



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/22386/2016

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 19 September 2018

Decision & Reasons Promulgated  
On 24 September 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NIGHAT KOSAH  
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Brown instructed by Ali & Co Solicitors.

For the Respondent: Mr Diwnycz - Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Moxon promulgated on 5 February 2018 in which the Judge dismissed the appellant's appeal against a decision of an Entry Clearance Officer refusing an application for leave to enter to enable her to join her spouse, a British citizen, in

the UK. The date of decision is 19 August 2016. The decision was upheld by an Entry Clearance Manager on 23 January 2017. The respondent's position is that it was not accepted that the appellant and her sponsor are in a genuine and subsisting relationship.

## **Background**

2. The appellant is a citizen of Pakistan born on 5 March 1989. The Judge having considered the written and oral evidence sets out findings of fact from [34] in the decision under challenge which can be summarised in the following terms:
  - a. It is clear from his entitlement to Personal Independent Payment, the letter from the General Practitioner, oral evidence and presentation during the appeal hearing that the sponsor has significant learning difficulties and care needs [36].
  - b. Although the sponsors presentation is not determinative it increases the unlikelihood that the appellant would wish to move to an unfamiliar country to pursue a marriage with someone who is unable to work and has significant care needs. The facts raise the possibility that entry clearance has been sought so that she would act as the sponsor's carer [36].
  - c. Evidence of contact between the appellant and sponsor adduced is limited, does not name both parties, and the messages are in Punjabi and have not been translated [37].
  - d. Given the sponsor asserts he communicates with the appellant in Punjabi it is of note that greeting cards are written in English. The sponsor's sisters claim that this was because the sponsor cannot write in Punjabi is said to be discrepant with the evidence of the sponsor who states otherwise [37].
  - e. Care was taken when considering the reliability of the sponsors evidence in light of his learning difficulties although the Judge was satisfied he does write in Punjabi due to his own admission and the fact he sought to rely upon WhatsApp messages which are in Punjabi [37].
  - f. Photographs shown could easily have been staged whilst the sponsor was recently in Pakistan [38].
  - g. The weight given to documentation adduced is reduced as a consequence of the above features of the evidence. The credibility of the sponsor's sister is undermined due to the inconsistencies between herself and the sponsor as to whether he writes in Punjabi and the inconsistencies between herself, the sponsor and his benefit entitlement as to his care needs [39].
  - h. The delay in entry clearance significantly undermines the assertion the appellant and sponsor are in a genuine and subsisting spousal relationship, particularly given the sponsor has refused to go to Pakistan since 2012. The explanation the sponsor's father was giving time for the appellant and sponsor to get to know each other was not acceptable given the delay was some 5 years [40].
  - i. The Judge noted the lack of evidence such as a letter or witness statement from the appellant herself explaining why she wishes to come to the United Kingdom [41].

- j. The Judge was not satisfied on the balance of probabilities that the appellant and the sponsor are in a genuine and subsisting marital relationship and was in fact satisfied that entry clearance has been pursued so the appellant can attend upon the sponsors care needs rather than be present as his wife [42].
- 3. At [43] the Judge writes: *"I therefore conclude that there is no qualifying family life between the Appellant and the Sponsor"*.
- 4. Thereafter the Judge makes the following addition to the decision:

**Postscript**

- 44. The Sponsor's capacity to consent to a marriage was not challenged at any stage by the Respondent, although I note that the ECO and ECM had considered the applications upon the papers and had not had the opportunity to speak to the Sponsor nor would they have had the details of his subsequent PIP award. His capacity does not impact upon my ultimate finding of fact that the Appellant and Sponsor are not in a genuine relationship but I do make the observations that I have significant doubt as to whether the Sponsor has capacity to consent to marriage.
- 5. The appellant sought permission to appeal asserting a procedural irregularity leading to unfairness on the basis that at no stage during the proceedings was the sponsor's capacity taken by the respondent or his representative. It is submitted there is no evidence to support any conclusion the sponsor did not have capacity to marry and no such issue was raised at the hearing. The appellant argues that the observation there is "significant doubt" as to whether the sponsor has capacity is closely connected to any findings of genuine subsistence of the marriage and must impact upon any ultimate finding in this regard. The appellant asserts it is incumbent upon the judge to raise such an important issue timeously at the hearing in order to allow a fair opportunity to respond and that it was difficult to discern how such doubts about capacity would not impact on the ultimate finding on the central issue in the appeal.
- 6. The appellant also asserts the Judge failed to properly direct himself in law as the appellant had entered into a legally recognised marriage on 6 June 2011, there was a post marital visits to Pakistan in 2012 and difficulties experienced by the sponsor which it was argued prevented the sponsor returning to Pakistan until his visit on 9 December 2017. The appellant relied upon evidence that during the stay there was a period of post marriage cohabitation from 9 December 2017 and 26 January 2018 and that the Judge does not provide adequate reasons for rejecting the evidence of the post marriage cohabitation given by the sponsor's sister. It is argued that a statement provided by the sister which attested to the sponsor's ability to carry out day-to-day tasks was provided but that it is not clear what the Judge made of the oral and written evidence of the sister and whether the Judge accepts evidence about the reasons for the delay in making the application and the reported views of the appellant about the marriage itself.
- 7. Permission to appeal was granted by another judge of the First-Tier Tribunal.

**Error of law**

8. It is important to consider matters that do not appear to be contentious in relation to the appeal before the Judge. This includes, as noted by the Judge, that the issue in the appeal was whether the appellant and sponsor are in a genuine and subsisting relationship. The Judge in the decision under challenge notes the appellant and sponsor married on 6 June 2011 in Pakistan and the Judge makes no adverse findings in relation to the validity of the marriage. The determination clearly shows that the Judge approached the issues in the appeal on the basis the appellant and sponsor are lawfully married in a marriage that has not been declared void.
9. The Judge also took into account both the written evidence of the sponsor and heard the sponsor give oral evidence and be cross examined. The Judge provides a legible typed transcript of the evidence given within the record of proceedings and no issue was taken by either the Judge or any party as to the capacity of the sponsor to provide written evidence or give oral evidence to the First-tier Tribunal.
10. The Judge at [44] specifically records that the sponsor's capacity to marriage was not challenged at any stage. This is recognition by the Judge that this was not an issue at large before the First-tier Tribunal and, of more importance to Ground 1, specifically states in this paragraph that "his capacity does not impact upon my ultimate finding of fact that the Appellant and Sponsor are not in a genuine relationship".
11. In ZB & HB (Validity and recognition of marriage) Pakistan [2009] UKAIT 00040 the Tribunal said "we are told that the sponsor has severe physical and mental disability and learning disabilities. He may or may not have a sexual urge, but we know nothing of his approach to the status of being a husband. Nor is there any evidence of his ability to form an intention to live permanently with anybody, whether as a husband or not. The only evidence that is available simply raises a doubt about those issues. For these reasons we cannot be satisfied that, at the date of the decision or subsequently, the appellant met the requirements of para 281(iii)"; but this was an appeal where that issue had been raised before the Tribunal.
12. On the issue of the validity of the marriage in ZB & HB, the Tribunal held that a marriage that is otherwise valid is not rendered void by demonstration of the (mental) incapacity of one of the parties at the time of the ceremony; but a marriage that is valid may, in special circumstances (which may or may not relate to capacity) not be entitled to recognition as such. No issue was raised in the current appeal regarding the validity of the marriage and nor does the Judge make any adverse findings on this point nor treat this as an issue requiring consideration in the appeal.
13. The relevant provisions under which this matter was considered was Appendix FM with reference to paragraph EC - P.1.1 which reads:

EC-P.1.1. The requirements to be met for entry clearance as a partner are that-

- (a) the applicant must be outside the UK;

- (b) the applicant must have made a valid application for entry clearance as a partner;
- (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and
- (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.

14. E-ECP.2.1 reads:

E-ECP.2.1. The applicant’s partner must be-

- (a) a British Citizen in the UK, subject to paragraph GEN.1.3.(c); or
- (b) present and settled in the UK, subject to paragraph GEN.1.3.(b); or
- (c) in the UK with refugee leave or with humanitarian protection.

E-ECP.2.2. The applicant must be aged 18 or over at the date of application.

E-ECP.2.3. The partner must be aged 18 or over at the date of application.

E-ECP.2.4. The applicant and their partner must not be within the prohibited degree of relationship.

E-ECP.2.5. The applicant and their partner must have met in person.

E-ECP.2.6. The relationship between the applicant and their partner must be genuine and subsisting.

E-ECP.2.7. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-ECP.2.8. If the applicant is a fiancé(e) or proposed civil partner they must be seeking entry to the UK to enable their marriage or civil partnership to take place.

E-ECP.2.9. (i) Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules; and (ii) If the applicant is a fiancé(e) or proposed civil partner, neither the applicant nor their partner can be married to, or in a civil partnership with, another person at the date of application.

E-ECP.2.10. The applicant and partner must intend to live together permanently in the UK.

15. It is not made out the Judge misdirected himself or failed to consider relevant issues. It is not made out the Judge has given rise to a procedural irregularity in relation to [44] which is clearly not intended by the Judge to form any part of the decision. That decision is clearly set out at [43] on the basis of the evidence considered by the Judge. There is arguable merit in the comment in the Rule 24 reply that the postscript comment is not a finding of fact and is not a finding that the appellant is not able to consent to marry but simply a recording of a legitimate concern that the Judge had based upon the testimony of the sponsor at the hearing. This view is supported by the specific comment of the Judge that the Postscript does not impact upon the ultimate finding that there is no qualifying family life between the appellant and sponsor.

16. It is not made out that adding this aside reflecting a concern of the judge indicates that the findings that went before are in any way affected by arguable legal error. The interrelationship between the two issues is not made out.
17. Ground 2 refers to the case of GA (subsisting marriage) Ghana [2006] UKAIT 46 in which it was found that whether a marriage is subsisting is not limited to considering whether there has been a valid marriage which formally continues and that the word requires an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprises a marriage properly described as “subsisting”. A later decision in Goudey [2012] UKUT 41 is all so relied upon in which it was found the decision in GA only required that there is a real relationship as opposed to the merely formal one of a marriage which has not been terminated and that 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 it was found Tribunal could not see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the Immigration Rules.
18. The Judge considers the evidence provided noting that the only sources of evidence appeared to be from the sponsor and the sponsors family, such as the sponsor’s sister, in relation to which a number of discrepancies arose. The Judge notes at [41] the lack of evidence such as letters or a witness statement from the appellant herself explaining why she wishes to come to the United Kingdom. It is important to remember that the language of the rules as expressed in the pleural, that the parties to the marriage want to live together as husband and wife.
19. The finding at [16] of ZB & HB, by reference to an earlier rule, that “The requirements of sub-para 281 (iii) are not met simply by a wish to share a house, nor by a wish to look after the sponsor, or a wish to alleviate the care responsibilities imposed upon the sponsor’s mother by her relatives. Even if it were to be accepted that the first appellant has an intention to live with the sponsor, we do not think that it can be said that the level of interest she has shown in him so far, and the reasons she gives for wanting to be with him really establish that she wants to be with him as his wife” is equally applicable under Appendix FM.
20. It is not made out the Judge failed to consider the evidence with the required degree of anxious scrutiny. It is not legal error for the Judge not make findings in relation to each and every aspect of the evidence. A reading of all the evidence clearly shows that all relevant matters were canvassed before and considered by the Judge. The Judge has given adequate reasons in support of the findings made which have not been shown to be arguably irrational or outside the range of findings reasonably open to the Judge on the evidence.
21. The Judge finds little weight may be placed upon the evidence of the sponsor’s sister for sustainable reasons. The evidence of post marriage cohabitation is not a matter upon which the Judge found weight could be placed upon that the sponsor or his sister would have liked. That is a matter for the Judge.
22. The appellant fails to establish any arguable legal error on the pleaded grounds sufficient to warrant the Upper Tribunal interfering in this judgement.

**Decision**

23. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 20 September 2018