IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/20122/2013
OA/20126/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 21 January 2015	**On 2 February 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER – NEW YORK

Appellant

and

SHALEEN MARIE JAKOBSEN
ELEK XAYVEON CHURELLA

Respondents

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Ms L Dickinson of Fursdon Knapper Solicitors

DETERMINATION AND REASONS

1. The Entry Clearance Officer appeals against the decision of the First-tier Tribunal (Judge Britton) allowing the appeals of Shaleen Jakobsen and her son Elek Churella against refusals to grant them entry clearance under para EC-C of Appendix FM of the Immigration Rules (HC 395 as amended).

© CROWN COPYRIGHT 2015

2. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellants are citizens of the United States of America. The first appellant is the mother of the second appellant and they were born respectively on 23 April 1978 and 6 January 2000.

4. The first appellant sought entry clearance as the fiancée of a British citizen, Mr Paul Bittle who is a British citizen born on 10 January 1969. The second appellant sought entry as the first appellant's dependent child.

5. The first appellant met the sponsor over the internet in November 2012. They established a relationship. The first appellant travelled to the United Kingdom with her son on 7 March 2013 and stayed with the sponsor and his son, Cole who is aged 13 for ten days. During that time the appellants met the sponsor's family in the UK.

6. The relationship of the appellant and sponsor developed such that they decided to marry. On 4 October 2013, the first appellant applied for entry clearance as a fiancée together with the second appellant as her dependent child.

7. Following an interview, on 23 October 2013, the Entry Clearance Officer refused each appellant entry clearance.

8. In respect of the first appellant, the ECO accepted that the appellant met all of the requirements of E-ECP of Appendix FM (as a partner) apart from two. First, on the basis that the appellant and sponsor had not made any arrangements for their marriage when the first appellant came to the UK, the ECO was not satisfied that she was "seeking entry to the UK to enable their marriage ... to take place" (E-ECP2.8). Secondly, on the basis of a number of convictions that the first appellant had in the USA the ECO was not satisfied that the first appellant met the suitability requirement in S-EC2.5 because her exclusion was "conducive to the public good".

9. The second appellant's application fell to be refused in line with the ECO's decision in respect of the first appellant.

The Appeals to the First-tier Tribunal

10. The appellants appealed to the First-tier Tribunal.

11. Before their appeals were heard, the Entry Clearance Manager reviewed the ECO's decisions and, on 2 January 2014, whilst maintaining the refusals conceded the suitability requirement in S-EC2.5.

12. Thus, when the appeal came before Judge Britton the only issue under Appendix FM was the requirement in E-ECP2.8 that:

> "If the applicant is a fiancé(e) ... they must be seeking entry to the UK to enable their marriage ... to take place."

13. The judge had a bundle of documents which were submitted by the appellants including a witness statement from the first appellant dated 16 June 2014 (at pages 1-6 of the bundle) and a statement from the sponsor dated 16 June 2014 (at pages 7-10 of the bundle). There were also a number of supporting letters from the sponsor's parents, family and friends (at pages 11-19 of the bundle). In addition, there is a letter from Danielle Peaks dated 20 May 2014 stating that she sold the first appellant a Vera Wang wedding dress in August 2013. In addition, the sponsor gave oral evidence before the judge.

14. In addition to the evidence concerning the appellants' visit to the UK in March 2013, both the first appellant and sponsor gave evidence that the sponsor and his son, Cole had travelled to America in order to visit the appellants and had stayed from 27 December 2013 to 8 January 2014 and again the sponsor had visited the appellant from 18 April 2014 until 27 April 2014.

15. The evidence before the judge was that the sponsor and appellant intended to marry on 25 October 2014 at Plymouth Registry Office with a reception at the Weston Mill Bank Social Club. Both of those venues had been booked.

16. The sponsor gave evidence that they had previously not made arrangements for their wedding as they did not want to put down a deposit and would make plans for their wedding when the first appellant came to the UK. It was accepted that the appellant and sponsor had not booked any wedding arrangements prior to the ECO's decision.

17. At paras 15-17 Judge Britton considered the issue of whether it was established on a balance of probabilities that the first appellant was seeking entry in order to marry the sponsor during the six months' leave she would be granted as a fiancée. The judge said this:

> "15. ... At the time of the applications the first appellant had not made arrangements to fix a date or place of the wedding as she wanted to make the arrangements when she was in the country. They did not waste money on paying a deposit until they had decided exactly the date of the wedding and lace of the reception.
>
> 16. They have had to scale down their wedding plans because of the costs involved. They now have a date of the wedding, 25 October 2014 at 12.45pm, and they will be married at Plymouth Registry Office. They have also booked the reception. The first appellant has also produced evidence that she has purchased a wedding dress.
>
> 17. I am satisfied that the first appellant and sponsor intend to marry and live permanently together in the UK. However, what was missing was evidence of when and where their wedding was to take place. The first appellant and sponsor have now produced such evidence, and the first and second appellant meet the requirements of the Immigration Rules."

18. As a result, the judge allowed the appellants' appeals under the Immigration Rules.

The Appeal to the Upper Tribunal

19. The ECO sought permission to appeal to the Upper Tribunal on the basis that the judge had erred in law in taking into account evidence of the parties' marriage arrangements which postdated both the applications and the ECO's decisions.

20. On 8 October 2014, the First-tier Tribunal (Judge Brunnen) granted the ECO permission to appeal on that ground. Thus, the appeals came before me.

Discussion

21. Mr Richards, on behalf of the Secretary of State acknowledged that the First-tier Tribunal had granted permission to appeal with some reluctance and had expressly invited the ECO to reconsider the decisions. Nevertheless, Mr Richards maintains that there was a material error of law in the determination on the basis set out in the grounds. The judge had failed to focus on the date of decision by taking into account post-decision events, namely that the parties had subsequent to the decisions made arrangements for their wedding in the UK.

22. Having made that submission, Mr Richards invited me to find there was an error of law and briefly to take evidence from the sponsor in order to remake the decision. He did not seek to press the point that on the evidence before me the appellant had not established the requirement in E-ECP2.8.

23. On behalf of the appellants, Ms Dickinson submitted that there was documentary evidence in the bundle which supported the judge's finding that the first appellant was seeking entry in order to marry the sponsor during the six months' leave she would be granted. Ms Dickinson accepted that the judge was wrong to take into account post-decision events in paragraph 17 of his determination but, in the light of the other evidence, any error was immaterial.

24. Having heard the submissions, I invited Ms Dickinson to call the sponsor to give oral evidence. He did so briefly. The sponsor adopted his statement of 6 June 2014. In his evidence-in-chief, the sponsor said that if the first appellant had been granted a visa they wanted to get married as quickly as possible. They had not made any concrete plans as they did not know how long the visa was going to take. It was their intention to live together and get married as soon as possible when the first appellant came to the UK.

25. In cross-examination, Mr Richards asked one question: he invited the sponsor to say whether there was anything wrong with the following statement, namely that at the time the appellants applied for entry clearance it was the first appellant's intention to marry the sponsor in the UK; that was also her intention at the date of decision even though no arrangements had been made. The sponsor confirmed that that was correct.

26. As these appeals are against decisions refusing entry clearance, s.85A(2) of the Nationality, Immigration and Asylum Act 2002 applies such that:

> "The Tribunal may consider only the circumstances appertaining at the time of decision."

27. By contrast, where that provision does not apply, by virtue of s.85(4), the Tribunal may:

> "consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

28. Nothing in s.85A(2) prohibits consideration of evidence that was not before the ECO and was "evidence arising" after the date of decision (see DR* [2005] UKIAT 00038). Subsequently obtained evidence, including evidence of post-decision events, is admissible providing that it relates to "circumstances appertaining at the time of the decision". As the IAT pointed out in DR, it is on that basis that evidence of "intervening devotion" between the date of decision and hearing is admissible as it reflects on the intention of the parties in a marriage case at the date of decision.

29. I did not understand Ms Dickenson to submit that the judge was entitled to take into account in this appeal the the post-decision evidence of post-decision events, namely the marriage arrangement in reaching a finding on whether the first appellant had established that at the date of decision it was her intention to marry the sponsor during her six months' leave in the UK. She submitted, however, any such error was not material given the other evidence before the judge.

30. There was indeed evidence before the judge that the parties intended to marry when the first appellant came to the UK even though no arrangements had been made. There was the evidence of the first appellant and sponsor in their witness statements and the evidence of the sponsor given orally. In addition, there was the evidence that the first appellant had purchased a wedding dress in August 2013 in America.

31. I have no doubt that it was open to the judge on the basis of this evidence to find that the first appellant had established on a balance of probabilities that she intended to marry the sponsor in the UK during her visit. The judge cast no doubt on the veracity or credibility of any of the evidence. His reasoning does, however, appear to reflect that the post-decision evidence that the parties had made marriage arrangements tipped the balance in the appellants' favour.

32. In the light of that, I accept that the judge materially erred in law in reaching his finding in respect of E-ECP2.8. The decision is set aside.

33. As a result, I must remake the decision. The evidence in these appeals points only in one direction. The witness statements of the first appellant and sponsor make clear that the only reason they had not made arrangements for their marriage before the ECO's decisions was a practical one. The sponsor reiterated that point in his oral

evidence before me. That evidence was not challenged and I accept it. The first appellant purchased a wedding dress in the USA before she planned to travel.

34. In addition, in response to the single question put to the sponsor in cross-examination, he confirmed that it had been the first appellant's intention to marry him when she came to the UK both at the time of making the application for entry clearance and at the time of the ECO's decision. Mr Richards did not seek to challenge that answer given in cross-examination.

35. I accept the evidence before me. It establishes on a balance of probabilities that at the date of applications and at the date of decision the intention of the first appellant was to marry the sponsor during the six month period that she would be granted leave as a fiancée under Appendix FM.

36. I am satisfied, therefore, that at the date of decision the first appellant met the requirement in E-ECP2.8. It is accepted that the first appellant met all the remaining requirements of Appendix FM for entry clearance as a fiancée.

37. Consequently, I am satisfied that the first appellant is entitled to entry clearance under Appendix FM and, in line with that, the second appellant as her dependent child is also entitled to entry clearance.

Decision

38. The decision of the First-tier Tribunal to allow the appellants' appeals involved the making of a material error of law. I set those decisions aside.

39. I remake the decisions allowing the appeals of the first and second appellants under the Immigration Rules, namely E-ECP of appendix FM and EC-C of Appendix FM respectively.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

Judge Britton declined to make a fee award as the appellants had not produced satisfactory evidence to the Entry Clearance Officer at the time of their applications.

I agree and for those reasons I too do not make a fee award.

Signed

A Grubb
Judge of the Upper Tribunal