Upper Tribunal
(Immigration and Asylum Chamber)

Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040(IAC)

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 14 December 2011	.....

Before

MR JUSTICE BLAKE, PRESIDENT

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

ENTRY CLEARANCE OFFICER, ISLAMABAD

Appellant

and

SHABANA NAZ

Respondent

Representation :

For the Appellant: Mr. N Smart, Senior Home Office Presenting Officer

For the Respondent: Aman Solicitors

i) It is for a claimant to establish that the requirements of the Immigration Rules are met or that an immigration decision would be an interference with established family life. In both cases, the relevant standard for establishing the facts is the balance of probabilities.

ii) Post decision visits by a sponsor to his spouse are admissible in evidence in appeals to show that the marriage is subsisting: DR (ECO: post-decision evidence) Morocco * [2005] UKIAT 00038 applied.

DETERMINATION AND REASONS

Introduction

1.
This is an appeal by the Entry Clearance Officer against a decision of Judge Freer promulgated 25 July 2011 allowing the appeal of Mrs Naz (the claimant) against a refusal of entry clearance to come to the United Kingdom as a spouse.

2.

The brief chronology is that the claimant is a national of Pakistan. Her husband is settled in the United Kingdom. He travelled to Pakistan for an extended visit from 14 November 2008 to 14 September 2009. On 9 April 2009 a marriage ceremony took place between them for which there are two pieces of evidence, a Nikah Nama and a set of photographs.

3.
The Entry Clearance Officer refused the application for the following reasons:

“It is reasonable to expect that in a genuine, subsisting, supporting and affectionate relationship which you claim has existed since 2008 that there would be significant evidence of regular contact, signs of companionship, emotional support, affection, and abiding interest in each other’s welfare and wellbeing. I note your sponsor was not present at the marriage ceremony and a proxy marriage was undertaken. You have not provided sufficient evidence of your claimed telephone contact. Given the background to your relationship, the lack of evidence of personal contact and regular correspondence between you I am not satisfied that you have genuinely formed a relationship and durable with outward signs of affection and companionship. You have therefore failed to demonstrate satisfactorily that both you and your sponsor intend to live permanently with each other as his or her spouse or that there is any affection and support between you. You have also failed to demonstrate that there is any substance to the marriage. Therefore on the balance of probabilities I am not satisfied that your relationship with your sponsor is subsisting or you intend to live with your sponsor”.

4.
There was an appeal to the First-tier Tribunal when the husband gave evidence. Like the ECO, the judge referred to the guidance given in GA (“Subsisting” marriage) Ghana * [2006] UKAIT 00046. That authority says at paragraph [12] that subsisting means not merely that the marriage is still in existence as a legal formality but the matrimonial relationship subsists.

5.
The judge took into account the evidence that was placed before him in the notice and grounds of appeal, the wedding photographs, the sponsor’s passport, the witness remittances slips and the sponsor’s statement of July 2011. He observed correctly at [9] that the burden of proof is on the appellant and the standard of proof required is a balance of probabilities. Thereafter there are some problems with this determination.

6.
First, at [10] the Judge makes an error against the interests of the appellant when he says that s. 85(5) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) limits him to considering only evidence at the time of the decision to refuse entry clearance. For that reason he excluded from consideration a post-nuptial visit between 17 February 2011 to 17 April 2011. That is an error because s. 85(5) of the 2002 Act only excludes post-decision evidence that does not relate to an issue or a circumstance that was in contention at the time of the decision. The law is properly explained in DR (ECO: post-decision evidence) Morocco * [2005] UKIAT 00038 in which the President of the IAT (Mr Justice Ouseley) explains that post-decision evidence that throws light on circumstances in contention and in existence at the time of the decision is admissible. However, this error could not found a ground of appeal by the ECO.

7.
The judge next found that the Entry Clearance Officer made a mistake in considering that this was a proxy marriage and concluded that both the photographs showing the bride and groom present at the marriage and the Nikah Nama itself supported the fact that both parties were present. As has been

carefully pointed out before us by Mr Smart for the ECO, an analysis of the document demonstrates that the bride had appointed a proxy to represent her, and the sponsor's signature on the Nikah was in block capitals rather than the signature used elsewhere in the documents before us. However the judge is perfectly right that the Nikah Nama did not itself suggest that the sponsor was represented by a proxy and so the ECO was wrong to conclude that the documentary evidence suggested that sponsor was not present.

8.
We decided de bene esse to hear some further evidence from the sponsor on the question of the Nikah Nama and he pointed out that the bride had a proxy because she was in a separate room but the Iman attended with the proxy to ask the bride whether she was willing to get married, and she did consent in person. His evidence to us is that the signature purporting to be the bride's signature on the Nikah Nama is indeed her signature and he identifies the person in the wedding photographs as the claimant. In addition he was asked why his signature appears in capitals rather than the signature that he has used on his passport and his witness statement and indeed a remittance slip. He says he was asked by the Iman to sign in capitals for reasons of clarity and had no reason to dispute that. Although none of us purports to be a handwriting expert, insofar as any comparison can be made between the block capitals of the sponsor's name there and else where in the documents there does not appear to be a significant difference between them. We therefore accept this evidence that was not challenged by Mr Smart.

9.
There was accordingly no error in the judge's conclusion that the ECO had misunderstood the position at the time of the wedding. This is an important aspect of the case because the judge accepted the sponsor's evidence that he came to Pakistan to get married and that he had a three month post-nuptial stay in Pakistan when they resided as husband and wife.

10.
Third, the judge said the gap between the marriage in April 2009 and the application for entry clearance in June 2010 concerned him and the sponsor's evidence was confused as to when he got married. He then noted at paragraphs 24 and 26:

"It is therefore far from the strong case so I remind myself of the standard of proof here is a relatively low one . He has the burden of proving the material facts to be so and I recognise that here the burden has not passed to the respondent. There is considerably more than nothing admissible in their favour in the way of evidence and there is no surviving suggestion of forgery or of any kind of deceit. Given that I have in the light of undisputed evidence removed the proxy issue from the table."

"I find the appellant's case just reaches the low threshold . It is borderline case but I must recognise the great importance given by current law to the enjoyment of family life and so I would allow it on human rights in any event if not under the Immigration Rules". (emphasis supplied)

11.
This reasoning is confusing and gives rise to Mr Street's central submission that the judge has applied the wrong standard of proof. It is of course trite that the standard of proof of the primary facts in entry clearance claims is the ordinary civil balance. A similar standard applies in Article 8 cases, where the claimant alleges that immigration action interferes with subsisting private or family life. Before we address this submission we will consider the next error made by the judge.

12.

Fourth, the judge criticised the ECO's reference to s. 108 of the 2002 Act because fraud was not alleged but the judge was wrong to make that an issue in the case. All the ECO was saying was that the Tribunal should not receive fresh evidence save insofar as was permitted by s. 108 to disprove fraud. With respect to the ECO, that is not a complete statement of the law for reasons we have already given by reference to DR (Morocco) * (above). However, there was no suggestion of forgery being made by the ECO and so this was not a case where the civil standard was more exacting in practice because it fell on a party to substantiate fraud.

13.
We cannot be sure what the judge meant by a relatively low standard of proof and a low threshold. This was neither a case for the application of the criminal standard nor the lower standard or reasonable likelihood applied in asylum claims. The judge should have asked himself simply whether it was more probable than not that the parties intended to live together as husband and wife and that the matrimonial relationship was subsisting. Within the civil standard this was an ordinary as opposed to what is sometimes described as a heightened scrutiny.

Material error of law

14.
Despite these potential flaws in the judge's reasoning, we are satisfied that he did not get the standard of proof wrong. He identified the right standard at the outset and all his positive findings reflect that standard rather than a flawed approach of inquiring only as to whether there was a reasonable possibility that the parties intended to live together. He found the sponsor somewhat confused but not trying to mislead. There were no false representations deployed or peculiar features to this application.

15.
The judge's reference to the delay in applying for entry clearance does not in itself raise any suspicion as to the nature of the relationship. It is obvious, even if it was not explored in the evidence below, that any sponsor who wants to promote an application which may succeed has first to return to the United Kingdom to find employment after a ten month break in Pakistan and second to produce evidence of maintenance and accommodation to the Entry Clearance Officer in the application.

16.
The judge concluded first that the sponsor had stayed in Pakistan for the purpose of residing with his wife; second that the sponsor had supported his wife post-nuptially by remittances; third that the telephone card evidence taken with his oral evidence supported his assertion that he telephoned his wife. He found the sponsor to be an honest albeit confused witness. There was thus ample evidence on which the judge could have found that it was more probable than not that the parties intended to live together as man and wife and that the matrimonial relationship was subsisting. Reading the determination as a whole we are satisfied that this is what the judge did find.

17.
It was unnecessary in those circumstances for the judge to have allowed the appeal on Article 8 grounds. If the appellant succeeded under the Rules there was no failure of the positive obligation to respect family life under Article 8(1) of the ECHR. If by contrast the judge was not satisfied on the facts that the Rules were met, there would be no positive obligation to admit parties to a marriage who probably did not intend to live together as husband and wife in the United Kingdom.

18.

In these circumstances despite the points that have been carefully made to us, we conclude that the judge did not err in his consideration of the claim under the Immigration Rules and any errors in reasoning are not matters of any substance. We conclude that he did apply the correct standard of proof and there was no material error of law enabling us to set aside the decision and re-make it.

19.
In any event if we were to re-make the decision for ourselves we would have reached the same decision as the judge on the evidence before him plus the post-nuptial visit of February to April 2011 which he wrongly excluded and the further evidence as to the Nikah ceremony we heard from the sponsor.

Decision

20.
The judge made no material error of law. This appeal is accordingly dismissed and the judge's decision stands.

Signed

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber

Date: 13 January 2012