IAC

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16749/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 December 2015	**On 6 January 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL HUTCHINSON

Between

MRS SHAMAILA SAFI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr E. Waheed, Counsel, instructed by Calices Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

The Appeal

1. This is an appeal by Mrs Shamaila Safi against the decision of First-tier Tribunal Judge Chana, sitting on 2 January 2015, who dismissed the appellant's appeal against the decision of the Entry Clearance Officer dated 25 July 2013 to refuse her entry clearance as a partner under Appendix FM of the Immigration Rules. The First-tier Tribunal did not make an anonymity direction and there was nothing before me to suggest that Ms Safi should be accorded anonymity for these proceedings.

2. In summary, the appellant is a citizen of Afghanistan born on 5 August 1990. The respondent refused the appellant's application for entry clearance as a partner under paragraph EC-P.1.1 of Appendix FM as although the appellant had submitted a marriage certificate and wedding photographs in relation to her marriage to the sponsor on 14 July 2011, the respondent was not satisfied that the relationship was subsisting due to the lack of evidence of a subsisting relationship since the wedding. The respondent was also not satisfied that the sponsor's passport showed that the sponsor was in the country at the time of the wedding. The review by the Entry Clearance Manager (ECM) on 10 June 2014 accepted that the sponsor was in Afghanistan at the date of the marriage. However the ECM was also of the view that there was a lack of satisfactory evidence of contact and noted that the application for entry clearance was not made until 16 April 2013, some 20 months after the marriage.

3. First-tier Tribunal Judge Chana, in a decision promulgated on the 9 February 2015, dismissed the appellant's appeal. Permission to appeal to the Upper Tribunal was granted on 1 October 2015. The grounds of appeal argued: ground (1) that the judge had not taken into account the evidence submitted in particular in relation to the claimed contact between the appellant and the sponsor; ground (2) that the judge had stated that there was no evidence such as stamps on the sponsor's passport that indicated he was in Afghanistan when the conception took place when in fact there was such evidence; and ground (3) that the judge, in finding that there was no evidence that the appellant consented to the marriage and that it was obvious that the application was made on her behalf, failed to take into consideration that the appellant will have physically submitted her entry clearance application.

Error of Law

Ground 2

4. Ms Fijiwala conceded that the judge had been wrong to say (as she did at paragraph [26] of the decision) that there was no evidence of visits to Afghanistan 'in and around June 2014 when the conception of the child took place' when in fact a copy of the sponsor's passport was before the judge which showed that he arrived in Afghanistan on 27 May 2014, exiting on 19 August 2014. Ms Fijiwala was of the view that if this part of the evidence was excluded which she argued it should have been as this was post decision evidence (the Entry Clearance Officer (ECO) decision having been made on 25 July 2013), then the error was not material.

5. There is no merit in Ms Fijiwala's argument; she conceded in her own submission that post-decision visits can be taken into consideration. Even if that were not the case the judge although she directed herself, at [25] that she was only allowed to consider 'facts as at the time of the Entry Clearance Officer's decision' went on at [26] to make a finding that there was no evidence that the sponsor was in Afghanistan 'in and around' when the conception took place in 2014, when there was such evidence. The judge then went on at [28] to state that she had considered all 'of the

evidence in the case as a whole in the round' and made a finding that it had not been demonstrated that the appellant and the sponsor were in a subsisting relationship.

6. The judge's findings of fact were set out at [22] through to [27]. Her findings in relation to the pregnancy which she considered at [25] and [26] were a factor in those findings, if not one of the central findings, in leading the judge not to be satisfied that the relationship was subsisting. This was a mistake as to a material fact which resulted in unfairness. It is arguable that without that mistake of fact the judge may have reached a different conclusion.

7. Accordingly the decision of the First-tier Tribunal to dismiss the appellant's appeal under the immigration rules was vitiated by a material error of law such that it must be set aside and remade.

Grounds 1 and 3

8. I am further satisfied that the judge failed to take into account evidence on material matters. The judge had before her, in addition to the sponsor's oral and written evidence a bundle which included almost 200 pages of call history documents (including Skype records, Talk Home, Tango and Lycamobile records). Ms Fijiwala submitted that it was clear from the bundle that all of this evidence post-dated the decision. However, that is not the case. Although there was a significant amount of post decision evidence of calls the bundle also included a large number of records dated in 2012 and the first half of 2013, which therefore predated the decision. The judge failed to make any findings in relation to this evidence of contact and I am satisfied that she fell into error. In addition although the judge made a finding, at [27] that there was no explanation as to why the appellant would continue to live with her own family and the sponsor's family after they were married it was the evidence before the judge including in the sponsor's witness statement for the first appeal (dated 20 October 2014) that his parents and his seven siblings all live in London (and are British Citizens). The judge made no findings as to this evidence which again was material to the overall assessment of whether or not the relationship was subsisting, given in particular the judge's finding at [27].

9. In relation to ground 3, in finding in particular at [23] that there was 'no evidence' that the appellant consented to the marriage, the judge failed to take into consideration all the evidence. This included that the appellant had provided her English language test and the judge failed to make any findings as to this evidence. Although Ms Fijiwala referred to the judge's findings that there was nothing in the appeal from the appellant, in particular no witness statement, the judge went on to make detailed findings in relation to the application including that it was on the internet, albeit with the appellant's signature, and that there was no evidence of consent. Those findings were not, as Ms Fijiwala contended before me, restricted to findings as to the lack of evidence on appeal, but included the judge's findings as to the alleged lack of involvement of the appellant in the process generally including the application. In that context I am

satisfied that the judge fell into material error in failing to make adequate findings in relation to what weight if any was to be placed on the appellant's sitting of the English test.

10. I gave my decision at the hearing that there was an error of law and that I would remake the decision afresh.

Remaking of the Decision

11. For the purposes of remaking the decision, I heard oral evidence from the sponsor, Mr Israrullah Safi who gave evidence in English. I also heard submissions from both representatives. All of the evidence and submissions are set out in the Record of Proceedings. The documents before me included the bundle of documents originally before the First-tier Tribunal and a supplementary bundle of documents for the purposes of remaking the decision. This included supplementary witness statements from the sponsor, together with witness statements from the appellant and the appellant's parents. I reserved my decision. I have carefully taken into account, in the round, all the evidence before me prior to reaching that decision, even if not specifically referred to below.

The Law

12. Appendix FM, Paragraph EC-P.1.1 of the Immigration Rules sets out the criteria for entry clearance as a partner. These include that the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.

13. An applicant is required to meet all the requirements in paragraphs E-ECP.2.1 to 4.2. These include:

> 'ECP.2.6. The relationship between the applicant and their partner must be genuine and subsisting;
>
> ECP.2.10. The applicant and partner must intend to live together permanently in the UK.'

The Burden and Standard of Proof

14. The burden of proof is on the appellant to establish her case on a balance of probabilities. I must assess the appellant's case in relation to the above matters at the date of the ECO decision, on 25 July 2013.

My Findings

15. It was not disputed that the only issue before me was whether the appellant and the sponsor were, at the date of decision, in a genuine and subsisting relationship and whether they intend to live together permanently.

16. I found the sponsor, Mr Israrullah Safi to be a credible witness. He gave consistent oral evidence and did not waiver under cross-examination. In finding the sponsor credible I have considered all the evidence including that he works on occasion as an interpreter for the Ministry of Defence. This was not disputed (and was evidenced on a number of the financial

documents). I am of the view that this would be a position of some trust and that the sponsor would not wish to jeopardise this role or his integrity generally by being party to a fraudulent application. His evidence was of assistance to me.

17. Although I accept that the telephone numbers given by the appellant in the application form were Pakistan telephone numbers, the sponsor in oral evidence and the appellant in her witness statement dated 20 October 2015, confirmed that as she had to attend the British High Commission in Islamabad in Pakistan in order to submit her application, she provided the contact numbers of her uncle in Pakistan as she understood from the ECO at the High Commission that they might need to contact her. On balance I am satisfied that this is a plausible explanation. The appellant was not asked on her application to provide any other telephone numbers. I do not therefore, in all the circumstances, draw any adverse inference from the fact that the numbers shown on itemised telephone records submitted by the appellant both with her application and on appeal are different.

18. The appellant has provided two witness statements, one dated 20 October 2015 and one dated 20 February 2015. Although these postdate the respondent's decision I have taken them into consideration insofar as they relate to the circumstances appertaining at the decision.

19. The appellant and the sponsor have provided a substantial amount of documentary evidence including telephone and other records, including of Skye and Tango internet calls. Although I accept that some of this evidence is of limited value, being for example undated screen grabs showing the appellant and the sponsor on the same screen, I have considered this evidence cumulatively, in the round. The appellant's sponsor has always consistently maintained (and this is supported by the appellant's subsequent witness statements (with translations) that he and his wife have maintained contact by a variety of methods. The couple met in August 2009 and the sponsor indicated in his first witness statement that between August 2009 and September 2012 they talked to each other using international calling cards, 'Maxitalk & Talk Home'. Although these were not produced, I accept that it is plausible that these may not have been kept at the time, particularly as the couple moved on to other methods of keeping in contact.

20. The couple married on 14 July 2011 and the sponsor remained in Afghanistan for a further month and a half after the wedding (and I accept that this is shown on the sponsor's passport stamps). The sponsor's passports also show a number of further visits to Afghanistan. Although the ECM in reviewing the appellant's grounds of appeal, by review dated 10 June 2014, indicates that there 'is no evidence' that the sponsor saw the appellant, for example in the visit to Afghanistan from 14 June 2012 to 11 September 2012, I accepted the sponsor's consistent evidence that all of his own family including his mother and father and siblings reside in the UK. Although that in itself does not mean that he was necessarily visiting the appellant, on the basis of all the evidence considered in the round,

including the consistent oral evidence of the sponsor and the appellant's witness statements, I accept on balance that he was.

21. The ECM asserted that there was no evidence of Skype contact 'in the file'. However this evidence was before me and consists of almost 100 pages of screenshots. The usernames 'Safi Israrullah' and 'Masrorisrar' can be seen on these screenshots as can pictures of the appellant and the sponsor on the screen in some of the screenshots. The dates of the skype calls are also visible and show contact from March 2013 onwards. As there was clearly contact therefore by Skype from at least March 2013 and the respondent's decision was not reached until 25 July 2013 I have considered this evidence in the round as supportive of the appellant and the sponsor's continuing relationship.

22. In relation to the considerable bundle of phone contact print outs the ECM asserted that the Lycamobile records named the sponsor and gave his telephone number, however the ECM asserted that the number called, 93777520377 was an Afghan number whereas the number provided for the appellant (with the application) was a Pakistan number. It was the appellant's and the sponsor's consistent evidence that the sponsor provided the appellant with a phone, number 93777520377 and that initially they spoke to each other every two or three days and that this then increased to every day and sometimes more than once a day. This is consistent in my findings with the frequency of calls shown in the phone records before me.

23. The Lycamobile records before me cover September 2012 to August 2013. The sponsor's passport records show that he was in Afghanistan from June 2012 until September 2012. It is plausible in this context that the sponsor may have given the appellant a phone by which to continue to maintain contact. I note that the Lycamobile records do indeed record calls to the Afghanistan number (which on balance on the basis of the consistent evidence before me from both the appellant and the sponsor I accept was the appellant's number) initially every few days in 2012 (and occasionally every day) although I note that the frequency of these calls increased in 2013 with sometimes more than one call a day, but again sometimes calls every two to three days. In the context of a long distance relationship and in light of what I accept on the basis of the evidence before me that sometimes connections can be unreliable in Afghanistan, I do not draw any adverse inference from the fact that the appellant stated in her application that she and her husband spoke every few days whereas the sponsor indicated it was every day. I accept on balance that both were the case at differing times in the relationship. The records before me support the evidence of both the appellant and the sponsor that contact increased as time has gone on.

24. The ECM also noted that the appellant's application for entry clearance was not made until 16 April 2013, some 20 months after the marriage and was of the view that this cast further doubt on the relationship. As I have indicated I am satisfied that there is more than ample evidence of telephone and other contact between the appellant and the sponsor prior

to the date of the ECO decision (and I am satisfied that the evidence of contact after this date is admissible in so far as it indicates that there was a subsisting relationship at the date of decision, which has continued).

25. In addition, the sponsor gave consistent oral evidence at his wife's appeal before me in relation to the delay in the application. In order to meet the financial requirements the sponsor indicated that he needed to complete his studies (for a diploma) after he returned from the wedding in order that he would be in a position to gain employment at the required financial level. After he completed his diploma he went to Afghanistan to visit his wife for a further 3 months in 2012 (and I accept on balance the oral and documentary evidence including passport stamps that indicates these visits took place) and returned to take up a full time job. The financial requirements were not in dispute and the sponsor has a number of positions, including (as noted above) as a translator for the Ministry of Defence. I accept the sponsor's evidence that once he was earning the required income level he had to ensure that he had at least six months of financial documents. In addition it was his consistent evidence that his wife had to pass the requisite English language test, which took more than one attempt. I accept the sponsor's evidence therefore that the earliest he and his wife were in a position to be ready to submit their application was March/April 2013, and the application was submitted in April 2013. I do not therefore attach any adverse inference from the fact that 20 months had elapsed from the marriage as I am satisfied that the appellant and the sponsor have adequately explained that this time was required in order that they would be in a position to meet all the relevant requirements when the application was made.

26. In finding that the marriage is subsisting and genuine and that the couple intend to live together permanently, I have considered all the admissible evidence which relates to the circumstances appertaining at the date of decision in July 2013. I am satisfied that there is adequate evidence including in the form of records of telephone and other contacts together with evidence of subsequent visits to Afghanistan by the sponsor. I accept on balance including in the context of the appellant's witness statements relating to this contact and these visits together with the sponsor's credible oral evidence in this regard, that the contact and visits were with and to the appellant.

27. Although I accept therefore that there was evidence before me that the appellant and the sponsor have had a child in 2015 (including DNA evidence that they both are the parents and of an application for a British Passport for that child) which is arguably evidence of a subsisting relationship in July 2013 which has continued, I am satisfied, for the reasons set out above, that the appeal clearly succeeds without recourse to this evidence.

Notice of Decision

28. The Judge of the First-tier Tribunal made a material error of law and her decision to dismiss the appeal is set aside. I substitute a fresh decision to allow the appeal.

Signed Date: 31 December 2015

M. M. Hutchinson
Deputy Judge of the Upper Tribunal