



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/08186/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 16 May 2017

**Decision &
Promulgated
On 06 June 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**SAAD KHAMIS ZADEH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - ISTANBUL

Respondent

Representation:

For the Appellant: Mr. A. Burrett, Counsel, instructed by Ozoran Turkan Solicitors

For the Respondent: Mr. P. Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. Following the error of law decision promulgated on 4 April 2017, the hearing was resumed for the decision to be remade.
2. I heard oral evidence from the Sponsor. Both representatives made oral submissions following which I reserved my decision.
3. I have taken into account the documents in the Respondent's bundle, the Appellant's bundle which was before the First-tier Tribunal (255 pages), and the Appendix to this bundle provided for this hearing (107 pages). I have also taken into account photographs provided by the Appellant

(numbered 1 to 13).

The Respondent's decision

4. The Respondent refused the application in the notice of decision dated 28 April 2015. In summary, the Respondent was not satisfied that the relationship between the Appellant and Sponsor was genuine and subsisting, or that they intended to live together permanently in the UK. The photographs provided showed the Appellant and Sponsor together on only four occasions, two of which were directly related to the wedding. The Sponsor only stayed in Iran for two months during which period the Appellant met and married him. Evidence of contact over Tango, Viber and Whatsapp had been provided, but they did not confirm that the people engaged in the conversations were the Appellant and Sponsor. The Respondent was not satisfied that the Appellant and Sponsor enjoyed the level of contact claimed.
5. The Respondent also refused the application under the financial requirements. The Appellant had not provided an employer's letter for the Sponsor.
6. The Entry Clearance Manager ("ECM") reviewed the decision on 21 July 2015. No new evidence had been submitted in support of the appeal or to address issues raised in the notice of refusal. The Respondent considered the application under Article 8 ECHR. There was no evidence that the Appellant and Sponsor would not be able to live together in Iran. It was not unreasonable to expect the Sponsor to return to his country of origin. The maintenance of effective immigration control was important especially in cases where the Appellant had been unable to satisfy the requirements of a legitimate and proper immigration rule.

Burden of proof

7. The burden of proof lies on the Appellant to show that the Respondent's decision is a breach of her rights to a family and private life under Article 8 ECHR. The standard of proof is the balance of probabilities.

Decision and reasons

8. At the outset of the hearing, Mr. Burrett stated that the Sponsor would need an interpreter. However, no interpreter had been requested by the Appellant's representatives. Mr. Burrett had not requested that an interpreter be present for this resumed hearing at the error of law hearing on 23 March 2017. The Sponsor said that he would be able to give evidence in English. I said that I would proceed to hear evidence from the Sponsor until and unless any problem with understanding arose. The Sponsor had no problem understanding the questions put to him, and neither he nor Mr. Burrett raised this as an issue.
9. I found the Sponsor to be an honest witness who answered all questions put to him and was not evasive. I find that I can rely on his evidence.

10. At the outset of the hearing, having considered the Appellant's bundle which had not been on the Tribunal file for the previous hearing, I expressed my surprise that there was no evidence to corroborate the claim made by Mr. Burrett at the error of law hearing that this was the second entry clearance application made by the Appellant. The chronology is set out on page 1 of the bundle and there is no reference to a previous application. I expressed my dissatisfaction at having been told by Mr. Burrett in submissions at the error of law hearing that this was the second entry clearance application made by the Appellant. Mr. Burrett stated that he had been told that this was the second application, although he acknowledged that there was no evidence to this effect. He stated that he had not been intending to mislead the Tribunal, and that maybe he had got it wrong.
11. I find that this is the first application for entry clearance made by the Appellant. The application was made in January 2015, refused in April 2015, reconsidered by the ECM in July 2015 and the hearing in the First-tier Tribunal was on 7 September 2016.
12. I also note that, although I had directed that the Sponsor explain why he had not attended the error of law hearing, no explanation was offered by Mr. Burrett or the Sponsor.

Relationship requirements

13. I have considered the evidence provided. At pages 138 to 139 is the letter which accompanied the Appellant's application. This states that the Appellant and Sponsor were introduced through family members who are neighbours in Iran. They began talking online in October 2013. They met in person on 20 February 2014. They were married on 23 March 2014. They have kept in touch using Tango, Viber and Whatsapp. The evidence provided is listed on page 139, and includes photographs, and evidence of communication. However, the evidence of communication provided is not included in the Appellant's bundle.
14. In the Respondent's bundle at Annex I there are two pages of what appear to be messages, but these are untranslated, and their source is not clear. It is not clear whether this was the only evidence of communication which was provided with the application.
15. I have considered the evidence of the Sponsor. As stated above, I found him to be an honest and reliable witness. In his witness statement the Sponsor said that he and the Appellant had started talking on the phone and messaging each other online in October 2013. No evidence of this was provided. In the Appendix bundle the Appellant provided print outs of Whatsapp chats and translations covering the period 13 March 2017 to 23 April 2017 (pages 65 to 106). This post-dates the application and decision. She also provided what are described as "couples telephone call logs" but it not clear what period of time these cover. They appear to be from Whatsapp (pages 36 to 45). This is the only evidence of contact provided.

The Sponsor provided a photograph of the Appellant which she had sent to him two weeks ago (page 107 of the Appendix).

16. I find that the Appellant and Sponsor met once before their marriage. I find that there is some confusion in the evidence as to when this was. However, I have taken into account the oral evidence of the Sponsor, as well as a photograph provided at the hearing which showed the Appellant and Sponsor together. I accept the Sponsor's evidence that this was taken in October 2013 in Iran (number 8). On the evidence before me, I find on the balance of probabilities that they first met in person in October 2013.
17. The next time that they met was when the Sponsor went to Iran for their marriage in February 2014. The marriage took place in March 2014. The next occasion they saw each other in person was in January/ February 2015 in Turkey when the Appellant made her application for entry clearance. It was not clear from the evidence provided with the application and for the appeal in the First-tier Tribunal that the Sponsor had gone to Turkey to meet the Appellant when she made the application. However, on the evidence before me, I find on the balance of probabilities that they met for a third time in person in Turkey in January/February 2015. The Sponsor provided photographs at the hearing showing the Appellant and him together in Turkey in April 2016.
18. Despite some reservations with the evidence, in particular with regards to the quality and quantity of evidence provided with the application, I find that the Appellant has provided evidence that she is in a genuine and subsisting relationship with the Sponsor. I find on the balance of probabilities that the relationship has been subsisting since they married. I am able to take into account evidence which postdates the application insofar as it relates to circumstances appertaining at the date of the decision. The Sponsor and Appellant met in Turkey again in 2016. The Sponsor has provided evidence of their recent Whatsapp communication. I find on the balance of probabilities that the Appellant and Sponsor intend to live together permanently. I find that the Appellant satisfies the relationship requirements of the immigration rules.

Financial requirements

19. The Respondent refused the application as the Appellant had not provided an employer's letter for the Sponsor. The letter provided with the application was not from the Sponsor's employer, as required under the immigration rules. Mr. Burrett accepted that the letter provided with the application, being from the Sponsor's employer's accountants, did not meet the requirements of the immigration rules.
20. For the appeal the Sponsor provided a letter from his employer (page 40 of the Appellant's bundle). I have considered this letter. It was not submitted by Mr. Armstrong that this letter did not meet the requirements of the rules, albeit that it post-dated the decision. I find on the balance of probabilities that this letter meets the requirements of the immigration rules.

21. Mr. Armstrong submitted that only five months' worth of the Sponsor's bank statements had been provided, from September 2014 to January 2015. However, the notice of decision indicates that bank statements were provided for the period August 2014 - February 2015, which is a period of six months. I find that bank statements were provided to cover the required period.
22. I do not accept Mr. Burrett's submission that this was a case where the policy of evidential flexibility should have been used to obtain an employer's letter, given that the Respondent was not satisfied that the relationship requirements were met, and given my findings above in relation to the quality and quantity of evidence provided with the application to show that these requirements had been met.
23. I find that the Appellant has now provided evidence which meets the financial requirements of the immigration rules. Taking into account all of the evidence, I find that the Appellant has shown on the balance of probabilities that she met the requirements for entry clearance as the spouse of the Sponsor under Appendix FM, the Respondent's immigration rules relating to Article 8.

Article 8 outside the immigration rules

24. I have further considered the Appellant's appeal under Article 8 outside the immigration rules in accordance with the steps set out in Razgar [2004] UKHL 27. I have found above that the Appellant and Sponsor are in a genuine and subsisting relationship. I find that they have a family life sufficient to engage the operation of Article 8 and I find that the decision would interfere with that.
25. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
26. In carrying out the proportionality exercise, I have taken into account my findings above in relation to the appeal under the immigration rules. The Appellant did not provide evidence with the application to satisfy the Respondent that she met the requirements of the immigration rules. However, I have found above that for the appeal she provided evidence to show that she met the requirements of the immigration rules at the time of the application.

27. I have also taken into account the factors set out in section 117B of the 2002 Act, insofar as they are relevant. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. The Appellant has shown that she meets the requirements of the immigration rules.
28. The Respondent was satisfied that the Appellant met the English language requirements of the immigration rules (117B(2)).
29. The Respondent was not satisfied that the Appellant met the financial requirements as the Appellant had not provided an employer's letter for the Sponsor. However she had provided evidence that the Sponsor was earning in excess of that required under the immigration rules to sponsor a spouse. I find that the Appellant and Sponsor are financially independent (117B(3)).
30. Sections 117B(4) to (6) are not relevant.
31. I attach particular weight to the fact that the Appellant has shown that she met the requirements of the immigration rules. I find that this reduces the weight to be given to the Respondent's public interest in maintaining effective immigration control.
32. I have taken into account that the Appellant and Sponsor were married in April 2014, over three years ago. I have taken into account that this application was made online in January 2015, and that the Appellant attended an appointment with the Respondent in February 2015 (page 140). I find that the application was made over two years ago. I also take into account that because the judge in the First-tier Tribunal did not deal properly with the evidence, this has prolonged the period of separation of the Appellant and Sponsor.
33. I have taken into account the evidence of the Appellant and Sponsor that the refusal has caused problems for the Appellant with her family. I find that the whole process has taken over two years. While I accept that, had more evidence been provided with the application or with the grounds of appeal, this may not have happened, I have to consider the circumstances as they are before me, which is that the Appellant and Sponsor have been separated for over two years since the decision was made. I accept the evidence that this has caused problems for the Appellant with her family in Iran.
34. Given that the Appellant meets all of the requirements of the immigration rules, I find the weight to be given to the Respondent's aim of maintaining effective immigration control is lessened. I find that the balance comes down in favour of the Appellant. I find that the Appellant has shown on the balance of probabilities that the decision is a breach of her rights and those of the Sponsor to a family life under Article 8.
35. I have not made an anonymity direction.

Signed

Date 5 June 2017

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and a fee has been paid. However, the evidence was not before the Respondent when the decision was made. In the circumstances, I make no fee award.

Signed

Date 5 June 2017

Deputy Upper Tribunal Judge Chamberlain