



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04170/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16 September 2015

Decision and Reasons Promulgated
On 7 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

QINZHU ZHANG

Appellant

and

ENTRY CLEARANCE OFFICER- BEIJING

Respondent

Representation:

For the Appellant: Mr H Kannangara, instructed by Anglo Chinese Law Firm Ltd
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of China, appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer (ECO) of 25 February 2014 to refuse her application for entry clearance to settle with her spouse, Wu Chen Yang (the sponsor), in the UK. First-tier Tribunal Judge P Telford dismissed the appeal. The appellant appeals with permission to this Tribunal.
2. The background to this appeal is that the appellant and the sponsor married in China in March 1988, they registered their marriage there on 12 August 1994. They claim to have two children born in 1989 and 1994. The sponsor came to the UK on 10 January

2000. The sponsor was granted leave to remain under the legacy policy on 22 February 2011. He was naturalised as a British citizen on 12 July 2012. The appellant and the sponsor did not see each other again until the sponsor returned to China in January 2013. The appellant applied for entry clearance and that application was refused by the ECO on the basis that the appellant did not meet the requirements of Appendix FM of the Immigration Rules. The ECO accepted that the marriage of the appellant and the sponsor continues as a legal formality but was not satisfied that there is an ongoing subsisting matrimonial relationship or that the parties intend to live together permanently in the UK. The ECO also decided that the appellant did not meet the income threshold requirement of Appendix FM and/or the related evidential requirements.

3. The First-tier Tribunal Judge found that the marriage is not genuine and subsisting finding that the lack of direct contact in 13 years was a significant factor in his decision. The Judge found no reason why the sponsor would not have visited his family in all that time and found that he had not shown that contact was maintained through the internet or other avenues in any meaningful way. The Judge found that the appellant had not shown that the sponsor sent financial amounts to such an extent that he could not afford to travel. He found that the appellant had not translated much of the evidence of internet conversations. The Judge found that photographs of a relatively recent one off visit to family and friends did not discharge the burden of proof on the appellant of proving that she and the sponsor had a relationship in the 13 years and today. In relation to the financial requirements the Judge found that the employer's letter provided was not consistent with HMRC documents and did not properly explain the procedure in relation to tips and overtime. The Judge therefore placed no weight on the employer's letter and did not accept that the sponsor's income is at the required level.

Error of Law

4. The appellant contends in the grounds of appeal that the Judge erred in focussing on the lack of contact since the sponsor left China and failing to consider the fact that the sponsor could not have travelled to China as he was in the UK unregulated and in failing to consider whether the relationship was subsisting at the date of the decision. It is further contended that the Judge failed to assess the marriage in its own cultural/factual setting. It is contended that the Judge misdirected himself in relation to the financial evidence in that he misread the P60 and did not appreciate HMRC rules in relation to the payment of tips.
5. The parties were in agreement that the relevant period for the assessment of financial evidence was April - September 2013, a period of six months before the application for entry clearance. Mr Kannangara indicated that he was not pursuing the ground of appeal alleging procedural unfairness arising from the fact that the ECO issued two decisions.

6. The issue before me therefore is whether the Judge made a material error in relation to the findings as to the subsistence of the marriage and as to the financial requirements.
7. Mr Kannangara submitted that paragraph 14 of the First-tier Tribunal Judge's decision shows that the only reason for the finding that the relationship is not subsisting is the fact that the couple did not see each other for 13 years. He submitted that the Judge failed to recognise the circumstances of this case in that the sponsor came to the UK in 2000 and could not go to China whilst he was an overstayer. He submitted that the appellant did not hold a Chinese passport and could not therefore travel until he obtained a British passport in October 2012. This submission ignores the fact, put forward by Mr Clarke, that the sponsor could have returned to China to his family. He was in the UK illegally from 2000 until he was encountered working illegally in 2009. It seems that he made an application for indefinite leave to remain in 2005 and that indefinite leave to remain was granted in 2011. But he was not an asylum seeker or refugee and could have returned to China at any time. His separation from his family was therefore by choice. He has not explained why he could not obtain a Chinese passport before or after he was granted indefinite leave to remain. There is no explanation as to why he did not obtain a Chinese passport and travel to China when he was granted indefinite leave to remain in 2011.
8. Mr Kannangara submitted that there was evidence of contact between the appellant and the sponsor during the 13 years, he said that the evidence was in the form of calling cards but he accepted that they were not produced to the First-tier Tribunal. The Judge could not consider evidence which was not before him. Mr Kannangara submitted that the sponsor had said in his witness statement that he had been sending money to his wife through friends and acquaintances until he was able to open a bank account. However there was no evidence from the family and friends that they had taken money to the appellant from the sponsor. Again the Judge did not err in concluding that there was insufficient evidence of financial transfers.
9. Mr Kannangara submitted that the sponsor has travelled to China on three occasions, from 9 January 2014 - 24 March 2013; from 27 January 2014 - 2 March 2014; and from January -April 2015. However two of these visits were after the date of the decision appealed against.
10. It is clear from reading paragraph 14 that the First-tier Tribunal Judge did not take the lack of visits over this period as the determining factor. I accept Mr Clarke's submission that it is appropriate to take account of the history of the relationship in assessing whether it is subsisting. The Judge refers to the lack of other evidence that the relationship was or is subsisting. The Judge referred to the lack of evidence of financial transfers and the fact that the sponsor had not translated the evidence of internet contact. The Judge could not have taken into account the untranslated evidence. The Judge said that photographs of a relatively recent one of visit could not alone show that the appellant and the sponsor had a relationship over the 13 years 'and today'. I am satisfied that it is clear that the First-tier Tribunal Judge considered all of the evidence in finding that the appellant had not shown that the marriage is

subsisting. In my view it is difficult to see how the Judge could have approached the evidence any differently. The Judge made no error in his findings that the appellant had not demonstrated that she met the relationship requirements of Appendix FM.

11. Mr Kannangara submitted that the Judge erred in relation to his assessment of the financial evidence as the ECO had considered the sponsor's earnings on the basis of 12 months earnings as shown in HMRC documents rather than on the basis of six months earnings as required. Mr Clarke accepted that the financial evidence was not dealt with in depth by the First-tier Tribunal Judge. It is unclear whether the HMRC documents referred to in the refusal notice were actually before the First-tier Tribunal Judge as they are not in the respondent's bundle.
12. I accept that the reasoning in relation to the financial requirements is unclear in light of the apparent lack of HMRC documents referred to in the refusal notice. The payslips appear to show that the sponsor earned £9360 gross during the relevant period, between April and September 2013. This would appear to meet the financial requirements. However it is also unclear what the HMRC documents say and whether all of the specified evidence was provided. In these circumstances it is unclear whether the appellant has demonstrated that she met the financial requirements of Appendix FM at the date of the decision.
13. In any event I have found that there is no material error in relation to the findings as to the relationship requirements. Any error in relation to the financial requirements is accordingly not material to the decision to dismiss the appeal.

Conclusion

14. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
15. The decision of the First-tier Tribunal shall therefore stand.

Signed

Date: 6 October 2015

Deputy Upper Tribunal Judge Grimes