



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06140/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 4th October 2018

Decision & Reasons Promulgated
On 6th November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MRS SHAMILA BI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Winters, Counsel, instructed by Gray and Co, Solicitors
For the respondent: Mr Mathews, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has been given permission to appeal to the Upper Tribunal the decision of First-tier Tribunal Judge James who in a decision promulgated on 5 October 2017 dismissed the appellant's appeal.

2. The appellant is a national of Pakistan who applied on 30 October 2015 for entry clearance to join her husband, Mr Umran Hassain, hereinafter referred to as her sponsor. They are paternal 1st cousins. He is a British national.
3. The respondent refused the application on 4 February 2016. Amongst other reasons, the entry clearance officer was not satisfied the relationship was genuine and subsisting. With the application were some photographs of the marriage. A member of the respondent's staff telephoned the sponsor and had asked him about his marriage and he gave the wrong date. He also said he last saw the appellant in October 2015 whereas the appellant had made no mention of such a visit nor was there any supporting evidence.
4. The appellant said they married in Pakistan on the 25th of March 2011. An application for entry clearance the appellant was made on 27 September 2013. This was unsuccessful, with the entry clearance officer not being satisfied the relationship was genuine. On that occasion the only evidence of contact was 4 pages of telephone cards which did not contain any personal information or details of the calls.
5. The sponsor's passport showed that he had visited Pakistan from 18 March 2011 until 26 May 2011 which covered the period of the marriage. However, there was no evidence of cohabitation during that period. The next entry in his passport was 31 October 2014 when he stayed until 20 November 2014. There was no documentation to confirm during that visit he was with the appellant. The respondent pointed out he would have other family members he could be visiting.
6. The appellant had not submitted other documentation to show regular contact beyond phone cards which did not confirm contact with the sponsor. It was pointed out again that the appellant's parents are siblings and they may have used these cards to communicate with each other.
7. The grounds of appeal assert that the sponsor recalled that during the telephone interview he stated he last visited his wife in October. He did not specify the year rather than stating 2015 as stated by the entry clearance officer. It is also alleged that he immediately corrected his mistake about the date of the wedding. It is also suggested that the sponsor sent a self-addressed envelope to the respondent for the return of the documents used in the application. However, telephone cards and photographs submitted were not returned. It was suggested that the respondent did not take proper account of these and appeared to have destroyed this evidence.

The First-tier Tribunal.

8. The appeal was heard by Judge of the First-tier Tribunal James in Glasgow on 27 September 2017. The judge heard from the sponsor and his sister. In a determination promulgated on 5 October 2017 it was dismissed. The only issue arising related to whether the marriage was genuine and subsisting.

9. At paragraph 6 the judge states that because of section 85 A(4)(a) of the Nationality, Immigration and Asylum Act 2002 the tribunal could only consider evidence if it was submitted at the time of application.
10. At hearing the presenting officer confirmed there was no transcript of the telephone interview with the sponsor. The judge took the view that in the circumstance the discrepancies could not be relied upon. However, during the course of cross-examination the sponsor had accepted he made errors in response to this call and the judge felt able to take this into account. The judge referred to the relevance of the telephone cards citing Goudey (subsisting marriage-evidence) Sudan [2012] UKUT 41.
11. Regarding the missing telephone cards the judge did not accept this meant that all the evidence of contact had been destroyed by the respondent. It was open to the appellant to reduce other evidence of contact.
12. The grounds of appeal contended that the sponsor used a landline to call his wife. However, an itemised telephone bills had not been submitted. This meant there could be no cross-referencing the numbers dialled with the telephone cards. The presenting officer confirmed at hearing there was no evidence that documentation submitted with the application had not been returned.
13. The sponsor's sister gave evidence saying she was present at the couple's wedding and that she would have been present in the family home when her brother spoke to his wife on the phone. The decision records this happened every 3 or 4 days after he returned from work and the calls would last for 15 to 20 minutes. She stated that her brother did not like using 'What's App'. The appellant would call her mobile phone using 'What's App' when she knew the sponsor would be at home and she would hand the phone to him.
14. At hearing screenshots were produced of the sponsor's sisters mobile phone said to be calls from the appellant. The screenshots show the name 'Shamil' being the appellant's 1st name but there was no link with the telephone numbers given in the application form or other documentation.
15. At paragraph 21 of the decision the judge recorded that the complete date of the telephone calls was not recorded on the mobile phone. The sponsor's sister had said calls were made in August 2017. The judge had referred to the date of refusal as being 4 February 2016 and stated that because of this they could not consider this evidence.
16. The judge did note an inconsistency in that the screenshots did give a time in that the calls were made as generally before 5 PM. The evidence of the sponsor's sister was that there would be received after 5 PM when the sponsor would have returned from work. She was cross-examined on this point. The judge concluded that this undermined the claims made in a witness statement and in her oral evidence about the calls being made to her brother. The 3 examples of calls made after 5 PM related to days when the sponsor was in

Pakistan. The judge queried why therefore the appellant would be calling him then.

17. The sponsor's sister also said in oral evidence that the sponsor did not use a landline which contradicted the grounds of appeal. The judge referred to the absence of phonecards subsequent to the date of application which could not have been lost.
18. The sponsor said that he had visited her in 2014, 2015, 2016 and 2017 along with his parents and another sister. However no statements or evidence was called to confirm this and the claim was contradicted by his statement and the stamps on his passport. The sponsor had submitted 3 money transfers and the judge at paragraph 33 referred to address of documentary evidence of financial support given that they would then have been made for about 6 years. It also turned out that the money sent was from his uncle.
19. At paragraph 34 the judge records the sponsor saying he had dinner with his wife in Pakistan on his last visit and produced the receipt and photographs. These related to a trip made between July and August 2017. The judge referred to this post-dating the date of refusal.
20. The judge concluded by finding the evidence of the sponsor and his sister was not credible and it had not been shown the relationship was genuine or subsisting. The judge concluded by saying the impression was that this is a marriage of convenience so as to obtain a spouse visa.

The Upper Tribunal.

21. Permission to appeal was granted inter alia on the basis it was arguable that the judge incorrectly excluded evidence from their mind on the basis it post-dated the decision. Reference was made to paragraph 21 which deals with evidence of telephone calls post decision where the judge commented: 'and thus I cannot consider this documentary evidence'.
22. At hearing it was accepted by the presenting officer that the judge erred in referring to post decision evidence not being open for consideration as section 85A (4)(a) of the Nationality, Immigration and Asylum Act 2002 had been repealed. However, it was contended in light of the other evidence that this error was not material to the outcome.
23. Reference was made to the judge's comments at paragraph 21, and alluded to at para 27. The same view is indicated in relation to a visit to Pakistan post decision at para 34.
24. Mr Winters relied upon the grounds advanced in the permission application. I was referred to note two of the headnote of Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041 (IAC). It reads:

“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. It is not a requirement that the parties also write or text each other.”

25. Mr. Mathews argued that although the judge misdirected herself about the admissibility of post decision evidence she nevertheless did consider the evidence of the subsequent phone calls as set out in paragraphs 20 and 22 and found they did not assist the appellant.
26. The same applies in respect of the stamps on the sponsor’s passport and the reference to a visit to Pakistan from July to August 2017 recorded at paragraph 34. Judge referred to the lack of documentary evidence of this visit and did referred paragraph 36 to the stamps on the sponsor’s passport.
27. Regarding the missing phonecards at paragraph 16 the judge recorded the presenting officer as stating there was no evidence on file of documents not being return. The judge referred to the absence of other evidence of ongoing contact and the discrepancies as to the times of calls that were recorded. This is further evidence of the judge considering the evidence albeit the it boasted the decision.
28. The grounds seek to fault the judge for referring to aspects of the evidence without making specific findings. An example of this is at 17 where the judge records that she is taking into account the sponsor’s contention that evidence submitted was destroyed and the presenting officer’s point there was no record on file to suggest this. As I read this simply indicating that she is taking both positions into account. This would suggest the judge is essentially taking a neutral stance about the phonecard evidence but is considering the evidence in the round.
29. Similarly, at paragraph 36 judge refers to the passport stamps on the sponsor’s passport and the photographs and receipts supplied in relation to what he said was a meal with the appellant. Mr Matthews makes the point that the judge cannot be expected to evaluate every single piece of evidence. In any event at paragraph 32 she did express a view where she said it was difficult to ascertain from the evidence of travel whether this was to see his wife or other family members. Reference was made to a jointly owned property in Pakistan which he had visited before his marriage.
30. The judge did comment upon the discrepancies the sponsor’s account in relation to a telephone interview in the context of his oral evidence. The judge had referred to the absence of a transcript of the telephone call but was able to referred to discrepancies from his oral account.

Conclusions

31. Notwithstanding the incorrect reference as to post decision evidence the judge in fact did consider the evidence. It is my conclusion that no material error of law occurred. Aside from this, the judge referred to additional factors which would justify the decision. I find that the judge carefully considered and evaluated the evidence appropriately.
32. The judge did not find the evidence of the sponsor or his sister credible. This was a matter for the judge to decide regard to all of the evidence. The judge referred to contradictory accounts about the telephone contact as well as a claim visits to Pakistan. Judge referred to the absence of documentary evidence which might have supported the claim contact and which should have been easily accessible. There was reference to the absence of correspondence or a witness statement from the appellant. The judge alluded to what evidence was as possibly relating to contact between family members. This is not specifically demonstrating the marriage was genuine and subsisting.
33. At paragraph 38 judge referred to their impression being that this was a marriage of convenience. When the rest of the decision is read I believe the judge made this comment as an aside. The issue for the judge to determine was whether the marriage was genuine and subsisting which is a different test from the notion of a marriage of convenience albeit in practical terms there is some overlap.

Decision

I find no material error of law established in the decision of First-tier Tribunal Judge James. Consequently, that decision dismissing the appellant's appeal shall stand.

Francis J Farrelly

Deputy Upper Tribunal Judge

Date :26 October 2018