



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01821/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28 September 2018

Decision & Reasons Promulgated
On 04 October 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MARK ALLEN ENCABO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms L Kenny, Senior Home Office Presenting Officer
For the Respondent: Ms J Heybroek, counsel, instructed by Pines Consultancy Ltd

DECISION AND REASONS

1. The Entry Clearance Officer (ECO) appeals against the decision of Judge of the First-tier Tribunal A Khawar (the judge), promulgated on 8 February 2018, allowing the appeal of Mr Mark Allen Encabo (hereafter claimant) against the ECO's decision, dated 14 March 2017, refusing him entry clearance as the partner of [EC] (hereafter sponsor).

Background

2. The claimant is a national of the Philippines, date of birth 5 August 1981. On 11 December 2016 he applied for entry clearance under Appendix FM and Appendix FM-SE of the immigration rules as the fiancé of the sponsor, a person with Indefinite Leave to Remain in the UK. A covering letter accompanying the application indicated that the claimant and his sponsor met through Facebook and they met face-to-face in the Philippines in April 2014 during a visit by the sponsor. The covering letter indicated that the claimant was previously refused a visitor entry clearance in August 2014 and that he failed to mention his relationship with the sponsor in this application on the advice of an agency who assisted with his application. The covering letter referred to a number of documents accompanying the application including a decree absolute relating to the sponsor's previous marriage which was dated 12 January 2016.
3. The ECO was not satisfied that the claimant was seeking entry to the UK in order to marry his sponsor. The ECO noted the omission of any reference of the sponsor in the claimant's previous visitor application. The ECO stated that a genuine relationship extends beyond a statement of intent to marry and that the history of the relationship leading to the commitment to marry, and evidence of regular contact and support, was a reasonable indicator of a subsisting relationship. The ECO then noted that the claimant had provided satisfactory evidence of communication with his sponsor and photos of them together on different occasions. The ECO stated however that there was no evidence of the claimant's intention to marry within 6 months of arrival in the UK. The respondent was therefore not satisfied that the claimant intended to live with his sponsor as a married person permanently in the UK, or that their relationship was genuine and subsisting. The ECO refused the application citing E-ECP.2.6, E-ECP.2.8 and E-ECP.2.10. The ECO did however find that the financial requirements and the English language requirements of Appendix FM had been met.
4. The entry clearance application constituted a human rights claim and the refusal of the human rights claim attracted a right of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002.

The First-tier Tribunal decision

5. The judge had before him a bundle of documents running to 40 pages. This included, *inter alia*, statements from the claimant and his sponsor, and statements from [RB] and [JB], close friends of the sponsor who had both witnessed the interaction between the claimant and the sponsor on the telephone and via Skype. The bundle additionally contained email correspondence dated January 2017 between the sponsor and a Registration & Nationality Officer employed by Barnet Registration And Nationality Service confirming that the local authority could not book an appointment for the

sponsor and the claimant to come to give notice for marriage as the claimant needed to establish residence for at least 7 days before notice could be given. Also included in the bundle were various money remittance receipts confirming that the sponsor regularly sent money to the claimant, social media conversations between the claimant and the sponsor, with English translation, a record of telephone calls between the claimant and the sponsor and a receipt for wedding rings.

6. The judge summarised the basis for the refusal of entry clearance and accurately directed himself as to the appropriate burden and standard of proof. The judge heard oral evidence from the sponsor and [RB]. At [9] of his decision the judge indicated that both witnesses adopted their witness statements and gave additional evidence, which was set out in his Record of Proceedings. The judge then summarised the claimant's account of his relationship with the sponsor, noting that the sponsor had previously been married in an abusive relationship and that she obtained a Decree Absolute issued on 12 January 2016. At [14] the judge noted the sponsor's oral evidence that she and the claimant had not yet married in the Philippines because the Philippines did not recognise the sponsor's divorce from her ex-husband and a delay in the Philippines judicial system meant that her previous marriage had not been annulled.
7. At [18] the judge explained that, having heard the oral evidence of the sponsor and her witness, and having examined the documentary evidence, that there was in fact "*overwhelming evidence*" to establish that the claimant's relationship with the sponsor was genuine and subsisting and that they intended to marry and live together permanently. Between [19] and [23] the judge referred to the evidence of contact and communication between the claimant and the sponsor in terms of telephone records and social media conversations, evidence of remittance of funds for a substantial period of time, evidence of the sponsor's travel to meet the claimant in the Philippines on two occasions, and evidence of four separate witness statements/tutorials from friends of the sponsor, including her employer, who were all aware of the relationship. The judge noted in each case that the Presenting Officer (PO) did not challenge any of the evidence. The judge additionally noted that the oral evidence from [RB] was consistent with her statement. In light of this evidence, and the fact that an Entry Clearance Manager Review only raised the issue of the adequacy of evidence to establish wedding plans or arrangements as being in contention, the judge concluded that the relationship was genuine and subsisting and that the parties intended to live together permanently.
8. The judge then considered the issue in relation to the intention to marry within 6 months of the claimant's entry clearance. At [36] the judge stated,

During cross examination the Sponsor has steadfastly maintained that in relation to arrangements for a wedding she has made enquiries with the various hotels for a wedding reception in order to establish the costs involved and availability. However she has not been in a position to be able to book a date and therefore

has nothing in writing in terms of an agreement with any hotel/venue. However she stated that they have purchased their wedding rings. This is clearly corroborated by the receipt for the wedding rings.

9. The judge additionally noted the sponsor's evidence that she had been in touch with the Registry Office (at [27]), that she wanted to be married in the UK because her life was here and she had a number of close friends who she wanted to attend the wedding (at [28]). In the same paragraph the judge also referred to the sponsor's evidence that she was unable currently to get married in the Philippines because her annulment had not yet been finalised through the Philippines legal system. The judge was satisfied that the sponsor had proffered plausible explanations as to the reasons why she and the claimant had not married in the Philippines. The judge additionally noted that the sponsor's account was entirely cooperated by [RB] who confirmed that she had been present and had overheard conversations between the claimant and the sponsor in relation to wedding venues. [RB] additionally stated that the sponsor had been in touch with hotels for a wedding reception (at [29]).
10. The judge was consequently satisfied that the requirements of Appendix FM had been met and allowed the human rights appeal.

The grounds of appeal, the grant of permission and the parties' submissions

11. There are 2 grounds of appeal. The first ground contends that the hearing was procedurally unfair because the judge refused to allow the PO an opportunity to take instructions in respect of the sponsor's assertion that her first marriage still needed to be dissolved in the Philippines. An extract from the PO's post-hearing minute of the hearing stated,

The rep raised that the appellant sponsor is still legally married in the Philippines and thus cannot marry the appellant in the Philippines. The rep stated that the sponsor's first marriage needs to be dissolved in the Philippines and that would take significant amount of time. No evidence was submitted in regards to this issue, or expert evidence about divorce in the Philippines. I asked to take instructions as this was not raised in the refusal, grounds or previously. The IJ refused for me to take instructions.
12. The grounds contend that the judge found strongly in favour of the sponsor's claim that she could not marry in the Philippines and that the ECO was denied a fair opportunity to respond to this new issue. The grounds additionally contend that it was difficult to see how the claimant could discharge the burden of proof with no supporting evidence about his alleged inability to marry in the Philippines.
13. The 2nd ground contends that the judge improperly prevented the PO from cross-examining the sponsor in respect of her plans to marry within 6 months.

Once again the Grounds rely on the PO's post-hearing minute of the hearing which read,

I attempted to cross-examine of plans that the sponsor and the appellant had made which demonstrate an intention to get married within 6 months.

The IJ stopped me, he stated that the question of pointless and unreasonable as the appellant doesn't know when he would be granted entry therefore cannot expect him to be making or have made any plans.

14. Permission was granted on both grounds.
15. At the start of the 'error of law' hearing I provided both parties with copies of the judge's actual notes from the hearing. I drew the representatives' attention to the 3rd page of manuscript notes. This was headed "*cross-exam*". The first recorded question was, "*Made any plans for marriage?*" The answers recorded by the judge included reference to enquiries made by the sponsor with hotels for a wedding reception and the costs involved, and the sponsor's explanation that she could not set a date and therefore could not reach any agreement with them. The sponsor also referred to the purchase of wedding rings and shoes. Cross examination continued in respect of the sponsor's family in the Philippines. The sponsor explained that she has all her friends in the UK. The sponsor was additionally asked about remittances to the claimant and why she could not arrange for her marriage in the Philippines and answered that her divorce was not accepted in the Philippines and she had to have her marriage annulled.
16. I additionally note that, at the point in the examination in chief of the sponsor when she was asked about the annulment of her marriage in the Philippines, the judge recorded, "*Application to Adjourn: Refused*".
17. The sponsor was able to provide a copy of her Decree Absolute on her mobile phone, which was shown to the representatives and myself, and which indicated that it was issued by the Barnet County Court on 12 January 2016.
18. Ms Kelly made no separate submissions in respect of the 2nd ground of appeal and I indicated to Ms Heybroek that I did not need to hear from her in respect of the 2nd ground. Ms Kelly submitted that the judge relied on the sponsor's assertion that she was unable to get married in the Philippines, that this was material to the judge's decision, and that it may have made a difference to his ultimate conclusion. It was not possible to speculate as to what may have happened if the judge had allowed the PO to take instructions and that an adjournment request may have been made to investigate the sponsor's assertion. Ms Heybroek submitted that any failure by the judge to enable the PO to obtain instructions could not be material because the sponsor and the claimant could marry under British law and there was overwhelming evidence that they intended to do so.

19. I reserved by decision.

Discussion

20. I can deal with the 2nd ground in the briefest of terms. The PO's note was created after the hearing. The Judge's own note, taken contemporaneously with the actual questioning during the hearing, constitutes powerful evidence that the PO was not prevented from cross-examining the sponsor on the issue of marriage plans. On the contrary, the judge's note records a number of answers given by the sponsor in respect of this very question. This is further supported by reference to the decision itself where, at [26], the judge describes the sponsor remained steadfast in relation to the wedding arrangements "*during the cross examination.*" I am not satisfied that the PO's minute of the hearing accurately reflects what actually happened. I find there is no merit whatsoever in the 2nd ground.
21. I approach the 2nd ground with a degree of caution given my concerns with the accuracy of the PO's minute. The judge's notes refer to an application to adjourn being made during examination-in-chief, which was refused. No other reference is made in the judge's note to an application by the PO to take instructions on the issue of the non-recognition by the Philippine authorities of the Decree Absolute obtained in the UK. I am nevertheless prepared to proceed on the basis that the PO did seek an opportunity to take instructions on this issue, and that this was refused by the judge.
22. The claimant only had to demonstrate that he was seeking to enter the UK to enable his marriage to take place. It is not a requirement of the immigration rules that the claimant is unable to get married in his country of origin. As the judge accurately described, there was "*overwhelming evidence*" to establish the claimant's genuine relationship with the sponsor and that he and the sponsor intended to marry in the UK. I have summarised this evidence at paragraph 7 above. Significantly, this evidence was not challenged by the PO. From [26] to [29] the judge gave powerful reasons for concluding that the sponsor and the claimant intended to marry in the UK. These included the evidence of inquiries made with various hotels, the purchase of wedding rings, correspondence with a Registry Office concerning an appointment to give notice of marriage, the sponsor's desire to marry in the UK because of the number of close friends she has here, and the corroborative evidence of [RB] confirming the sponsor's investigations of wedding arrangements with hotels. The sponsor's evidence that she could not marry in the Philippines because her marriage was not yet annulled under Philippine law was only a small element in the evidence before the judge. In light of the considerable body of evidence supporting the claimant's stated intention to marry in the UK, it is difficult to discern any purpose in seeking instructions from the ECO. It was open to the PO to submit that there was no evidence that the sponsor and the claimant could not marry in the Philippines, but it does not appear that any such submission was made. In

any event, in concluding that the claimant could not discharge the burden of proof regarding his alleged inability to marry in the Philippines, the grounds entirely fail to appreciate that the claimant does not need to prove his inability to marry in the Philippines. There was no dispute between the parties that the sponsor and the claimant were legally free to marry in the United Kingdom. There was simply no need for the sponsor to show that he could not marry in the Philippines. The evidence before the judge overwhelmingly pointed to an intention on the part of the claimant and his sponsor to get married in the UK and the question whether the sponsor was unable to marry in the Philippines was, in these particular circumstances, insufficiently material to the judge's overall conclusion.

23. For these reasons I find there was no procedural unfairness in the hearing that could, on any rational view, have led to a materially different outcome.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error of law on a point of law. The ECO's appeal is dismissed.



28 September 2018

Signed

Date

Upper Tribunal Judge Blum