**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/07707/2019

**THE IMMIGRATION ACTS**

| **Heard via Skype for Business at Field House** | **Decision & Reasons Promulgated** |
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| **On 19 February 2021** | **On 19 March 2021** |

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**SAMSUN NESSA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellant: Mr C Timson instructed by Maya Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Bangladesh. She appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 3 April 2019 refusing her application for entry clearance to join her British citizen husband in the United Kingdom.

2. The couple married in 1969 and have six children, five of whom live in Bangladesh and the sixth who has lived in the United Kingdom since 2000. The appellant's husband, the sponsor, came to the United Kingdom in 1989. He did not return to Bangladesh until 2014 when he stayed for

three months and subsequently visited Bangladesh in 2015 for two months and in 2018 for a month. His evidence was that he was not able to travel to Bangladesh before 2014 as he did not have the relevant leave and thus would have been refused entry on return. Photographs were provided showing the appellant and the sponsor attending a registry office in 2018 to obtain a marriage certificate which they had not obtained at the date of their marriage in 1969 because they were not issued at the time.

3. There was an issue as to whether or not the Entry Clearance Officer had been able to interview the sponsor. In his oral evidence he said that he had received and answered two phone calls, on the first occasion he confirmed his name and indicated that he did not speak English, and on the second occasion he was asked if he had made an appeal for his wife and when he confirmed he had, the call ended.

4. In the refusal letter it was stated that despite several attempts to contact the sponsor no interview with him was concluded. The Entry Clearance Manager provided records showing that attempts were made to contact the sponsor on 2 and 3 April 2019 and the interview arrangement team tried on numerous occasions but there was no reply. The judge did not find the sponsor's evidence in relation to this to be credible commenting that if he had spoken to the ECO she saw no reason at all why there would have been an error made in the witness statement.

5. In his evidence the sponsor also said that whilst in the United Kingdom he had maintained contact with his wife via the telephone using cash prior to phone cards being available and he used to call her from his sister's phone but he now had a mobile phone.

6. The judge had concerns about the evidence as set out in particular at paragraph 15 of her decision. She found it surprising that there was only the sponsor's evidence to support his wife's appeal and a complete lack of supporting evidence from the UK based family members. The sponsor was asked why his son who was based in the United Kingdom had not given a witness statement or evidence. The son had attended the hearing and the sponsor said he attended the solicitors' office with him, but the judge considered it to be somewhat unusual that he had not provided any evidence in support of his mother's appeal and clearly would be in a position to add valuable evidence in relation to the nature of his parents' relationship, since that had been doubted.

7. In addition, the sponsor's sister lived in the United Kingdom and the judge considered she could have confirmed the relationship as well. As regards the absence of evidence to confirm family life prior to the sponsor's arrival in the United Kingdom, the sponsor was asked as to why, for example, there were not photographs showing his family life in Bangladesh prior to his arrival in the United Kingdom. He said that it was a long time ago and the judge accepted that this was not a matter that had been raised by the ECO in the decision letter but she did not see any explanation or reason to

ignore why the UK based family members had chosen not to support the appeal.

8. The judge was also concerned at the lack of knowledge of the appellant of her husband's life in the United Kingdom. She knew nothing about his work or where he lived in the United Kingdom, and the judge considered that was not consistent with a subsisting marriage. It seemed to her incredible that the appellant would not enquire as to the work the sponsor did. She was able to say what he had done by way of work when in Bangladesh. The judge had expected that his job in the United Kingdom as a chef was one that she would have expected to be within the appellant's knowledge. She did not accept that this was down to cultural difference and a lack of education. She concluded that if they talked as frequently as was claimed it was incomprehensible that the appellant would be unaware of her husband's circumstances.

9. In addition, the appellant had said that the sponsor lived alone, which contradicted the sponsor's evidence that he lived with his son when not working. The judge did not find it credible that the appellant would be unaware of this.

10. The judge also identified discrepancies between the evidence of the couple. In her interview the appellant said that the sponsor visited Bangladesh in 2016 and 2018 and not 2014, 2016 and 2018. She claims that they communicated by telephone and letters, whereas the sponsor said that he never wrote to his wife because she could barely read. When he was asked about what she had said at interview and her claim to have received letters he said in his evidence: "if by chance I did write a letter I don't remember but my wife does not really read and write, she's quite old". In addition, the appellant said at interview that they spoke on the telephone daily, whereas the sponsor said they spoke sometimes today, sometimes tomorrow, then sometimes five days or after a week and it could be once a week or four times a week. When his wife's account was put to him he said that to her daily would be like every two days. He referred to her age and implied that she got confused and was uneducated and the judge found this to be a further attempt to address a clear inconsistency.

11. The judge went on to consider relevant guidance in GA [2006] UKAIT 00046 in assessing the issue of whether the relationship was genuine and subsisting. It was noted that the word "subsisting" was not limited to considering whether there had been a valid marriage which formally continued but required an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprised a marriage that can properly be described as subsisting.

12. The judge also considered Goudey [2012] UKUT 00041 (IAC), where it was held that it was not necessary to produce particular evidence of mutual devotion before entry clearance could be granted, and evidence of

telephone cards was capable of being corroborative of the contention of the parties that they communicated by telephone even if such data could not confirm the particular number the sponsor was calling in the country in question. It was not a requirement that the parties also wrote or texted each other. Also, it was said there that where there were no countervailing features generating suspicion as to the intentions of the parties, such evidence might be sufficient to discharge the burden of proof on the claimant. The judge also considered guidance in Naz [2012] UKUT 00040 (IAC) where it was held that it was for a claimant to establish that the requirements of the Immigration Rules were met or that an immigration decision would be an interference with established family life.

13. The judge went on to say that having considered all of the evidence provided including the errors made in interview she did not find that given the length of marriage and separation and in the context of this case the couple's marriage was anything other than a formality. Having found that the appellant could not meet the requirements of the Immigration Rules she went on to consider the family life of the appellant and in light of her finding in respect of the Immigration Rules the length of time the couple have spent apart, the fact that the sponsor of course could return to Bangladesh to resume the family life they had shared over 30 years ago, there were no features which could amount to the decision being disproportionate and that as a consequence the claim failed outside the Rules, bearing in mind also the guidance in respect of proportionality in Razgar [2004] UKHL 27.

14. The appellant sought and was granted permission to appeal on the basis that the judge had not taken proper account of the evidence such as the telephone cards, the genuineness of the reason why the sponsor was unable to visit the United Kingdom before 2014, the length of the marriage and the evidence of ongoing communication on the evidence given by the sponsor. Permission was granted on all grounds.

15. In his submissions, which also relied on the skeleton argument that had been put in, Mr Timson argued that the judge had not disputed that the couple had six children and that the sponsor had returned to Bangladesh when he was able to do so. It was not suggested that he had visited anyone other than his wife. Money had been sent and no issue it seemed was taken regarding the fact that the wife lived in the family home. Essentially, where there was no issue about the marriage and the existence of the six children and the fact that the sponsor had returned to Bangladesh as soon as he could and sent money, there was a lot of evidence of telephone calls, the case was one that should have been allowed. The judge had given insufficient credit to the appellant in respect of the evidence. The appeal had been dismissed because of a few inconsistencies but all the positives seemed not to have been given much weight. It would be an odd situation if the marriage were not subsisting and yet the husband had come back three times and it should be questioned why he would not do if the relationship was not subsisting.

The most concerning thing was the point to be found at paragraph 19 where the judge said that she could not find that in the context of this case the couple's marriage was anything other than a formality. It seemed clear that the judge was suggesting that due to the fact they had been married and the length of separation the appellant raised the children with the sponsor's financial support it would only be the additional point concerning the overwhelming evidence that the marriage was subsisting. The sponsor was now in his 70s. As regards the minor discrepancies as to whether he was contacted by the ECO or not, he had not been interviewed and that was the main point. The relationship was a lengthy one. He had continued to send money when the children were no longer of school age and that was relevant as they were now adults. There were other relatives and the son had attended the hearing with his father and it could not be adverse that other family members were not there. They would be able to attend if there was a rehearing.

16. Ms Isherwood argued that on the last point Mr Timson was giving evidence. The burden of proof was on the appellant and she could ask for witnesses to attend if she wanted them to do so. It could not be said that the five children in Bangladesh were not supported by their father as the evidence had not been provided on that.

17. The issue was as set out at paragraph 11 by the judge, that of whether or not the relationship was genuine and subsisting. It was not a question of whether the couple were married or whether they had children but it was the subsistence of the relationship. The judge had set out the contradictions in the evidence. The judge had noted the frequency of the contact and there was a contrast in the couple's evidence. Even if the appellant did not know about the circumstances in the United Kingdom, that was what the judge was considering. There was a lack of photographs about earlier family life and the judge was entitled to look at the evidence as a whole. There was a lack of evidence from family members. The judge had noted the case law. She had not ignored any evidence. The findings were open to her and she had identified the problems she had with the evidence and it was a question of whether the test was met in the circumstances. The appeal should be dismissed.

18. By way of reply Mr Timson argued that it was not a matter of giving evidence about money sent when the children were adults. The judge had not disputed that evidence of money sent from the sponsor to the appellant and that it continued after the children became adults and this was relevant to the genuineness of the relationship. As regards knowledge the judge seemed to hold against the couple because of just two or three points. As regards awareness of the sponsor's circumstances the judge did not believe the appellant would not know if the test were to be met but it was the Goudey problem and little could be known about jobs in such circumstances. People's relationships differed and it was hard to understand perhaps but nevertheless genuine. There was no

overwhelming adverse evidence. Paragraph 19 was the essential problem of the decision. The appeal should be allowed.

19. I reserved my decision.

20. The key point, as identified by Ms Isherwood in her submissions, is the question of whether the relationship is genuine and subsisting and whether the judge was entitled as a matter of law to find that it was not. It is not a question whether the couple are married or the number of children that they have but whether the judge's reasoning was sufficient to support her conclusion that the requirements of the Rules were not met and that the appeal could not succeed outside the Rules.

21. The judge set out her concerns in some detail, in particular at paragraph 15, where she found to be of particular significance the absence of supporting evidence which could have been provided and the ignorance of the appellant about her husband's circumstances in the United Kingdom. I do not think weight of any significance could be attached to the issue about the interview, and I do not consider that the judge attached more than minimal weight to that. She was entitled to note the inconsistencies at paragraph 17 of her decision and went on thereafter as I have noted above to set out the relevant guidance in authorities such as GA and Goudey. It is clear, as she said at paragraph 19 of her decision, that she considered all the evidence provided in coming to her conclusion that the requirements of the Rules were not met. The discrepancies and inconsistencies in the evidence were not matters which the judge could be expected to ignore, and in my view she gave proper weight to them. She was clearly aware of the existence of the telephone cards and equally was entitled to conclude as she did that if the couple talked as frequently as claimed it was incomprehensible that the appellant would be unaware of her husband's circumstances.

22. The points made by Mr Timson are in the end, in my view, matters of disagreement only. It has not been shown that the judge erred as a matter of law in her evaluation of the evidence or her application to the law of her proper findings in respect of that evidence. The challenge is one of disagreement only, and the judge came to conclusions that were open to her on her proper findings of the evidence before her. Accordingly this appeal is dismissed.

No anonymity direction is made.

Signed Date 17 March 2021

Upper Tribunal Judge Allen