Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00391/2017

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunals	**Decision & Reasons Promulgated**
On 2nd March 2018	**On 19th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

[M Y]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: No legal representation
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Phull, promulgated on 13th November 2017, following a hearing at Birmingham on 24th October 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Afghanistan, who was born on [ ] 1995. She appealed against the decision of the Respondent dated 7th December 2016, refusing her application to join her husband, a recognised refugee in the United Kingdom by the name of [AY], under paragraph 352A of HC 395. The decision was upheld upon review by the Entry Clearance Manager on 5th March 2017.

The Appellant's Claim

3. The Appellant's claim was that she was applying under paragraph 352A of HC 395 on the basis of the family reunification policies. This fell to be applied to her under the Refugee Convention, as a consequence of her husband, [AY], being granted asylum. Since she was his wife, and could still prove, she is entitled also to join him in the UK.

4. The evidence before the judge on 24th October 2017 from the Sponsor was that,

> "The Appellant was part of his family unit because they married on 20th April 2010 before he fled Afghanistan. At the time his wife was 15 years old. They were married in accordance with their Islamic traditions and tribal culture and relatives on both sides attended the ceremony. The marriage was not registered with the state at the time" (paragraph 7).

5. Thereafter, the Sponsor fled Afghanistan and came to the UK and he applied for asylum, "but he did not disclose on his application form that he was married because some friends told him that as his wife was only 15 years old at the date of marriage this would not be looked at favourably" (paragraph 7). This was, in fact, the crux of the Appellant's difficulty.

6. The reason was that thereafter, although the Sponsor was then granted refugee status (see paragraph 8) the lack of documentary evidence confirming that he had indeed married his wife before he fled Afghanistan, together with his failure to so disclose, meant that he had an additional evidential burden to satisfy.

The Judge's Findings

7. The judge held that although she had an Islamic marriage certificate (pages 175 to 188 of the Appellant's bundle), which did give the date of marriage as 20th April 2010, it was nevertheless the case that the marriage certificate "does not give details of where the marriage took place" (paragraph 14). This was important to the determination of the judge because in her application form, the Appellant had stated (at page 119) that "she has been living in Pakistan as a refugee from Afghanistan" and it did appear that she had been contradicting her evidence of having lived and married in Afghanistan in 2010 (see paragraph 14).

8. The judge accordingly concluded that this was not a case of a pre-flight family reunion application to be determined under paragraph 352A of the Immigration Rules. If the Appellant could not succeed under the Immigration Rules then the only

question was whether there were exceptional circumstances outside the Rules, and in this respect, given that the Sponsor had been visiting the Appellant in Pakistan, there was no reason why this could not continue in the future, so that such exceptional circumstances were not proven on the facts of this case.

9. The appeal was dismissed.

Grounds of Application

10. The grounds of application state that further clarification could now be provided in terms of where the marriage took place because the English translation of the original marriage certificate had been incomplete and did not disclose the place of the marriage.

11. On 28th December 2017 permission to appeal was granted, but expressly on the basis only that, given that the judge had found that the couple were in a genuine and subsisting relationship, the judge ought to have considered whether there were insurmountable obstacles to family life being conducted elsewhere. The judge had, he said, concluded that the Appellant can continue visiting the Sponsor in Pakistan (which was a safe third country) and communicating through modern means of communication. Such approach, however, was contrary to the established jurisprudence now that certain relationships (for example between husband and wife or between parent and child) cannot meaningfully be conducted in this way.

The Hearing

12. At the hearing before me on 2nd March 2018, the Appellant was again not legally represented. Once again he had his brother, [MRY], who acted as a McKenzie friend. The Sponsor himself was clearly in a state of deep anxiety. Prior to the hearing he had to leave the courtroom because he had just suffered a panic attack. He had to be attended to, both by his relatives who accompanied him, and by the court usher. He was pacified, given a drink, and allowed to retain some composure, before he re-entered the courtroom to begin the hearing. It is not in contention that the Sponsor does suffer from deep anxiety and post-traumatic stress disorder because there is medical evidence to this effect. In the circumstances, he sat next to his brother, [MRY], who placed reliance upon the grounds of application dated 23rd November 2017 (which appear in the Respondent's bundle). On this basis, he made the following submissions.

13. First, that the political tension between Pakistan and Afghanistan now means that the majority of refugees had been forcibly evicted from Pakistan by the government there and that the Appellant and her parents-in-law also had to leave Pakistan in this way at the end of 2016. She was a non-documented Afghan refugee when she returned back to Afghanistan. From there she applied for a Pakistani visa that was valid for three months. This enabled her to return back to Pakistan legally and it was from there that she applied at the UK Embassy to join her sponsoring husband in the UK. However, once the three month visa had run out she was then forced to leave

Pakistan, was evicted from that country, and is now in Afghanistan, where she has been living ever since.

14. Second, that although the judge was correct in stating that the submitted marriage certificate did not show the place of the marriage, because the translation was a very poor translation into English so that such information was indecipherable, he did now have the original marriage certificate, with a full English translation. The marriage certificate confirms the location of the marriage as having taken place in Kabul District 5, and this was clear from the stamp, on the original marriage certificate. At the hearing itself, the Sponsor had confirmed precisely this, stating that the marriage took place in Puliwali which was the Logar Suburb of Kabul. Indeed, this location can be clearly found on the stamp itself which is put on the document. Puliwali in the Logar Province is in the outskirts of Kabul.

15. Third, thereafter the official marriage certificate, issued by the Afghan Consulate in Pakistan, is dated 18th June 2014, and this also contains the relevant details.

16. Fourth, that the Sponsor's wife, [MY], was indeed 15 at the time of the marriage, although she might have looked older as a result of her having put makeup on her face, but there was a wedding video which proved that she was actually much younger.

17. For his part, Mr Mills submitted that the rejection of this appeal was inevitable, because the application was made under the family reunion policy, as enshrined in paragraph 352 of the Immigration Rules, but at the hearing the Appellant failed to satisfy the judge that this was a pre-flight marriage, because the marriage certificate did not set out in a legible form the location of the marriage. That being so, the only way that the Appellant could now succeed was under the principles set out by the Supreme Court in **Agyarko**, but for this she would have to show that there were very compelling circumstances. This she cannot do. She may be in an invidious position but she is in no different a position to many others who cannot comply with the Immigration Rules and are forced back onto free-standing Article 8 jurisprudence.

18. In the Appellant's case, however, two options are now open to her, which are not in many other cases.

    (i) First, she had avoided applying under Appendix FM, because she did not want to have to show that her husband was earning the requisite £18,600 for a married couple, but this she could now do because her husband, the Sponsor, was registered disabled and was in receipt of disability allowance, such that he did not have to work because he could not work given his health condition.

    (ii) Second, given that the properly translated marriage certificates were now available, which did show that the location of the marriage ceremony was in the Puliwali District of the Logar Suburb in Kabul, she could actually make the same application again under the family reunion policy as

enshrined in paragraph 352 of the Immigration Rules, and she had a better chance of success.

Error of Law

19. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

20. First, and most importantly, this is a case where the judge has found that the Appellant and the Sponsor are in a genuine and subsisting relationship.

21. Second, the Sponsor has visited Pakistan a number of times (paragraph 18) where the Appellant was based, and the judge accepts that "They have lived together as husband and wife in Pakistan during his visits since at least 2013, and they maintain regular contact, evidence that is not challenged by the Respondent" (paragraph 22).

22. Third, and no less importantly, it is the case that the Sponsor, himself a refugee from Afghanistan, had seen his wife the Appellant, [MY], move from Afghanistan to Pakistan, and then return back to Afghanistan when she and her parents-in-law were evicted, being able to return only after she had procured a three month visa back to Pakistan, and when that had expired, she was forced to leave and return back to Afghanistan again. That, indeed, is where she continues to currently live.

23. Fourth, the prospect that the Sponsor is now evasive, therefore, is of having to exercise his "family life" rights with the Appellant by attempting to visit her (not withstanding his worsening ill health such that he has now been registered as disabled in the UK) not to Pakistan, but to Afghanistan, and that is a country from which, of course, he has fled and secured full refugee asylum status in this country. In short, it is not a country to which he can return.

24. It is in these circumstances that the question of "exceptionality" has to be considered. The definitive authority now is the Supreme Court case of **Agyarko [2017] UKSC 11**, where the court explained that,

> "The Secretary of State has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she had defined the word 'exceptional', as already explained, as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate" (paragraph 60).

25. The test accordingly, is whether it would be disproportionate, bearing in mind any unjustifiably harsh consequences for the Appellant and his wife, to the continuance of family life through, what the judge in this case referred to, as "contact by modern means of communication" (paragraph 24).

26. Whilst it may well in any event be argued that such an approach is not proportionate in circumstances where a husband and wife have lived together and enjoyed family

life together, which would have been the case when the Appellant and his young wife were living together as a married couple in Afghanistan shortly after the marriage, and also was the case, as the judge found when the Sponsor started visiting his Appellant wife in Pakistan in 2013 (at paragraph 22), the fact is that the Sponsor would not even now be able to make the occasional periodic visit to see his wife, because she has moved back to Afghanistan, from which country the Sponsor had fled as a refugee.

27. In this respect, **Agyarko** is once again helpful in setting out the correct approach:

> "If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the 'insurmountable obstacles' test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are 'exceptional circumstances'."

28. This is a case where there are plainly insurmountable obstacles to the Sponsor continuing to maintain a family life with his wife in any meaningful sense, and certainly not in the sense in which he has previously enjoyed when he was able to live with her, because he cannot return to Afghanistan where she is now based. Yet, the marriage is a genuine and subsisting one.

29. What they are facing are "very significant difficulties" in the continuance of their family life. This poses a very serious hardship for them and I accept that their circumstances in this situation are "exceptional circumstances" in the sense that there are unjustifiably harsh consequences, with the Appellant having been evicted back to Afghanistan, a country to which the Sponsor cannot return.

Remaking the Decision

30. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

31. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

32. No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Juss

Date
17th March 2018

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I make a fee award of any fee which has been paid or may be payable.

Signed
Deputy Upper Tribunal Judge Juss

Date
17th March 2018