IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17472/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 8th May 2015	**On 19th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MRS TAHMINA KHANUM SONY
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Brown of Counsel
For the Respondent: Miss Johnstone

DECISION AND REASONS

Introduction

1. The Appellant born on 20th July 1990 is a citizen of Bangladesh. The Appellant was represented by Mr Brown of Counsel. The Respondent was represented by Miss Johnstone, a Home Office Presenting Officer.

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Substantive Issues under Appeal

2. The Appellant had made application for entry clearance to the United Kingdom as the spouse of Mr Fahem under Appendix FM of the Immigration Rules. The Respondent had refused that application for a number of reasons as outlined in paragraph 3 of the judge's determination. The Appellant had appealed that decision and her appeal was heard by First-tier Tribunal Judge McAll sitting at Manchester on 4th July 2014. The judge had dismissed the appeal under both the Immigration Rules and on human rights grounds.

3. The Appellant had made application to appeal that decision and that application was initially refused by Designated First-tier Tribunal Judge Murray on 25th September 2014. The judge gave full reasons for his decision to refuse. The application was then repeated and permission to appeal was granted by Deputy Upper Tribunal Judge Bruce on 20th February 2015 on the basis that it was arguable the Tribunal had failed to consider the nature of the marriage within an appropriate cultural context under **GA [2006] UKAIT 00046**.

4. The Respondent had opposed the appeal but somewhat unusually within the response letter had themselves pointed to what was said to be two separate errors of law made by the judge in terms of his consideration of an English language certificate and maintenance generally. In many ways therefore this was an application made by both parties asserting an error of law had been made by the judge. Directions were set for me consider firstly whether an error of law had been made and the matter comes before me in accordance with those directions.

Submissions on behalf of the Appellant

5. Mr Brown submitted in terms of the Grounds of Appeal that the judge had failed to consider the cultural background of the parties in accordance with the guidance in **GA Ghana [2006]** and **Goudey [2012] UKUT 00041**. It was submitted that the demonstration of contact was sufficient to show that the marriage was subsisting.

Submissions on behalf of the Respondent

6. Miss Johnstone submitted that no error had been made by the judge in his conclusion that this was not a genuine and subsisting marriage. In terms of essentially a cross-application it was submitted that as a result of the two refusal letters and the review letter by the Entry Clearance Manager it was entirely clear that two matters had been put in issue namely whether the Appellant met the English language requirement and secondly maintenance and the proof of documentation in support of income. It was submitted the judge had not dealt adequately or at all with those two matters.

7. At the conclusion of the submissions I reserved my decision to consider the submissions and the documents provided.

Decision and Reasons

8. It was agreed evidence in this case that a valid marriage had taken place between the Appellant and the Sponsor on 28th March 2012. It was further agreed that following that marriage the parties had been together until the Sponsor returned to the UK on 14th April 2012. The issue taken by the Respondent was that there was an insufficiency of evidence of direct or indirect contact since April 2012 to demonstrate that this was a subsisting marriage.

9. The date of decision in this case is 1st July 2014. The application had been made as early as May 2013 and although the Entry Clearance Officer's refusal was dated 4th August 2013 that did not decide on all issues because the Entry Clearance Officer in this case (as occurred in many cases) postponed a decision on the financial income threshold to await an outcome of the appeal in the case of **MM**. The second and concluding refusal letter and the Entry Clearance Manager's review took place on 1st July 2014.

10. The judge had found for reasons given at paragraphs 17 to 25 that this was not a subsisting marriage. In particular at paragraph 21 he had found that the Appellant had failed to establish that she had had regular contact with the Sponsor since the date of their marriage. That, on the evidence available was inaccurate. There was evidence of indirect contact and evidence of financial support for a period of about twelve months from August 2013 to about May 2014. Further there had been a visit to the Appellant in Bangladesh for a six week period in September/October 2013.

11. It is in respect of this visit that the grounds criticise the judge for not considering **GA** on the basis that had the marriage not been subsisting then within the culture of Bangladesh the parties would not have lived together. In **GA** at paragraph 14 the Upper Tribunal stated:-

> "An Immigration Judge when the subsistence of a marriage will plainly have to bear in mind the cultural context and the wide differences that exist between individual lifestyles, whether by choice, or by circumstances, or by economic necessity. He will also be able to put the claim into the context of the history of the relationship and to assess whether and to what extent this illuminates the nature of the parties' present relationship and future intentions."

Quite understandably there is no expansion on that loose phrase cultural context and it seems clear from paragraph 14 of **GA** and the context in which it was written that the Upper Tribunal was merely stating the point that whilst it may be difficult to assess what is in the minds of individuals that is nevertheless a task for an Immigration Judge to perform. The culture of a particular country or race is an extremely difficult matter. On the one hand there are no doubt individuals, and there may be many, who defy cultural expectations. Secondly to assume that all or most individuals fit into the stereotype of a perceived culture is potentially patronising and speculative.

12. In this case it was agreed that the Appellant and Sponsor had entered into an arranged marriage in 2012 and that at the time of the Sponsor's visit to Bangladesh in

September/October 2013 they remained married and the visit came a few months after the Appellant's application to join her husband in the UK. The fact that the Appellant and Sponsor may have lived together in September/October 2013 at a time when they are lawfully married seems hardly worthy of note and the Grounds of Appeal are merely speculative and misconceived.

13. However the judge in this case does not appear to have taken any or any proper account of that visit and seems to be demanding a rather strict and significant level of evidence to demonstrate continuing contact between the parties over what is a relatively short period and set against the accepted background that the parties had entered into and remained within a valid legal marriage. There was an error of law made in the judge failing to adequately take account of the visit and the evidence of contact available and to give that due weight when considering the question of subsistence of the marriage.

14. The Respondent raises two features within the decision in submitting the judge made errors of law unrelated to the above matter. Firstly it is said the judge failed to take account of the relevant Immigration Rules in Appendix FM relating to proof of the English language requirements. It was agreed evidence that the Appellant had taken an English language test at a test centre in Bangladesh, but because of general concerns as to the reliability of that particular test centre the Respondent had not validated that test but instead had offered the Appellant an opportunity of taking a fresh test free of charge. The Appellant had availed herself of that opportunity and the judge referred to an email sent by the Appellant's solicitors claiming to enclose a photocopy of the relevant test certificate. The Respondent in their response state that that certificate was neither seen by the Presenting Officer or judge and referred to the email being sent in July 2014 and accordingly that was evidence postdating the decision in August 2013. The judge had relied on the email and the Appellant's own evidence to conclude that the test certificate had been sent to the Respondent. Whilst it is understandable the judge would assume the certificate had been attached to the email there was no evidence that the Appellant had passed the test to the appropriate level required nor had either the Respondent, Presenting Officer, or the judge seen an original certificate and to that extent the Appellant had not complied with the Immigration Rules and it was an error for the judge to have found that she had done so. The point made by the Respondent that the test certificate postdates the date of decision is entirely misconceived. Firstly, as indicated above the decision in this case was only concluded on 1st July 2014 and in any event in the Entry Clearance Manager's review letter he had explicitly invited the Appellant to retake a test free of charge, and in those circumstances to refuse to accept any evidence proffered from that test would be both unfair and dishonest. At the hearing before me I was shown the original test certificates. As I indicated to the parties at the hearing if I found errors of law had been made in this case which necessitated a rehearing it would be a matter of good sense for the Respondent prior to that hearing to examine the original certificates to see whether that remained an issue.

15. Secondly, the Respondent notes that the judge provided no adequate reason for accepting the remarkable increase in the Appellant's salary just prior to the

application and thereby allowing him to succeed on the income threshold and by inference the presentation documents required under Appendix FM-SE for the requisite period prior to the date of application.

16. The date of application in this case was May 2013 and it was therefore necessary for the Sponsor to demonstrate at the date of application he had an annual income of £18,600 or more. Further under Appendix FM-SE it was necessary for him to produce the required documentation to support that claimed income for the six month period prior to the date of application. It appears plain when looking at the Appellant's bundle before the First-tier Tribunal Judge that the documents provided by the Appellant did not cover the relevant six months prior to the date of application. Furthermore the P60 for the tax year April 2013 to April 2014, namely the year after the Appellant's application and at a time when the Appellant it is said had had a substantial increase in salary discloses an income of £16,032.87.

17. Unfortunately the judge dealt very superficially with the income requirements under Appendix FM and the documentary requirements under Appendix FM-SE. This was a case where both the claimed level of income and the available supporting documentary evidence as required needed careful examination. There has been an inadequate examination of that income level and supporting documentation which on the face of it would seem to suggest that at the relevant time the Sponsor failed to meet the income threshold and that documents produced in support are documents that postdate the relevant period required under Appendix FM-SE.

18. For all the above reasons I find that material errors of law were made in this decision such that the decision as a whole is rendered unsafe and needs to be remade afresh.

Notice of Decision

I find that material errors of law were made in this case and set aside the decision of the First-tier Tribunal and direct that this decision is made afresh.

Anonymity not retained.

Signed Date

Deputy Upper Tribunal Judge Lever