**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/01594/2013

**THE IMMIGRATION ACTS**

**Heard at Birmingham**
**on 8th April 2014**

**Determination Promulgated**
**On 11th April 2014**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**FAHIMA BAKHSHI**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - ISLAMABAD**

Respondent

**Representation:**

For the Appellant: Mr Gill instructed by Bassi Solicitors.
For the Respondent: Mr Mills – Senior Home Office Presenting Officer.

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge S J Pacey, promulgated on 8th November 2013, in which she dismissed the appeal against the refusal of an Entry Clearance Officer to allow the Appellant to enter the United Kingdom for the purposes of settlement with her husband.

2. The Judge made the following observations and findings:

   i. Documentary evidence showed that the sponsor travelled to Afghanistan in July 2013, retuning the same month [8].

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ii. The parties would not have had in mind the need to provide objective evidence of contact at this late stage but it was accepted they have maintained contact by the cheapest means possible i.e. phone cards. No adverse inference is being drawn from the lack of objective evidence relating to contact between the parties. The objective evidence made available significantly post dates the date of the decision [9].

iii. It is not disputed that the parties are married. The evidence indicates that the sponsor went to Afghanistan in July 2013. Photographs showed the parties together. The sponsor would have needed time off work to travel to Afghanistan which would have involved some expense which is a point in his favour. Set against this is the fact he has an incentive to go to Afghanistan other than to see his wife as he has family there [10].

iv. The sponsor only has a few weeks holiday a year and last saw his wife on 18th May 2012. He must have stayed in Afghanistan for several weeks after the wedding but he has other relatives there which would have acted as an incentive for him to have an extended stay [11].

3. Also in paragraph 11 of the determination the Judge stated "It seems very strange however, that the sponsor did not go to see his wife (on his own account) until July 2013, well over a year after the parties last saw each other. Notwithstanding that he said that they maintained contact by telephone means I would have thought that if the relationship was genuine and subsisting the sponsor would have gone to his wife well before July that year. I recognise that he said he only had a few weeks holiday each year but that does still not explain how it comes to be that the visit took place so late in the day, and so long after the date of refusal."

4. As a result of the issues of concern to the Judge she dismissed the appeal under the Immigration Rules and Article 8 ECHR.

## Discussion

5. The application was initially refused under paragraphs 281 (iii), (iv) and (v) although the financial aspects were conceded on review leaving the only issue whether the criteria of 281 (iii) could be met.

6. It cannot be said the Judge failed to consider all the evidence she was asked to consider with the required degree of care or that she gave no reasons for the findings she made and so this is an appeal where such findings can only arguably be challenged on the basis of irrationality, namely that they were outside the range of permitted findings the Judge was entitled to make on the evidence.

7. Permission to appeal was granted by Upper Tribunal Judge Latter on a renewed application on 24th January 2014 on the basis it was arguable that the Judge may have erred in her assessment of whether the marriage was genuine and subsisting.

8. Guidance on the proper approach when assessing whether a marriage is subsisting is to be found in two main cases the first of which is GA (Ghana)* [2006] UKAIT 00046 in which the Tribunal said that the requirement in paragraph 281 that the marriage be subsisting is not limited to considering whether there has been a valid marriage which formally continues. The word requires an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprises a marriage that can properly be described as subsisting. The second case is Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041(IAC) in which the Tribunal held:

   (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.

9. In Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040(IAC) the Tribunal held that (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.

10. The evidence before the Judge was that the Appellant and sponsor married in 2012 and that the sponsor remained in Afghanistan until May 2012. The Judge seems to been of the opinion that the fact the sponsor did not return until July 2013 was a visit 'so late in the day' as to justify a conclusion that the marriage did not subsist. The evidence before the Judge of ongoing contact was accepted

and the Judge specifically refers to the fact that adverse findings would not be made on the basis of the evidence made available, but fails to give adequate reasons for finding that such contact, following Goudey which the Judge clearly considered, did not prove on the balance of probabilities and in the absence of adverse credibility findings that the relationship was genuine and subsisting and that they have the intention to live together permanently.

11. The evidence of indirect contact was accepted by the Judge which indicates that notwithstanding an inability to visit between the stated dates the parties' maintained regular contact with each other.

12. There was also evidence from the sponsor that he has contact with his children from his previous marriage every Sunday which requires him to remain in the United Kingdom. There was evidence the sponsor is employed but does not receive a substantial wage and that he was granted refugee status having fled from Afghanistan. It is accepted that he has family in Afghanistan as the marriage was arranged by such family members and the Appellant is the sponsor's cousin. It may be that during any visit to Afghanistan he would see family members but that in itself does not appear on the fact to support a conclusion that it means he did not visit his wife or provide adequate reasons for discounting the sponsors written and oral evidence that he did.

13. Having considered the evidence cumulatively, the adverse finding based upon the frequency, or lack of, visits and other matters the Judge considered justified the decision make this one of those rare cases in which it can be found that such a finding is irrational. This was also accepted by Mr Mills having had the opportunity of reading the determination in full.

14. I set the determination aside although the factual findings are preserved. Permission was given to the Appellant, pursuant to Rule 15 (2A) of the Upper Tribunal Procedure Rules to introduce additional evidence which includes more photographs of the time the Appellant and sponsor spent together and evidence that the sponsor has secured a period of extended leave from his employer to enable him to travel to Afghanistan on Friday 18th April 2014. He returns on 26th May 2014 during which period he will visit his wife, and, no doubt, his other family members.

15. In remaking the decision I accept that the parties are married, that there is evidence of ongoing intervening contact between them, that the sponsor has provided a plausible explanation for the visits undertaken to date based upon employment and domestic arrangements in the United Kingdom, and that they have continued to maintain contact as evidenced by the Viber telephone records provided. There is clear evidence that the sponsor wishes to travel to Afghanistan and has made arrangements to enable him to do so with his employer. Having followed the guidance in the authorities referred to above and in the absence of any sufficient countervailing factors, I am satisfied that the

Appellant has discharged the burden of proof upon her to show that not only she but also the sponsor consider themselves to be in a subsisting marriage and that they intend to live together as man and wife in the United Kingdom.

## Decision

16. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

## Consequential Directions

17. Forthwith on receipt of this decision the respondent shall issue entry clearance. [Provided the respondent is satisfied there are no circumstances arising after the date of this determination / the decision under appeal which make it necessary to refuse to do so].

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Fee Award.

Note: this is **not** part of the determination.

19. In the light of my decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Reasons: The Appellant succeeded on her appeal and should have done so on the basis of the information available and before the First-tier Tribunal.

Signed…………………………………………….
Upper Tribunal Judge Hanson
Dated the 10th April 2014