



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: HU/27189/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 17 July 2018

Decision and Reasons Promulgated
On: 14 August 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

MRS OFAMEN LUCY AJEGBANGBA
ANONYMITY DIRECTION NOT MADE

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation

For the Appellant: Ms A Patyna, counsel, instructed by JBR Morgan Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria, born on 20 November 1972. The appellant appeals with permission against the decision of the First-tier Tribunal promulgated on 14 December 2017, dismissing her human rights appeal against the decision of the respondent to refuse her application for entry clearance as the wife of her sponsor, who is in the UK.
2. The ECO was not satisfied that her relationship with her sponsor is genuine and subsisting and that they intend to live with each other permanently in the UK.

3. Ms Patyna, who did not represent the appellant before the First-tier Tribunal, relied on the grounds set out in the application for permission and her "speaking note."
4. She noted that the Judge did not think that it would be proportionate to refuse entry clearance simply because of an omission to obtain the required reference when there is further evidence that she has met the required standard in the English language - [37].
5. He also found that there was no substance in the respondent's contention that the appellant had not proved that the marriage was valid due to lack of sufficient evidence that the sponsor was present at the ceremony [39].
6. She submitted that the Judge appears to have accepted that the evidence pointing to the genuineness of the relationship between the appellant and sponsor was genuine. In that respect, he referred to evidence of frequent trips that the sponsor had undertaken which would be consistent with the claim that the relationship was developing between him and the appellant. There were also a substantial number of photographs taken on different occasions which were produced. The sponsor has been sending money, including "often quite substantial amounts" [40]. He also noted the evidence of very frequent telephone calls between the parties.
7. He stated that in the absence of any contra-indications, he would have said that sufficient evidence of the relationship had been provided.
8. He then expressed his 'concerns' at [42] based on what was contained in the appellant's previous visa application in 2009. The notice of decision '... refers to the fact that it stated the Sponsor was her cousin'. The appellant herself has not dealt with that issue, but the sponsor has done so, saying in his statement that he is not related to her outside marriage and that it was an error due to a communication barrier between himself and the agent who completed the form. He stated that on examining the form more closely, further discrepancies are apparent. Those were put to the sponsor during evidence but in each case he blamed the agent for what has been put down.
9. He noted at [46] that the sponsor suggested in his evidence that incorrect details were put down by the agent to "make it more responsible". He could not explain that further, but, in any event, the Judge did not find it credible that the information could have been put in the form by a third party without the appellant's knowledge. Any suggestion that an agent would have taken it upon himself to embellish the application by inserting false information without telling her is wholly implausible. He could not have inserted various details without her providing them. The sponsor's attempts to put blame for all the discrepancies on the agent was unconvincing. He did not find him to be a believable witness in this regard. The appellant was aware of the answers given in the application form in 2009 - [46].
10. He referred to the fact that the form mentions the sponsor's former wife. The sponsor said in evidence that he was living with her at the time and his marriage to her had not broken down. After the breakdown in about 2010-11, they were living in the same

house but were separated. The sponsor said that his relationship with the appellant started in 2009. The Judge accepted that the sponsor might have had two relationships on the go at the same time but it was pointed out to the Judge that his ex-wife must have supported the applications for him to stay in the UK at times when their relationship was either unstable or had ceased altogether [47].

11. The Judge noted that prior to becoming a British citizen, the sponsor relied upon his ex-wife's status as an EEA national to secure a right of residence as her family member [48].
12. He found that it was inconceivable that the sponsor could have successfully made the applications that led to the grant of documentation without the co-operation of his former wife. It is difficult to see why his first wife was willing to lend her assistance as she is likely to have known that he was spending a lot of time talking to the appellant on the phone and also sending money to her. Although the marriage was eventually dissolved in February 2016, it called into question his evidence about the relationship between him and the appellant [48].
13. The Judge accordingly took into account discrepancies in considering the content of the visit visa applications made by the appellant in 2009 which he compared to the sponsor's evidence at the hearing. This left him unable to say which of them is closer to the truth [49].
14. He went on to state at [49], that if the visit visa application is more accurate than the current one, there is the possibility that the appellant and the sponsor really are cousins and, given that the sponsor has denied that this is so, the real situation is that the marriage is merely a subterfuge to enable the sponsor to assist one of his relatives to gain entry to the UK. If, on the other hand, the visit visa application contained false representations and the appellant and the sponsor are not related outside marriage, this significantly affects the appellant's credibility, since if in 2009 she was prepared to tell a series of untruths in order to try to obtain entry to the UK, it is conceivable that the current application is, notwithstanding the considerable amount of supporting evidence, nothing more than an elaborate scheme to gain entry based on a marriage which is not genuine.
15. In the event he found that the appellant had not established that her relationship with the sponsor is genuine and subsisting.
16. Ms Patyna submitted that the Judge has accordingly left open to himself only two options: that the marriage was "a subterfuge" or "an elaborate scheme to gain entry to the UK." Either scenario involved a serious accusation of dishonesty towards the appellant and/or his sponsor.
17. Given the abundant evidence pointing the other way, cogent evidence and reasons were required to substantiate either of the Judge's conclusions. That is particularly so when regard is had to the substantial effort made to perfect the "elaborate scheme." This involved the making of daily phone calls over a period of a year and a half; regular and substantial financial transactions over many years, ensuring that

photographs of the couple were taken on different occasions when the sponsor visited Nigeria; organising an elaborate wedding ceremony; the changing of the appellant's last name to the sponsor's, and the sponsor then agreeing to give evidence at the appellant's appeal.

18. She submitted that it was not open to the Judge to conclude that the only conclusions available to him on the evidence were that the marriage itself was not genuine (either because it was a "subterfuge" or an "elaborate scheme" to gain entry). There was also the possibility that, whilst incorrect information was included in the appellant's visa application some nine years ago, the marriage which took place in 2016 and continued until the appeal hearing, was genuine.
19. In any event the Judge failed to reach a finding as to which "scenario" was more likely than not, stating that he was unable to say which of them was closer to the truth. He thus failed to apply a consistent standard of proof to the evidence.
20. She noted that he referred to the possibility that they are really cousins [49] and stated that "it is conceivable" that the application is, notwithstanding the considerable amount of supporting evidence, nothing more than an elaborate scheme to gain entry [49]. She submitted that the question however, is not whether it was "possible" or "conceivable" that the marriage was an "elaborate scheme" to gain entry but rather whether it was more likely than not that the marriage was genuine. The question therefore should have been whether it was more probable than not that the parties intended to live together as husband and wife and that the matrimonial relationship was subsisting – Naz (Subsisting marriage – standard of proof) Pakistan [2012] UKUT 0040.
21. Nor did the Judge make any findings at [47] let alone explain what bearing that issue had on the overall evidence in the context of the required standard of proof. Nor did the Judge reach reasoned and sustainable findings regarding the overall credibility of the sponsor, stating only at [46] that he did not find him believable in respect of the evidence of the 2009 visa application. In particular, he did not have regard to the statement of the sponsor at [24] of his statement where he stated that if his marriage is not genuine, he would not continue to speak with his spouse daily. He would not continue to spend money on her in order to support her financially and could not travel thousands of miles to Nigeria to see her solely for immigration purposes. He moreover stated that he travelled to Nigeria in order to be with his spouse.
22. She submitted that the Judge noted with regard to the money that was sent to the appellant by her sponsor that he appreciated that the respondent was suggesting that she could in fact be acting as a vehicle for the receipt of money on behalf of others, especially when she appears to have her own income from her employment in the Police Pensions Office.
23. However, the Judge made no findings as to whether it was established that the appellant is financially supported by him, which he asserted in his witness statement.

There he stated that he supported her because her income was insufficient for her to support herself.

24. Accordingly the Judge failed to resolve or give proper reasons regarding key conflicts of evidence.
25. Ms Patyna further submitted that at no stage did the Judge 'put any of this' to the sponsor during his evidence. Accordingly, the stigma that attaches to both the appellant and the sponsor following those findings 'remains forever'.
26. In reply, Mr Tufan submitted that the Judge considered the earlier visa application. The Judge referred to the various anomalies and considered the alternatives. At [50] he found that the appellant had not established that the relationship with the sponsor is genuine and subsisting. He was entitled to come to that conclusion.

Assessment

27. The issue of fact which was raised in the refusal letter was whether or not the parties were in a genuine and subsisting relationship and that the appellant intended to live with him in the UK.
28. The Judge at [39] made positive findings regarding the respondent's concern that the marriage was not valid. He found that there was no substance to that point.
29. Nor did he consider it significant that there was an apparent discrepancy in the telephone call evidence with regard to the incorrect ordering of the two digits. This he found was likely to be a simple error [41].
30. More significantly, he had regard to the significant amount of evidence showing that the relationship between the appellant and the sponsor was genuine and subsisting. This included the fact that her spouse made frequent trips to Nigeria for several years. He had also been remitting substantial amounts of money to the appellant in Nigeria for several years. There was no underlying basis for the respondent's 'suggestion' at [40] that the money might have been sent to the appellant 'acting as a vehicle' for the benefit of others.
31. He also had regard to the substantial number of photographs taken on different occasions and the very frequent telephone calls made between them. He stated that in the absence of any contra-indications, he would have said that sufficient evidence of the relationship has been provided.
32. Notwithstanding those findings, he concluded that the marriage was "a subterfuge" or an "elaborate scheme to gain entry to the UK."
33. I accept Ms Patyna's submission that this amounts to an accusation of dishonesty both in respect of the appellant and the sponsor.
34. I find that there was a substantial amount of evidence pointing the other way. Accordingly, cogent evidence and reasons were required to substantiate either of the

two options referred to at [49]. As submitted, in order for there to have been an elaborate scheme to gain entry, this must have involved the making of daily phone calls for more than one and half years; the transfer of regular and substantial amounts of money to her over the years. Such an elaborate conspiracy also involved the production of photographs of the couple taken on different occasions when the sponsor visited Nigeria. It also involved the organisation of a bogus wedding ceremony, and the appellant's changing of her name to the sponsor's.

35. When considering the evidence as a whole, I do not find that there were only “two options” available. I accept that incorrect information was set out in the appellant's visa application some nine years ago. The Judge gave substantial weight to the inconsistencies without considering that the marriage itself took place in 2016 and has continued until the date of the appeal.
36. There is also force in Ms Patyna's submission that the Judge applied an inconsistent standard of proof relating to the evidence as to which “option” is closer to the truth. The question is not whether it is possible or conceivable that the marriage was a facilitating scheme for the appellant to gain entry to the UK, but whether it was more likely than not, that the marriage was genuine and subsisting and that they intended to live together as husband and wife.
37. Having regard to the substantial positive findings made by the Judge both individually and cumulatively supporting the case that they were party to a genuine and subsisting relationship, I find, as noted by First-tier Tribunal Judge Keane in granting permission, that the Judge has bestowed excessive weight upon the discrepancies which he discerned in the evidence, and insufficient weight was given to the relevant considerations.
38. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I accordingly set aside the decision and re-make it.
39. In remaking the decision I find that the appellant has produced substantial evidence attesting to the genuineness and subsistence of the relationship between her and her sponsor. This is evidenced by the sponsor's presence at the marriage ceremony in Nigeria and the fact that he has spent periods of time in Nigeria both before and subsequent to the wedding. It was in fact accepted by the Judge that evidence of these trips was consistent with the claim of a developing relationship between them. Photographs taken of them on different occasions were produced and there was evidence of the sponsor sending the appellant quite substantial amounts of money, which I find to be for her benefit and use. In addition there is evidence of the frequent telephone calls.
40. Notwithstanding the discrepancies relating to the 2009 application there is no proper basis for finding the marriage is an elaborate scheme to facilitate the appellant's immigration claim. In that respect I have had regard to paragraph 24 of the sponsor's statement where he asserted that if his marriage is not genuine, he would not continue to speak with his spouse daily. He would not continue to send money to

her to support her financially and would not travel to Nigeria to see her solely for immigration purposes. He in fact stated that he travelled to Nigeria in order to be with her.

41. I find that the appellant has shown on the balance of probabilities that the marriage relationship is genuine and subsisting and they intend to live together as husband and wife in the UK.
42. The decision to refuse an entry clearance application is treated by the respondent as a refusal of a human rights claim. Accordingly the appellant has a right of appeal pursuant to s.82(1)(b) of the 2002 Act. The appellant claims that the decision breaches her right to respect for family life under Article 8 and is unlawful under s.6 of the Human Rights Act 1998.
43. The burden lies on the appellant to establish that Article 8(1) is engaged. If that is achieved, the burden passes to the respondent to show that the decision appealed against is proportionate in the circumstances. The standard of proof is the balance of probabilities. I have had regard to evidence up to the date of hearing.
44. Although the five stage approach referred to in Razgar [2004] UKHL 27 relates to a removal case, the guidelines are apposite when considering the appellant's entry clearance application.
45. I find that Article 8 is engaged on the basis of family life established between the appellant and her sponsor. The respondent's decision is in accordance with the law.
46. In considering the fourth question, I find on the evidence as a whole, that the relevant requirements of the Rules have been met.
47. I move to the fifth Razgar question which concerns proportionality. This involves a balancing exercise. I must have regard to the considerations set out in s.117B of the 2002 Act. The maintenance of effective immigration controls is in the public interest. There is no contention that the appellant cannot speak English. Nor is there any contention that the appellant is not financially independent. I do not find that any of the other sub sections of s.117B have any relevance to this appeal.
48. Having regard to the evidence as a whole, I find that the decision of the respondent constitutes a disproportionate interference with the parties' right to respect for family life. I find that there would be a breach of Article 8 if the appeal were dismissed.

Notice of Decision

Having set aside the decision of the First-tier Tribunal, I re-make it and allow the appellant's appeal.

No anonymity direction is made

Signed Deputy Upper Tribunal Judge Mailer Dated: 31 July 2018