IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/03236/2014
OA/03238/2014
OA/03239/2014
OA/03242/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th March 2015	**On 15th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) KOUSAR YOUNIS
(2) WAQAR YOUNIS
(3) DANISH YOUNIS
(4) ATTIA YOUNIS
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr I Ali (Counsel)
For the Respondent: Miss J Isherwood (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Thomas, promulgated on 4th December 2014, following a hearing at Birmingham on 19th November 2014. In the determination, the judge dismissed the appeals of Kousar Younis, Waqar Younis, Danish Younis, and Attia Younis. The Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants comprise a family of a mother and her children. They are all citizens of Pakistan. They were born respectively on 4th June 1971, on 4th November 1995, on 4th November 1995, and on 2nd December 1996. The second and third Appellants are twins. They appealed against the decision of the Respondent Entry Clearance Officer dated 23rd January 2014, refusing their application for entry clearance to join the husband of the first Appellant, and the father of the remaining Appellants, Mr Mohammed Sahir, a person present and settled in the UK.

The Appellants' Claim

3. The Appellants' claim is that the first Appellant and the Sponsor married on 1st April 1982. They have been married for 22 years. There is a marriage certificate. There is a video recording of the event. The second and third Appellants are twins and were born on 4th June 1995. The fourth Appellant was born on 2nd December 1996. They are all children of the marriage. They all live together in Pakistan. The Sponsor has maintained contact with all of them. There has been one visit by the Sponsor. The Sponsor's marriage was arranged. He is now a British citizen. However, when he first came to the UK on 15th March 1996, he had applied for asylum and this was rejected, and he was only granted indefinite leave to remain, and eventually became a naturalised citizen in 2013. He has maintained contact with the Appellants. He has visited them once in July 2014, after he had acquired legal citizen in the UK. He stayed for three weeks then. He uses telephone cards to call them. He works for Twin Plastics Ltd as a machine operator. He has a 50% share in a fast food company. His marriage with the first Appellant is genuine and subsisting. He loves his wife and children and wants to be reunited with them. His position is that, "there will be no reason for him to send money to his wife if his relationship was not ongoing, genuine and subsisting" (paragraph 6).

The Judge's Findings

4. The judge was satisfied that the parties were married on 1st April 1992 as claimed. There was no issue that the first Appellant was the mother of the remaining Appellants. The judge observed how the Sponsor left Pakistan soon after the conception of his third child, the fourth Appellant (see paragraph 16). There were birth certificates, which were not original, but they "do carry some evidential weight" (paragraph 16). The judge also observed that, "there is no issue that the Sponsor has remitted funds to the first Appellant over the years" (paragraph 16). There had been evidence from a Dr Rehman before the judge, and the judge

observed that, "I also accept the evidence of Dr Rehman that he has in the past taken gifts from the Sponsor to the Appellants" (paragraph 16).

5. However, the judge then went on to hold that, the fact that the three children existed "indicates that the matrimonial relationship existed from 1992 until 1996 when the Sponsor came to the United Kingdom" (paragraph 17) but it could not be said that it existed beyond this time without further evidence. There was no evidence at all from the first Appellant to confirm the existence of the marital relationship or her intentions. The judge observed that, "whilst I accept that she is illiterate and has dyslexia, I note from her application that she speaks Mirpuri and Urdu well" (paragraph 23). The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge erred in her finding that the marriage did not subsist and that there was no intention to live together permanently given the weight of the evidence before her. The Sponsor had given evidence that he had returned back to Pakistan, after he had got legal status in the UK, and lived as man and wife with the first Appellant on that occasion. Furthermore, there was also a discrepancy in the judge's conclusions at paragraph 24, where the judge held that the marriage does not subsist under the Immigration Rules, and what she concluded later at paragraph 30, namely, that family life could continue by the Sponsor rejoining his wife and children in Pakistan.

7. On 2nd February 2015, permission to appeal was granted.

8. On 13th February 2015, a Rule 24 response was entered.

Submissions

9. In his submissions before me, Mr Ali, appearing on behalf the Appellants, relied upon his well crafted skeleton argument. The principle point here was that the had failed to abide by the strictures in **Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC)**. In this case, the President of the Tribunal gave judgment to the following effect:

> "It may be that the ECO and the judge considered that the requirement to show a "against subsisting marriage" imposes some significant burden to produce evidence other that showing that there was a genuine intention to live together as man and wife in a married relationship. If so we conclude that is an error of law. The authority of **GA ("subsisting" marriage) Ghana [2006] Imm AR 453** only requires that there is a real relationship as opposed to the merely formal one of a marriage which has not been determinative. Where there is a legally recognised marriage and the parties who are living part both want to be together and live together as husband and wife, we cannot see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the Immigration Rules".

10. For her part, Miss Isherwood submitted that given that the Appellant, after the failure of his asylum claim, did not leave the UK (see paragraph 18) the absence of eighteen years away from his wife and family, was a matter that the judge could ask for further evidence on, as proof for the existence of a genuine and subsisting marriage. Furthermore, whereas the Sponsor was sending monies, it is by no means clear that he was sending the money to the children alone, or to his wife as well. The essential basis of the decision here was that the marriage was not genuine and subsisting any longer. The judge was entitled to so conclude.

11. In reply, Mr Ali submitted that there was no way in which the judge's findings at paragraph 31 could be reconciled with the findings at paragraph 25. In the latter, the judge had said that family life could be continued in Pakistan. In the former, she had denied the very existence of family life.

12. Second, it was wrong to say (at paragraph 23) that "there is no evidence at all from the first Appellant to confirm the existence of a marital relationship or her intentions". The judge had completely overlooked the witness statements of the parties. These made it quite clear that a German married life was intended. Moreover, at question 1.18 of Appendix 2 of the VAF application form, the Appellant makes it clear that her intention is to live permanently with the Appellant. These facts alone suffice for the purposes of the Tribunal decision in **Goudey**. The judge was wrong to have overlooked the importance of that decision.

13. Third, the judge's reasoning is irrational in other respects. On the same facts, the judge finds the relationship and tie of the Sponsor with his children to be a genuine and subsisting one. Yet, on the same facts again, he finds the relationship and tie with his wife, the first Appellant, who had borne him three children, to be baseless.

14. There were two additional facts which were of great importance. First, the judge concluded that there were "evidence of financial remittances from the Sponsor". She went on to say that, "there is indeed evidence of such remittances from September 2012 to date" (see paragraph 20). This showed the Sponsor's commitment to his family. Mr Ali submitted that he had actually worked out, from the remittances that were submitted, the funds that the Sponsor had over the two year period, sent to his family, and they amounted to no less than £16,000, a very substantial sum. Second, the remittances were all in his wife's name. It did not make sense for him to send the money to his wife, if his relationship with her had broken down, and it was not a genuine and subsisting one. The judge also states that it is not clear what the parties talk about. She accepts that "the Sponsor has telephone contact with the Appellants" (paragraph 21) but that "the Sponsor gives no evidence of the content of conversations" (paragraph 21). This could simply not be true because at paragraph 14 of the witness statement the nature of the relationship is fully described. The judge had overlooked this.

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. The judge at paragraph 30 implies that there is a distinction between British citizenship at birth and British citizenship acquired by naturalisation. This follows from the observation that, "in the same way that he chose to leave his family and move to the United Kingdom, there is nothing preventing him from returning to live with his family in Pakistan now. He is not a British citizen by birth and is therefore able to rejoin his family" (paragraph 30). To say so is not only not based on law, but defeats the application of Article 8 jurisprudence in appropriate cases, as there will be an implication here that any person not a British citizen otherwise than birth, can return back to the country of his origin.

16. Second, the suggestion at paragraph 30 that a family life can be continued in Pakistan abroad, runs counter to the conclusion at paragraph 24 earlier that, "whilst the Appellant and Sponsor are married and have three children, the evidence does not prove, as required, in line with the case of **GA**, that the marital relationship subsists and that the parties intend to live together permanently in the United Kingdom". The two conclusions in the two separate paragraphs are discordant and therefore amount to an error of law.

Re-Making the Decision

17. I have remade the decision on the basis of the decision of the original judge, the evidence that I have heard today, and the submissions before me. I am allowing this appeal for the reasons given by Mr Ali in his clear and succinct submissions. On any view, this is a case where the Sponsor has regular contact with his family, which includes the contact with the first Appellant, his wife. The evidence is clear on this point and was accepted by the original judge when she observed that, "I accept that the Sponsor is still in contact with the Appellants" (paragraph 21). It is not true that there is no evidence of the content of the conversations because this is set out in paragraph 14 of the witness statement of the Sponsor.

18. Second, there is acceptance that from 1996 onwards the Sponsor has been supporting his family. There is evidence of remittances from September 2012 to date and these remittances are all in the name of the first Appellant, the Sponsor's wife.

19. Third, the couple have been married for 22 years. There is no rule of law that a period away in the UK, for a couple who are otherwise married and have children, imports a presumption that the marriage has thereby broken down, with no intention to live permanently together. In the very nature of things, where a person is an economic migrant, as has been the implication here, there will be a period of long separation, until such time, should it ever arise, that the person away in the United Kingdom acquires legal status.

20. The presumption is, if anything, the other way as demonstrated by the present decision in **Goudey** which confirms that all that is required is a real relationship as opposed to a merely formal one, and where there is a legal recognised marriage, and the parties are living apart, and both want to be together, and to live together as husband and wife, nothing more is required to demonstrate that the marriage is genuine and subsisting.

21. Fourth, there are three children of the marriage.

22. Fifth, the Sponsor sends, not just monies, but gifts as well, as confirmed by Dr Rehman.

23. Sixth, it is not clear why the evidence of the Sponsor, given and taken at face value, is not credible. The evidence is credible because it is perfectly consistent with every other action that he has taken with respect to his wife and family. The Appellants only have to satisfy the Tribunal on a balance of probabilities. This they have done. The appeal is allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed under paragraphs EC-P.1.1(d) and E-ECP2.6 and E-ECP2.10 (Appendix FM) of the Immigration Rules.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th April 2015

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a whole fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 11th April 2015