Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17448/2012

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 21 March 2014 and 10 June 2014	**On 7th July 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

MAHA TAHIR SAEED BOY

Appellant

and

THE ENTRY CLEARANCE OFFICER - CAIRO

Respondent

Representation:

For the Appellant: Mr G Hodgetts instructed by South West Law (on 21 March) and Mr D McConnell (on 10 June)
For the Respondent: Mr I Richards (on 21 March) and Mr T Wilding (on 10 June), Home Office Presenting Officers

DETERMINATION AND REASONS

1. The appellant is a citizen of Sudan who was born on 1 January 1988. On 27 June 2012, she applied for entry clearance to join her spouse, Jafar Osman Bassi who is a British citizen. On 31 August 2012, the Entry

Clearance Officer refused the appellant's application under paragraph 281 of the Immigration Rules (HC 395 as amended). The ECO was not satisfied that the appellant met the requirements of paragraph 281 of the Rules:

(1) the English language requirement (para 281(i)(a)(ii));

(2) that the appellant and sponsor were validly married (para 281(i)(a)(i));

(3) that their marriage was a genuine and subsisting one and that they intended to live together permanently as spouses in the UK (para 281(iii));

(4) that adequate accommodation was available to them (para 281(iv)); and

(5) that they would be adequately maintained in the UK without recourse to public funds (para 281(v)).

The First-tier Tribunal

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 16 May 2013 Judge A D Baker dismissed the appellant's appeal under para 281. It was conceded before Judge Baker that the appellant met the English language requirement of paragraph 281(i)(a)(i) and, on the evidence before her, the Judge accepted that the appellant also met the maintenance and accommodation requirements in paragraph 281(iv) and (v). However, Judge Baker was not satisfied that the appellant and sponsor were validly married or that their marriage was a genuine and subsisting one and that they intended to live together permanently as spouses in the UK.

The Hearing Before the Upper Tribunal on 21 March 2014

3. The appellant sought permission to appeal to the Upper Tribunal. On 19 June 2013, the First-tier Tribunal (Judge Kamara) granted the appellant permission to appeal. Thus, the appeal came before us on 21 March 2014.

4. At that hearing, Mr Hodgetts who represented the appellant, submitted that the Judge had erred in law in a number of respects. First, she had erred in concluding that the parties' marriage was not genuine. The Judge was wrong to disregard the original marriage certificate submitted at the hearing by the appellant. Mr Hodgetts submitted that at paragraph 15 of her determination, Judge Baker had misdirected herself when she had said:

> "I do not accept that the appellant's production now of the original certificate meets the requirements in circumstances where there has been a challenge to the validity of the Rule. As pointed out by the Home Office Presenting Officer, the submission of the original certificate was to allow

> the Entry Clearance Officer to examine it in order to determine whether it could be accepted."

5. Mr Hodgetts submitted that there was no requirement in law or under the Rules to submit an original certificate of marriage before a marriage could be accepted as valid. In any event, section 85(5) of the Nationality, Immigration and Asylum Act 2002 contemplated the Tribunal considering evidence relevant to the circumstances appertaining at the date of decision which had only been submitted at the appeal hearing. Relying on the grounds, Mr Hodgetts submitted that the Judge had erred in law in failing to examine and consider for herself whether the marriage certificate could be relied upon in the light of the fact that the ECO had produced no evidence (through verification procedures) that the marriage certificate was not genuine.

6. Secondly, Mr Hodgetts submitted that Judge Baker had erred in law in reaching her conclusion that the parties' marriage was not genuine and they did not intend to live together permanently as spouses. Mr Hodgetts submitted that it was irrational not to take into account that the parties had, subsequent to their claimed marriage met on two occasions. First, there was a joint visit of some two months between March and May 2012 in Cairo which was supported by the evidence and appeared to be accepted by the Judge at para 16 of her determination. Secondly, there was a joint visit again in Cairo of about a month from early January 2013 until early February 2013.

7. Further, Mr Hodgetts submitted that the Judge had failed to take into account all the evidence contained in the appeal bundle that demonstrated "intervening devotion" and financial support of the appellant by the sponsor. As regards the former, Mr Hodgetts submitted that the Judge had only referred to three emails (one of which she had found unreliable) when, in fact, there were a number of emails at pages 81-93 of the bundle. He submitted that the Judge had also failed to take into account evidence of phone calls made between the couple set out in the phone bill at pages 37-47. Finally, as regards financial support, Mr Hodgetts relied on the financial remittances between the sponsor and appellant at pages 26-37 of the bundle; none of which, he submitted, had been taken into account by the Judge.

8. On behalf of the ECO, Mr Richards submitted that the Judge was obviously in some difficulty when the marriage certificate was produced on the day of the hearing. He submitted that there was no error on the Judge's part to reject that document. As regards the subsistence of the marriage, he submitted that even if another Judge could have made a different conclusion it was not established that Judge Baker's finding was not properly open to her.

9. At the conclusion of the submissions at the hearing on 21 March 2014, we indicated to the parties that we were minded to find an error of law in the Judge's conclusion that the parties' marriage (if valid) was not a genuine

and subsisting one and that they had no intention to live together permanently. We indicated that we were minded on the evidence to reverse that finding of fact. However, we indicated that we were troubled by the fact that the certificate of the marriage had not been authenticated.

10. In the light of that, we decided to adjourn the hearing in order to give the ECO an opportunity to authenticate (or otherwise) the genuineness of that document. We directed that the ECO should have 8 weeks to carry out that process. We directed that the ECO should by Friday 16 May send to the Vice President's Office at Field House the results of the authentication process and serve them on the appellant's representative. Thereafter, by 30 May 2014, the appellant, through her representatives, should make any response to be sent to the Vice President's Office at Field House and to the Presenting Officer, Mr Richards at the Cardiff Office.

11. In the result, no communication (whether in the form of a verification report or other representations) was made by the ECO by Friday 16 May.

The Hearing Before the Upper Tribunal on 10 June 2014

12. Consequently, the appeal was listed for a 'for mention' hearing before UTJ Grubb on 10 June 2014.

13. At that hearing, Mr Wilding (who then represented the ECO) informed the Tribunal that no verification report had been received from the ECO in Cairo. He indicated that a request had been made on 2 April, following the initial hearing and that had subsequently been chased up by the Presenting Officer's Unit in Cardiff on 9 May and 5 June but no response had been received from the ECO

14. In the light of that, Mr Wilding invited UTJ Grubb to further adjourn the appeal in order to give the ECO more time. Mr McConnell (who then represented the appellant) invited the Upper Tribunal to determine the appeal. UTJ Grubb concluded that the ECO had had ample opportunity, including two reminders from the Presenting Officer's Unit, since the previous hearing to obtain and file in accordance with the UT's direction a verification report or other evidence dealing with the authentication of the parties' claimed marriage certificate. It was not, in the circumstances, appropriate to exercise discretion to further adjourn the hearing. The Upper Tribunal would, therefore, determine the appeal on the basis of the submissions made at the previous hearing.

Discussion

Error of Law

15. As regards the validity of the parties' marriage, we accept Mr Hodgetts' submissions that the Judge was wrong to conclude in paragraph 15 that the appellant could not rely upon the original marriage certificate produced at the hearing for the first time simply because it had not been

produced earlier. The Judge was, in our view, entitled to take that fact into account but was required to consider the reliability of the document in the light of all the evidence. She could not disregard it out of hand simply because it had not been produced earlier. Indeed, one practical way forward might have been, as it was for us at the earlier hearing, to allow time for the ECO to carry out enquiries and produce such evidence as the ECO wished on the authenticity or genuineness of the document. It does not appear that any such application was made by either party before the Judge in this appeal. However, as we have said, in our view the Judge erred in law by simply disregarding this piece of evidence which was before her.

16. Secondly, it is clear to us that, whilst the Judge gave a number of reasons for not accepting the genuineness of the parties' marriage and that their intentions were to live together permanently as spouses, in doing so she failed to take into account relevant evidence to those issues.

17. In her determination, Judge Baker referred to three emails between the parties. As we have said, she found one of those emails to be unsatisfactory. However, at pages 81-93, there were a number of emails between December 2010 and January 2013 showing contact between the parties consistent with a genuine and loving relationship. In addition, at pages 37-47 there is a phone bill covering the period 11 June 2012 to 10 August 2012 showing, it is claimed, a telephone number linked to phone card calls abroad (see page 36 of the bundle) and which, at least for that period, offers support to there having been contact between the parties. It does not seem to have been suggested before Judge Baker, nor was it before us, that the calls do not relate to contact between the parties. Finally at pages 26-34 there are a number of documents including Western Union remittances showing payments by the sponsor to the appellant over a period of time between June 2009 and April 2013.

18. In failing to take this evidence into account in reaching her finding, Judge Baker erred in law.

19. For these reasons, her findings in relation to the validity of the parties' marriage and as to whether their marriage is genuine and subsisting and that they intend to live together permanently cannot stand and we set them aside.

Re-making the Decision

20. We now turn to remake the decision. We remind ourselves that the burden of proof is upon the appellant to establish on a balance of probabilities that she meets the requirements of para 281 of the Rules at the date of decision, namely 31 August 2012.

21. As we have already indicated, it was conceded before Judge Baker that the appellant met the English language requirement and Judge Baker's findings that the appellant met the maintenance and accommodation

requirements of para 281 are not challenged and stand. Therefore, the only outstanding issues relate to the validity of the marriage and the genuineness of the parties' relationship and their intentions.

22. As regards the former, the appellant has submitted a bi-lingual marriage certificate from the Elfashia Family Court in Sudan dated 30 November 2010 stating that on 10 November 2010 the sponsor and appellant were married. Whilst we accept that it is for the appellant to establish the validity of her marriage, despite being afforded ample opportunity to do so, the ECO has not adduced any evidence as to the authenticity or otherwise of this document. It is for us to consider the reliability of this document in the light of all the evidence. Nothing was drawn to our attention that suggested that this document was other than genuine and it seems to us that in these circumstances a decision-maker is driven to accept it as what it purports to be .

23. We turn, therefore, to consider the evidence in relation to the genuineness of the parties' relationship. The parties' evidence was that they had met on two occasions and, in effect, lived together during those periods following their marriage. The first occasion was between 14 March 2012 and 9 May 2012 when they travelled to Cairo and stayed together for about two months. The second occasion, again in Cairo, was between 8 January 2013 and 11 February 2013, a period of just over one month. We do not agree with Judge Baker's assessment (at para 20) that these visits do not "go to substantiate" the claim that their relationship is subsisting. The evidence is clearly consistent with them having a subsisting relationship given the cultural context in which they have lived. It would be rather surprising if an unmarried woman and man originating from Sudan, a Muslim country, would, if not married and having a genuine relationship, spend periods of time of this sort living together in a third country. The appellant and sponsor also gave evidence that following their marriage they went to Khartoum for their honeymoon where they stayed in a hotel and it was there that the "studio" photographs were taken.

24. Further, there is the evidence of intervening devotion in the form of phone calls and emails. Even if Judge Baker's criticism of one of the three emails she considered has merit (see paras 20-23), that has to be seen in the context in the bulk of the evidence which has not been challenged by the ECO.

25. Further, there is also the evidence of financial remittances made by the sponsor to the appellant which are also consistent with a commitment to one another supporting the evidence of both the appellant and sponsor that they are genuinely married, that their relationship is subsisting and that they intend to live together permanently as spouses in the UK. We note, as Judge Baker did in her determination, that there are no wedding photographs and no supporting evidence from family members concerning the marriage or any evidence of the marriage ceremony itself. The photographs submitted by the appellant, it is accepted, were taken at

a “studio”. In reaching our findings, we take into account the explanation given by the sponsor in his oral evidence in which he frankly accepted that they had no photographs of the actual wedding.

26. Looking at the evidence as a whole, the preponderance of it is supportive of the evidence of the appellant and sponsor that they are genuinely married and intend to live together permanently. The evidence of intervening devotion exists and does not, in our judgement, appear to be contrived or manufactured in order to support an otherwise false claim. We accept the evidence of their post-marriage visits as supportive of their accounts. They have produced what is claimed to be an original marriage certificate and which stands unchallenged by any evidence from the ECO. We consider its reliability in the light of all the evidence. We find it to be a reliable document.

27. We find, on a balance of probabilities, that the appellant has established that she is validly married to the sponsor and that their marriage is genuine and subsisting and that they intend to live together permanently in the UK as spouses. The appellant has, therefore, established the requirements in para 281(i)(a)(i) and (iii). As we have already indicated, it was either conceded before Judge Baker or Judge Baker found as satisfied that the appellant met the remaining requirements of paragraph 281. Consequently, we find that the appellant, at the date of decision, met the requirements of para 281 of the Rules.

Decision

28. The decision of the First-tier Tribunal to dismiss the appellant’s appeal under para 281 of the Rules involved the making of an error of law. That decision is set aside.

29. We remake the decision allowing the appellant’s appeal under para 281 of the Rules.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

TO THE RESPONDENT
FEE AWARD

Having allowed the appeal under the Immigration Rules, we consider it appropriate to make a full fee award.

Signed

A Grubb
Judge of the Upper Tribunal

Date: