



IAC-AH-KRL-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)    Appeal Number: HU/10251/2019  
(V)**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 April 2021**

**Decision & Reasons Promulgated  
On 26 May 2021**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

**MRS TANVEER AKHTAR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Mr I Ali, M&K Solicitors

For the Respondent: Mr D Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Pakistan. Her date of birth is 1 January 1976.
2. On 20 November 2020 Upper Tribunal Judge Kamara granted the Appellant permission to appeal against the decision of First- Tier Tribunal Judge Watson to dismiss the Appellant's appeal against the decision of the Entry Clearance Officer on 29 April 2019 refusing to grant the Appellant entry clearance as the spouse of Mr Muhammad Said (the Sponsor) who is

settled in the United Kingdom. The matter came before me in order to determine whether the judge made an error of law.

### **The decision of the First-tier Tribunal**

3. The issue before the First-tier Tribunal which was whether the Appellant is in a genuine and subsisting relationship with the Sponsor and whether they intend to live together as husband and wife. The couple were married in 1992. They have four children. The Sponsor left Pakistan twenty years ago. He was granted indefinite leave to remain here in October 2014.
4. The judge dismissed the appeal for a number of reasons. The judge stated that there was no evidence of “longstanding contact and financial support” throughout the period when the Appellant and the Sponsor have been living separately. The judge found that the evidence provided relating to telephone contact pertained to a six-month period before the date of the application. He found that there is no indication of whether the telephone calls were made to the Appellant’s phone.
5. The judge took into account WhatsApp printouts submitted by the Appellant. The name on the printouts is “Miss Said Pak Pak”. However, the judge found that there was no evidence that this was the Appellant’s account. The judge found that the evidence did not “show longstanding contact between the Appellant and the Sponsor ...”.
6. At paragraph 12 the judge noted that the evidence relied on by the Appellant (AB 250) indicated that the Sponsor had sent a copy of his letter to the ECO to her in the WhatsApp chat. The judge stated:

“12. ... This clearly states that the interviewee wishes to rearrange his interview and wishes to be interviewed in Urdu. He states that he is on holiday in Pakistan and will return on 24.04.19. This is puzzling as the sponsor would have no reason to call his wife and attach a copy of his letter whilst he was in Pakistan if he were indeed staying with her at the time. It is not consistent with the sponsor living with the appellant in March/April 2019 or with her being Miss Said Pak Pak.”
7. The judge rejected Mr Ali’s submission that inconsistencies in the interviews (for example the Appellant and the Sponsor giving different dates when they last saw each other and the dates of the Sponsor’s visits to Pakistan) are explained by the interview not having been conducted in the Appellant’s first language which is Pahari. The interview was conducted in Urdu. The judge concluded that this did not explain any of the discrepancies because at no time in the interview record was it suggested that the Appellant could not understand the language or that it was not conducted in her chosen language. The Appellant indicated in the interview that she understood the questions.
8. The judge considered evidence of financial remittances but concluded that “this does not demonstrate a pattern of support of a wife through the

years". The judge noted one remittance dated in 2017, one in 2018 and several in 2019.

9. The judge attached weight to the Sponsor having had legal status here since 2014. The judge said that the Sponsor "has not been hampered in supporting his wife since 2014, nor in contacting her". The judge also attached weight to the Sponsor having returned to Pakistan only in June 2015, February 2018 (for five weeks) and March 2019 (for six weeks).
10. The judge concluded, at paragraph 16, that the Appellant has not shown that she is in a genuine and subsisting marriage with the Sponsor. The judge said that she acknowledged the cases relied on by Mr Ali representing the Appellant, namely Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 0040 and Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 0041 and that they guide her that there does not need to be particular evidence of devotion and that telephone cards can be evidence of contact and that postdecision visits and evidence are capable of establishing facts on the balance of probabilities.
11. The judge said that she had considered these cases and whilst she accepted that phonecards may not be kept and that it was not "at all significant that the Appellant did not know the address of an English flat that she was to make her home in given that English is a strange language to her and she has never been there", she went on to find that "the lack of any form of evidence of contact between the Appellant and the Sponsor prior to 2018 and the lack of remittances (save for one) prior to 2018 is not supportive of a genuine relationship." The judge, at paragraph 17, also took into account that despite two of the couple's children having been granted entry clearance in 2018 neither attended the hearing nor gave evidence in support of their parents' relationship.

### **The Grounds of Appeal**

12. The first ground of appeal is that the judge applied the incorrect standard of proof. In support of this it is said that the judge extended the "audit trail" by "expecting evidence from the couple's children". The judge repeatedly searched for evidence of longstanding contact and financial support throughout the years of marriage. However, this is the wrong test (see paragraph 12 of Goudey) There was no evidence that the couple did not want to be together or that there had ever been any friction between them. There is no evidence that they had engaged in a relationship with anyone else.
13. In GA ("Subsisting" marriage) Ghana [2006] UKAIT 0046 the Tribunal said "An Immigration Judge, when assessing the subsistence of a marriage will plainly have to bear in mind the cultural context and the wide differences that exist between individual lifestyles, whether by choice, or by circumstances or by economic necessity".

14. The judge failed to consider the explanations provided by the couple for any “perceived inconsistencies”.
15. Ground 2 is that the judge attached “no weight to relevant evidence”. The judge was shown photographs of the couple together during visits to Pakistan. The Sponsor did not have legal status in the UK until 2014 and there had had visited Pakistan on three occasions since. The relevant test is not cohabitation, which in any event, the absence of was explained by the Sponsor having lived and worked in the UK.
16. Ground 3 is that there was a procedural irregularity because the judge raised an issue that was not raised by the Respondent or at the hearing and therefore the Sponsor was not able to give evidence about this issue. The issue was that the couple “might have in some way fabricated the evidence of contact”. This was first raised by the judge in her decision.

### **Submissions**

17. I heard full submissions from Mr Ali and Mr Clarke. Mr Ali relied on the grounds and his skeleton argument. He said that grounds 1 and 2 are inextricably linked. The thrust of his oral submissions was that the decision of the judge was irrational. It was contrary to the judgement in Goudey to dismiss the appeal for want of evidence of longstanding contact and support.
18. In response to ground 2, I asked Mr Ali what evidence the judge did not attach weight to or not take into account. He said that this was not really the challenge. He said that the point is that there was a substantial amount of evidence before the judge which was sufficient to discharge the burden of proof.
19. In respect of ground 3, I brought the decision of the Entry Clearance Manager (ECM) dated 12 November 2019 to Mr Ali’s attention. He seemed not to be aware of it. It is clear that fabrication of communication had been raised. (It appears from this decision that the Appellant submitted Lyca mobile call records and WhatsApp chat records after the decision of the ECO. The ECM stated as follows: -  

“Finally further WhatsApp chat records have been provided, the WhatsApp chat header gives the name Miss Said Pak Pak, I do not believe this to be the Appellant, I can see there are several photos on there (very poor quality scan, unable to make any people out) however the majority of the record is missed calls with the odd money transfer confirmation and emoji”.)
20. Mr Ali withdraw ground 3. However, he then submitted that it was clear that had the judge considered the photographic evidence she would have concluded that the communication was between the Appellant and the Sponsor and therefore whose name the WhatsApp shows is irrelevant. Thus, it appeared that despite having said what I recorded at paragraph

- 18, there was a challenge on the basis that the judge did not take into account evidence.
21. Mr Ali raised an issue not raised in the grounds in respect of paragraph 12 of the decision (and page 250 of the AB). He said that the point that was not raised at any time by the Respondent. It was a matter that should properly have been raised by the judge at the hearing so that the Sponsor could give evidence about it.
  22. Mr Clarke submitted in respect of Goudey that the case before the First-tier Tribunal was not a neutral case. He relied on the Surendran guidelines in respect of ground 3.<sup>1</sup> He said that the ECO/ECM raised significant credibility issues in the decisions and points were taken in respect of the WhatsApp communication. He relied on paragraph 21 of TK (Burundi) [2009] EWCA Civ 40.
  23. This Appellant failed to engage with issues raised in the decision of the ECO and the ECM. It was open to the judge to draw negative inferences. The judge properly directed herself on the standard and burden of proof and applied it.
  24. Mr Ali repeated that there is no requirement for evidence of long-standing contact about which case law is clear. There was evidence of photographs in the bundle of the couple shown together post 2014. It is unclear why the evidence did not dispel the doubts raised by the ECO. Moreover, he said that there was no reason why this couple was interviewed which is not consistent with policy. The interviews are effectively a memory test. There was evidence in the witness statements addressing the inconsistencies. He said that the decision seemed harsh.

## **Conclusions**

25. The problem with the grounds is that they fail to engage with the fact ECO/ECM raised issues which were said to cast doubt on whether the relationship was genuine and subsisting. There were issues raised about inconsistencies in the interviews, including what the parties said about visits made to Pakistan and the Sponsor's employment here.
26. It is not clear to me whether the Secretary of State's decision to interview the parties was a matter raised before the First-tier Tribunal. In any event, it is not a matter raised in the grounds of appeal before me. There is no evidence before me to suggest that the decision to interview the parties was unlawful and/or that the transcripts should not have been relied on by the judge.
27. The Appellant's reliance on Goudey is misconceived. In Goudey the couple had been married for a significantly shorter period of time. The evidence before the Tribunal in Goudey was not problematic in the way that it was

<sup>1</sup> In Surendran v SSHD (19197), it set out guidelines for judges (at that time known as adjudicators) where the Home Office was unrepresented. These were approved and annexed to the starred decision of MNM v SSHD [2000] UKIAT 00005 (00/TH/02423) [2000] INLR 576.

in this case. The point made by the Tribunal in Goudey was that evidence of phonecards is capable of being corroborative. There is no error in the way that the judge dealt with the phone records (see paragraph 10) or the WhatsApp printouts (see paragraph 11). There were in this case “countervailing factors” capable of arising suspicion as found by the judge, for example the inconsistencies in the interviews. The case before the First-tier Tribunal could not be described as “neutral”. The judge reasonably expected to see evidence in support of contact and financial contributions before 2018, in the light of the issues raised by the ECO/ECM.

28. The burden of proof rests on the Appellant. The judge set out the applicable burden of proof at paragraph 3 of the decision. There is no challenge to herself direction. Considering the findings that are made and the overall conclusion there is no substance in the assertion that the judge did not properly apply the standard and burden of proof having correctly directed herself. She reached a conclusion which was open to her on the evidence.
29. The Appellant’s representatives were aware of the issues raised. While it may be irrelevant whether the WhatsApp chat is in the name of the Appellant or not because what is clearly in issue is whether the parties communicated with each other, there was in this case no explanation for the name of Said Pak Pak showing on the account, despite the issue having been raised by the Respondent. If the account was not the Appellant’s and she was using someone else’s account to communicate to the Sponsor, this should have been her evidence.
30. The judge did not dismiss the appeal because the Appellant and the Sponsor had not lived together for a period of twenty years. This misrepresents the decision. The Appellant’s reliance on what the Upper Tribunal said at paragraph 14 in GA (“Subsisting” marriage) Ghana [2006] UKKAIT 0046 is misconceived. The judge was entitled to take into account the lack of supporting evidence throughout the period of the marriage.
31. In respect of paragraph 12 of the decision, the Appellant is not able to rely on this as a ground of appeal. It was a new matter raised for the first time before me. Mr Ali did not seek permission to amend the grounds. In any event, there is no substance in the argument. The phone logs and WhatsApp chat were not accepted as supporting communication between the Appellant and the Sponsor. It was evidence that the Appellant relied on. The judge cannot be criticised for analysing this evidence. It was incumbent on her to do so. She draw inferences from it. The fact that the evidence showed that the Sponsor sent correspondence via WhatsApp to who he claimed to be the Appellant at a time when he was in Pakistan purportedly with her, was a matter that the Appellant’s legal representatives were reasonably expected to have identified and prepared the case accordingly. There is no unfairness arising. Matters of credibility were clearly in issue. The Appellant had the opportunity to advance her case. Properly applying the Surendran guidelines, there is no error of law.

There is no procedural irregularity or unfairness identified by Mr Ali. Mr Ali did not seek to adduce evidence of what Sponsor would have said had the judge asked him about the matter at the hearing.

32. At ground 2 it is asserted that the judge did not attach any weight to relevant supporting evidence. Most of this ground amounts to a disagreement with the findings of the judge. In respect of photographic evidence in the Appellant's bundle, it was not incumbent on the judge to identify each and every piece of evidence before her. She had as recorded at paragraph 8, that there was a copy of the Appellant's bundle. What weight to attach to the evidence was a matter for the judge.
33. The Appellant's application is dismissed. The decision of the First-tier Tribunal to dismiss the Appellant's appeal is maintained.
34. No anonymity direction is made.

Signed Joanna McWilliam  
Upper Tribunal Judge McWilliam

Date 12 May 2021