



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

Appeal Number: HU/02819/2020

THE IMMIGRATION ACTS

**Heard on: 11th April 2022
At: Field House**

**Decision & Reasons Promulgated
On 22nd April 2022**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**Mr R C Clarke
(no anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

**For the Appellant: Mr Balroop, Counsel instructed by Vendrys Henry
Lawyers Ltd**

For the Respondent: Mr McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Jamaica born on the 1st May 1983. He seeks indefinite leave to remain in the United Kingdom on human rights grounds.

Background and First-tier Tribunal Decision

2. The Appellant was granted leave to enter on the 13th December 2011 as the partner (husband) of Mrs D. Clarke. He thereafter renewed that

leave on two further occasions. On the 18th November 2019 he applied for indefinite leave. The application was refused on the 4th February 2020.

3. The Secretary of State gives a single reason for refusal: information had come to light which showed that the Appellant and his wife were no longer in a subsisting relationship, and that they did not intend to live together in the future. The application therefore failed to meet the requirement at paragraph E-LTRP.1.10 of Appendix FM. The letter does not explain what that information was, but there is no doubt that it was a letter from Mrs Clarke. She had written to the Home Office on the 29th November 2019 stating that the marriage had broken down and that she had filed for divorce. She attached a notice of proceedings issued in March 2019 by the Family Court at Liverpool to that effect.
4. The Appellant exercised his right of appeal to the First-tier Tribunal. In his grounds he stated that he and his wife were now reconciled and averred that the marriage was genuine and subsisting, and that it was their intention to live together permanently in the future. He attached a letter from Mrs Clarke dated the 18th February 2020 in which she expressed regret for her earlier letter. She had been angry and confused and they had been having a difficult time. However upon reflection she had decided to reconcile with the Appellant who had been with her through thick and thin; her children love and respect him as a father. She stated that she wished to support his appeal.
5. The matter duly came before First-tier Tribunal (Judge Minhas), who was not persuaded about Mrs Clarke's change of heart. Although it was accepted that this had been a genuine and subsisting relationship for some nine years until March 2019, events since then led the Tribunal to conclude that it was no longer so. In particular the Tribunal noted:
 - i) That Mrs Clarke had supported her husband's application for ILR in July 2019 despite the fact that she had filed for divorce in March 2019. She did so again on the 18th November 2019. Although this is not explicitly said by the Tribunal, my reading of the decision is that it drew from this history the inference that Mrs Clarke was prepared to assist her husband in obtaining leave to remain even though she knew that the marriage was no longer subsisting. Her retraction of the letter of denunciation had to be seen in that light;
 - ii) She would not have initiated the divorce proceedings lightly, and weight is placed on the absence of evidence to indicate that those proceedings have been withdrawn;

- iii) Husband and wife gave inconsistent evidence about when he became aware of the divorce proceedings and whether he had refused to sign the paperwork;
 - iv) The explanation offered by Mrs Clarke as to the ups and downs of the relationship, namely that she had suffered emotional upset and turmoil following a cancer diagnoses was lacking in credibility given that the cancer preceded the claimed difficulties in the marriage by some three years and she had not provided medical evidence supporting her claim to have suffered emotional issues;
 - v) None of the correspondence produced supports the claimed intention to live together in the future;
 - vi) Little weight can be attached to the evidence of the couple's children since they were not cross examined;
 - vii) The bank statements support the accusation in the letter of denunciation that the Appellant does not support the family financially, and there is no evidence of support from Mrs Clarke to him.
6. By a decision dated the 7th January 2021 the First-tier Tribunal therefore dismissed the appeal on human rights grounds.

The Challenge: Discussion and Findings

7. The Appellant was granted permission to appeal against the decision of Judge Minhas on the 11th March 2021. The matter came before me at Manchester Civil Justice Centre (remote hearing) on the 29th November 2021.
8. At that hearing Mr Balroop for the Appellant submitted that the First-tier Tribunal decision is flawed for procedural unfairness and a failure to take relevant evidence into account.
9. The fairness challenge was this. In its decision the Tribunal takes several points against the Appellant which were not taken by the Respondent, and to which the Appellant did not have the opportunity to respond. Two such findings were highlighted by Mr Balroop's submissions.
10. The Tribunal did not ask for further elaboration of Mrs Clarke's reference to her cancer diagnosis. It appeared to discount her evidence that this had caused stress in her marriage because she had been in remission for some three years at the relevant time and had

not seen a counsellor. Had she been asked, the grounds assert, Mrs Clarke would have explained that she had undergone a mastectomy and that the operation had left her with feelings of profound insecurity such that her relationship with her husband was adversely affected. The HOPO had not challenged her about her evidence as it stood, and the Judge did not ask her to clarify. It is submitted that Mrs Clarke did not spontaneously offer any further detail because she thought her point would be understood.

11. For the Secretary of State Senior Presenting Officer Mr McVeety accepted that this was not evidence that every decision maker would have rejected. It was however rejected, he submits, without error here. The witness knew why she was being asked about her marriage breakdown, and it was for her to offer an explanation. It was not 'unfair' for the judge to reject evidence.
12. I agree with Mr McVeety that this was not an unfairness point of the type discussed in MS (Sri Lanka) v SSHD [2012] EWCA Civ 1548. This was not a forensic challenge out of the blue. The Appellant - and his wife - plainly knew that their credibility was on the line. It was the Home Office case that their marriage was no longer subsisting and that their claims to the contrary were untrue. In those circumstances it cannot be said that Mrs Clarke, or Counsel, was subject to any unfair disadvantage. I therefore reject that ground, but I do return to this particular finding of the First-tier Tribunal below.
13. The second limb of the fairness challenge relates to the Appellant's finances. The Judge concluded that the Appellant is "supported" financially by a H Peters and a K Clarke. She drew this conclusion from the bank statements. Mr Balroop strongly objected to this point. The Secretary of State had never asserted or suggested that the Appellant was supported by anyone other than himself and the point arose neither in cross examination or submissions. Had he been given the opportunity to address the Judge's concerns about these references in his bank statements he would have told him that K Clarke is his sister, and that from time to time they lend each other money. H Peters is a friend to whom he had loaned money; the payment in the bank statements was that loan being repaid.
14. I am satisfied that this was an unfair point to take against the Appellant. Unlike the general evidence about the state of the marriage this was a forensic challenge out of the blue, the findings at the Tribunal's paragraph 20 apparently weighing heavily against the Appellant. To this extent, ground (i) is made out. There is a further difficulty with paragraph 20, and this leads me to ground (ii).
15. Ground (ii) is that the Judge did not look at the evidence properly. At paragraph 20 the decision reads:

“...I find the lack of financial support from Mrs Clarke to the appellant, and the lack of evidence that the appellant contributes to the family finances or bills **demonstrates, on balance**, that the parties do not reside together and are not in a genuine and subsisting relationship”

(my emphasis)

16. It is clear from the words I have emphasised that this was a finding central to the decision. I am satisfied that this reasoning failed to take into account evidence in the bank accounts of fairly frequent transactions between Mr and Mrs Clarke. Mr Balroop has identified four payments from the Appellant to Mrs Clarke totalling £950 between August and November 2019. In the same period she also transferred small amounts of money to him. This evidence stands in contradiction to the Tribunal’s conclusion that there is a “lack of evidence” of money passing between the two, as one might expect to see from a cohabiting couple. Mr Balroop further complains that the Tribunal has had no regard to the frequent cash withdrawals made by the Appellant in the same postcode as the matrimonial home, and his accompanying evidence that he gets cash out to give to Mrs Clarke for housekeeping etc. Given the weight that the Tribunal apparently attached to the *lack* of financial ties between the two, I am driven to conclude that this evidence was of some relevance, and it must be an error of law to have overlooked it.
17. By my decision of the 29th November 2021 I determined that the decision of Judge Minhas must be set aside. The findings about the couple’s finances were at the centre of the Tribunal’s decision and the error of fact that infects those findings cannot easily be extricated from the decision overall.
18. I would add this. Although I have not found Mr Balroop’s unfairness challenge to be made out, I have found the Tribunal’s approach to Mrs Clarke’s evidence hard to understand. It was her evidence that she has known the Appellant since 2002. They slowly fell in love and she made several visits to Jamaica after he returned there in 2003. They married in 2010. They have been married ever since. There was however a period in 2018 - 2019 where she began to find things very difficult. At paragraphs 11-12 of her statement of the she sets out why. I do not need or wish to set out the intimate details of those difficulties in this judgment, save to say that the consequences of her cancer treatment in 2014 had left her suffering from symptoms including early menopause, fatigue and mood swings. She became insecure about her body and in her own words, reclusive and paranoid. She accused her husband of infidelity. This was the context of her decision to instigate divorce proceedings, and to write the letter to the Home Office that she did.

19. This evidence was rejected by the First-tier Tribunal for two reasons. First because the cancer treatment had been completed 3 years previously, and second because Mrs Clarke had not produced any evidence of counselling. It seems to me that these reasons fail to engage with the incredibly personal nature of the evidence that she gives. It is not hard to imagine that a woman who undergoes invasive treatment for cancer might continue to suffer the psychological consequences of losing a breast long after the cancer itself has gone. Nor is it difficult to accept – indeed it may even be a matter of which judicial notice could be taken – that many, many people in this country, including menopausal women, endure the kind of very real emotional turmoil described by Mrs Clarke without ever receiving formal support for it. Mr McVeety defended this reasoning on the grounds that the Judge had already formed the view that Mrs Clarke was an unreliable witness and so was entitled to reject her explanation for the difficulties in her marriage during 2019. If that is so, then that in itself was an error of law. The whole point was that the evidence had to be assessed in the round. This very intimate evidence, which cannot have been at all easy for Mrs Clarke to give, whether to a solicitor or the Tribunal, required more attention than it received.
20. Those being my findings, I directed that the matter come back before me as a ‘face to face’ hearing where the witnesses could appear in person. It is to be regretted that it took as long as it did for the matter to be listed again.

The Decision Re-Made

21. Representing the Secretary of State at the continuance hearing, Mr McGirr acknowledged at the outset that the issue between the parties was simply one of fact. If the Appellant – and his wife – could show, on a balance of probabilities, that their marriage is today genuine and subsisting, then the appeal must be allowed.
22. I heard evidence from three witnesses.
23. The first was the Appellant himself. He adopted his witness statements. Therein he sets out the history of his relationship with his wife as I have summarised above. He describes the events that led his wife to write as she did to the Home Office as a “misunderstanding”. More recently he has started attending medical appointments with his wife which have led him to a deeper insight into how she might have been affected by her mastectomy, and the resulting scars to her body. In his oral evidence he told me that he now knows that he was not there for her as he should have been. He always thought she was very strong and it had not occurred to him that might be feeling vulnerable. He now sees that he let her down.

He avers however that now he and his wife adore each other and that their problems are in the past. In response to Mr McGirr's questions the Appellant denied ever having moved to Orpington. His sister lives in Orpington and he goes to see her from time to time as she plaits his hair for him. At some point in the period 2019-2020 he did go and stay with her for about 2 weeks, before returning to the matrimonial home. He could not recall exactly when this was but he thinks it may have been after he received the refusal letter from the Home Office in February 2020. Although this was not explained to the Appellant, the questions about Orpington arose because in her original letter to the Home Office his wife and told them that this is where he was living. The Appellant was also asked when he had become aware that his wife had instigated divorce proceedings against him. He said that it was only after the Home Office had refused him. He denied ever having looked at the divorce petition, or that he had refused to sign it until he had his leave to remain - again, this was an allegation made by his wife in her letter of denunciation. Finally the Appellant was asked whether it had been his idea for his wife to withdraw the divorce petition. He said that they had agreed to do this together.

24. I then heard evidence from the Appellant's wife. She adopted her witness statements. I need not rehearse here the background to the relationship that she sets out, since that is all accepted.
25. The issues in her marriage arose after she began her recovery from cancer. Her breast cancer was of a type which required a complete mastectomy which had left her with what she regarded as a "disfigured" body. She told me that she had always been a confident and strong person but that the surgery, and the subsequent radiotherapy, had left her physically and emotionally exhausted. Even after her surgical wounds had healed she found it difficult to get over the loss of her breast. She experienced symptoms of menopause such as anxiety and insomnia. She felt unattractive. She became depressed. All of this led her to withdraw from her husband, to whom she had hitherto been very close. He in turn started to keep out of her way. They entered into a downward spiral where she would become paranoid and angry if he was out, and so would challenge him when he got home. These kind of confrontations in turn made him leave the house more. In her oral evidence she gave an example of this dynamic. She recalled that one day he had gone out to the shop and had taken a little longer than usual. She had seen that he was on his phone (presumably from the window) and had leapt to the conclusion that he was on the phone to another woman. When he came back in the front door she immediately started questioning him and having a go at him. He turned round and went straight back out. Mrs Clarke told me that she can now fully understand why he did so: "I wouldn't want to live like that - I wouldn't want someone treating me that way". Asked by me whether she had ever sought any help during this period she said that she had in fact gone to one

counselling session for cancer survivors but had found this had left her more depressed: the women there, unlike her, had also had to undergo chemotherapy and this left her feeling that she couldn't complain about her situation and guilty that she was feeling this bad when her illness, and treatment, could have been much worse.

26. Mrs Clarke explains that she had filed for divorce in the middle of this difficult period in her life. It had frequently been something that she had threatened her husband with during arguments, but once she had done it, she could not bring herself to take it any further so she had just started the process, then ignored it. The Family Court had sent him a copy of the divorce petition but he had refused to engage with it. He had told her that he did not want to divorce but she had stayed angry. There were ups and downs in the year which followed. One particular down occurred in November 2019, when he had gone out all night with friends and had not come home until the morning. She was enraged, and convinced herself that he must have been with another woman. In what she describes as "spite and fury" wrote the letter that she did to the Home Office. Although she was herself at that point convinced that her marriage was over, she admitted before me that she had written things in that letter that were not true. Specifically, her husband had not been living in Orpington, and he had not threatened to withhold his agreement to the divorce until he got a grant of leave to remain.
27. Mrs Clarke was asked about why she had only just withdrawn the divorce: documents were produced before me showing that she had filed an application notice to withdraw her petition on the 8th April 2022. She explained that she had just ignored it. She had thought that it was just "lapse" if she didn't pursue it, and it was not until her husband's solicitors asked her to that she understood that had to formally withdraw it. It had then taken some time to save up the money to pay the fee. It costs £50 to file an application notice in the Family Court and money is really tight in the household, since her husband's permission to work was withdrawn.
28. Mrs Clarke, like her husband, stressed that the difficulties they went through are now behind them. She said that since he received the refusal letter in February of last year they have been able to sit and talk things over. She has explained to him how bad she has been feeling. He has come to understand how he let her down, and how he should have been more sensitive. He should have been able to talk to her about how she was feeling instead of avoiding it. She has accepted that her behaviour was pushing him away more. Now they are communicating much more effectively and he has started attending appointments with her. She is now undergoing breast reconstruction surgery and he has been coming along with her to see the surgeons etc and talking to her about how she is coping with it all.

29. Finally I heard evidence from Ms D. Gordon, who is the daughter of Mrs Clarke, and the step-daughter of the Appellant. Ms Gordon said that could not be exact but she thought that she had known the Appellant since she was about 13. As far as she is aware he has always lived with her mother since he arrived in this country. Although she had moved out and lived independently in 2017 she was at the family home everyday because her job is just down the road. She would therefore go back to her mum's house at lunchtime or after work pretty much every day. She did so because her child was there. Asked to clarify why her child was there she said that her stepdad – the Appellant – was looking after the child whilst she and her mother were at work. Ms Gordon has in fact now moved back into that house. She was unaware of the Appellant ever having lived in Orpington. In a letter written to the Tribunal Ms Gordon avers that her mother and the Appellant are in a genuine and subsisting relationship and that as far as she is concerned they love each other.
30. The Respondent could have done little else at the date of refusal than act upon the letter written to them by Mrs Clarke. Given that divorce proceedings had been instigated, and her position was as it was set out in the letter of November 2019, the decision maker could have done little else. This is not however a judicial review, where I am confined to assessing the lawfulness of the decision at the point that it was taken. This is a statutory appeal brought on human rights grounds and it must be decided on the facts as they stand at the date of this hearing.
31. The evidence was not entirely consistent. The Appellant told Mr McGirr that he had been completely unaware of the May 2019 divorce petition until he received the refusal letter in February 2020. That patently cannot have been correct, since he was named as the defendant in that petition and the Family Court would have served it on him: indeed it was the evidence of Mrs Clarke, and elsewhere in his evidence the Appellant himself, that this was indeed what happened. It was however their consistent evidence that he had simply ignored the document. Looking back over my note of his evidence, I think it likely that in fact what the Appellant had in mind when he responded to Mr McGirr's question was the letter of denunciation, which his wife did not tell him about and of which he only became aware once the Home Office relied upon it to refuse him leave. The evidence about when the Appellant went to stay with his sister is similarly unclear – he thought it after the refusal, his wife thought it before, and his step-daughter was completely unaware that he had gone there at all. That is not however a matter that I attach very much weight to, considering that it does not appear to have been for more than a week or two. The consistent documentary evidence is that he has always lived at the family home in South London.

32. Those matters aside, I found the evidence given by the three witnesses to be wholly straightforward, credible and compelling. The Appellant was frank about his own shortcomings. His stepdaughter was unchallenged in her evidence that as far as she is concerned he has always lived with her mum and that they remain a couple. Her evidence that he was childminding for her during the tumultuous period in question was revealed almost as an aside. I attach considerable weight to their testimony.
33. The star witness was however Mrs Clarke. As I noted in my 'error of law' decision, it cannot have been easy for her to give the evidence that she did, first to her husband's solicitor, then to the First-tier Tribunal, and then to me. Although it is a scandal, it remains the case that each of the three challenges that Mrs Clarke has faced remain subject to stigma: cancer, menopause and mental ill-health. In her evidence she told me that there was nowhere she could turn to talk about how she was feeling. She thought that no one would understand; she had stopped trusting her husband; she did not want to burden her children; counselling left her feeling guilty that there were others worse off than her. I found her evidence about how she took the actions that she did in a fit of "spite and fury" to be moving and credible. I also gained the impression that Mrs Clarke is exactly as she described: a strong, independent and confident woman who has experienced a period of crisis in which she felt none of those things.
34. It is quite clear from the evidence that this is a marriage that has faced a very difficult period. For Mrs Clarke the effects of her serious illness were not just physical: it seems that at some points she felt that the mental consequences were worse. The Appellant did not deal well with that. He did not support his wife in the way that she wanted him to, and between them they created what sounds like a very unhappy dynamic. The question for me is simply whether they have got over that. Having heard the evidence of the witnesses I am left in no doubt at all that they have. Neither Mrs Clarke nor her daughter came across as the kind of people who could be persuaded to do something they did not wish to do; nor did they come across as people who would come to court and lie. The evidence was entirely credible. I am satisfied on all of the evidence before me that today this is a genuine and subsisting marriage and that the parties intend to live together permanently.

Decision and Directions

35. The decision of the First-tier Tribunal is flawed for error of law and it is set aside.
36. The appeal is allowed on human rights grounds.

37. There is no order for anonymity.

Upper Tribunal Judge Bruce
11th

April 2022