



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/00618/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 24 July 2014 and 2 October 2014**

**Determination Promulgated
On 23 October 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

HAMED OMOTOSHO AJAO

Appellant

and

ENTRY CLEARANCE OFFICER-ACCRA

Respondent

Representation:

For the Appellant: Ms V Sharkey, Legal Representative, Medivisas UK LLP

For the Respondent:

On 24 July 2014 Mr G Saunders, Senior Home Office Presenting Officer

On 2 October 2104 Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal came before me on 24 July 2014 when I found an error of law and I gave an extempore judgment giving my reasons. I was particularly concerned that the one good point that I had identified in the First-tier Tribunal Judge's determination seemed to be wholly unsupported by the evidence and I set aside the decision. I was nevertheless anxious to be fair to all the parties including the Entry Clearance Officer and I gave the parties time to produce further evidence.
2. The terms of my summary judgement, subject to minor corrections) is set out below:
 - 1 This is an appeal by a citizen of Nigeria against a decision of the First-tier Tribunal dismissing his appeal against the refusal of entry clearance to the United Kingdom as a husband. The Entry Clearance Officer was not satisfied that the appellant is in fact engaged in a subsisting marriage and the First-tier Tribunal came to the same conclusion.

2. This case I find illustrates the extraordinarily difficult task that sometimes faces the Upper Tribunal under the guise of determining whether or not there was an error of law. I will put the sponsor out of her misery immediately by saying that I am persuaded there is an error of law and the case has to be heard again.
3. I will now give my reasons. Firstly I make it plain that not all of the grounds are equally impressive. Mr Saunders summarised the appellant's case by addressing the three points raised, and I agree with him that the first point is not made out. It was said that there was some uncertainty about the standard of proof applied by the judge but that I find is completely wrong.
4. At paragraph 11, which is a crucial paragraph, the judge did say that the evidence was not conclusive evidence that the marriage was subsisting and that is a dangerous phrase but it is absolutely plain when the paragraph is read as a whole that although he said the evidence was not conclusive the test he applied was what was probable and he found that it had not been shown the marriage was probably subsisting. There is no point to be made there.
5. The third ground of appeal said too much weight was given to certain factors and Mr Saunders said quite correctly that weight is a matter for the judge and it is really only if the decision goes into the territory of being perverse that the wrong application of weight can be said to show an error of law. It was the appellant's case that the decision was perverse although it is the second ground about points not being taken that were not put which has caused me the greatest concern.
6. The Entry Clearance Officer's position is in some ways is easy to understand. The Entry Clearance Officer had no evidence of recent cohabitation and was faced with a man who had a previous history of going into the United Kingdom on a visa as a fiancé and leaving behind him a woman pregnant, and then with a child, to whom the appellant was not married. The Entry Clearance Officer was entitled to find that this was a poor reflection on the appellant's sense of responsibility and to reach the conclusion that he did. The Entry Clearance Officer did not know about that contact that had taken place afterwards when the sponsor had visited the appellant and spent time with him.
7. The reasons given for the First-tier Tribunal's conclusion are the previous history coupled with, as explained at paragraph 10, "the inconsistencies and conflicting evidence set out above". That is potentially a perfectly good reason but when I look at what those inconsistencies and conflicting evidence are it becomes a much less impressive point.
8. It was held against the appellant that as well as saying he wanted to see his wife in the United Kingdom he said he would see his daughter. I really cannot see how that is any indication at all of the status of his present marriage. It is a plain fact that there is a daughter of an earlier relationship. It is not an unusual state of affairs for people who have children from an earlier relationship to preserve that relationship even though they are then married to a subsequent partner. It really is not a point that should be taken against the appellant and I do not understand why it was.
9. At paragraph 8 in the determination it is noted that the appellant said in answer to questions at interview that he cohabited with his wife from the time their relationship began in September 2010 until he left the United Kingdom in 2011 but that is not what the wife said. She claimed that they lived together between May and September 2011. There is no getting away from it; this is difference in the evidence and it is something which the judge was entitled to take into account

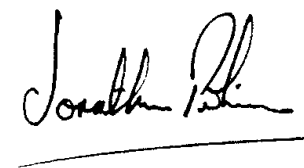
although when the remark is seen in context with the rest of the evidence it is not such a very impressive point.

10. He did say in answer to earlier questions that the relationship started in 2010 and in answer to the critical question that they lived together from when the relationship began. It was never expressly put to him that he meant to say that they cohabited as soon as the relationship started. It would have been helpful if it had been put because his meaning might have become clearer. He said in his statement that they lived together for about five months, which is about what the sponsor says. That really is the only point of substance taken against him, and I cannot see that it justifies the conclusion that was reached.
 11. At paragraph 7 the judge said that there was an inconsistency. It was in a previous application dated 6 February 2012 that the appellant had said that he was still residing with his previous partner when he was encountered by the authorities. Well, if that is right that is a version of events very different from the one presented here. The problem is I can find no justification whatsoever in the papers for that assertion.
 12. In an effort to give me confidence I asked Mr Saunders, who could not find it in his papers, and I asked him to look in my papers and he could not find it either. He was of course assisted by Ms Sharkey, who had a duty to help me as well as to help the court and they could not find it.
 13. I have to say there is nothing before me that justifies that conclusion, and when I take that out the evidence that supports the conclusion reached is extremely skimpy. Further it is a finding reached on the inclusion of the matters listed at paragraph 7 which I find entirely unjustified and I cannot say with any confidence that if the judge had not made the finding he did at paragraph 7 he would have reached the conclusion that he did. I just do not know but I do know that the conclusion he reached was without any particularly unchallengeable or telling point and included a thoroughly bad point at paragraph 7. I cannot look at the conclusion and say that but for the bad point at paragraph 7 he would have still reached the conclusion that he did.
 14. It follows therefore that I have to conclude that on the material before me the conclusion of the First-tier Tribunal Judge was not safe, and I set aside that decision, and then I will have to decide what to do with it.
 15. Looked at from the appellant's point of view I see why he wishes to go ahead today. Ms Sharkey is ready and it is unattractive from her point of view for me to adjourn the case for the respondent to try and repair the defect in the case.
 16. The fact is I am not here to please either party but to reach a good decision that is fair in all the circumstances and I am concerned that the judge may have had a proper reason for his findings in paragraph 7 and I am going to adjourn the case now so that further evidence can be produced on another occasion. It will remove an area of doubt one way or the other.
 17. The only direction that I give is that any party wishing to rely on any evidence not presently before the Tribunal should serve it on the other party no later than seven days before the hearing.
3. The Entry Clearance Officer has produced some further evidence in the form of an earlier "Reasons For Refusal Of Entry Clearance" which I have read. I do not find that it is of any assistance whatsoever beyond confirming what we knew already, namely that there had been an earlier unsuccessful application.

4. It is an irony that the one thing that concerned me because it was completely unsupported by the evidence is now in fact supported by evidence coming from the appellant himself who need not have made a statement at all but did and he explains that in fact he was still living in the same house as his former partner when his relationship with the present partner started but it was an unhappy arrangement after the relationship had died and before they were able to organise their affairs to separate.
5. I know from when I used to practise in the family courts that it is by no means unusual particularly, if I may say it without being disrespectful, amongst the less well-off members of society, that people have to stay in the same house albeit unhappily and I do not see that that this is the crushing point against the appellant that it was thought to be. It is not evidence that the relationship with the present partner is a sham and that he just wants to get to his first partner which was the concern. It is just evidence that for a time the appellant and his former partner stayed in the same house.
6. As Ms Sharkey said very fairly in her submissions, the case advanced by the appellant is not especially strong but it is all the points that have to be made. There is evidence of contact. There is evidence of being to see each other. All the things that you would expect to find in the case of a couple who are committed to each other but separated by several thousands of miles is the evidence that is here. None of it is compelling. For example, I cannot look at the telephone bills and know with confidence that the appellant has been contacted by his sponsor but I can accept and do accept the explanation that the phone bills show the use of a cheap means of payment available through Tesco in exactly the way that would be expected if the sponsor was telling the truth and I think she was. There was very little to put to her in cross-examination. Her further evidence merely confirmed that she continued to be in a close relationship and although it is post-decision evidence of marginal value the fact that they are still together tends to be in support of the fact that they were together at the material time. It does not prove it but it points the right way.
7. This is not a case where there is any good reason that I can see for disbelieving the appellant. There may be some points in the story that are not absolutely completely tied together but that sometimes is indicative of truthfulness rather than rehearsal. I certainly find that the essential points are made out, namely that the appellant and his partner are in frequent contact with each other as they have been since they separated by the appellant's return and want to get back together.
8. I have been reminded of the decision of this Tribunal in **Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041 (IAC)** by the President Mr Justice Blake with Deputy Upper Tribunal Judge Juss. This shows, if authority is needed, that once there is credible evidence of commitment there is very little more if anything to do to prove a subsisting marriage and an intention to live together. The evidence is there. No proper reason has been given to go behind it and find that it is a sham. It may be. I do not have to be satisfied, so I am sure. On the balance of probabilities that the appellant's case is made out. So, having

set aside the decision of the First-tier Tribunal on an earlier occasion I now allow the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 22 October 2014