



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07001/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24 May 2018

Decision & Reasons Promulgated
On 13 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SADIYA [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

v

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D. Bazini, counsel instructed by JJ Law solicitors
For the Respondent: Mr. L. Tarlow, Senior Presenting Officer

DECISION & REASONS

1. The appeal came before me for an error of law hearing on 19 March 2018, when an error of law was conceded by the Presenting Officer, Ms Ahmad, following submissions on the behalf of the Appellant. A copy of that decision is appended.

Hearing

2. At the hearing on 2 May 2018, I heard evidence from the Sponsor, with the assistance of a Somali interpreter. Mr Bazini reminded me that the Sponsor is a vulnerable witness by virtue of his mental health. The Sponsor confirmed that he had visited Ethiopia in 2017 and that he had stayed with his wife in Addis Ababa, in the Saris area and that he had stayed in a house that his wife rents, which is owned by an Ethiopian woman. His mother in law also stays there.

3. When asked what happens about his medication when he was in Ethiopia, the Sponsor said that he usually receives injections but there he took tablets. When asked when he last spoke to his wife, the Sponsor said that it was a few minutes ago and before that, last night. The Sponsor was then taken through photographs from his visit to his wife in 2017 and their wedding in 2008. When asked about his wife passing the English language test he said that this had taken her 2 or 3 years.

4. The Sponsor was cross-examined by Mr Tarlow, when he confirmed that he married the Appellant on 7 June 2008. He was asked how he met his wife and he said that when they were young they lived in the same place and were neighbours. When asked if the marriage was arranged he said that he started communicating with her about getting married in 2006 by telephone. Reference was made to the telephone records at page 42 of the original bundle and the Sponsor clarified that these show communication via text rather than by phone call but that now they do speak more on the phone than via texting. The Sponsor said that at the beginning they would speak 2-3 times a week and now the Appellant calls him using viber every 2 to 3 days. He confirmed that he had spoken to her whilst sitting and waiting outside the courtroom.

5. The Sponsor confirmed that he sent his wife money on a monthly basis and that he sent US \$250. He said that the money comes from his benefits, which comprise a Personal Independence Payment which replaced DLA of £204 and ESA, both of which he receives fortnightly and is paid into his bank account. This is shown at page 136 of the Appellant's bundle.

6. The Sponsor was asked why, when he married in 2008, the first entry clearance application was not made until three and a half years later and he responded that he got sick and was hospitalised. The Sponsor was then asked why the next entry clearance application was not made until 2016 and he stated that the benefits he was receiving stopped and he was made homeless and all these problems happened to him.

7. There was no re-examination.

8. In his submissions, Mr Tarlow sought to rely on the refusal dated 19.2.16. He said that the Respondent's position is that there is insufficient evidence of a subsisting relationship in that there are only a few photographs and various money transfer receipts. He asked that I dismiss the appeal.

9. In his submissions, Mr Bazini asked that I make a positive findings on credibility having heard the Sponsor give evidence. He drew attention to the fact that Mr Tarlow has not sought to challenge anything that the Sponsor said but rather that his submission is that there is insufficient evidence. Mr Bazini submitted that there is more than sufficient evidence to show on the balance of probabilities that it is a genuine and subsisting marriage. There was no interview by the Entry Clearance Officer. Emotional support and affection can establish that a marriage is genuine and subsisting. This marriage is between first cousins and was partly a choice but partly arranged.

10. Mr Bazini submitted that the Sponsor's account of the delays is completely consistent with someone who has serious medical or mental health issues, although these are more under control now. He drew attention to the fact that the Sponsor has made a number of visits to his wife, most recently in 2017 and that no challenge has been made to this or that he lived with his wife and mother in law during those visits, which are supported by photographs. He submitted that there is also an abundance of evidence of the Sponsor sending his wife financial support and that this can be taken into account when assessing whether the marriage is genuine and subsisting.

11. Mr Bazini also drew attention to the references in the medical reports over the years where the Sponsor is complaining about not having his wife with him. The fact the Sponsor has indicated what his problems are indicates that he is genuine in relation to the marriage. He asked that I take judicial note of the fact that they are a Muslim couple and that she covers her hair and that it is extremely unlikely she would enter a marriage like this simply to get entry clearance and that it would also be contrary to the wider family's wishes.

12. Mr Bazini submitted that there is no evidence that it is not a genuine and subsisting marriage and that the previous Judge applied far too high a standard of proof. He submitted that there is really nothing here apart from the delays and the fact that years have passed, but that this is more than balanced out by the evidence and the fact that the Sponsor has had serious mental health problems. Mr Bazini drew attention to the fact that the phone numbers called are consistent with the phone numbers on the application form ending 980. The Sponsor's evidence of speaking to his wife today was spontaneous. He submitted that the couple have been apart for far too long and that the appeal should be allowed.

My findings

13. I have taken careful account of the evidence contained in three Appellant's bundles, two of which were before the First tier Tribunal and a new supplementary bundle sent on 14 March 2018. I also had sight of the original photographs from the wedding between the Sponsor and the Appellant and those taken during visits to his wife in Ethiopia.

14. I had the benefit of hearing evidence from the Sponsor and I take account of the fact that his evidence was not challenged by Mr Tarlow on behalf of the Respondent. I find that his evidence was credible in that it was consistent with the supporting evidence and was plausible. Whilst the Sponsor did not always answer the question directly, I bear in mind the fact that he is a vulnerable witness by virtue of his diagnosis of paranoid schizophrenia, which is currently well managed by way of a depot injection every fortnight, administered by the mental health team of Ealing Recovery West and he also receives ongoing support in the community as well as regular appointments with a Consultant Psychiatrist. I also bear in mind that his evidence was given through an interpreter and I consider that he made no attempt to evade the question of dissemble but did not always completely understand the question he was asked.

15. The sole issue to be determined is whether the marriage between the parties is genuine and subsisting. I have directed myself in light of the decisions in GA (subsisting marriage) Ghana [2006] UKAIT 00046 where the Tribunal held that:

"the word requires an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprises a marriage properly described as subsisting".

16. In Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 00040 (IAC), the Upper Tribunal held that:

"(i) it is for a claimant to establish that the requirements of the Immigration Rules are met or that an immigration decision would be an interference with established family life. In both cases, the relevant standard for establishing the facts is the balance of probabilities.

ii) Post decision visits by a sponsor to his spouse are admissible in evidence in appeals to show that the marriage is subsisting."

17. It is clear from the evidence that, whilst there was a delay in making the first application for entry clearance on 9 July 2011 following the marriage on 7 June 2008, the Sponsor visited his wife in Ethiopia from 16 May to 13 August 2009 but he was unable to undertake further visits or afford to make the entry clearance application until 2011. I find that the delay does not undermine the

genuineness or subsistence of the marriage, particularly bearing in mind the Sponsor's evidence, which I accept, that he was also unwell during this period. This application was refused on 26 January 2012. It is not entirely clear from the papers but it appears that this decision was not appealed but rather that a second entry clearance application was made on 2 December 2015 and was refused on 19 February 2016.

18. The Sponsor's oral evidence, which is supported by the written evidence is that he visited his wife from 6 July to 4 September 2013 and again in June 2014, however, thereafter his benefits were stopped and he became homeless and was not placed in new accommodation until 2015. Thus although there was a further delay in making a second application for entry clearance, I do not find bearing in mind the reasons provided and the more recent evidence which I can take into account as post decision evidence and which points to an ongoing and subsisting relationship between the parties, that this delay undermines the subsistence of the marriage.

19. There is evidence that the Sponsor has been supporting his wife financially in the form of money transfer receipts from 2015. I accept his evidence that he also sent money before this time but the amounts varied due to his financial situation and that this evidence was submitted with the first entry clearance application. I have also taken account of evidence in the form of phone records showing regular contact between the parties both in the form of texts and phone calls. Further, the Sponsor visited his wife in Ethiopia between 14 September and 13 November 2017, which is supported by the stamps in his travel document and photographs of him with his wife taken during this visit.

20. In light of the evidence considered as a whole, I am satisfied that the Appellant has discharged the burden of proving to the balance of probabilities that the marriage between the parties is genuine and subsisting and that they intend to live together permanently in the United Kingdom. I find the requirements of E-ECP 2.6. and 2.10 and thus EC-P 1.1. (d) of Appendix FM of the Rules are met.

Decision

21. I allow the appeal on human rights grounds and direct that entry clearance be granted on the basis that the Appellant meets the requirements of the Immigration Rules and that the decision of 19 February 2016 represents a disproportionate interference with the parties' right to family and married life.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

11 June 2018