



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
HU/24560/2018

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
(remote)
On: 3rd December 2020

Decision & Reasons Promulgated
On: 18th December 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AA
(anonymity direction made)

Appellants

And

Entry Clearance Officer, Sheffield

Respondent

For the Appellant:
For the Respondent:

Mr Janjua, Janjua & Associates
Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born in 1990. He appeals with permission against the decision of the First-tier Tribunal (Judge Shimmin) to dismiss his human rights appeal.

Anonymity Order

2. This decision includes information about the mental health history of the Sponsor. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I am concerned that identification of the Appellant could lead to identification of the Sponsor. I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

3. On the 15th January 2018 the Appellant made an application for entry clearance to the United Kingdom in order to settle with his Sponsor, a British woman whom I shall refer to herein as S. The application was referred to the entry clearance ‘hub’ at Sheffield, and a decision made on the 7th November 2018. The Entry Clearance Officer refused the application on the following grounds:

- i) Suitability: EC-P.1.1(c) read with S-EC.2.2(a) of Appendix FM.

The Appellant stated in ‘Appendix 2’ to his application that the Sponsor had never been married before. Checks (unspecified) by the Respondent found this to be untrue. The Entry Clearance Officer was therefore satisfied that false information had been supplied with the application.

- ii) Eligibility: EC-P.1.1(d) read with Section E-ECP.

The Respondent, having had regard to the discrepant information provided about the relationship, was not satisfied that the marriage was genuine and subsisting.

Further the Entry Clearance Officer could not be satisfied that the Sponsor was free to marry the Appellant as no evidence had been provided that her first marriage had ended.

- iii) Further and in the alternative the Respondent did not consider there to be any exceptional or compelling circumstances such that entry clearance would be justified 'outside of the rules'.

4. Having heard the evidence of S the First-tier Tribunal agreed with the Entry Clearance Officer on each of these matters and the appeal was dismissed.

5. Permission was granted by Upper Tribunal Judge Sheridan on the grounds that the First-tier Tribunal erred in the following material respects:

- i) Failing to make a finding on the medical evidence.

It was the oral evidence of S that she suffers from depression, anxiety and personality disorder which she believes to "affect her performance when under pressure". Although no independent evidence was before the Tribunal in respect of these conditions, there was reference to them in material in the Respondent's bundle and they remained relevant to the Tribunal's assessment of the case.

- ii) Making a finding unsupported by the evidence.

The Tribunal concluded that S had not been free to marry the Appellant and as such their marriage could not be considered valid. There was no evidence to support the contention that she was not free to marry; there was not even evidence to suggest that she had previously been married by United Kingdom law.

- iii) Error of fact/misdirection.

The Appellant is found to have supplied false information when he said that his wife had not been married before. In fact she had not been married according to English law: he therefore told the truth.

6. Before me Mr Janjua sought, and was granted, permission to amend the grounds. The detail of these changes is set out below but in short summary it is submitted that Mr Janjua had prepared the case before both First-tier and Upper Tribunals in good faith that what was said in the refusal letter about the discrepancies was correct. He had however told the First-tier Tribunal that he

had not been in possession of all of the documents relied upon by the Respondent, and in particular the document 'Appendix 2' which is referred to in the refusal. When I informed Mr Janjua that the file contains no such document he sought to amend the grounds to submit that the Tribunal took immaterial matters into account, made mistakes of fact and misunderstood the case before it. Permission was granted on all these grounds.

Error of Law: Discussion and Findings

7. It is of course the case that the Appellant must succeed on all three of his pleaded grounds if he is to succeed in this appeal. That is because a negative outcome on any one of the matters in issue – whether the relationship is genuine and subsisting, the validity of the marriage or whether he lied – would result in the appeal being dismissed.

Validity of Marriage, False Information

8. I take these two issues together, because as I explain, they are very much intertwined. The foundation of the Respondent's decision to refuse this application with reference to S-EC.2.2 of Appendix FM was this response to a question put to the Appellant at interview on the 2nd October 2018:

“Q26: Have you or your spouse been married before?
A: No we haven't, this is our first marriage for both of us”

9. The Respondent noted the evidence found elsewhere that in fact S had undergone a *nikah* in approximately 2010/11 and lived with that man in the United Kingdom before the 'marriage' ended. It was this evidence which led the First-tier Tribunal to agree with the Respondent that *this* marriage had not been shown to be valid, and moreover that the Appellant had lied at his interview.
10. The answer given by the Appellant at his interview had to be read in context of the other evidence he had given about his wife. That evidence included:
 - i) A statement signed by the Appellant on the 9th August 2019 in which he says the following “we got engaged had our Islamic *nikah* on 2 August 2014 however due to my immigration status we could not register our marriage in the UK” and that subsequently “we registered our marriage in Pakistan”. Of his

wife's previous Islamic marriage the Appellant says "I further confirm that at the time of our marriage, we were both free to marry each other. My wife was previously in a relationship with a British citizen which ended in 2011"

- ii) A copy of the 'FLR (FP)' form completed by the Appellant and submitted to the Respondent under cover of letter dated 28th October 2014. This bundle was submitted by the HOPO to Judge Shimmin. It related to an in-country application for leave that the Appellant made after being apprehended as an overstayer, the refusal of which resulted in him returning to Pakistan. The covering letter lists the documents submitted to the Home Office at the time, which included photographs of injuries sustained by S (as I apprehend it, allegedly inflicted on her by her former partner), and a photograph of her "divorce" - unfortunately neither document is actually reproduced in this bundle. What is produced in the bundle is the actual application form, in which the Appellant says this [at §7.17]:

"wife got married in UK only nika done no registry married. husband in Pakistan now divorced Islamically"

That bundle also contains a series of letters from family and friends, the contents of which need not be set out here save to note that they serve to confirm three things: that the S was previously in a relationship in the UK which ended badly, in the aftermath of that relationship she suffered mental health problems, and that the relationship that she now has with the Appellant is genuine and subsisting and giving her great happiness.

11. I am satisfied that in its assessment of the matters of validity and false information the First-tier Tribunal failed to have any regard at all to this important evidence. What the application form in 2014 illustrates is that the Appellant was quite willing to disclose that his wife had previously been married according to Islamic law in the United Kingdom. He says so himself, she said it in a supporting letter, and several people who know the couple signed statements to the same effect. His evidence in his 2019 witness statement is entirely consistent with that. What the evidence also indicates is that the Appellant understood the difference, as a matter of law, between a *nikah* and a 'registered' - that is to say legally recognised - marriage. In both the 2014 application and the 2019 statement the Appellant draws a distinction between the two. The strong inference is that he understood that a *nikah* conducted in Bradford between two British nationals such as S and her first 'husband' was not, as far as English law is concerned, a marriage at all. Thus

when he said at his 2018 interview that neither he nor she had been previously married, he was both correct as a matter of law, and telling the truth. That the interviewing officer plainly understood that to the case can be inferred from the fact that the alleged 'discrepancy' was not then put to him. I am satisfied that in its assessment of the 'suitability' refusal under S-EC.2.2 the Tribunal has failed to take relevant evidence into account. I set its reasoning aside on that point.

12. As for the validity of the marriage, I am wholly satisfied that there was no reason to doubt it. The consistent evidence of Appellant and Sponsor, given over a six year period between 2014 and 2020 and encompassing the in-country application as well as this entry clearance one, was that she had previously undergone a *nikah* in the United Kingdom, that marriage was never registered in accordance with United Kingdom law, and her ex-partner, now in Pakistan, had "divorced her Islamically". It is of course the case that a bare *nikah* undertaken in the United Kingdom is not, without more, a legally valid marriage. For that reason the dissolution of that marriage was not something that should have concerned the Tribunal. Under the operative Islamic law the S would have simply been divorced by oral *talaq*. That S was in fact considered "divorced Islamically" was nevertheless manifestly evident from the fact that her friends and family recognised her as such, and that the authorities in Pakistan were so satisfied when her - legally binding - *nikah* was contracted and registered in Pakistan in 2015. I am satisfied that there was no evidential basis upon which to doubt the validity of the Appellant's marriage at all. I set the Tribunal's reasoning on that matter aside.

Genuine and Subsisting?

13. That leaves the question of whether this is a genuine and subsisting marriage. The First-tier Tribunal decision identifies several reasons for concluding that this marriage was not genuine or subsisting. All of them are concerned with the quality and consistency of information provided at different times. The written grounds alleged that in reaching that conclusion the Tribunal has failed to weigh in the balance the evidence of S that she is suffering from mental health problems which impede her ability to recall and narrate events clearly. She finds it difficult to remember things and gets flustered under pressure. The Respondent resisted that ground of appeal on the basis that most of the alleged discrepancies arise from the Appellant's evidence, not hers. As I mention above, before me Mr Janjua considerably widened the scope of his challenge. He did so upon confirmation from myself that the file contains no 'Appendix 2', of which more below, and that the application form in the Respondent's bundle simply does not say what it is recorded as saying in in the decision.
14. The first 'discrepancy' identified by both Respondent and First-tier Tribunal was about when the couple first met. The Respondent asserts that the

application for entry clearance, made on the 15th January 2018, was supported by a statement at 'Appendix 2' saying that the Appellant first met his wife on the 5th May 2015 in Pakistan. Both refusal letter and First-tier Tribunal decision contrast that unfavourably with Home Office records demonstrating that he was apprehended at her house in Bradford in 2014.

15. As I note above, 'Appendix 2' does not feature in the Respondent's bundle. I have carefully reviewed the file that was before the First-tier Tribunal. As far as I can see no such statement has ever been produced, and the application form itself says nothing about when the couple met. In fact it is clear from the transcript of the interview conducted with the Appellant on the 2nd October 2018 that it was his evidence that he had met his wife long before May 2015. At that interview he is asked [Q7] when and how he first got to know her. He says that he met her at Bradford College of Management in 2012 and that they chatted and went for dinner. At no point does the interviewing officer challenge that evidence, or put to the Appellant that 'Appendix 2' indicated anything different. It seems to me that the Appellant's spontaneous disclosure at interview that they met in 2012 is entirely consistent with the Home Office records which show that he was encountered *at the Sponsor's address* on the 27th October 2014 in the United Kingdom. I find that the First-tier Tribunal erred as a matter of fact when it notes at its §3 "the appellant stated in his application that he first met his sponsor in person in Pakistan on 5 May 2015'. The application form says no such thing.
16. The second discrepancy identified was concerned with whether or not the couple are related outside of marriage. In the interviews conducted on the 2nd October 2018 he said that they were "far relatives"; she said that they were "not related". This is contrasted with the evidence "in the application" that they were first cousins. Again, I am unable to find any reference in the application form to the evidence alleged to be in it. Nowhere on the file is there a document in which it is said that the Appellant and S are first cousins. If it was said in the mysterious 'Appendix 2' that document was not before the First-tier Tribunal. What the Tribunal has done is adopt an assertion in the refusal letter as if it were fact. It is true that there is some difference between the answers the couple gave when interviewed: the Appellant said that they were "far" relatives and it was her view that they were not related at all. In the context of two families who come from the same area in Mirpur this is hardly likely to be material: statistically speaking it is highly likely that the Appellant is a "far" relative to many, if not all, the people in his home village.
17. The third discrepancy is alleged to have arisen in respect of events in August 2014. During the interviews both Appellant and Sponsor described the ceremony that they underwent in the United Kingdom at that time as an "engagement ceremony". However in his in-country October 2014 application for leave to remain the Appellant had said that this was an Islamic marriage, a

claim in fact supported by the submission of a *nikahnama*. Although it is unclear what weight the Tribunal attached to this matter, I am satisfied that there is absolutely no discrepancy arising. It is commonly the cultural practice of Mirpuris to treat a *nikah*, absent the *rukhsati* or *bharat*, as an engagement: until the party is over and the bride joins the groom's family, social convention would hold that the wedding had not yet occurred, notwithstanding that in the eyes of God the contract had been signed.

18. The fourth matter of concern for the Tribunal was this: "it does not appear that they know each other's hobbies very well as different answers were given at interview". I am not satisfied that this reflects a fair, or complete reading of the evidence. When asked his wife's hobbies the Appellant says [at Q23] that she likes going to the gym and watching Indian movies. She does not mention Indian movies at her interview, but she does confirm [at her Q21] that she likes going to the gym. He identifies his own hobbies as being cricket and horror novels: she says he likes cricket and watching horror films. It does not seem to me fair to describe these answers as "different", particularly where no weight at all is given to the many consistent answers provided by the couple.
19. Removing these pillars from the edifice of the reasoning there is very little holding the decision of the First-tier Tribunal upright. It is true that in October 2018 the Appellant said that he met his wife in 2012, and she thought it was 2013. The decision records S's oral evidence that she was unable to say what course her husband originally came to the United Kingdom to study - ie the course he signed up to before they had ever met. I have already addressed the matter of whether she had been 'married' before above. The one matter that did weigh against the Appellant was that in 2014 immigration enforcement officers caught the Appellant at his wife's house in Bradford. He tried to lie about who he was and why he was there, before admitting his true identity. That does him no credit and the Tribunal was entitled to weigh that matter in the balance when considering his overall credibility as an applicant. It is however difficult to see how it undermines his claim that this is a genuine marriage.
20. I am satisfied that in its assessment of whether this was a genuine relationship the First-tier Tribunal has erred in making mistakes of fact (about what the evidence actually said) and further in failing to take material evidence into account: I return to this below but there was copious evidence before the Tribunal indicating 'intervening devotion' between these two; she has been to Pakistan to visit her husband on several occasions. Their assertions were supported by family and friends. The discrepancies, as I set out above, were a mirage. I am satisfied that the First-tier Tribunal erred in its approach to the question of 'eligibility' and I set its reasoning aside.

The Decision Re-Made

21. The unchallenged findings are these:

- The Appellant was in the United Kingdom in 2012 studying at Bradford College
- The Sponsor was a student at the same college at the time
- He was apprehended at her property in the United Kingdom 2014
- The couple underwent a *nikah* in August 2014 in the United Kingdom and after the Appellant's return to Pakistan S travelled there to have their 'wedding' ie the *rukhsati*

22. To these skeletal facts I add the following evidence weighing in the Appellant's favour:

- The consistent evidence of both Appellant and Sponsor that they are in a genuine relationship and intend to live with one another permanently in the United Kingdom
- The evidence of 8 other witnesses, submitted with the application in 2014, to support that claim
- The fact that when separately interviewed the couple gave consistent answers about where and how they met, who attended their traditional wedding in Pakistan, how often she has visited him since, how they maintain contact, and their respective interests and hobbies
- Photographs of the event in Pakistan showing the Sponsor in customarily elaborate dress and make up, a large cake etc
- Numerous photographs of the couple together
- Aeroplane tickets evidencing the Sponsor's trips to Pakistan
- Western Union money transfers showing money sent from S to the Appellant
- Numerous - possibly hundreds - of 'whatsapp' instant messages, calls and images. I note that the Appellant is identified on the Sponsor's phone as "Baby xx"

- Mobile telephone bills showing numerous – possibly hundreds – of calls made between the two

23. All of that evidence supports the contention that this is a genuine and subsisting relationship. Against it I weigh the matters identified at my §19 above. The Appellant overstayed his visa in the United Kingdom and when caught at her house by immigration officials in 2014 he panicked and lied before revealing his true identity. That goes generally to his credibility, and to his willingness to circumvent immigration control: I therefore weigh that matter in the balance against him, but noting as I do that the ECO evidently did not consider those matters significant enough to warrant refusal on ‘suitability’ grounds – that is an assessment with which I respectfully agree. I attach only very little weight to the fact that one said that they had met in 2012 and the other 2013: no-one can be expected to have a perfect chronological memory of dates and events that long ago. I attach no weight at all to the fact that she could not, in 2018, identify the name of the course that her husband signed up to when he applied for entry clearance as a student in 2010.
24. Having taken all of the evidence into account I am in no doubt whatsoever that this is a genuine and subsisting marriage. I say that conscious that I have found the burden discharged way beyond the applicable standard of a ‘balance of probabilities’. I say that because all of evidence all points one way.
25. Given what I have said above I do not think I need to add to my findings on validity and the allegation of false information: neither ground for refusal was properly founded in the evidence. I do however note that I now have before me confirmation from the General Register Office that S has not, between 2006 and 2020, registered any marriage in the United Kingdom. Thus any doubts that might linger about whether this Muslim woman was legally married when she decided to marry someone else can be dispelled.

Decision

26. The determination of the First-tier Tribunal contains errors of law and it is set aside.
27. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.
28. I would add that it has been almost three years since the Appellant made his application for entry clearance to join his wife. In the circumstances the

Respondent will no doubt wish to prioritise this matter and grant entry clearance without further delay.

29. There is an order for anonymity.

A handwritten signature in black ink, consisting of the letters 'CBE' in a cursive, stylized font.

Upper Tribunal Judge Bruce
13th December 2020