



**The Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: OA/18865/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On September 7, 2015**

**Decision and Reasons
Promulgated
On September 8, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MS NGUYEN Y NHI DO
(NO ANONYMITY DIRECTION)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

Appellant
Respondent

Ms Francis, Counsel, instructed by Rahman & Co Solicitors
Ms Isherwood (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a national of Vietnam and on June 5, 2013 she submitted an application to join the sponsor, Tam Viet Do, as his spouse dependant. The respondent refused her application on September 17, 2013 on the following grounds:
 - a. There were question marks over the sponsor's earlier marriage;
 - b. Whether this marriage was genuine and subsisting;
 - c. Concerns over whether the financial requirements of the Rules were met; and

- d. Under paragraph 320(11) HC 395.
2. The appellant appealed this refusal under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
3. The matter was listed before Judge of the First-tier Tribunal SJ Clarke on February 24, 2015 and in a decision promulgated on March 10, 2015 the Tribunal refused her appeal finding the marriage was not genuine. In all other respects the Tribunal found in her favour.
4. The appellant applied for permission to appeal on March 20, 2015 and permission to appeal was granted by Judge of the First-tier Tribunal Ransley on May 15, 2015.
5. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

SUBMISSIONS

6. Ms Francis submitted that the Tribunal had erred by firstly, failing to determine all of the issues in dispute between the parties and secondly, by failing to take into account all relevant evidence when considering whether the relationship was genuine and subsisting.
7. The respondent had stated she was not satisfied that the marriage was not valid because the sponsor claimed to have been married previously and whilst there was nothing to suggest the marriage had ever been ended. Ms Francis submitted the Tribunal should have made a clear finding on this issue.
8. Turning to the second ground of appeal Ms Francis submitted that the Tribunal failed to have due regard to all of the evidence that had been submitted when considering whether the marriage was genuine and subsisting. The Tribunal had failed to make specific reference to the joint bank accounts and the fact that these statements covered related two different addresses. The Tribunal also failed to have regard to the NHS medical cards that were also registered to the same address.
9. The test to show a genuine and subsisting relationship was a low test and was set out in the cases of Goudey (subsisting marriage-evidence) Sudan [2012] UKUT 00041 and GA ("Subsisting" marriage) Ghana * [2006] UKAIT 00046 where the Tribunal made clear that the appellant had demonstrated, on the balance of probabilities, that their relationship was subsisting at the relevant time. Evidence of contact by telephone had been adduced in the absence of any countervailing factors then the evidence adduced should have been sufficient to discharge the burden of proof on the appellant. The Tribunal failed to give reasons why no weight was attached to the evidence adduced and the fact the appellant and sponsor claimed not to have known each other before the sponsor came to the United Kingdom was not a factor that should have been held against

the appellant even though they came from the same village. The decision should be set aside and the appeal allowed.

10. Ms Isherwood relied on the Rule 24 response dated June 5, 2015 and submitted there was no material error.
11. With regard to the first ground of appeal Ms Isherwood submitted that this was not material. The Tribunal's decision to refuse the appellant's appeal had not been made on validity grounds but had been made on the basis that the marriage was neither genuine nor subsisting.
12. With regard to the second ground of appeal Ms Isherwood submitted that the appellant's ground was a mere disagreement with the Tribunal's decision. In paragraphs [17] and [18] of its decision the Tribunal had properly considered the relationship and evidence and made findings open to it.
13. Whilst the Tribunal did not specify which documents it had considered it made clear in paragraph [18] that there was limited evidence to show that they were living together. The submission of bank statements did not prove parties were living together but merely they shared the same address. The failure of witnesses to attend on the day of hearing and other matters were matters the Tribunal was entitled to take into account because the tribunal had scepticism about the relationship itself and the reasons given were sustainable.
14. Ms Francis responded to those submissions and reiterated that the Tribunal had to make a finding as to whether the marriage was a valid marriage before considering whether the marriage was genuine and subsisting. The failure to deal with that issue was a material error.
15. As regards her second ground Ms Francis reiterated that taking all the evidence demonstrated theirs was a genuine and subsisting relationship and the Immigration Rules were met.
16. At the conclusion of the evidence I reserved my decision.

FINDINGS AND REASONS ON ERROR IN LAW

17. This was an application by the appellant to join her husband who was a UK citizen of Vietnamese origin. The background to this matter was that the appellant had previously been issued with a Tier 4 Visa on December 29, 2010 and she entered the United Kingdom on January 7, 2011. There was an issue over her attending the course and her leave was curtailed on June 7, 2011. She did not appeal that decision.
18. In May 2011 (some suggestion in their statements this was February 2010 which cannot be right) the appellant and sponsor began their relationship and they married on December 4, 2011 albeit they began to live together from July 2011.

19. There were two refusal letters in this case but the relevant refusal letter is dated September 17, 2013. Following the hearing before the first Tier Tribunal on February 24, 2015 the Tribunal was satisfied that the financial requirements of the Immigration Rules were met and that the respondent should not have exercised her discretion under paragraph 320 (11) HC 395. The only outstanding issue held against the appellant was the genuineness and subsistence of the relationship.
20. Evidence of their relationship had been submitted to the Tribunal. Some of the evidence was submitted to the respondent directly and some of the evidence was contained in a bundle submitted to the Tribunal on November 10, 2014.
21. Within the bundle were witness statements from both the appellant and the sponsor along with letters of support. There were also bank statements from HSBC in the sponsor's sole name indicating that he lived at 55 Lynton Road London and there were also joint bank statements with the Nationwide showing the appellant and sponsor shared the same address. One bank statement also referred to a previous address that they had claimed to have lived at together and there were also medical cards confirming their address at the time along with a number of photographs said to have been taken in Vietnam when the sponsor visited the appellant in November 2013.
22. The Tribunal was clearly aware of all of this evidence as there is reference to the appellant's bundle and other documentation in the determination. The Tribunal also referred to the sponsor's oral evidence at the Hearing.
23. The Tribunal considered all of the evidence and found in the appellant's favour in respect of the refusal on both financial grounds and under paragraph 320(11) HC 395.
24. The only remaining issue for the tribunal, was the genuineness and subsistence of their marriage.
25. In her grounds of appeal Ms Francis has also submitted that the Tribunal should have made a finding as to whether the sponsor's earlier marriage meant this current marriage was not valid.
26. As regards Ms France's first ground of appeal I find this has no merit. The issue is not material to the matter in hand. Whilst the respondent raised it in the refusal letter the Tribunal made clear at paragraph [19] that it was deciding the appeal without reference to that fact. The Tribunal did not make an adverse finding and the issue of whether the other matter was legal is not a matter which undermined the Tribunal's assessment of this marriage. If the Tribunal had made a negative finding or had stated there were ongoing concerns, then Ms Francis may have had a valid point but as no issue was taken by the Tribunal on this point. I take that as a finding that the Tribunal found there was no merit to that point.

27. The remaining issue and ground of appeal is whether the Tribunal was entitled to find the marriage was neither genuine nor subsisting.
28. The Tribunal made a negative finding against the sponsor in relation to how they came to meet in the United Kingdom and whether they knew each other in Vietnam. Both parties indicated they came from the same village but the sponsor's evidence was that he did not know the appellant before she came to United Kingdom and they were introduced by a mutual friend. The Tribunal had the benefit of hearing oral evidence from the sponsor and viewed the sponsor's passport in respect of the visit that took place on November 23, 2013. The Tribunal noted the sponsor had gone to visit his family and the appellant did not accompany him on this occasion.
29. The Tribunal was entitled to form a view as to the marriage on that evidence but before doing so the tribunal considered other evidence.
30. In particular, it considered letters in the bundle but noted that no supporting witnesses attended the hearing to give evidence that they had lived together and that their marriage was subsisting. The tribunal found this to be a large omission.
31. Whilst there was some evidence of the parties living together the Tribunal found this was limited. Ms Francis submits that the Tribunal's failure to identify each part of the evidence amounts to a material error but the Tribunal is not obliged to list each piece of evidence. The Tribunal's task is to consider the available evidence and to then decide if the appellant has demonstrated the relationship was genuine and subsisting.
32. I have therefore reviewed the evidence submitted. Ms Francis submitted that joint and sole bank statements and medical cards at the same address demonstrates the parties lived together. Such evidence can be evidence of parties living together but as the Tribunal made clear in Goudey where there are countervailing circumstances a Tribunal could come to a different conclusion.
33. The Tribunal was not convinced by letters from third parties especially when none of those witnesses attended the Hearing. The Tribunal was entitled to make such a finding in circumstances where it had concerns over how the parties first met.
34. The photographs carried limited weight when the appellant lived in the same village as his family who the sponsor stated he had gone to visit on that trip in November 2013. The absence of phone records was factor relied on by the Tribunal. In Goudey the Tribunal said absence of phone records or did not mean the relationship was not subsisting where there were no countervailing circumstances. Again, the issue is how did the Tribunal assess the evidence.
35. This is not a decision where no findings or reasons were given. The Tribunal considered the evidence and whilst not detailing each piece of the

evidence it made it clear that on the evidence submitted it was not satisfied that the relationship, at the date of the decision, was genuine and subsisting.

36. I agree with Ms Isherwood that the grounds of appeal are a mere disagreement with the decision and this is not a case where the Tribunal has made a material error. The findings were open to the Tribunal because concerns were properly raised about the relationship and some of those concerns arose out of the oral evidence given before the first Tier Tribunal.
37. In the circumstances, I find no material error on either ground.

DECISION

38. There was no material error. I uphold the original decision.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT
FEE AWARD**

I make no fee award.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis