Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14196/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 April 2018	**On 24 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR ZAHID HOSSAIN BHUIYAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr M Hossain, Counsel
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Bangladesh born on 20 September 1955 who appealed to the First-tier Tribunal against the decision of the respondent Entry Clearance Officer, of 10 November 2015, to refuse the appellant's application for leave to remain as a partner. In a decision promulgated on 18 July 2017, Judge of the First-tier Tribunal Brewer dismissed the appellant's appeal.

2. The appellant appeals with permission from the Upper Tribunal on the following grounds (in summary):

Ground 1

The First-tier Tribunal failed to apply the case law of **Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC)**.

Ground 2

It was incorrect to conclude that there was no medical evidence about the sponsor's inability to travel.

Ground 3

The judge failed to place proper weight on the evidence including of the appellant's Bangladesh Government job.

Ground 4

The decision on Article 8 was inadequate.

Hearing

3. Mr Hossain's primary submission was reliant on the case of **Goudey** and specifically paragraph 12 , which provides as follows:

> "... 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."

4. Mr Hossain referred to [26] of the Decision and Reasons where the judge had referred to the appellant's "leave" to come to the UK which meant leave from Bangladeshi television which Mr Hossain indicated showed that the respondent was aware that the appellant was coming to the UK with three years "leave" from his job and that he had to go back. Mr Hossain emphasised that it was a condition of his leave from Bangladeshi television that he had to return. He also emphasised that a condition of his leave in the UK was that he had to return. Mr Hossain submitted that nothing more was required under **Goudey** and the Tribunal did not show that that had been applied. The couple have been married since 1984 and have two children, one of whom was working in the UK in the cabinet office and had attended the First-tier Tribunal appeal (on 8 June and not 23 June 2017 as erroneously recorded by the Judge of the First-tier Tribunal). The second daughter was married in the UK and both the appellant and the sponsor attended the reception. Mr Hossain rehearsed the sponsor's immigration history including that her leave was curtailed in 2007 and then reinstated.

5. In relation to the judge's findings at [27], Mr Hossain argued that it had been the intention of the appellant to bring her husband to the UK if she had obtained indefinite leave to remain in 2010, whereas she only obtained discretionary leave, not obtaining indefinite leave to remain until 2013. The appellant had also maintained that he was waiting for his money on retirement and that it was always his intention to come back to the UK. When asked to identify where the judge had got it wrong, including in relation to the finding that there was no evidence that the sponsor could not travel to Bangladesh for medical reasons, Mr Hossain submitted that the Tribunal had failed to apply the correct standard of proof of a balance of probabilities and on balance the Tribunal should have accepted that she could not travel given the evidence of her medical condition. He further submitted that the judge got it factually wrong in stating that the appellant did not apply for further leave in 2008.

6. Mr Hossain also emphasised that there was evidence of the sponsor's three visits to Bangladesh, although he accepted that this was noted by the Tribunal at [38]. Mr Hossain submitted that the judge failed to place appropriate weight on this evidence and he again relied on **Goudey**. He further submitted that the decision on Article 8 was inadequate given that the couple had been married since 1984.

7. Ms Everett submitted that Mr Hossain was seeking to reargue the original appeal and that **Goudey** was not authority for a position that if someone was still legally married their appeal must always succeed. She submitted that the facts in this appeal were different from those in **Goudey**. It was for the Tribunal to assess whether there was an intention of the parties to live together in a subsisting relationship and she submitted that in **Goudey** there were no countervailing factors, whereas this case was more complicated.

8. Ms Everett submitted that the judge was entitled to reach the findings he did, that there was no medical reason why the sponsor was unable to visit Bangladesh more often than she had. Although Mr Hossain sought to persuade the Tribunal that the appellant's leave of absence from his job with Bangladesh television, as a Government department, was similar to the type of leave that would be given in a grant of leave to remain, Ms Everett submitted that there was no evidence before the First-tier Tribunal that this was the case or that the appellant had to return to permanently to Bangladesh or could not otherwise have visited. Ms Everett submitted that the judge had provided adequate reasons for not accepting the reasons given by the sponsor and the appellant for spending the time that they had apart. The fact that a different judge may not have reached the same decision did not vitiate the decision of the First-tier Tribunal given the cogent reasons. There was no perversity in the reasoning.

9. In relation to Article 8, if the Upper Tribunal was persuaded that the First-tier Tribunal was entitled to come to the decision it did, there was no error in relation to the approach to Article 8 given that the outcome would have been necessarily the same.

10. In reply Mr Hossain submitted that he was not rearguing the case and the grounds were arguable and submitted again that **Goudey** was clear and that there does not need to be anything further. He submitted that there were no adverse credibility findings against the sponsor and relied on the medical evidence that her situation was deteriorating. Mr Hossain also submitted further photographs and had submitted a further bundle in the event that the Tribunal found an error of law.

Error of Law Discussion

11. I am not satisfied that any error of law has been identified. The facts of this case, as set out by the First-tier Tribunal Judge at [7] are that the sponsor and appellant married in 1984 and have two adult children and that the sponsor is in receipt of Personal Independence Payments and that the appellant states he wishes to come to the UK to help his wife. The sponsor has suffered the same conditions since 2007. The appellant left the UK in 2008, whereas the sponsor remained in the UK with a dependent child (and indeed the sponsor at the Upper Tribunal hearing stated that one of the reasons she had not returned to Bangladesh was because her daughter had tuberculosis where she had restricted trips). The sponsor had visited Bangladesh three times since 2008, the last one at the time of the application for entry clearance and the respondent Entry Clearance Officer had not been satisfied with the evidence of contact. Although the respondent Entry Clearance Officer was not satisfied that the appellant could be adequately maintained this ground was not before me as the judge was satisfied on the evidence on this basis at [36]. The Tribunal set out the relevant law and case law including **Goudey**, including specifically that where there are no countervailing factors generating suspicion as to the intentions of the parties (my emphasis), such evidence (referring to evidence of telephone cards) may be sufficient to discharge the burden of proof on the claimant. The Tribunal also cited the reference in **Goudey** to the fact that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but that this does not require the production of particular evidence of mutual devotion.

12. I do not accept therefore Mr Hossain's submission that the judge did not properly apply **Goudey**. The judge set out the evidence. Although Mr Hossain submitted that there were no negative credibility findings, the judge did not accept the contention of the sponsor and the appellant on a number of issues. The judge noted that it was significant that earlier phone records were provided despite it having been said initially that it was not possible to obtain such records. In addition, the judge noted, at [26], that the sponsor could not confirm that the appellant had ever asked for permission to come back to the UK on holiday to visit his family, from his employer in Bangladesh (and Mr Hossain did not substantively address this) and that the appellant did not say in his statement that he did. What the appellant had said in his statement which the judge considered was that he was unable to visit the UK "due to my work", whereas, in the judge's findings, this contradicted the sponsor's evidence, that he required leave to come to the UK implying, as it did, that he did not get such leave. Whilst that might be said, in itself, to be an exercise in semantics, there

was no error in the Tribunal's subsequent conclusion that "At no time after his return to Bangladesh in 2008 did the appellant apply for holiday leave to come to visit his family in the UK". That was a finding properly open to the First-tier Tribunal. It is clear that the Tribunal was also aware, from the appellant's witness statement, that the appellant had not been in breach of immigration law.

13. The Tribunal then went on logically to consider the position of the sponsor and her visits to Bangladesh. The Tribunal noted that the appellant applied for indefinite leave to remain in 2008, which had been refused, but in 2011 she had obtained discretionary leave and she then went to visit her husband. On return she applied again for indefinite leave to remain which was obtained in 2013, the sponsor then visiting Bangladesh in 2014 and 2015. The Tribunal considered the sponsor's evidence that inbetween visits she was unwell. There is no error in the Tribunal's findings that there was no medical evidence of the sponsor's inability to travel. That does not mean that the Tribunal did not take into consideration the medical evidence before it of the sponsor's medical conditions (and the judge notes, at [27] that it is not disputed that the sponsor has medical problems).

14. The judge's findings were specifically in relation to the lack of medical evidence in relation to an inability to travel and Mr Hossain was unable to point to any evidence to the contrary. Whilst the Tribunal does not require corroboration, there was no error in the Tribunal's approach, that given that the sponsor has medical problems it was surprising that if she could not travel for medical reasons there was no evidence of this fact (particularly as there was other medical evidence). The sponsor's claim to be unable to travel is also contradicted by the fact that she did travel to Bangladesh from time to time. In considering whether the First-tier Tribunal erred in law I can place no weight on the additional evidence produced nor on the oral comment, made by the sponsor before the Upper Tribunal, that she was unable to travel due to her daughter's tuberculosis as that evidence was not before the First-tier Tribunal.

15. The Tribunal then went on methodically to consider the evidence of phone contact from [28] to [33] and concluded that there was evidence of regular contact during 2015 but no evidence of any contact prior to this. The Tribunal summarised the evidence at [34], including that the appellant voluntarily left the UK in 2008. There is no error, as suggested by Mr Hossain, in the finding that the appellant did not "seek leave to remain" in 2008. The appellant in his witness statement confirmed that he had never lived in the UK in breach of Immigration Rules and relied on his wife's statement that his leave was extended between July 2008 and 5 January 2010, but that he left the UK on 3 November 2008 whilst his leave was valid. The judge was not contradicting that evidence but found that the appellant did not seek to extend that leave. The fact that it expired in 2010 rather than 2008 is immaterial (and if anything begs the question as to why the appellant did not return for a visit during the currency of that leave). The Tribunal went on to find that the appellant was a qualified professional who had already worked in the UK for three years. The

Tribunal found that the appellant had not sought leave to come to the UK for a holiday and that there was no evidence of the appellant calling the sponsor, and whilst there was evidence of the sponsor calling the appellant, or at least calling a number attributed to the appellant, this was only from 2015 and the Tribunal notes that at this time the appellant would have been contemplating his retirement plans. The Tribunal took into consideration the visits in 2011, 2013, 2014, and even accepting the limitations in travel between 2008, 2011, was entitled to reach the finding he did that it was unclear why the contact was so sparse after 2011 given that the appellant was working and that there was no reason why he could not have paid for flights and there was no evidence medically that the sponsor could not travel.

16. The Tribunal demonstrated that evidence of contact, travel and medical issues were all considered and the Tribunal's decision was adequately reasoned, reaching the conclusion, at [35], that the evidence demonstrated that the relationship was not genuine and subsisting. It is clear therefore that the Tribunal was of the view that , following **Goudey**, there was no more than the 'formality of a marriage' and that the Tribunal was not satisfied that the parties intended to live together permanently in the UK. The Tribunal therefore provided adequate reasons for reaching the decision the Tribunal did, having taken into consideration all the evidence before it and applied the correct standard of proof. I bear in mind that such reasons must be proper, intelligible and adequate and that it is 'not a counsel of perfection' (**see MD (Turkey) [2017] EWCA Civ 1958**). There was no misdirection in law or otherwise and it could not be suggested that the decision was perverse.

17. In relation to Article 8 the Tribunal was not satisfied, for the reasons given, that there was a genuine and subsisting marriage. It is difficult to see how any different Article 8 decision could have otherwise been reached. At [37] the Tribunal found that there was no interference in family life given that it had not been established for the purposes of Article 8 and that there were no exceptional circumstances, taking into account the length of time the parties had lived apart, the lack of contact and the fact that there was no evidence before the First-tier Tribunal that the sponsor's medical position had worsened. Again, these reasons were adequate.

18. The decision of the First-tier Tribunal does not contain an error of law therefore and shall stand.

Signed Date: 23 April 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

Signed Date: 23 April 2018

Deputy Upper Tribunal Judge Hutchinson