Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21360/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 May 2014	**On 20 June 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAN MICHAEL DEBRAH

Respondent

Representation:

For the Appellant: Mr Saunders, Senior Home Office Presenting Officer
For the Respondent: Mr Ward, James & Co Solicitors

DETERMINATION AND REASONS

1. The respondent, Jan Michael Debrah, was born on 11 September 1980 and is a male citizen of Ghana. I shall hereafter refer to the respondent as

"the appellant" and to the Secretary of State as the "respondent" (as they were respectively before the First-tier Tribunal).

2. The appellant had appealed against the decision of the respondent dated 13 June 2013 to refuse him leave to remain in the United Kingdom as the spouse of a person present and settled (Dr Claire Elizabeth Bailey, hereafter referred to as the sponsor). The application of the appellant had been refused on the single ground that the appellant's marriage to the sponsor was not subsisting and that the parties did not intend to live together permanently. The appellant appealed to the First-tier Tribunal (Judge Khawar) which, in a determination promulgated on 17 March 2014, allowed the appeal under the Immigration Rules. The Secretary of State now appeals, with permission, to the Upper Tribunal

3. There are two grounds of appeal. First, the respondent submits that the evidence before the First-tier Tribunal (both oral and written) strongly indicated that the marriage was not subsisting. Mr Saunders, in his oral submissions, did not seek to persuade me that the evidence was such that any decision to allow the appeal would have been perverse; rather, he submitted that the judge's reasons were inadequate in the light of the strong evidence in favour of the Secretary of State's position.

4. Judge Khawar in his determination gives a thorough account of the evidence. On 28 August 2012, the Immigration Officer had attended an address in Southampton in order to locate the appellant. The appellant was found at the property with a woman who was not his wife (Sherren Emily Eleagli). Following this meeting, and as the judge noted [11] "the respondent concluded that she was not satisfied that the appellant's marriage is subsisting ...".

5. The Immigration Officer (Mr Harrison) did not attend before the First-tier Tribunal to give oral evidence but the judge did hear from the appellant and sponsor. At [17], the judge concluded that he did not "accept the evidence of the appellant and sponsor as it is highly unlikely that IO Harrison but has simply made up his account as to what the appellant and sponsor said [when interviewed by him]." Elsewhere [19] the judge describes the evidence of the appellant and sponsor as "unsatisfactory." At [20] he noted a "further significant inconsistency" between the evidence of the appellant and the sponsor. He found that the appellant had fabricated an account of attending his wife's birthday celebrations. However, the judge also noted that IO Harrison had given a description in his written statement of his attendance at the appellant's home address where he had "noted family photos of a Ghanaian family and a European family. There were female belongings mixed with male belongings throughout the flat, including the bed and bathrooms." By contrast, Mr Harrison had found "no male effects *(sic)*" at Sherren's property. The judge also noted [22] that the appellant had "submitted a substantial volume of documentary evidence which clearly shows that he resides with his wife." The judge was led to conclude that, whilst there were unsatisfactory features in the evidence of the appellant and sponsor, he

was satisfied "on the balance of probabilities [that] the appellant's marriage is subsisting and that both he and his spouse intend to live together permanently as husband and wife."

6. I do not find that the first ground of appeal has merit. Mr Saunders submitted that, whilst it was open on the circumstances in this appeal for the judge to find that the marriage was subsisting, he had failed to give sufficient reasons for his decision. I disagree. Judge Khawar has conducted a detailed analysis of the evidence but he has certainly been well-aware (as he repeatedly states in the determination) that much of the evidence given by the appellant and sponsor was discrepant and unsatisfactory. Ground 1 is, in effect, a disagreement with the judge's finding that the evidence of cohabitation of the appellant and sponsor (as adduced by both parties in the appeal) should lead him to conclude, by reference to the correct standard of proof of the balance of probabilities that the marriage was subsisting. I consider that to be a clear and cogent reason; indeed, it is difficult to see what other reasons the judge might have given for that finding. Another judge, faced with the same evidence, may have come to a different conclusion. However, that is not the point. Judge Khawar's task was to assess the evidence and make findings on the balance of probabilities. I find that he has not erred in law in completing that task.

7. I should at this point refer to an error in the grounds (which is repeated also in the determination) as regards the Immigration Rules to which this application was subject. The grounds refer to the "new" Rules, in particular E-LTRP.1.7. This application for a variation was made on 1 July 2012, that is eight days before the new Rules came into force (9 July 2012). The relevant Rule was, therefore, paragraph 284 of HC 395, in particular (vi):

   (vi) each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting;

8. As the respondent observes in Ground (2), the requirement that a marriage must be "genuine and subsisting" appears in a separate sub-paragraph from the requirement that the parties must intend to live together permanently with each other as his or her spouse. Ground (2) asserts that the judge conflated these two requirements but effectively only made findings in respect of the subsistence of the marriage and took no account of the "parties going forward."

9. Any misunderstanding as to the applicable Rules is not material because (see above) paragraph 284(vi) contains an almost identical requirement as to the subsistence of the marriage and the intention of the parties, albeit contained within the same sub-paragraph. Mr Saunders submitted that the judge's findings concerned only the subsistence of the marriage at the date of the hearing and not the intentions of the appellant and sponsor. I do not agree with that submission. Not surprisingly, in the light of the evidence before the judge, his primary focus has been on the genuineness and subsistence of the relationship between the appellant and sponsor.

The written evidence of both appellant and sponsor indicates that each intends to live with the other as his or her spouse. Whilst I acknowledge there are two separate requirements in the Rule, it is difficult to imagine circumstances in which a marriage is found to be subsisting and genuine but where the intention of the parties to the marriage to continue the relationship is not found to exist. Obviously, a husband and wife may intend to separate at a time when they are both cohabiting in the same property. However, the subsistence of a marriage goes beyond cohabitation and indicates the existence of a relationship which both parties are happy to see continue. Had the judge only been required to make a finding in respect of cohabitation, then that would have been a relatively easy matter in the light of the evidence of IO Harrison and the large volume of written evidence produced by the appellant. However, it is clear from the determination (see [10], [12], [23]) that the judge was satisfied that the parties were not only cohabiting but that their relationship was subsisting and that they intended that relationship to continue. I find that the judge has not conflated the two requirements but has made his findings fully aware of all of the provisions of the Rules and of the difference between the existence of a relationship and mere physical cohabitation in the same property. I find that he has not erred in law and that this appeal should be dismissed.

DECISION

10. This appeal is dismissed.

Signed Date 12 June 2014

Upper Tribunal Judge Clive Lane