Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/22012/2013
OA/22011/2013

THE IMMIGRATION ACTS

Heard at Newport
24 July 2015

Promulgated on
14 September 2015

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

THE ENTRY CLEARANCE OFFICER, DHAKA

Appellant

and

MOSA JIBUNNAHAR MAHMOOD
SANJIDA MAHMOOD

Respondents

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

DETERMINATION AND REASONS

1. The first respondent (whom we shall call "the claimant") is a national of Bangladesh, as is the second respondent, her child. They applied to the Entry Clearance Officer for entry clearance as the spouse and dependent child of Shahin Mahmood ("the sponsor"). The application was refused on 18 November 2013. There were four grounds of refusal, which we summarise, adding references to the relevant paragraph of Appendix FM to the Statement of Changes in Immigration Rules, HC 395 (as amended).

© CROWN COPYRIGHT 2015

First, the Entry Clearance Officer was not satisfied that the single wedding photograph that had been produced was genuine (S–EC.2.2(a)). Secondly, the Entry Clearance Officer was not satisfied that the sponsor was free to marry the claimant on the date of the alleged wedding, and therefore was not satisfied that the marriage was valid (E–ECP.2.7). Thirdly, the Entry Clearance Officer considered that the application was not supported by the necessary documents, required by the provisions of Appendix FM-SE. Fourthly, the officer declined to accept the English Language Test Certificate produced, because "investigations have confirmed that the documents which you have submitted do not reliably demonstrate that you have passed the stated qualification" (E–ECP.4.1). The child's application was refused as dependent upon the claimant's.

2. The respondents appealed to the First-tier Tribunal. Judge Burnett allowed their appeal. He concluded that the evidence did not show that the photograph was fraudulent, and that the documentary evidence satisfied him that the marriage was valid. His examination of the sponsor's payslips and his bank account showed a number of odd features, but it did appear that the pay recorded in the payslips was indeed being paid into the sponsor's bank account, and that the documents showed that, which was what the rule required. So far as the English Language Certificate is concerned, the judge noted that a new certificate (dated July 2014) long post-dated the application and the Entry Clearance Officer's decision. But he considered that "the process of refusing the appellant's application without offering her an opportunity to re-sit the test first [was] procedurally unfair in the Patel sense". He therefore allowed the appeal having found in favour of the appellant on the first three grounds and considering that the Entry Clearance Officer's decision was not in accordance with the law on the fourth. He evidently took the view that the Entry Clearance Officer should consider the English Language Test Certificates now produced.

3. The Entry Clearance Officer appealed on the ground that the judge had erred in considering the requirements of specified evidence: contrary to what was implied by his determination, the required documents were not before him or, indeed, before the Entry Clearance Officer. So far as concerns the English test, if "Patel" was a reference to the decision reported as [2011] UKUT 00211, that decision has no application to an out of country application, where the limitations of leave extended by s 3C of the Immigration Act 1971 do not apply. There was no reply under Rule 24.

4. In his submissions to us, Mr Richards enlarged briefly on the grounds. He submitted that the judge had wholly failed to identify the documents he regarded as meeting the requirements of the rules; and that his conclusion in relation to the test certificate was incoherent. The only proper outcome was for the judge to dismiss the appeal. Ms Dickinson took us through the documents. She had some considerable difficulty in identifying exactly how the applicant's bank statements reflected the amounts and dates of payment recorded in the payslips. She accepted, however, that the position was that, at the date of the decision, the claimant could not meet

the requirements of the rules in relation to the English Language Test Certificate. She did not seek to support the reasoning of the judge in relation to unfairness, but made a brief submission on Article 8. The problem with that, however, is that, as we have said, there had been no Rule 24 reply: Article 8 was not before us.

5. The financial documents are a mess, and we can entirely understand that the Entry Clearance Officer, who already had doubts about the reliability of the evidence of the marriage, should have regarded them as failing to show what they were required to show. Crucially, however, the absence of a valid English Language Test Certificate means that this application could not succeed, and the appeal to the First-tier Tribunal could not succeed. The judge ought to have dismissed the appeal.

6. Although, like Article 8, the issue of the validity of the marriage was not before us, we note that it is said to have taken place a few days after the sponsor divorced his previous wife by Talaq. If that is so, the divorce cannot have been obtained by “proceedings” within the meaning of s 46(1) of the Family Law Act 1986, as would be the position if the procedure prescribed by the Pakistan Family Laws Ordinance 1961 (which runs in Bangladesh) had been followed. A divorce obtained other than by means of proceedings is not recognised in the United Kingdom if either party was habitually resident in the United Kingdom during the year immediately preceding the divorce. The non-recognition of the divorce would not itself invalidate a second marriage by a Muslim man domiciled in Bangladesh, but clearly raises questions which would need to be resolved in any future application.

7. As we have said, Article 8 is not formally before us; but we can see no ground for saying that the circumstances of the claimant’s family are such that she and her child are entitled to admission despite failing to comply with requirements of the rules.

8. Judge Burnett erred in law. We set aside his decision and substitute a decision dismissing the appeals of both of the appellants before him.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 10 September 2015