whilst they were living in different countries and that they had lived apart for two years prior to the making of the application for entry clearance, such that there might be a concern about their future intentions. This case is factually very different.

30. As such, the Judge was right to begin by noting that the marriage was a legal one. The issue thereafter though was whether there were "countervailing factors" which indicated that the relationship was nonetheless not genuine and subsisting. Although the Judge did not expressly refer to his reasons in terms of "countervailing factors", read as a whole, his reasoning thereafter at [39] to [44] of the Decision follows that approach. The Judge therefore undertook the correct exercise and there is no erroneous failure properly to direct himself or any wrong self-direction.

31. I turn then to the second way in which Mr Dhanji argued the case, namely that the Judge has provided insufficient reasons for his finding that the relationship is not genuine and subsisting or that the conclusion he reached was not open to him on the evidence.

32. Based on what is said at [39] to [44] of the Decision, the reasons can be summarised as follows:
    (a) There was an inconsistency in the way in which the Sponsor claimed to remain in contact with the Appellants. If, as he said, he used a landline, the calling cards which appear at the end of the Appellant's bundle can have no evidential value. The Sponsor said that he did not use WhatsApp in order to communicate due to connection problems ([27.1] of the Decision) but that was inconsistent with the evidence of the Witness who used that method of communication.
    (b) The Sponsor had produced no photographs of the Appellants in the nine years that they had lived separately. He said that he had some which could be produced ([27.2] of the Decision). However, none were provided and there has been no application to adduce further evidence.
    (c) The Appellants provided no evidence for the appeals. Even if the application forms were completed on the Appellants' instructions and there was, as the Respondent says, an affidavit asserting the continuance of the relationship, there was no statement from any of the Appellants before the Judge. As such, there was no confirmation from the First Appellant that she and the Sponsor had put the extra marital affair behind them or as to her attitude to his bisexuality. The Witness was not aware of the Sponsor's bisexuality and had only recently been made aware of the affair ([40], [42] and [43] of the Decision).
    (d) The Sponsor was hesitant in his evidence as to the detail of his sons' education.
    (e) There was no application for the Sponsor's family to join him between 2014 (when his asylum appeal was allowed) and 2018. The Sponsor's explanation was that he did not have the money to pay for the application, but these were family reunion applications which do not attract a fee ([41] of the Decision).

33. I did not understand Mr Dhanji to take issue with any of the facts on which the Judge's reasons are based; rather he submitted that it was not open to the Judge to reach the conclusion he did on that evidence. That is essentially a submission that the Judge's conclusion is irrational or perverse on the evidence. That is a high threshold to cross and one which is not made out in this case.

34. Nor can it be said that the Judge has failed adequately to provide reasons for his conclusions. Those are evident from the summary which I have provided above of the relevant part of the Decision.

35. For those reasons, the Judge was entitled to reach the conclusion he did about the subsistence of the relationships between the Appellants and the Sponsor. It follows that the Appellants have failed to show that the Decision contains any error of law. I therefore uphold the Decision

DECISION

The Decision of First-tier Tribunal Judge Housego promulgated on 7 October 2019 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellants' appeals remain dismissed.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 9 December 2020