
**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041(IAC)

**THE IMMIGRATION ACTS**

**Heard at Sheldon Court, Birmingham** **Determination Promulgated**

**On 14 December 2011**

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**Before**

**MR JUSTICE BLAKE, PRESIDENT**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**ELHAM GOUDEY**

Appellant

**and**

**ENTRY CLEARANCE OFFICER CAIRO**

Respondent

**Representation :**

For the Appellant: Mr Koulang of Attar Solicitors

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

i) GA (“Subsisting” marriage) Ghana * [2006] UKAIT 00046 means that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted.

ii) Evidence of telephone cards is capable of being corroborative of the contention of the parties that they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question. It is not a requirement that the parties also write or text each other.

iii) Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant.

**DETERMINATION AND REASONS**

Introduction

1.
This is an appeal from a decision of Judge Birk sitting in the First-tier Tribunal, Immigration and Asylum Chamber in a decision promulgated on 13 July 2011. The decision was to dismiss the appellant's appeal from a refusal of entry clearance to join the sponsor in the United Kingdom as his wife.

2.
Two reasons were relied on by the respondent to refuse the application. First, at the date of the application the appellant was, by a few months, under the age of 21. Second, the Entry Clearance Officer was not satisfied with the material submitted to him demonstrated that the parties intended to live together as husband and wife and the marriage was subsisting. The onus was on the appellant to satisfy the ECO of these matters under paragraph 281(iii) of the Immigration Rules.

3.
Permission to appeal to the Upper Tribunal was granted on 14 October 2011. By that stage it was apparent from the decision of the Supreme Court (upholding the Court of Appeal) in the case of R (on the application of Quila and Others) v Secretary of State for the Home Department [2011] UKSC 45 that the requirement of the Rules that the applicant be aged over 21 was an unlawful and disproportionate one in the context of entry for the purpose of settlement as a spouse. Mr Smart cannot and does not rely on the first ground as supporting a refusal of entry clearance. The second ground remains disputed.

Factual basis of claim

4.
The background to this case is that the sponsor is a national of Sudan originally from the Darfur region who came to the United Kingdom and was granted refugee status. In due course he was naturalised as a British citizen, the status he held when he sought to sponsor the admission of his wife. He states that there were family discussions about finding him a wife and a relationship had begun in 2008 when he was in the United Kingdom and his wife was in Sudan. From the appellant's entry clearance application she says that she moved to accommodation in the city of Omdurman about two years before the application for entry clearance was made.

5.
On 4 August 2010 the appellant was issued with a passport. Between 18 August 2010 and 14 September 2010 the sponsor was in Egypt. There is evidence that the appellant joined him during this period unaccompanied by any chaperone. Two photographs were taken of them together in Cairo. On 20 August 2010 the application for entry clearance was made. It was refused on 8 November 2010 without interview.

6.
The appellant in the entry clearance application form answers fully, clearly and consistently all 151 questions. In the course of that form she says that she has lived at her present address for two years; she gives her telephone number in Sudan which is a mobile number; and she gives the telephone number of her husband in the United Kingdom which is again a mobile number. She says that she contacts her husband by telephone.

7.
A considerable volume of material by way of the sponsor's mobile telephone bills was placed before the judge at the appeal. From those it is apparent that he had contacted telephone numbers that

matched up to telephone cards that he had purchased; a great many of these cards were copied into the bundle of evidence. The period of the telephone contact revealed by this material suggests that this extended back to 2008. The sponsor explained that he used telephone cards as that was a cheap way of phoning Sudan. We understand the methodology is that a person purchases a pre-paid card, dials the number on the card and then enters a pin number supplied that enables the call to be transferred to the telephone number of the recipient. However, the billing data only indicates the neutral intermediary number that is being telephoned and not the eventual end user. The judge made the point that therefore the cards by themselves were not direct evidence that the sponsor had telephoned his wife.

8.
The sponsor further had submitted evidence of remittances. He says that he paid money into a company in Birmingham, they telephoned their principal office in London and remittances were sent to the Sudan. There was a letter from the remittance company saying that the sponsor had supplied money that was sent to his wife at a regular rate but the judge was troubled that no receipts for individual remittances had been submitted.

9.
In his determination the judge says this:

“15. The parties claim to telephone each other since 2008. It is clear that texting is an available option. I do not accept as credible that there would be no texts over this time. I accept that there are telephone calls made to the 020 number. However, there is no confirmation that the appellant is the person who is being telephoned.

16. I also find that there was contradictory evidence as to the reason why there has been no written communication between them. Firstly the sponsor stated plainly that there was no postal service and then he states that there is a very poor service. He did not explain when first asked that it was not worth sending correspondence due to a poor postal service. I find he was only prepared to give a more accurate account when asked in cross-examination and I find this reduces the weight that I place on his explanation. “

Error of Law

10.
In our judgement the judge has mis-directed himself as to the weight to be attached to the total documentation relating to the telephone calls. Whilst it is true that this documentation does not of itself prove that the sponsor has been speaking to his wife as opposed to someone else in the Sudan, the material gives corroborative support for the wife’s account in the entry clearance application and the appellant’s testimony in the appeal. It is clear that a great many telephone calls have been made using the telephone cards during the period of the relationship. This is substantial support for the proposition that they conducted their relationship by telephone. It is improbable that all this communication was with someone else rather than the person who the sponsor has married and wants to bring to the United Kingdom. Parties who intend to conduct a relationship by telephone do not also have to demonstrate that they conduct a relationship by written correspondence in order to show that they intend to live together as man and wife. The suggestion that they may have texted each other is speculation on the judge’s part. As we understand the position it would be more expensive to text and the telephone cards cannot be used for that purpose. The judge was therefore imposing his own view of how the parties could reasonably be expected to conduct their relationship as opposed to evaluating the consistent and supported evidence that was before him as to how they actually did.

11.
Everything else is neutral in this case. There is no evidence of lies, poor immigration history or deception. There is some evidence of financial sponsorship though the judge was entitled to be unimpressed by it for the reason he gave the absence of receipts is not a factor that goes to the discredit of the application.

12.
Accordingly we find that there has been an error of law in the assessment of this case and whether the requirements of the Immigration Rules had been met. It may be that the ECO and the judge considered that the requirement to show a “subsisting marriage” imposes some significant burden to produce evidence other than that showing that there was a genuine intention to live together as man and wife in a married relationship. If so we conclude that that is an error of law. The authority of GA (“Subsisting” marriage) Ghana * [2006] UKAIT 00046; [2006] Imm AR 543 only requires that there is a real relationship as opposed to the merely formal one of a marriage which has not been terminated. Where there is a legally recognised marriage and the parties who are living apart both want to be together and live together as husband and wife, we cannot see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the Immigration Rules.

Re-making the decision

13.
We therefore re-make the decision and conclude on what we have read and seen we are satisfied on the evidence taken as a whole that the Rules are complied with and allow the appeal on that ground.

14.
Applying common sense the appellant and the sponsor are single, are the right age for each other, and the sponsor as a young man would undoubtedly be of an age when he would want to have the company of a wife. She appears to have moved homes when the marriage was being arranged. He travelled to Egypt to meet his wife and there is some evidential support for the proposition given in his oral account that the relationship was conducted by telephone. We see no basis on which the judge could dismiss the consistent evidence that they intended to live together as man and wife as lacking in credibility.

15.
We agree with the judge that if the parties had been unable to satisfy the Entry Clearance Officer or the judge on appeal that they intended to live together as man and wife and the marriage was subsisting, Article 8 would not require the appellant to be admitted and so that part of the decision is undisturbed.

Decision

16.
The judge made a material error of law. His decision is set aside. We remake the decision by allowing the appellant’s appeal.

17.
We direct that upon receipt of this determination the Entry Clearance Officer promptly grants entry clearance.

Signed

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber

Date: 13 January 2011