



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

Appeal Number: HU/05505/2016

THE IMMIGRATION ACTS

Heard at Manchester CJC

**Determination
Promulgated**

On 3 December 2018

On 11 December 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA

ANONYMITY DIRECTION MADE

Respondent

Representation:

For the appellant: Mr Bates, Senior Home Office Presenting Officer

For the respondent: Ms Faryl, Counsel

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This prohibition applies to, amongst others, all parties.

Introduction

1. The respondent ('the SSHD') has appealed against the decision of the First-tier Tribunal ('FTT') allowing MA's Article 8 appeal, the FTT having found that she is in a genuine and subsisting marriage with her British citizen spouse ('the sponsor').
2. I have anonymised MA's name because this decision refers to medical and sensitive evidence relevant to the sponsor.

Background

3. MA is a citizen of Pakistan. She married the sponsor on 21 October 2012. They claim that they last met when the sponsor visited MA in Pakistan on 29 June 2014.
4. The sponsor's GP, Dr Morijawala, has confirmed in a letter dated 15 August 2017 that he has epilepsy. This is supported by a letter reviewing the sponsor's condition dated 17 March 2014, prepared by Dr Gosal, a consultant neurologist.
5. MA's application for entry clearance to join the sponsor in the UK was refused in a decision dated 19 January 2016. The SSHD did not accept that the parties were in a genuine and subsisting relationship. This decision was appealed to the FTT. The FTT was satisfied that the parties were in a genuine and subsisting relationship and allowed the appeal on Article 8 grounds.
6. The SSHD appealed, relying upon two grounds of appeal: (i) having found that the sponsor's failure to give evidence at the hearing, weighed heavily against him, the FTT failed to take this into account when concluding that the relationship was genuine and subsisting, and (ii) the FTT erred in law in relying upon evidence provided by the sponsor's sister ('Ms H') "*on his behalf*".
7. FTT Judge JM Holmes granted permission to appeal in a detailed decision dated 5 April 2018.
8. A hearing before the Upper Tribunal ('UT') on 31 August 2018 was adjourned due to the illness of MA's Counsel. At that hearing I gave directions to MA to file and serve a skeleton argument addressing the basis upon which it is contended that the FTT was entitled to accept the credibility of Ms H's evidence in the light of its finding that the evidence could have been given by the sponsor. MA filed and served a skeleton argument on 2 October 2018 and the SSHD filed and served a position statement in response on 28 November 2018.

FTT decision

9. The sponsor attended the FTT hearing but did not give evidence. It is recorded that Ms H gave "*evidence on his behalf*" at [18]. The FTT did not accept that Ms H held power of attorney for the sponsor. The FTT was also concerned that the medical evidence did not indicate why the sponsor was unable to give evidence at the hearing. As the FTT put it at [19], the evidence available "*merely confirms what medical conditions [the sponsor] has and does not indicate what functional limitations arise out of those medical conditions*". The FTT did not accept Ms H's explanation that the sponsor provided unreliable evidence attributable to the sponsor's medical conditions. The FTT was clearly not satisfied that the sponsor lacked the capacity to answer questions and attached "*significant weight to his failure to give evidence in this appeal*" at [19].
10. The FTT considered that there was sufficient additional evidence to support the claim that the parties' marriage was genuine and subsisting for effectively two reasons, as summarised at [20] to [22]. First, the FTT accepted that the sponsor visited the appellant in June 2014. Secondly, there was evidence of considerable number of phone calls between MA and the sponsor for the period September 2015 to August 2017.

Hearing

11. At the beginning of the hearing I made it clear that I did not find the unsigned and undated skeleton argument helpful. I therefore asked Ms Faryl to address me first and to address the issue I summarise at [8] above.
12. Ms Faryl invited me to find that the FTT was entitled to treat Ms H as having given evidence on the sponsor's behalf given his history of being upset the last time he gave evidence before the Tribunal and its clear finding that the sponsor is a vulnerable witness. Ms Faryl was unable to take me to any such clear finding in the decision, and acknowledged it is merely implicit from the evidence that he is unable to travel on his own and his sister acts on his behalf for benefits purposes. Ms Faryl submitted that in any event, the evidence in support of the finding that the parties are in a genuine and subsisting marriage did not emanate solely from the sister. When I pointed out that it was Ms H who gave evidence that the sponsor met with MA when he travelled to Pakistan in 2014 and it was Ms H who described the phone conversations between the parties, Ms Faryl acknowledged that the only significant independent evidence were the photographs of the wedding.

13. After hearing from Ms Faryl, I did not need to hear from Mr Bates (having already considered the SSHD's position statement) and announced that the FTT's decision contains an error of law, for reasons I set out in this decision.

Error of law discussion

14. I am satisfied that the FTT failed to adequately reason why it was prepared to accept that the parties have a genuine and subsisting relationship on the evidence available to it.
15. The FTT appears to have accepted that Ms H was able to provide evidence on the sponsor's behalf. This is to be derived from the FTT's reasons for its ultimate conclusion. These reasons are twofold and the evidence to support them came directly from Ms H. Ms H gave evidence that the appellant met MA when he travelled to Pakistan in 2014, but lost the phone with the relevant photos - see her statement dated 18 August 2017 at [7] to [8]. Similarly, the evidence that the parties were in regular phone contact also came directly from Ms H explaining what the telephone logs demonstrated - see her statement at [9] and [16].
16. The FTT has offered no reasons for accepting evidence on the sponsor's behalf in this manner. The FTT did not accept that Ms H was the sponsor's attorney at - see [18] and [19]. The FTT was well aware that the sponsor has a number of medical conditions including epilepsy and Ms H had authority to act for him in a limited capacity regarding his benefits but expressly noted at [19] an absence of medical evidence that the sponsor is unable to answer questions. The FTT noted that the sponsor did not "*put forward medical evidence*" that he is a vulnerable witness. The FTT squarely rejected the explanation that the sponsor was incapable of giving evidence, yet the FTT went on to accept evidence provided by another, which if he was able to give evidence, the sponsor was far better placed to provide. In my judgment the FTT irrationally accepted evidence from Ms H, without addressing an obvious issue: if as the FTT found, the sponsor did not lack capacity to give evidence and was capable of answering questions, then he was in a position to provide the very evidence put forward on his behalf. The FTT has entirely failed to explain why it was prepared to treat Ms H's evidence regarding the sponsor's actions as credible, particular when it did not accept the reason put forward for the sponsor not giving evidence himself.
17. The skeleton argument is a vague and unhelpful document. This appears to submit that the sponsor's learning disability and experience of being upset when he previously gave evidence, was such that it was "*thought best for evidence to be given by the sister*". This completely fails to engage with the apparent inconsistency in the FTT attaching significant weight to the sponsor's

failure to give evidence, yet also apparently attaching significant weight to evidence regarding the sponsor's own actions, as provided by Ms H.

18. The skeleton argument attaches evidence that was clearly not available to the FTT: a letter dated 21 January 2018 from Dr Al-Memar, a locum Consultant Neurologist and a 2018 power of attorney clearly post-date the 2017 FTT hearing. In any event the 21 January 2018 letter merely confirms that the sponsor has epilepsy and is having up to 8 attacks per month. It is also stated that "*he has some learning difficulties*". This is not particularised and the basis for this assertion is unknown. The letter dated 5 January 2009 indicates that the sponsor was suffering with epileptic fits at the time. As the FTT noted, it had medical evidence describing the sponsor as having epilepsy. Ms Faryl did not refer to these documents when making her submissions. Any suggestion that Ms H, as the sponsor's "*attorney*" gave evidence "*on his behalf*" completely fails to acknowledge that the FTT did not accept her as his attorney.
19. For the reasons set out above, the SSHD has made out his grounds of appeal and it follows that the FTT decision must be set aside and re-made de novo. The nature and extent of the factual findings required are such that the matter shall be remitted de novo to the FTT.

Final points

20. There are many concerning aspects to this case. MA's solicitors have failed to clarify the nature and extent of the sponsor's learning disability. This must be corrected forthwith. An early identification of issues relevant to vulnerability is important. The source of the solicitors' instructions is also unclear: do they emanate from the MA, the sponsor or his sister? It is for these reasons, inter alia, that it would be helpful to have a case-management hearing before the FTT.

Decision

- (1) The FTT decision contains an error of law and is set aside.
- (2) I remit the decision to the FTT to be decided by a judge other than Judge Siddiqi.

Signed:
Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 4 December 2018