



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/13943/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 8 October 2014**

**Determination**

**Promulgated**

**On 15 October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J M LEWIS**

**Between**

**MRS SARMILA MAHESAN**

**and**

**ENTRY CLEARANCE OFFICER - CHENNAI**

Appellant

Respondent

**Representation:**

For the Appellant: Mr J Babarinde of Hatten Wyatt Solicitors

For the Respondent: Miss S L Ong, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**The History of the Appeal**

1. The Appellant, Mrs Sarmila Mahesan, was born on 24 July 1986 and is a citizen of Sri Lanka.
2. On 18 January 2013 the Appellant applied for entry clearance to the UK as the partner of her husband, Mr Mahesan Varatharajaperumal. Her application was refused on 21 May 2013. The Appellant gave Notice of

Appeal on 26 June 2013. On 10 December 2013 the Respondent reviewed and adhered to the decision. The Appellant's ensuing appeal was heard by Judge Miller sitting at Taylor House on 19 June 2014. Both parties were represented, the Appellant by Counsel instructed by her previous solicitors. In a determination promulgated on 7 July 2014 the judge dismissed the appeal under the Immigration Rules and on Article 8 human rights grounds.

3. Permission to appeal was granted to the Appellant on 19 August 2014 by Judge Ford in the following terms:

"1. The Appellant seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Miller dated 07 July 2014 whereby he dismissed the Appellant's appeal against the Secretary of State's decision to refuse her application for spousal entry clearance.

2. It is arguable that Judge Miller erred in refusing the adjournment application by the Appellant. The adjournment was sought because the Respondent had failed to supply the documents that were submitted with the application including money transfer receipts and a photo album. It is arguable that those documents could have made a difference to the outcome of the appeal. Judge Miller was not satisfied that the Appellant and the sponsor were in a genuine subsisting relationship. It is arguable that it was unfair to refuse the adjournment and direct the Respondent to produce the missing documents (SH (Afghanistan) 2011 EWCA Civ 1284).

3. There is an arguable material error of law."

4. Procedural directions followed. On 4 September 2014 the Respondent submitted a response under Rule 24 of the Upper Tribunal Procedure Rules, submitting that Judge Miller directed himself appropriately and did not need to consider a further adjournment request on conclusion of the evidence because no such request was made at that stage.

5. The Sponsor attended the error of law hearing. Both representatives made submissions on the issue of error of law. I retired, in the event for fifteen minutes, to consider this issue.

### **Error of Law**

6. I took into account the application for permission to appeal, the Rule 24 response and the oral submissions of both parties. When I returned to the hearing room, I said that I had concluded that the determination did reflect a material error of law, for the following reasons.

7. Some of the documents submitted by the Appellant with her application, including money transfer receipts, letters and cards, were not included in the evidence submitted to the Tribunal by the Respondent under Rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which requires the inclusion of unpublished documents referred to in the refusal decision. Judge Miller recorded that at the outset of the hearing the Appellant's representative sought an adjournment on that basis. Judge Miller declined the adjournment, stating that he would reconsider any application at the conclusion of the case. He recorded that none was made at that time. He was entitled, and indeed bound, I said, to decline the adjournment application if he considered that the appeal could be justly determined without an adjournment. So the refusal of the adjournment was not legally erroneous.
8. At paragraph 22 the judge expressed a number of concerns about the evidence which led him to the view that the Appellant and the Sponsor were not in a genuine relationship. These included, at paragraph 22(iv), that although the Appellant stated in her grounds of appeal that she had produced various items including letters and cards, no letters or cards had been produced at the hearing, which the judge would have expected. This, I concluded, was procedurally unfair. Having declined to grant an adjournment sought on this basis, it was unfair to hold against the Appellant her failure to produce documents which she had supplied to the Respondent, who had not placed them in evidence. As Miss Ong submitted, the judge had other concerns as well; but his overall assessment of the evidence might have been affected by the material which the Appellant had sought to place in evidence and, through no fault of her own, had been unable to do so.
9. When the judge stated at the outset that he would reconsider any adjournment application at the conclusion of the case, he can have had in mind only an adjournment of the hearing part heard. This was open to him to direct, even without an application for it. He had not done so.
10. I concluded that the determination reflected a material error of law and was not reliable. I said that I set it aside and would hear the appeal again on all issues.
11. On the application of the Appellant, I admitted in evidence an album of photographs of her wedding to the Sponsor and a bundle of telephone records, and during the hearing some other photographs.

### **Rehearing the Appeal: the Legal Background**

12. The decision was made under Appendix FM of the Immigration Rules, which contains the requirements necessary for a family member to establish family life. Specifically in point in the decision is paragraph EC-P.1.1(d), requiring an applicant for entry clearance as a partner to meet all of the requirements of Section E-ECP, including Section E-ECP.2.7

requiring that, if the applicant and partner are married, it must be a valid marriage as specified. This is the issue in the appeal, the remainder of the decision of the Respondent referring to aspects of the evidence leading to the conclusion that the marriage was not valid.

13. Section 86 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) provides that I must allow the appeal insofar as I think that the decision against which it is brought was not in accordance with the law (including Immigration Rules) or that a discretion exercised in making the decision should have been exercised differently. I may consider evidence about any matter which I consider relevant to the substance of the decision, including evidence concerning a matter arising after the date of the decision. However, where the appeal is against the refusal of entry clearance or a certificate of entitlement, I may consider only the circumstances appertaining at the time of the decision: Sections 85(4) and (5) of the 2002 Act; **LS (Gambia)** [2005] IAR 310. In the latter cases, evidence of subsequent actions which casts light upon the position at the date of the decision is admissible; evidence of subsequent events differing from the position at that time, even if predicted or reasonably foreseeable (e.g. changed intention to live together; obtaining employment which was predicted or reasonably foreseeable) is not: **DR (ECO - post-decision evidence) Morocco** [2005] UKIAT 00038\*.
14. The onus of proof in establishing these matters lies upon the Appellant. The standard of proof is that of the balance of probabilities, as it is also for any related human rights issues, save in relation to issues of removal, where it is that of reasonable likelihood or real risk: **Box** [2002] UKIAT 02212.

## **The Evidence**

15. At the hearing the Sponsor gave evidence through an interpreter in the Tamil language in chief, in which he adopted his statement, cross-examination and re-examination. Submissions followed, which I have taken into account. I reserved my determination.
16. I summarise the evidence compendiously and so far as relevant.
17. Born on 30 December 1977 in Sri Lanka, the Sponsor arrived in the UK in December 1999 and claimed asylum. In 2009 he was granted indefinite leave to remain. He works in the UK.
18. The Sponsor and the Appellant first spoke by telephone in 2007, at the time when the Sponsor’s cousin married the Appellant’s brother. The Sponsor telephoned from the UK to congratulate them and the Appellant answered the telephone. They spoke again on the telephone in 2008 and 2010 as friends. In December 2011 a broker arranged their marriage, speaking with both sets of parents. The Appellant and the Sponsor did not

speak together about this. They met for the first time on 29 January 2012 at the airport at Chennai, when the Sponsor arrived for their wedding.

19. The Sponsor stayed in India until their wedding, which took place on 4 February 2012 in Madras. He remained in India for a month afterwards, living with the Appellant as husband and wife, before returning to the UK on 28 February 2012.
20. The Sponsor made two further visits to India, on 9 February 2013 and 15 March 2014. During each visit he spent half of his time with his parents and half with his wife, the Appellant.
21. When the Sponsor is in the UK, he and the Appellant communicate by telephone, sometimes using calling cards which do not record calls, and by Skype. The Sponsor suffers from stress, for which he takes tablets.
22. In evidence is a large and impressive album with many photographs of the wedding of the Appellant and the Sponsor. There are also other photographs, taken during the Sponsor's visit in 2013 at a gathering in his wife's family's house. Also in evidence are several cards which the Appellant had sent to the Sponsor for Diwali and for his birthday, some with their envelopes; the Sponsor said that he had not kept some of her earlier cards. In evidence too are the Sponsor's extensive telephone records, frequently showing a telephone number which the Sponsor said was that of the Appellant and which is the same number as she gave in her application form. There are also statements from several relatives about the relationship between the Appellant and the Sponsor and about their having attended the wedding.
23. The decision and the review of it contend that at interview the Appellant did not remember dates and basic information and gave information which was inconsistent. The record of the interview records the Appellant saying that she was tense and confused. In her grounds of appeal she says that she was very nervous. The decision argues that she did not know the Sponsor's telephone number; to this she replies that she did not need to memorise it because she had it as an automatic dial on her telephone. The decision says that she was confused about the details of two passports which she had lost in the past. On her behalf it is submitted that she may have been, but that this is not material. The decision also argues that she did not remember details of two previous entry clearance applications which were, Mr Babarinde said at the hearing, applications in connection with her intended marriage to somebody else.
24. There are indeed inconsistencies and admitted inaccuracies in the Appellant's responses at interview. However the broad thrust of her responses is consistent and plausible. Her evidence and that of the Sponsor are broadly consistent. Their evidence is supported by a significant volume of documentary evidence, including that of an obviously elaborate wedding ceremony and gathering, attended by many people

including the relatives who made statements to that effect. At the hearing the Sponsor had a good and consistent recollection of dates and even times, and appeared to me to be a witness of truth.

25. Weighing all of these considerations, I accept the evidence of the Appellant and of the Sponsor. Specifically I find that their marriage was at the date of the decision and indeed remains a valid one.
26. This is the only issue in the appeal, because the decision does not invoke any of the other requirements of Appendix FM of the Immigration Rules. I accordingly allow the appeal.

### **Decision**

27. The previous determination contained an error of law and is set aside.
28. The appeal is allowed under the Immigration Rules.

Signed  
October 2014

Dated: 14

Deputy Upper Tribunal Judge J M Lewis