Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07538/2020
UI-2021-000788

THE IMMIGRATION ACTS

Heard at the Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 26th April 2022	**On 25th August 2022**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

EBITHAL NASR AL DIMKHALIL SHARAF ALDIN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Forbes, Lifeline Options
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a national of Sudan. On 17th December 2019 she applied for entry clearance under the Family Reunion provisions of the immigration rules. The appellant claimed that she is married to Mr

Waleed Ali Hassan Ahmad "the sponsor"), a Sudanese national who arrived in the United Kingdom in October 2016 and has been granted leave to remain as a refugee. The application was refused by the respondent for reasons set out in a decision dated 18th August 2020. The appellant relied upon 'cash receipt vouchers' to demonstrate an ongoing relationship with her sponsor. Following checks conducted by the respondent, the respondent concluded that the 'cash receipt vouchers' relied upon not genuine. The receipts had been recorded in a document verification report (DVR) as not genuine. The fact that the documents were found not to be genuine led the decision-maker to doubt the genuineness of the appellant's relationship with her sponsor. The respondent was not satisfied that any relationship between the appellant and sponsor existed before the sponsor left Sudan, or that the appellant and sponsor intend to permanently live with each other. The respondent was not satisfied that there is a genuine and subsisting relationship. The application was also refused under paragraph 352A(iii) and (v). The respondent did not consider there to be any exceptional circumstances justifying a grant of leave outside the rules, or that the decision was in breach of Article 8.

2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Mehta ("Judge Mehta") for reasons set out in a decision promulgated 20th September 2021. The sponsor attended the hearing before the First-tier Tribunal and gave evidence. The issues in the appeal are set out in paragraph [5] of the decision. The relevant legal framework is identified at paragraphs [12] to [20]. For reasons set out at paragraphs [23] to [50] of the decision, the appeal was dismissed.

3. Permission to appeal was granted by First-tier Tribunal Judge Grimes on 26th October 2021. Judge Grimes said:

> "2. It is arguable that the judge erred in failing to make a clear finding as to whether he found that the use of false documents led to a discretionary refusal under paragraph 9.7.1 or a mandatory refusal under paragraph 9.7.2 of the Immigration Rules.

> 3. It is further arguable that the judge erred in the proportionality assessment (paragraphs 44 – 45) in that, in finding that a fresh application for entry clearance from Sudan would lead to a short period of separation, he failed to take account of paragraph 9.8.1 (with reference to paragraph 9.8.7) of the Rules which provides for mandatory refusal of an application for entry clearance within a period of 10 years.
>
> 4. Although I consider the contention that the judge's findings on paragraph 9.7.1 and paragraph 352A are contradictory has less merit, permission to appeal is granted on all grounds."

4. The respondent has filed and served a Rule 24 response dated 20th November 2022. The respondent opposes the appeal. The respondent claims Judge Mehta was under an obligation when considering the appellant's appeal, to determine firstly, whether or not the appellant had exercised deception. The respondent claims Judge Mehta erroneously quoted the discretionary grounds for refusal (paragraph 9.7.1) at paragraph [12] of his decision. The respondent had referred to paragraph 320(7A) of the immigration rules in her decision and that was later transposed as paragraph 9.7.2 of the immigration rules as a mandatory ground of refusal. The respondent claims Judge Mehta was satisfied that the evidence of the respondent was sufficient to establish a prima facie case of deception and went on to consider and reject the appellant's innocent explanation. There was therefore no discretion, and the application was bound to fail under the immigration rules. The respondent claims Judge Mehta considered the claim both under the immigration rules, and outside the rules and was entitled to dismiss the appeal for the reasons given.

5. Before me, Mr Forbes submits the first and second grounds of appeal can be taken together. Judge Mehta carefully considered the appellant's account of her relationship with the sponsor and found that Mr Ahmad gave evidence in relation to the marriage and their subsequent relationship in a straight-forward and consistent manner. Judge Mehta accepted the sponsor's evidence in that regard and found the appellant and sponsor are in a genuine and subsisting marriage and they intend to live together permanently. Mr Forbes submits that is difficult to reconcile with a mandatory refusal under the immigration rules. The Judge found

the appellant provided false documents in order to bolster her claim and used deception by relying upon false receipts when seeking leave to enter, when the appellant did not require any such assistance, on the findings made by the judge. Mr Forbes refers to the decision of the Upper Tribunal in Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041 cited by Judge Mehta in paragraph [31] of his decision. The Tribunal said that where there are no countervailing factors generating suspicion as to the intentions of the parties, evidence of telephone card or extensive call logs covering the eligible period, may be sufficient to discharge the burden of proof on the claimant.

6. As to the third ground of appeal, Mr Forbes submits that in reaching his decision as to refusal under paragraph 320(7A) of the immigration rules, Judge Mehta refers to the evidence of the sponsor and the explanation provided by Mr Ahmad but does not address whether the appellant herself had engaged in deception. The sponsor's evidence was that he had been sending money to the appellant through a man by the name of Tariq Adam, and there was no reason to doubt what Tariq had said or done, as the appellant had been receiving the money in Sudan.

7. As far as the fourth ground of appeal is concerned, Mr Forbes submits Judge Mehta refers to paragraph 9.7.1 of the immigration rules and although that rule provides for discretionary refusal, it is treated as requiring a mandatory refusal. He submits Judge Mehta does not expressly refer to paragraph 9.7.2, and if that was the rule being considered, it was incumbent on the judge to consider whether the decision maker had proved that it is more likely than not the applicant used deception in the application. Mr Forbes submits Judge Mehta does not adequately address the appellant's intentions in reaching his decision, and in the end, it is not clear whether Judge Mehta was addressing paragraphs 9.7.1 or 9.7.2 of the immigration rules.

8. Finally, Mr Forbes submits that grounds five and six of the grounds of appeal can be taken together and concern the judge's assessment of proportionality. He submits Judge Mehta failed to have regard to the fact that this a is 'family reunion' application for settlement. If there is a finding that the appellant used deception, Part 9 of the rules provides for refusal for a period of 10 years where the applicant has used deception in an application.

9. In reply, Mr Bates submits that on any view, as Judge Mehta stated at paragraph [24] of his decision, the appellant's sponsor does not dispute that the documents were false, and the Judge rejected the explanation that was given by the sponsor. Mr Bates submits Judge Mehta gives cogent reasons for his conclusion that the appellant has practised deception. Mr Bates submits that although Judge Mehta found, on the evidence before the Tribunal, that the appellant and sponsor are in a genuine and subsisting relationship and that they intend to live together permanently, the appellant would not have known when she made her application that the application would succeed. He submits it is for an applicant to satisfy the respondent that the relevant requirements are met, and when making application an individual might seek to bolster their application for a whole range of reasons. Here, the appellant sought to do so using false documents.

10. Mr Bates submits Judge Mehta referred to paragraph 9.7.1 of the immigration rules in his decision. Paragraph 320(7A) was replaced by paragraph 9.7.2 of the rules and is clear that an application for entry clearance, must be refused where the decision maker can prove that it is more likely than not the applicant used deception in the application. Judge Mehta found, at [29], that the appellant provided false documents in order to bolster her claim and utilised deception by relying upon false receipts when seeking leave to enter the United Kingdom. Mr Bates submits there is a potential difficulty regarding the consequences of the mandatory 10-year ban because the Judge refers, at [44], to "*Separation*

for a short period whilst an application is made from Sudan without false documents". However, Mr Bates submits that is immaterial because there was no other evidence before the Tribunal that would have resulted in a different outcome.

Discussion

Ground 4; The relevant ground for refusal

11. It is useful to begin by considering the fourth ground of appeal first, and the relevant version of the general grounds for the refusal of entry clearance that applied. The respondent referred to paragraph 320(7A) of the immigration rules in her decision. Judge Mehta refers to paragraph 9.7.1 of the immigration rules in his decision.

12. The Statement of Changes in Immigration Rules (HC813) presented to Parliament on 22nd October 2020 *(after the respondent's decision but prior to the decision of Judge Mehta)* amended the Immigration Rules used to regulate people's entry to and stay in the United Kingdom. HC 813 revised and simplified the rules on the exercise of the powers to refuse or cancel permission on suitability grounds. The implementation provisions provide that the changes to Part 9 shall take effect at 9am on 1st December 2020. They also however provide that in relation to the changes which take effect at 9am on 1 December 2020, if an application for entry clearance, leave to enter or leave to remain has been made before 9am on 1 December 2020, the application will be decided in accordance with the Immigration Rules in force on 30 November 2020 *(my emphasis)***.** The appellant's application was made on 17th December 2019 and the relevant Immigration Rule in force on 30th November 2020 was as follows:

> "**Part 9**
>
> **General grounds for the refusal of entry clearance, leave to enter or variation of leave to enter or remain in the United Kingdom**

> Refusal of entry clearance or leave to enter the United Kingdom
>
> …
>
> 320. In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2-8 of these Rules, the following grounds for the refusal of entry clearance or leave to enter apply:
>
> **Grounds on which entry clearance or leave to enter the United Kingdom**
> **is to be refused**
>
> …
>
> (7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.
>
> …"

13. It is in my judgment clear that Judge Mehta erred in his reference to paragraph 9.7.1 of the Immigration rules, at paragraph [12] of his decision. The question for me is whether that is material to the outcome of this appeal. Mr Ahmad did not dispute that the receipts purporting to show the transfers made to the appellant through the Dahbshil transfer services, were false. Judge Mehta noted, at [24], that although that much was conceded by the sponsor, he states that he did not know that they were false. At paragraph [26] Judge Mehta refers to the explanation provided by the sponsor and at paragraph [27], Judge Mehta found the sponsor's evidence to be vague and incredible. At paragraph [29], Judge Mehta found that the appellant had provided false documents in order to bolster her claim and utilised deception by relying upon false receipts when making her application. Those findings clearly address the issues that arise in any proper consideration of the mandatory ground of refusal set out in paragraph 320(7A) in force on 30th November 2019. In my judgment, the erroneous reference to paragraph 9.7.1. of the immigration rules is in all the circumstances, immaterial.

Grounds 1 and 2; Contradictory findings

14. There is in my judgement no contradiction between the findings made by Judge Mehta regarding the general grounds for the refusal of entry clearance at paragraphs [23] to [29] of his decision, and his findings at paragraphs [30] to [36] as to whether the requirements for leave to enter as the partner of a refugee are met. The two rules are directed to different issues, and different considerations apply. The general grounds for refusal of entry clearance, and paragraph 320(7A) of the immigration rules is concerned with the question as to whether false representations have been made, or false documents or information has been submitted in relation to the application.

15. At paragraphs [30] to [37] of his decision, Judge Mehta considered whether the appellant satisfied the requirements of paragraph 352A of the immigration rules. He found that Mr Ahmad gave evidence in relation to the marriage and their subsequent relationship in a straight-forward and consistent manner and he accepted the sponsor's evidence in that regard. He noted the appellant had provided a genuine marriage certificate. At paragraphs [36] and [37], Judge Mehta said:

> "36. I find that the appellant and Mr Ahmad lived together in Addis Ababa between January 2021 and February 2021 and place significant weight upon the travel tickets produced in the bundle. There is also a plethora of financial evidence of which there has been no dispute in which Mr Ahmad has financially supported the appellant and there is further a number of telephone communications showing that they have kept in contact. This is corroborated by the photographic evidence of their devotion to each other. I find that Mr Ahmad is a refugee. I find that the marriage took place before Mr Ahmad left Sudan which was his habitual residence and I find that the marriage existed before Mr Ahmad left Sudan.
>
> 37. I therefore find that the Appellants as at the date of the hearing now meet Paragraph 352A of the Immigration Rules and they are in a genuine and subsisting marriage, and they intend to live together permanently."

16. As Mr Bates submits, the applicant would not have known when she made her application, whether it would succeed. It is therefore entirely possible that an applicant might provide a false document to support an application. The fact that Judge Mehta concluded, on the evidence before the Tribunal, that the appellant and sponsor intend to live together

permanently and the marriage is subsisting, does not in any way detract, and is not in any way inconsistent, with his earlier finding that false documents had been submitted in relation to the application. In reaching his decision that the appellant has established the requirements for leave to enter as the partner of a refugee are met, the judge clearly had regard to all the evidence before him, when considering whether the appellant has discharged the burden of proof on her. There is therefore no merit to the first and second rounds of appeal.

Ground 3; Whether the appellant was a party to the deception

17. The third ground of appeal also has no merit. The claim that in reaching his decision, Judge Mehta erred failing to consider whether the appellant herself was a party to any alleged deception potentially committed by either the sponsor or a third party is misconceived. For reasons set out at paragraphs [23] to [29], Judge Mehta found that the respondent had discharged the initial evidential burden to provide prima facie evidence of dishonesty. At paragraphs [25] to [28], Judge Mehta considered the explanation given by the sponsor and rejected that explanation. He was not satisfied that the appellant and sponsor had provided an account that satisfies the minimum level of plausibility. At paragraph [29], he said:

> "I find that the appellant has provided false documents in order to bolster her claim and utilised deception by relying upon false receipts when seeking leave to enter the United Kingdom."

18. The fundamental problem with the appellant's case is that this was an application for settlement that was made by her, for settlement. The documents submitted in support of the application were documents submitted by her. In AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773, the Court of Appeal held that the word "false" in "false representation" and "false document" in paragraphs 320(7A) and 322(1A) of the Immigration Rules meant "dishonest" rather than "inaccurate". In paragraph [67] Rix LJ said:

> "67. First, "false representation" is aligned in the rule with "false document". It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purpose of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies "whether or not to the applicant's knowledge".

Grounds 5 and 6; Article 8 and proportionality

19. At paragraph [38] of his decision, Judge Mehta said that given he had found that the appellant does not meet all of the requirements of the immigration rules, he would go on to consider whether the respondent's decision is nonetheless disproportionate on Article 8 grounds. He accepted the appellant has established a family life with the sponsor. He referred to the public interest considerations set out in s117B of the Nationality Immigration and Asylum Act 2002, and concluded, at [42]: *"The appellant does not meet the immigration rules for entry clearance to the United Kingdom"*. At paragraphs [44] to [47], he said:

> "44. There is no evidence of an unreasonable delay in the processing or granting of any potential entry clearance if the application was to be made from Sudan. Family life has continued since Mr Ahmad came to the UK. Separation for a short period whilst an application is made from Sudan without false documents would not be disproportionate.
>
> 45. There is no evidence that the time taken to make an application from Sudan will result in a substantial interference with the appellant's family life.
>
> 46. In the upper tribunal case of Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) it was held that neither the case of Chikwamba nor Agyarko support the contention that there cannot be a public interest in removing a person from the UK. The same principle applies in relation to entry clearance and it cannot be said that just because the appellant is likely to succeed in an application for entry clearance if one was to be made from Sudan now there is no public interest in denial of entry clearance.

> 47. It is in the public interest that those who submit false documents should not be granted entry clearance to the UK."

20. At paragraphs [49], Judge Mehta referred to the appellant and Mr Ahmad being in a genuine and subsisting marriage, as a factor weighing in favour of the appellant. At paragraph [50] he concluded:

> "I have taken a step back and considered all the factors in favour of the appellant against the public interest. In all the circumstances, notwithstanding the relationship and the family life the appellant and Mr Ahmed have enjoyed I find this is insufficient to tip the scales in her favour. I am not satisfied that there are exceptional circumstances in the appellant's cases, for the reasons set out above, that would warrant a grant of leave outside of the immigration rules. I do not find it would be unduly harsh for entry clearance to be refused".

21. Although it is true to say, as Mr Bates submits, that in light of the findings made by Judge Mehta, the appeal was bound to fail under the immigration rules, as Judge Mehta noted at paragraph [20], where an appellant cannot satisfy the requirements of the immigration rules, the judge is bound to consider whether the decision to refuse the application is nevertheless, disproportionate.

22. In my judgment the appellant's claim that in reaching his decision, Judge Mehta failed to have regard to material factors, has merit. At paragraph [44], Judge Mehta said that there is no evidence of any unreasonable delay in the processing or granting of any potential application for entry clearance from Sudan. He noted the appellant and Mr Ahmad have been able to continue their family life since Mr Ahmad came to the UK and said: "*separation for a short period whilst an application is made from Sudan without false documents would not be disproportionate.".* He went on to say, at [45]; "*There is no evidence that the time taken to make an application from Sudan will result in a substantial interference with the appellant's family life.".*

23. In my judgment, in reaching his decision Judge Mehta failed to recognise that this is a 'family reunion' appeal and more importantly, that there is at least the possibility that as far as any application for entry clearance

that is now made is concerned, paragraph 9.8.3A operates such that the application for entry clearance, may be refused because of the finding that the appellant used deception in relation to a previous application (whether or not successfully). Judge Mehta appears to proceed on the basis that a short period of separation whilst a further application for entry clearance is made from Sudan would not be disproportionate. It seems likely however that it will not simply be a short period of separation and there could be prolonged separation.

24. In my judgement, the decision of Judge Mehta is therefore vitiated by a material error of law and must be set aside. I preserve the findings that:

a. The application for entry clearance falls for refusal under the general grounds for refusal set out in paragraph 320(7A) of the immigration rules in force on 30th November 2019. False documents have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), in relation to the application or in order in support the application.

b. The appellant satisfies the requirements for leave to enter as the partner of a refugee as set out in paragraph 352A of the immigration rules.

c. The appellant has established a family life with her sponsor.

Remaking the decision

25. The appellant has appealed the respondent's decision to refuse her application for entry clearance, under s.82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s.6 of the Human Rights Act 1998.

26. The central issue in this appeal is whether the decision to refuse leave to remain is proportionate to the legitimate aim. In a human rights appeal,

although the appellant's ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.

27. Here, the appellant satisfies the requirements for leave to enter as the partner of a refugee. However, the application cannot succeed under the immigration rules because it falls for mandatory refusal under the general grounds on which entry clearance is to be refused as set out in Part 9 of the Immigration Rules.

28. I have carefully considered whether the decision to refuse the appellant leave to enter is nevertheless disproportionate. The ultimate issue is whether a fair balance has been struck between the individual and public interest; GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630. In reaching my decision, I have had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest. I also acknowledge the strong public interest in ensuring that those that provide false documents in support of an application are unable to benefit from their deceit and the deception they perpetrate. As Rix LJ said in AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773, where a false document is submitted, the mere fact that a dishonest document has been used for

such an important application is understandably, a sufficient reason for a mandatory refusal, whether or not to the applicant's knowledge. Judge Mehta was not satisfied that Mr Ahmad had given a credible account that he would send money to the appellant without obtaining a receipt or that he would not ask for and keep documentary evidence of the money transfers.

29. The sponsor, as a recognised refugee, cannot be expected to continue his family life in Sudan. Although a further application for entry clearance may be possible in light of the findings made by Judge Mehta regarding the appellant's relationship with her sponsor, there is a likelihood that the application would now fall for refusal. Any application now made would be subject to Part 9 of the Immigration rules and part 9.8.3A of the rules now provides that an application for entry clearance may be refused where a person used deception in relation to a previous application (whether or not successfully). Accordingly, the refusal of entry clearance has the effect of severing the relationship between the appellant and sponsor.

30. This is a human rights appeal that is to be decided at the date of the hearing. In refusing the appellant's entry clearance application, the respondent's doubts about the appellant's relationship with the sponsor arose from the fact that she had submitted money remittance receipts which were not genuine. However, Judge Mehta was satisfied, despite the false receipts, that the appellant's relationship with the sponsor existed before the sponsor left Sudan and that the relationship was a genuine and subsisting one. That finding is not challenged by the respondent. I am just persuaded that on the particular facts of this case, although the application could not succeed under the immigration rules, the public interest does not require entry to be refused to the appellant.

31. In my final analysis, having considered all the evidence before me in the round, I find the refusal of entry clearance is a disproportionate

interference with the appellant's and sponsor's family life and is in breach of Article 8.

32. It follows that I allow the appeal.

Notice of Decision

33. I set aside the decision of First-tier Tribunal Judge Mehta promulgated on 20th September 2021.

34. I remake the decision and allow the appeal on the basis that the refusal of leave to remain is in breach section 6 Human Rights Act 1998 (based on Article 8 ECHR).

Signed **V. Mandalia** Date 22nd August 2022

Upper Tribunal Judge Mandalia