Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11318/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 16 February 2016	**On 3 March 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

Nargis Mohammadi
[No anonymity direction made]

Appellant

and

Entry Clearance Officer New Dehli

Respondent

Representation:
For the appellant: Mr R Ahmed, instructed by Immigration Advice Service
For the respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Nargis Mohammadi, date of birth 15.10.88, is a citizen of Afghanistan.

2. This is her appeal against the decision of First-tier Tribunal Judge Carlin promulgated 1.5.15, dismissing on all grounds her appeal against the decision of the Secretary of State, dated 21.8.14, to refuse her application for entry clearance to the United Kingdom as a partner, pursuant to Appendix FM of the Immigration Rules. The Judge heard the appeal on 27.3.15.

3. First-tier Tribunal Judge Osborne refused permission to appeal on 16.7.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kopieczek granted permission to appeal.

4. Thus the matter came before me on 16.2.16 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out herein, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Carlin to be set aside and remade by allowing the appeal.

6. In granting permission to appeal, Judge Kopieczek considered it arguable that the First-tier Tribunal Judge made the assessment of the genuineness of the relationship on the basis of personal assumptions about what level of contact, etc., he would expect to see.

7. Despite granting permission, Judge Kopieczek stated, "the appellant will have to counter the argument that the grounds in fact amount to no more than a disagreement with the judge's assessment of the evidence." This was also the thrust of Mr Mills' submissions, reflecting the Rule 24 reply dated 15.9.15, which stated, "The grounds have no merit and merely disagree with the adverse outcome of the appeal. The Judge considered all the evidence that was available to him and came to a conclusion open to him based on that evidence and the rules, based on the balance of probability and does not disclose any error."

8. At §19 of the decision the judge relied on the fact that there had been only one visit by the sponsor to the appellant since their marriage and month together in Afghanistan in 2012 as an indication that the relationship was not genuine and subsisting. The judge rejected his explanation that he did not make more visits because he was afraid that he might lose his employment. The judge pointed out that Mr Mohammadi was in full-time employment from October 2013 and would have had sufficient vacation time to make a visit. However, it is submitted that the judge failed to take into account the sponsor's witness statement at A1, which explained the delay in making the entry clearance application was because of the need to meet the financial requirements of Appendix FM. As a taxi driver he had to show 12 months earnings and this would be difficult to accomplish if he spent time outside the UK. I am not satisfied, however, that this demonstrates any error of law. The judge was entitled to take into account as part of the assessment of the evidence as a whole that there had been only one visit since 2012.

9. Although he had somewhat of an uphill struggle, I find that Mr Ahmed very carefully demonstrate that the remaining grounds were more than a mere disagreement with the outcome of the appeal. He first pointed out all the factors that the judge found in favour of the appellant, as set out under the heading of 'Findings of Fact,' between §5 and §11 of the decision, including that they had lived together after marriage and that the sponsor had returned to Afghanistan once since the marriage.

10. In particular, my attention was drawn to §10 the judge stated, "Since they were married, the appellant and Mr Mohammadi have kept in contact by telephone. They

generally speak over the telephone two or three times per week." This was not a submission but a finding of fact.

11. Despite that finding, however, at §18 the judge took the view that if the relationship had been genuine and subsisting he, "would have expected there to be more frequent telephone calls," and concluded, "the appellant had not satisfied me to the requisite standard that there had been the frequent contact by telephone that I would expect between a married couple such as the appellant and Mr Mohammadi."

12. After detailing other evidence of contact, at §23 the judge stated that the contact between the appellant and the sponsor, "was what might be expected of reasonably close friends or relatives. It was not the type of contact, given the nature and frequency, that might be expected of husband and wife."

13. Mr Mills sought to suggest that §10 was not a finding of fact but a summary of the appellant's submissions, but accepted that if it were a finding of fact it would be difficult to justify the judge's conclusion on the issue of frequency of contact.

14. Whilst the judge was entitled and indeed required to make an assessment on the evidence as to whether the relationship was genuine and subsisting, it appears that the judge adopted a highly personal and therefore subjective view or assumption as to how frequently a married couple in such circumstances should speak by telephone or make other contact. The judge does not explain why telephoning two or three times a week was insufficient, or what frequency, in his view, would be sufficient to demonstrate a genuine and subsisting relationship, and why. In this respect, I accept the submission of Mr Ahmed that the judge's approach was misconceived and in fact inconsistent with the findings of fact. In the circumstances, I find the decision flawed for error of law.

15. In remaking the decision, it requires nothing more than to refer to the findings of fact set out between §5 and §11 of the decision. On those findings alone, there is more than ample evidence to demonstrate on the balance of probabilities that this is a genuine and subsisting relationship.

Conclusions:

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it.

Signed
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Signed
Deputy Upper Tribunal Judge Pickup

Dated