Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/23307/2012
OA/23311/2012
OA/23312/2012

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 14th August 2014	**On 9th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MRS AYSHA KHATUN
(2) MISS BUSHRA AKTER BIBI
(3) MASTER MAHMUD SULTAN TARIQ
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER (DHAKA)

Respondent

Representation:

For the Appellants: Mr N Ahmed (Counsel)
For the Respondent: Mr I Richards (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Broe, promulgated on 26th March 2014, following a hearing at Birmingham Sheldon Court on 26th February 2014. In the determination, the judge

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allowed the appeal of Mrs Aysha Khatun, Miss Bushra Akter Bibi, and Master Mahmud Sultan Tariq. The Respondent Entry Clearance Officer, applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are all citizens of Bangladesh. They consist of the principal Appellant, who is the wife of Mr S Uddin, a person present and settled in the UK, and his two children. The principal Appellant was born on 16th June 1968 and the children were born on 15th April 1995 and 20th March 1997 respectively. They appealed against the decision of the Entry Clearance Officer dated 15th October 2012, to refuse their application to join their sponsoring husband and father respectively in order to live with him permanently as his family members in the UK under paragraphs 281 and 301 of HC 395 respectively.

The Judge's Findings

3. The judge heard the account on behalf of the Appellants that the principal Appellant had met the sponsoring Mr Uddin in Sylhet in 1986 and the relationship began in that year, but she last saw him on 31st May 2011 and they kept in contact by telephone, but they had four children, and they planned to live with the Sponsor at his rented home on Worcester, where the Sponsor worked at a restaurant. The judge had regard to additional documentation, including DNA reports, and age assessments, with respect to the children of the Sponsor.

4. The Sponsor had originally applied for asylum in the UK, and when that was refused he did not return back to Bangladesh after 2006, but only went back in 2011 for some three months after he had got indefinite leave to remain in the UK. The judge stated that the issues before him were the subsistence of the marriage, the intentions of the Appellant and the Sponsor, and the maintenance and ages of the children (see paragraph 17).

5. He held that there was no dispute that the principal Appellant was married to the Sponsor and that the remaining Appellants are the children of the Sponsor (see paragraph 18). However, the judge then went on to express himself in terms that, "I am not however persuaded that the marriage is not subsisting" (paragraph 18) before concluding that the relationship was as maintained and the parties intended to live together in the way that they contended (paragraph 18). The appeal was allowed.

Grounds of Application

6. The grounds of application are wide ranging and allege that the judge failed to provide adequate reasons for his findings.

7. On 10th April 2014, permission to appeal was granted, but only on the basis that the judge appeared to have expressed himself through a double

negative at paragraph 18 when he stated, "I am not however persuaded that the marriage is not subsisting" which demonstrates that the judge had reversed the correct burden of proof and looked to the Respondent Entry Clearance Officer to show that the marriage was not genuine and subsisting, whereas this burden merely lay upon the Appellant. Aside from this, the judge granting permission held that the application "is cast in terms that look suspiciously like an attempt to re-argue the Respondent's case".

Submissions

8. At the hearing before me on 14th August 2014, Mr Richards, appearing as a Senior Home Office Presenting Officer on behalf of the Respondent, relied upon the Grounds of Appeal. He said that the judge's core task was to assess whether the marriage was a subsisting one, given that the parties had voluntarily separated for a period of time. In expressing himself in the way that he did, he had plainly reversed the burden of proof and for this reason alone, the decision had to be set aside and remitted back to the First-tier Tribunal.

9. For his part, Mr Ahmed submitted that whatever error lay in the judge's determination, was not a material error. This is because the judge had already apprised himself of the true nature of where the burden of proof rested. He had said both at paragraph 5 and at paragraph 21 that the burden of proof lay with the Appellant. In any event, there were also four children of the marriage. Just because the parties had separated did not mean that the marriage was not a subsisting one.

10. Given that the standard of proof was on a balance of probabilities, it was more likely than not that the marriage continued to subsist. Indeed, the Sponsor retained contact with his family and even sent money back to his family. This was clear proof that the marriage was subsisting and the family remained his own. Further while there was cross-examination of the Sponsor and the judge was satisfied on the evidence that the marriage was subsisting.

11. There was also documentary evidence. It is true that the Sponsor did not return to Bangladesh, but the fact that he did so as soon as he got indefinite leave to remain, was indicative of the fact that he wished to be reunited with his family on the basis that the marriage was a subsisting one.

12. In reply, Mr Richards submitted that there may well have been evidence before the judge to conclude as he did but he had reversed the burden of proof and that was a material error.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error of law such that the decision should be set aside

under Section 12(1) of TCEA 2007 as a matter of law. This is because, whereas it is the case that the judge has expressed himself rather inelegantly at paragraph 18, it is clear, on a broad and overall reading of the determination, that the judge was in no doubt as to where the burden of proof lay.

14. He stated at the outset (at paragraph 5) that "The burden of proof is on the Appellant and the standard of proof required is a balance of probabilities". When he ended his determination he again in his last paragraph stated that, "Therefore on the totality of the evidence before me, I find that the Appellants have discharged the burden of proof ..." (paragraph 21).

15. It is true that the judge expressed himself in the manner that he did at paragraph 18, but when this is considered in the context of the determination as a whole, it is clear that whatever error there is in this expression, is not a material error of law.

16. The evidence consisted not just of what the Appellant and the Sponsor stated. The evidence also consisted of the fact that there was DNA evidence, and contact between the parties, together with remittances of money to the family in Bangladesh. Moreover, the Sponsor returned to Bangladesh to live with his family for three months.

17. The burden of proof is on a balance of probabilities, and it is not beyond all reasonable doubt, and on a proper reading of the determination, it is clear that the judge was entirely aware of where the burden of proof lay. There is no error in the determination.

Decision

18. There is no material error of law in the judge's decision. The determination shall stand.

19. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th September 2014