



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

Appeal Number: OA/20853/2013
OA/20855/2013
OA/20863/2013
OA/20856/2013

THE IMMIGRATION ACTS

**Heard at Phoenix House, Bradford
On 6th November 2014**

**Determination Promulgated
On 7th November 2014**

Before

UPPER TRIBUNAL JUDGE COKER

Between

ENTRY CLEARANCE OFFICER

And

**SHAKUNTALA BHUSAL
ASMITA BHUSAL
ANJANA BHUSAL
AAYUSH BHUSAL**

Appellant

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr I Ali, counsel, instructed by Equity solicitors

DETERMINATION AND REASONS

1. The appellant (hereafter the ECO) appeals a decision of the First-tier Tribunal, which allowed the appeals of the respondent's (hereafter the claimants) against the decision of the ECO to refuse to grant them entry clearance as the wife and three children of their husband/father of a Tier 2 Migrant under paragraph 319C(d) and (e) of HC 395. The mother had been refused entry clearance on the grounds that she had failed to show she was in a genuine and subsisting marriage with her husband and the children had been refused in line.

2. The Rules in so far as relevant to this appeal are as follows:

319C. Requirements for entry clearance or leave to remain

To qualify for entry clearance or leave to remain as the Partner of a Relevant Points Based System Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

(a)...

(b) ...

(c) ...

(d) The marriage or civil partnership, or relationship similar to marriage or civil partnership, must be subsisting at the time the application is made.

(e) The applicant and the Relevant Points Based System Migrant must intend to live with the other as their spouse or civil partner, unmarried or same-sex partner throughout the applicants stay in the UK.

.....

3. The First-tier Tribunal judge set out the evidence before him, which included the oral evidence of the sponsor husband/father. He concluded

“..... Having looked at the evidence on the whole I believe that this is a genuine and subsisting marriage. There is a genuine reason why the Sponsor has not been to Nepal to visit but this does not indicate that the marriage is not genuine and subsisting or that they do not intend to live together.

14. Taking into account all the evidence I have before me the appeal is allowed”.

4. Permission to appeal had been sought by the ECO, and permission granted, on the basis that the First-tier Tribunal judge had failed to identify and apply the correct burden and standard of proof or give adequate reasons why, given the paucity of evidence, the case was made out. The ECO pleaded that the burden was on the appellant to prove what she asserts and not for the judge to seek reasons to disprove or diminish that burden.

5. The judge had documentary evidence before him. He heard oral evidence, which he found credible. He considered the evidence as a whole. The reference by the judge to the acceptance by him of the reason why the sponsor has not gone to Nepal is not a reversal of the burden of proof but a finding in favour of the appellants on the basis of the evidence of the sponsor.
6. The mere fact that there is a paucity of documentary evidence does not mean that a finding adverse to an appellant must follow. This judge heard the oral evidence of the sponsor and accepted its credibility and made findings considering the evidence as a whole (see [14] determination). Although the judge did not specifically self direct himself as to the burden and standard of proof, it is plain that he approached the evidence “as a whole”, made findings on that evidence “as a whole” and in the light of that evidence concluded that the marriage was genuine and subsisting. Although there is a comment that there was a genuine reason not to visit Nepal this does not indicate a reversal of the burden of proof but rather a comment as to the reasons given. There is no requirement for a judge to self direct as to the burden and standard of proof; particularly an experienced judge who can be considered to understand this and apply it unless it is plain and clear that he has not.
7. Mr Diwnycz did not seek to argue that there had been a reversal of the burden of proof and stated that he considered that the application of the correct burden and standard of proof was intrinsic to the document.
8. I am satisfied that there has been no error of law in the First-tier Tribunal determination. I do not set it aside. I dismiss the appeal by the ECO.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The decision of the First-tier Tribunal stands.

Date 6th November 2014

Upper Tribunal Judge Coker