



Upper Tribunal

(Immigration and Asylum Chamber)
OA/07836/2014

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
Promulgated

Decision & Reasons

On the 18th March 2016

On the 6th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS FIZA SOHAIL
(Anonymity direction not made)

Claimant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: No attendance

For the Secretary of State : Mr Harris (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge D. Wilson, promulgated on the 10th April 2015, in which he allowed the Claimant's appeal under the Immigration Rules in respect of

her application for entry clearance as the partner of a British citizen under Appendix FM of the Immigration Rules. For the sake of clarity in this decision, although it is the Secretary of State's appeal, the Secretary of State will just be referred to as the "Secretary of State" and Mrs Sohail will be referred to as "the Claimant".

2. Permission to appeal in this case has been granted by Upper Tribunal Judge Goldstein on the 8th September 2015, in which he noted that the Claimant had originally been refused entry clearance by the Entry Clearance Officer on the ground that the ECO was not satisfied that the Claimant's marriage was genuine and subsisting. Judge Goldstein granted permission to appeal on the basis it was arguable that the First-tier Tribunal Judge:
 - a) failed to adequately consider the intentions of the Claimant towards the marriage, not least in the absence without explanation, of a witness statement from her;
 - b) failed to adequately reason his finding that the marriage was genuine and subsisting, in circumstances where the evidence of the Sponsor was that the relationship would only subsist if the Claimant was granted entry clearance.
3. Judge Goldstein found it was arguable that the Judge failed to give adequate reasons for his finding on material matters, and arguably erred as to whether or not he was entitled in law to seek to reach the conclusions he did for the reasons given. Permission to appeal was granted on all grounds.
4. Within the original grounds of appeal seeking permission to appeal to the Upper Tribunal it was argued that the First-tier Tribunal Judge made a material misdirection in law in failing to consider the intentions of the Claimant towards the marriage when there is no witness statement from her or an explanation for this. It is argued that the intentions of both parties were of equal importance and the Judge failed to consider the Claimant's intentions thereby committing an error of law and that in the absence of a witness statement from the Claimant, the Judge erred in

finding the marriage was genuine and subsisting. Within the second ground of appeal it is argued that at [28] it was recorded that the sponsor confirmed that it would only be a subsisting relationship with the Claimant, if the Claimant was allowed to come to the UK and it is said that this demonstrated that to the sponsor living in the UK, living in the UK is more important than living with his spouse in a genuine and subsisting marriage. It is argued the Judge failed to consider this evidence when making his finding in respect of the genuine and subsisting nature of the marriage, and that the marriage must be genuine and subsisting in order for entry clearance to be issued rather than the other way round. It is argued that that if the sponsor is not prepared to live with the Claimant in Pakistan, this is not consistent with a genuine commitment to the marriage.

5. Within the renewed grounds of appeal to the Upper Tribunal the same two grounds of appeal argued. It is further argued that it was not possible to make reasoned finding on the Claimant's intentions towards the marriage in the absence of a witness statement from the Claimant.

6. Although no one attended at the appeal on behalf of the Claimant, I did consider it was in the interests of justice to proceed in the absence of the Claimant or sponsor under the Upper Tribunal Procedure Rules, given that notice of the proceeding had been sent to both the Claimant and the sponsor indicating the appeal was to be heard on Friday 18th of March 2016 at 10 a.m. on the First Floor Piccadilly Exchange, 2 Piccadilly Plaza, Mosley Street, Manchester, by notice of hearing issued and sent on the 8th February 2016. No explanation was given for the failure on part of the Claimant or her sponsor to attend, and in the absence of good reason for the failure to attend, I consider that it was in the interests of justice to proceed in the absence. However, do bear in mind this is still for the Secretary of State to prove that the First-tier Tribunal Judge materially erred in law, and this cannot be simply assumed as a result of the absence of the Claimant at the appeal hearing.

7. In his oral submissions before the Upper Tribunal, Mr Harris relied upon

the grounds of appeal and the grant of permission to appeal. He argued that the Judge failed to take account of the fact that there was no witness statement from the Claimant and that the Judge was wrong to find that both parties had genuine intentions towards marriage in the absence of the statement from her. He did however concede that the Judge did have the Claimant's application which had a signed statement of truth and which included a declaration of the intention of the Claimant to live in the UK with her sponsor, and that document was evidence before the First-tier Tribunal Judge. However, he argued that the couple met 3 to 4 days before the arranged marriage and then stay together for just 19 days before the sponsor returned to the UK and after that an application was made for the Claimant to come to the UK to join him. He said that there is no evidence or suggestion that the marriage was not valid, but that the Claimant could not show a subsisting marriage. He argued that the sponsor had said in evidence that if the Claimant was not granted entry clearance to come to live with him in the UK that there will not be a subsisting marriage.

My findings on error of law and materiality

8. In respect of the submission that the Judge failed to properly consider the intention of the Claimant towards marriage in light of the fact there is no witness statement from her or explanation for this, I do bear in mind that the First-tier Tribunal Judge did have as evidence before him the application for entry clearance made by the Claimant herself, in which at question 1.18 the Claimant had ticked "yes" in answer to the question "do intend to live your sponsor permanently?" and at question 2.1 had given the address she and her sponsor intended to live together in the UK. This application form was completed by the Claimant seeking entry clearance as a spouse of someone settled in the UK and further within that application form she gave evidence as to their contact in terms of Skype, and WhatsApp, she gave the date and place when they married on 29th October 2013 in Lahore, Pakistan, and detailed how they lived together as husband and wife under one roof after getting married on 29th October 2013 till the sponsor left for the UK on the 11th November 2013. This was evidence from the Claimant was before the Judge and the First-tier Tribunal Judge was entitled to take that evidence into account in regards

to the Claimant's own intentions, as he has clearly done within the decision. There is no legal requirement for the Claimant to also file and also of a witness statement in addition to the contents of her application form. The application form itself was evidence that the Judge was entitled to take account of in respect of her intentions, and it is perfectly clear having read the decision, that he has relied upon the contents of her application form and in particular her evidence therein as to her intention to live permanently together with the sponsor, evidence therein as to the address at which they intend to live in Manchester, and her evidence therein as to how they maintained contact and how they lived together under one roof after their marriage until the time when the sponsor came back to the UK.

9. Further, the Judge heard evidence from the sponsor in the UK, the Claimant's husband. He was perfectly entitled to assess the evidence of the sponsor, not only with regards to his own intentions, but also in regard to his evidence as to the intentions of the Claimant. It is not an error of law for the Tribunal to believe a witness. In this regard, in giving evidence the sponsor had talked about how he and his wife communicated via modern forms of communication and how the Whataspp messages were contained within the Claimant's bundle onwards, which the Judge noted in his decision. Further the Judge also referred to the text messages and phone calls made between between 14 December 2013 and the 3rd January 2014 within the bundle and the electronic messages between A41 and A49. The Judge also made reference to the financial support provided by the sponsor to the Claimant.

10. On the basis of all this evidence the First-tier Tribunal Judge found that he was satisfied that the relationship between the Claimant and sponsor was genuine and subsisting and they intended to the Claimant in UK. In light of the evidence this was a finding that was open to him on the evidence. There is no requirement for the Claimant to submit a further statement, although the Judge did clearly take into account the fact that he found it surprisingly that there was not statement from the sponsor at [46]. However, he has given clear and adequate and sufficient reasons for his findings that the marriage was genuine and subsisting and that the parties

intended to live permanently together in the UK.

11. In respect of the second ground of appeal in respect of the comments of the sponsor recorded at [28] of the decision that "He was asked what would become of the marriage if the appeal was unsuccessful. He said that it would be a problem. He would like his wife to come and join him. He has no intention of residing in Pakistan. He lives in the United Kingdom. He was asked if it was the case that there would only be a subsisting relationship if his partner is allowed into the UK United Kingdom and he confirmed this was correct". It is argued that the Judge had failed to take account of this to determine whether or not the parties were subject to a subsisting marriage and whether they did genuinely intend to live together in the UK.
12. The Judge in determining whether or not the marriage is subsisting has to consider this, as was agreed by Mr Harris on behalf of the Respondent, as at the date of the appeal hearing. There are two separate tests that have to be overcome in determining whether or not the marriage is subsisting, and whether or not the parties intend to live together permanently in the UK. The Claimant has to prove that she and her sponsor were in a subsisting relationship as at the date of the appeal hearing and they also need to establish and prove on the balance of probabilities that they intend to live permanently together in the United Kingdom. These are separate tests. The question as to whether or not a marriage is subsisting has to be established as at the date of the decision and relates to the state of the marriage as at that date. The question as to whether they intend to live permanently together in the United Kingdom relates to future intention. Both elements have to be proved.
13. The fact that circumstances may occur in the future which may mean that the relationship breaks down, does not determine whether or not the marriage was subsisting as at the date of the appeal hearing. On the basis, on the evidence before the Judge he was perfectly entitled to find the marriage was genuine and subsisting as at that date.

14. The evidence that the sponsor would not want to live with the Claimant in Pakistan, but would want to live permanently with her in the UK again was sufficient for the judge to find that they did intend to live permanently together in the UK. The requirements of the Rules required them to have an intention to live together permanently in the UK, and did not require that they intended to live together permanently in a different country. The findings of the Judge were perfectly open to him on the evidence before him.

15. The decision of First-tier Tribunal Judge D. Wilson therefore does not contain a material error of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge D. Wilson does not contain a material error of law and is maintained.

Signed

R McGinty

Deputy Judge of the Upper Tribunal McGinty
2016

Dated 18th March