



SELF-TYPED

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

Appeal Number: IA/22930/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5 October 2015

Decision and Reasons Promulgated
On 13 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RUBANA QADEER
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Claimant

Representation:

For the Appellant: Ms J. Isherwood, Specialist Appeals Team
For the Respondent: Mr A. Blake, Counsel instructed by AKL Solicitors

DECISION AND REASONS

1. The SSHD appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision to refuse to vary her leave as a partner under Appendix FM, and against her concomitant decision to remove her, because her presence was not conducive to the public good (S-LTR 1.6) and because she had not shown she was free to marry her British national sponsor or that the relationship between them was genuine and subsisting. The First-tier Tribunal did

not make an anonymity direction, and I do not consider that the claimant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. The claimant admits a history of previous deception. Apart from some differences on dates, she accepts the account of her adverse immigration history given in the decision under appeal.
3. The claimant is a national of Pakistan, whose date of birth is 20 October 1978. In the identity of Rubana Qadeer ("RQ"), which the judge below found was her true identity, she made two applications for a visit visa in July 2006, one after another, which were both refused. On 13 September 2007 she applied for entry clearance as a visitor in the identity of Rubana Javed ("RJ"), date of birth 20.10.79. The application was accompanied by a genuinely issued passport for RJ. In the application form, the claimant said she was married to Mr Javed Iqbal Anwar. The application was refused on 14 September 2007.
4. On 23 November 2012 the claimant, in the identity of RQ, applied for entry clearance from France as the fiancée of Mr Amer Najeeb Latif. In her application form, she failed to declare that she has been refused a visa on three previous occasions. Instead, she gave the answer "No" in response to a specific question on this topic (Question 42). The application was refused on 6 February 2013 with a right of appeal on the sole ground that the claimant had not shown that she met the financial requirements of Appendix FM and Appendix FM-SE. The claimant appealed.
5. While her appeal was pending, the claimant made a second application for leave to enter a fiancée. In answer to Question 42, she declared the most recent refusal of a visa (the refusal in February 2013) but she did not declare the three earlier refusals.
6. On 28 February 2013 the application was refused on the ground that the claimant had failed to declare her previous application in a false identity (identified through matching her biometric information) and that she had previously claimed to be married, and so she could not be confirmed as being free to marry her sponsor in the UK.
7. The claimant did not appeal this refusal, but continued to prosecute her appeal against the earlier refusal. Her appeal came before Judge Sethi sitting at Hatton Cross on 11 July 2013. Both parties were legally represented. The ECO had failed to file a bundle in accordance with Rule 13 of the 2005 Procedure Rules, but the legal representatives agreed that this did not prejudice the conduct of the appeal. The sponsor gave oral evidence, and he was only cross-examined on the documents evidencing his annual earnings as a qualified Chartered Engineer and a director of Pall Mall Developments Ltd. In his subsequent decision allowing the appeal, the judge noted at paragraph [17] that neither the ECO nor Mr Archie (who was the HOPO) had put in issue any of the remaining requirements under Section EC-P.
8. On 28 August 2013 the claimant was granted limited leave to enter the UK as the fiancée of Mr Latif until 28 February 2014. On 23 October 2013 she contracted a civil

marriage to Mr Latif and on 3 January 2014 the couple celebrated a religious marriage.

9. On 27 February the claimant applied for leave to remain, using a form FLR (M). In answer to question 5.5, she declared that she had been refused a visa in 2007, and in answer to question 9.2, she admitted that she had used the RJ identity for the application in 2007.
10. On 16 May 2014 the Secretary of State gave her reasons for refusing the claimant's application for leave to remain, and for making a concomitant decision to remove her under Section 47 of the 2006 Act. As summarised by the judge below, the SSHD was of the view that it was not desirable to allow the claimant to remain in the UK due to her actions which, while falling short of criminal behaviour, involved the use of deception, the deployment of false documents and the provision of false information.

The Hearing Before, and the Decision of, the First-tier Tribunal

11. The appeal came before Judge Eban sitting at Richmond Magistrates Court on 27 March 2015. Mr Blake of Counsel appeared on behalf of the claimant. The SSHD was not represented. The claimant and the sponsor gave oral evidence, and Judge Eban summarised their evidence in some detail at paragraphs [7] to [10] of her subsequent decision.

12. The judge set out her findings of fact in paragraph [11]:

“Having carefully considered what the witnesses told me (which is noted in the record of proceedings), I make the following findings:-

...

2. The [claimant's] true identity is Rubana Qadeer ...

3. The [claimant] was not married before her marriage to Mr Amer Najeeb Latif. This is based on the [claimant's] evidence which I found to be credible.

...

6. The [claimant's] marriage to Mr Amer Najeeb Latif is genuine and subsisting. They are keen to start a family.

...

8. ... I find that at the time the [claimant] applied in a false name she was under the control of her male relatives, and accept that she would have little power to do other than she was told. I also accept the [claimant's] evidence that she was unsure what precisely her male relatives had done, and what documents she was asked to sign or declarations she made. I find that the [claimant] recalled that she had made applications, but did not know precisely when, or what was said on her behalf and so omitted information without realising the significance of doing so when she later applied as a fiancée.

9. Mr Amer Najeeb Latif has lived continuously in the UK for over 40 years and could not integrate into life in Pakistan.”

13. The judge went on to consider Article 8. At paragraph [17] she said that the rules were the starting point, and the claimant did not meet them. So the question which she had to decide was whether there would be unjustifiably harsh consequences not sufficiently recognised under the Rules if the claimant returned to Pakistan. She gave her reasons for answering this question in the affirmative in paragraphs [18] and [19].

The Application for Permission to Appeal to the Upper Tribunal

14. The ground of appeal was that the Judge had failed to give any or any adequate reasons for finding that the claimant was in a genuine and subsisting marriage and/or that the judge had failed to resolve “the conflict of opinion” on whether the marriage was genuine and subsisting. The judge had found that the marriage was genuine and subsisting, and that the claimant enjoyed family life with the sponsor, at [11.6] and [16]. But at no point in her decision did she consider the evidence on this point and she provided no reason for her finding, contrary to **Budthathoki (reasons for decisions) [2014] UKUT 00341 (IAC)**.

The Grant of Permission to Appeal

15. On 10 June 2015 Judge Colyer granted permission, as it was arguable that the judge had failed to provide adequate reasons for the finding of fact that the claimant was in a genuine and subsisting marriage, “[t]his being an issue at the heart of the appeal”.

The Rule 24 Response

16. On 28 July 2015 the claimant’s solicitors served an extensive Rule 24 response opposing the appeal, which had been settled by Mr Blake. At paragraph 36, he submitted that it was plainly open to the judge, on the totality of the evidence (both oral and documentary), to make the omnibus finding that the claimant and her spouse were living together in a genuine and subsisting relationship. Sufficient findings were rehearsed and others could be readily inferred. No material piece of evidence was overlooked by the judge. The weight which the judge afforded to certain aspects of the evidence, while attaching correspondingly little or no weight to other aspects, lay comfortably within the bounds of the standard of rationality: see **Mukarkar v SSHD [2006] EWCA Civ 1045** at [39]-[41], **Nixon [2014] UKUT 00368 (IAC)** at [13] and **Edwards v Bairstow [1956] AC 14**.

The Hearing in the Upper Tribunal

17. At the hearing before me to determine whether an error of law was made out, Ms Isherwood relied on **The Queen on the application of Agyarko & Ors v Secretary of State for the Home Department [2015] EWCA Civ 440**. She submitted that the judge had focussed too much on the sponsor, and the adverse consequences for him if his wife’s appeal was dismissed, and had failed to engage adequately with the SSHD’s reasons for doubting the claimant’s true intentions, which included the lengths to which she had gone to attempt to enter the UK in the past. The judge’s approach had been back to front. She had found that the marriage was genuine and subsisting and that both parties to the marriage genuinely intended to live together permanently in

the UK as husband and wife, before analysing why this might not be the case from the claimant's perspective, having regard to her immigration history.

18. Mr Blake took me through the documentary evidence which had been before the judge, and he submitted that on analysis the error of law challenge was one of irrationality in finding the claimant credible (cf **Nixon**) rather than a lack of adequate reasoning (cf **Budhathoki**).

Discussion

19. The ground of appeal gains some traction because the judge omitted a vital dimension of the SSHD's case when setting it out at paragraph [6]. The case for the SSHD was not simply that the claimant did not meet the suitability requirement at S-LTR 1.6. It was also part of the SSHD's case that the claimant had, by her conduct, not shown that she met the eligibility requirements. The Rule 24 response is predicated on the premise that, once the claimant admitted her adverse immigration history, the only factual issues in controversy were (a) her true identity and (b) whether she was free to marry. But while these were important factual issues which needed to be resolved, another strand to the SSHD's case was that the claimant's past attempts to enter the UK called into question her true motives in attaching herself to the sponsor. In short, it was reasonable to question whether the claimant was cynically using the sponsor as a means to an end (to gain the right to settle in the UK); and that, by her past conduct, she had not shown that she had a genuine intention to live together permanently with him in the UK as husband and wife, and thus she had not shown that the marriage was genuine and subsisting.
20. The judge's error at paragraph [6] is compounded by the judge's approach at paragraph [11]. She does not expressly engage with this particular concern of the SSHD (that the claimant is using the sponsor as a means to an end) before making a finding that the marriage is genuine and subsisting.
21. However, unlike the First-tier Tribunal judge in **Budhathoki**, Judge Eban rehearsed the evidence of the claimant in some detail before declaring that she found her evidence to be credible. Part of her evidence was that she had met the sponsor through a Muslim on-line dating website when she was legally resident in France, working as a teacher. Initially she had no idea where the sponsor lived. Moreover, as she was already living in Europe, she did not embark on a relationship with him so as to come to the UK by any means.
22. As Ms Isherwood submitted, it remains wholly unexplained why the family resorted to fraud in an unsuccessful attempt to secure her admission to the UK under a false identity in 2007. But the absence of a satisfactory explanation for the conduct in 2007 did not preclude the judge from finding that the claimant was credible as to her motives in seeking entry clearance as a fiancée in 2012.
23. The finding at paragraph [11.6] is supported by the undisputed finding at [11.5] that the parties entered into a civil marriage, followed by a religious one, both of which are documented, There was also other documentary evidence in the bundle which

was supportive of the finding, comprising photographs and emails which were exchanged between the couple in 2011 at an early stage of their courtship.

24. The finding at paragraph [11.6] cannot be viewed in isolation from the other findings made by the judge, nor should it be divorced from the reasoning which underpins those other findings. None of the other findings of fact are challenged by the SSHD, including the finding that it was not the claimant who decided to try to enter the UK in 2006 and 2007. This was a decision taken by male members of her family who exercised control over her.
25. The significance of **Agyarko** is that it provides a springboard for an argument by the SSHD that there were not exceptional circumstances in this case which justified the claimant being granted Article 8 relief outside the rules. But there is no error of law challenge to the judge's assessment of proportionality, and Ms Isherwood confirmed that she was not seeking to add a new ground of appeal. The decisive factor which tipped the scales in the claimant's favour was that, following her successful appeal against the refusal of entry clearance on financial grounds, the ECO had granted her entry clearance as a fiancée *despite having actual or constructive knowledge of her history of deception* (when it was open to him to invoke this as a ground for not issuing her with a visa), and he had thus engendered a legitimate expectation on her part and on the part of the sponsor that they would be allowed to establish family life together in the UK; and that her past would not derail an otherwise meritorious application for limited leave to remain as a spouse. The reasoning of the Judge on the issue of proportionality is sound, and the fact that a different Tribunal might have reached a contrary conclusion on the same facts, applying **Agyarko**, is irrelevant.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. The SSHD's appeal to the Upper Tribunal is dismissed.

Anonymity

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson