



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04996/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 12 December 2017

Decision and Reasons Promulgated
On: 2 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS RUSHMIN BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Malik, counsel, instructed by Hamlet Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh, born on 10 August 1987. She appeals with permission against the decision of the First-tier Tribunal Judge who dismissed her appeal against the respondent's decision refusing her application for settlement in the UK with her sponsor. The decision was promulgated on 13 July 2017.
2. In granting permission to appeal, Upper Tribunal Judge Pitt found that it was arguable that the Judge took an incorrect approach to the evidence of indirect contact by way of telephone calls, which also included a large number of calling cards and telephone records. She noted that it was apparently undisputed that those records showed multiple calls on numerous days to the home where the appellant lives, albeit with other family members and the evidence of the appellant and the sponsor regarding regular telephone calls, consistent.
3. Although the sponsor gave evidence about cash remittances for which there was no documentary evidence, the Judge did not indicate why that evidence or that of the

appellant and sponsor in general, was not reliable as to the genuineness of the relationship.

4. Judge Pitt also found that it is arguable that the Judge had been required to conduct a separate assessment as to the genuineness of the marriage in the Article 8 assessment outside the Rules, taking into account the evidence as at the date of hearing rather than as at the date of decision. There was post-decision evidence by way of telephone calls, remittances and a further visit, arguably capable of allowing a different conclusion to that under the Rules.

The background to the appeal

5. In refusing her application, the respondent was not satisfied that the relationship with her sponsor was genuine and subsisting.
6. They met on 10 December 2009 and married on 17 December 2009. Before the marriage they had met on only two occasions. There was no independent evidence of contact immediately after the wedding. Some telephone evidence had been produced but this simply showed calls made to Bangladesh over a period of time. Money transfers were produced which could have been produced by anybody with a home computer.

The error of law hearing

7. Mr Malik, who did not represent the appellant before the First-tier Tribunal submitted that the Judge erred in not taking into account post-decision evidence. The decision was made after 5 April 2014.
8. At paragraph [12] the Judge found that the calls to the family home in Bangladesh had not necessarily been to his wife. He had earlier noted that this was an arranged marriage and the parties had only met for the first time one week prior to the marriage and only once in the intervening period. They saw each other again when the application was made in February 2016. The sponsor had claimed not to have a good job and therefore it had been expensive for him to travel more regularly. Many of the telephone calls in evidence were after the date of the application.
9. Mr Malik referred to paragraph [9] where the Judge stated that the telephone evidence consisted of calls made after the application between June 2016 and May 2017 using Lycamobile. Calls between 2014 and 2015 were also made on a service called Simplecall and were also made on Talk Home between 2013 and 2014. Not all the calls were made to the same number and most of them were to a number ending 831.
10. It had been agreed at the First-tier hearing that the issue was whether the marriage was subsisting [10].

11. Mr Malik referred to page 3 of the appellant's bundle which contained the witness statement of the sponsor which was before the First-tier Tribunal. In his statement he claimed that he missed her and kept contacting her by various telephone cards. He used various cards over the period.
12. The sponsor also stated that the receiver's telephone number was provided in the application form. Mr Malik referred to page 8 of the bundle which confirmed in a written acknowledgement that the global mobile number of the subscriber ended in 831. That document is dated 20 March 2016. Moreover, Annex B of the index in the appellant's bundle identified the document produced at page 8, as 'Acknowledgement of Mobile Registration of the appellant for her mobile number.'
13. Mr Malik referred to the Upper Tribunal's decision in Naz (Subsisting Marriage-Standard of Proof) Pakistan [2012] UKUT 00040, produced in the bundle before the First-tier tribunal. The Upper Tribunal held that post-decision visits by a sponsor to their spouse are admissible in evidence appeals to show that the marriage is subsisting.
14. He referred to the appellant's application form contained in the respondent's bundle. There she has set out her primary contact number which ended in '831'. That telephone number that corresponded with the printouts produced identifying calls that have been made to that number.
15. The evidence of these telephone calls is set out from pages 201 and following. The appellant's application was made on 3 February 2016. The evidence produced demonstrated that a considerable number of calls made via Simple Cell for the period 27 December 2014 until 8 January 2016, which all pre-date the date of the application.
16. Evidence was also produced at pages 205-216 on the Talk Home account summary of the sponsor. This identified calls to the 831 number for the period 18 November 2013 until 15 January 2014. There was also the Lyca Mobile print out setting out the sponsor's call history for the period 12 June 2016 until 17 May 2017.
17. Mr Malik submitted that there was 'enough evidence' to show that there had been continuous telephone contact between the appellant and sponsor since 18 November 2013. Prior to that, the sponsor stated that calling cards were used from the date of marriage on 17 December 2009.
18. The Judge also failed to take into account that there had been several visits made since 2009. The sponsor visited her from 10 October 2012 until 24 November 2012; again on 13 February 2016 until 24 March 2016 and more recently between 17 April 2017 until 6 May 2017.
19. The Tribunal in Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 noted that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted. Evidence of telephone cards is capable of being corroborative of the contention of

the parties that they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question. Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant.

20. Mr Malik noted that there has never been any dispute as to the validity of the marriage. The Judge had however failed to engage with the extent of the communication, including the calling cards. The appellant herself asserted in her witness statement before the Tribunal that her husband has visited her on three occasions, including at the time when the appeal was pending. Further, they kept contact by telephone and he continued to send money to her almost every month – paragraph 3, page 7.
21. Mr Malik submitted that the Judge has given no proper reasons why he rejected all this evidence. There is only one paragraph, namely paragraph 12 of the decision. In addition, there was evidence of money transfers in the bundle at page 191 showing remittance forms and money receipts to the appellant from her sponsor between November 2010 and 2016.
22. Moreover at [8] the Judge noted the sponsor's cross examination to the effect that apart from the remittances, all money was sent to her on a monthly basis. It was sent through an agent for cash. The evidence was not engaged with in the decision section of the determination.
23. Mr Malik further submitted that where a claimant does not meet the requirements of the Rules, it would be necessary for the Judge to go on to make an assessment under Article 8 applying the criteria established by law – Singh v SSHD [2015] and PG (USA) v SSHD [2015] EWCA Civ 118.
24. There has been no findings or any assessment under Article 8. The Judge found that the appellant cannot succeed outside the Rules on the basis of a disproportionate interference with his family life as he did not accept that the appellant had a subsisting marriage.
25. On behalf of the respondent, Mr Melvin relied on the Rule 24 reply. The complaint that there is no indication as to why documentary and oral evidence was rejected is a “mere disagreement”. The Judge noted that there was only one visit between the marriage in 2012 and the date of application. He found that the appellant's assertion that he loves his wife was not corroborated. The telephone evidence post dates the application and only demonstrates calls to his family home and not necessarily to his wife.
26. The contention that the Judge failed to consider post-decision evidence which could make a difference outside the rules is misconceived. The Judge has taken into account all the evidence or the lack thereof. He is clearly suspicious of the post application evidence. The grounds fail to identify any compelling circumstances.
27. Mr Melvin referred to the six findings made at [12] which he submitted were open to the Judge. He noted that the sponsor decided not to attend this hearing.

Assessment

28. The Judge had regard to the telephone calls which were after the date of the application [12]. It does not appear that he had regard to the full history of the telephone calls that were made and which were produced in evidence.
29. The Judge stated that the calls were not necessarily to his wife. However, there was evidence that the mobile telephone number ending on 831, and which the sponsor claimed related to the appellant's mobile phone, was the number of the mobile telephone shown to be listed in her name.
30. There was thus potentially significant evidence which the Judge overlooked. Further, there was also evidence of telephone communication between them for the period between the date they married in 2009 until the present.
31. There was also evidence produced of money transfers to her on a monthly basis, which was sent through an agent for cash. The sponsor had claimed that all the money went only to his wife.
32. Nor was a separate Article 8 assessment made outside the Rules, at which evidence was admissible at the date of hearing rather than simply the date of decision. This post-decision evidence is capable of producing a different conclusion to that under the Immigration Rules.
33. I accordingly find that there have been errors of law. The parties agreed that should that be the finding, the decision should be set aside and the case remitted to the First-tier Tribunal for a fresh decision to be made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and it is set aside. The case is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made.

Anonymity direction not made.

Signed Deputy Upper Tribunal Judge Mailer

Dated: 22 December 2017