



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: OA/07579/2014

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 11 March 2016**

**Decision Promulgated
On 11 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MAVIA KHADIM

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Manuel promulgated on 5 August 2015 which allowed the Appellants appeal against the Respondents refusal to grant entry clearance to the Appellant as the spouse of Tahleel Ahmed (the Sponsor).
3. The Appellant did not attend the appeal nor was she represented at the appeal as those who had previously appeared, Thornhills had written to the court on 9 March 2016 indicating that they would no longer be representing the Appellant and also that they understood that the Appellant would not be attending. I am satisfied that due notice of the appeal was served upon the Appellant at the address that was given. I am therefore satisfied that having been served notice of the hearing and not attended it is in the interests of justice to proceed with the hearing in the Appellant's absence as I am entitled to do by virtue of paragraph 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

4. The Appellant was born on 1 January 1989 and is a national of Pakistan.
5. On 8 April 2014 the Appellant applied for settlement in the UK as the spouse of the Sponsor.
6. On 23 May 2014 the Entry Clearance Officer refused the Appellant's application. The refusal letter gave a number of reasons:
 - (a) It was not accepted that the relationship was genuine and subsisting as there was no evidence other than purported wedding photographs of an ongoing relationship.
 - (b) The Appellant had only produced a copy of the Nikah Nama when original documents were required to prove that the marriage was valid.
 - (c) The Appellant had not produced the necessary language certificate.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Manuel (“the Judge”) allowed the appeal against the Respondent’s decision. The Judge found :
 - (a) The Sponsor and Appellant were aware that an original language certificate was required but produced instead a notarized copy.
 - (b) There was nothing in the Rules or evidential requirement of Appendix FM-SE to suggest that a notarized copy was not acceptable.
 - (c) She accepted that the parties relationship was ongoing and genuine.
 - (d) The issue of the language certificate was not pursued.
8. Grounds of appeal were lodged arguing that the Judge had materially misdirected herself in law in that paragraph 39B(d) of the Immigration Rules requires that specified documents must be originals unless otherwise stated. Appendix FM-SE paragraph 26 which relates to the evidence of marriage does not state that copy documents are acceptable; and findings that the marriage was genuine were vitiated by the same error.
9. On 27 November 2015 First-tier Tribunal Judge Andrew gave permission to appeal.
10. At the hearing I heard submissions from Mr Mc Vitie on behalf of the Appellant that :
 - (a) The Rule 24 response from Thornhills conceded that specified evidence had not been submitted.
 - (b) The matter could be remedied by the making of a fresh application.

Finding on Material Error

11. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law in relation to the production of documents.
12. The evidential requirement, Appendix FM-SE, require that specified documents are produced as evidence of those matters that must be proved in immigration applications. In relation to specified documents paragraph 39B provides
 - (a) *Where these Rules state that specified documents must be provided, that means documents specified in these Rules as being specified documents for the route under which the applicant is applying. If the specified documents are not provided,*

the applicant will not meet the requirement for which the specified documents are required as evidence.

(d) Specified documents must be originals, not copies, except where stated otherwise.

13. Appendix FM-SE paragraph 22-26 sets out the requirements for evidence relating to Marriage or Civil Partnerships and this does not include a proviso that notarized copy documents are acceptable alternatives to originals.
14. The failure of the First-tier Tribunal to address and determine whether a copy document was acceptable by reference to the law as set out in paragraph 39B of the Rules constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
15. In relation to the finding that the marriage was genuine and subsisting the Judge made findings having heard evidence from the Sponsor and his mother and brother and accepted that the print outs of Viber Messages and Whats App reflected a genuine and ongoing relationship between the Appellant and Sponsor. I am satisfied that the error in relation to the copy Nika Nama does not infect these findings.
16. I therefore set aside the decision and remake it in respect of the production of the copy nika nama.
17. The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability.
18. I have determined this matter based upon facts that were appertaining at the time the decision of the Entry Clearance Officer on 23 May 2014 being constrained by Section 85(5) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) I am entitled to take into account evidence of matters occurring after the date of the decision providing that they relate to and inform an understanding of facts in existence at the time of the decision pursuant to DR (Morocco) [2005] UKIAT 00038.
19. The Appellant's appeal is pursuant to Section 82 of the 2002 Act.

20. The Appellant and the Sponsor claim that they married on 25 January 2014. An application was submitted on 8 April 2014 on behalf of the Appellant for settlement in the UK with the Sponsor. It is accepted that the did not submit the original of their Nika Nama as required by the Rules although in correspondence with the Visa Application Centre dated 17 December 2013 from those representing the Appellant it was confirmed that the original nika nama would be provided.
21. There is no explanation as to why the original has not been provided as the matter is not addressed in the Sponsors statement or in the grounds of appeal nor did he attend court before me to explain it.
22. The Rule 24 notice argued that the Respondent should have exercised the discretion available in Appendix FM-SE D which provides that if a specified document has been submitted, but it is in the wrong format, or it is a copy rather than the original, or does not contain all the necessary information, the caseworker may also contact the applicant to request the correct version. However I am satisfied that in Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC) the Tribunal held that where applicants wish to invoke any discretion of this kind, they should do so when making the relevant application, highlighting the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested. It is clear in this case that the Appellants representatives were aware of the requirement to produce the original document and not only did not do so but also did not provide an explanation of why it was not produced nor did they ask that the evidential flexibility discretion was exercised in the Appellants favour.
23. The Appellant therefore cannot succeed under the Rules.
24. The grounds of appeal submitted that the Appellant's rights under Article 8 of the Convention are engaged. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27.

Will the proposed refusal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

25. I have accepted that the Appellant and the Sponsor are in a genuine relationship albeit they have failed to provide the original of their nika nama as required.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

26. I am satisfied that refusal of entry clearance would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

27. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate their conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

28. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy their private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

29. I have reminded myself that Lord Bingham in Razgar stated that in a judgement on proportionality that the ultimate question is, "*whether the refusal of leave to enter or remain in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.*"

30. There is no evidence before me to suggest that the Sponsor, who is of Pakistani origin himself could not enjoy family life with his wife in Pakistan. Moreover even if that were not the case there is no reason why it would be disproportionate to expect the Appellant to provide an original nika nama in support of a fresh application as these are the evidential requirements of Rules that govern entry clearance applications to the UK and underpin the system of immigration control whose maintenance is in the public interest. I am satisfied that the application failed to comply with the Immigration Rules and no compelling circumstances were identified why those Rules should not be applied in the Appellants case in the usual way, there was nothing disproportionate in applying the Rules in accordance with their terms, with the effect that Appellants application failed and she would have to make a new one.

31. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

Decision

32. I set aside the decision of the First-tier Tribunal as containing a material error of law. I substitute the following decision:

33. The appeal is dismissed under the Immigration Rules.

34. This appeal is also dismissed on human rights grounds (Article 8)

Signed

Date 20.3.2016

Deputy Upper Tribunal Judge Birrell