Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20879/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 9th August 2013	**On 29th August 2013**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

KULDIP KAUR

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Janjua of Janjua & Associates
For the Respondent: Mrs Pettersen

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Upson made following a hearing at Bradford on 24th May 2013.

Background

2. The Appellant is a citizen of India born on 11th March 1947. She applied to come to the UK to join her husband Mr Gurdip Singh who had gone to the UK in 1991 and he obtained indefinite leave to remain in 2010. No application was made for her to join him at that stage because it was known that she would not be able to meet the English language requirements. The Appellant became 65 in March 2012 at which point she became exempt.

3. The central issue in this appeal is when she made her application to join the Sponsor. The facts are not in dispute. The Appellant submitted an online application on 6th July 2012 three days before the changes in the Immigration Rules. She was then given a reference number which was valid for 28 days and told that within that period she could book an appointment and pay the fee. The fee was paid two weeks later on 19th or 20th July.

4. The Appellant was refused under the new Rules on the grounds that the Entry Clearance Officer was not satisfied that the Appellant's relationship with the Sponsor was genuine and subsisting nor that she could meet the maintenance requirements.

5. The judge found that the Appellant had applied in person on 19th/20th July and agreed with the Entry Clearance Officer that the appeal should fail on both counts.

The Grounds of Application

6. The Appellant appealed on the grounds that the judge's decision was against the weight of evidence and had not applied the proper standard of proof.

7. Secondly he had failed to take into account that in India applicants are not allowed to visit the High Commission or their nominated agents without first submitting an online application. The Appellant did so on 6th July 2012 and was not given a date until 19th July 2012 which was unfair because it was not her fault that she was not given a date until after the rule change.

8. Permission to appeal was granted by Designated Judge Campbell on the date of application point. He said that if the administrative procedure requires an online application in all cases it was arguable that the relevant date was the date of the online submission.

9. On 29th July 2013 the Respondent served a reply defending the judge's determination but in any event arguing that the finding that the parties do not have a genuine and subsisting marriage had not been challenged and therefore irrespective of which Rule was applied the appeal could not succeed.

Submissions

10. Mr Janjua accepted that his firm completed the application form and advised the Appellant to put in the application before the change in the law and that he was not aware that the relevant date would be the date on which the fee was paid, but

submitted that it was incumbent, as a matter of fairness, on the British High Commission New Delhi to inform the Appellant that she had only four days to pay the fee or the application would be considered under the new Rules.

11. In the USA or Europe it was possible for an online application to be accompanied by a card payment but the British High Commission India could not take payments online. If they had the facility to do so the payment could have been made at the same time as the online application which would have been before the Rule change. It was a principle of English law that all applicants should be treated equally but the High Commission in New Delhi was not in a position to process online applications in the way that European embassies did. They should have stopped accepting online applications at the point when they could not be processed before the Rule change. There was no warning that if the Appellant did not make the payment before 9th July she would be treated under the new Rules, and there ought to have been transitional provisions. In accepting the application on 6th July the High Commission had made a contract with the Appellant that the application would be treated under the old Rules.

12. Secondly he submitted that the judge's decision on the subsistence of the marriage was against the weight of the evidence. Both the Appellant and Sponsor were elderly and illiterate but they had been married for over 30 years and had communicated with each other during the Sponsor's absence by telephone cards and there had been a recent visit. Furthermore the Sponsor had assisted his wife to make the application - there would have been no reason for him to pay a fee of £1,000 and embark on a lengthy and expensive procedure if the marriage was not subsisting.

13. Mrs Pettersen relied on the case of Kaur (Entry Clearance – date of application) [2013] UKUT 00381 in which the Upper Tribunal held that the date on which an application for entry clearance is made is not effectively established by any of the provisions of the Immigration Rules and has to be established by reference to statute and secondary legislation. An application which does not comply with the requirement in Regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 to be accompanied by payment of a fee is a nullity and not an application for the purpose of the Immigration Rules or any statutory provisions. An application for entry clearance is therefore made on the date on which payment of the relevant fee is made. If the application is made online and payment of the relevant fee is also made online contemporaneously with submission of the online application the date of application is the date of submission. If payment of the relevant fee is not made until the printed application form is submitted the date of application is the date on which those are handed over.

14. Accordingly it was clear that the relevant date in this case was when the fee was paid i.e. after the Rule change. It had been open to the Appellant to make her application earlier, specifically after she became 65 in March 2012, or following the announcement on 19th June 2012 that the Rules would be changed. She was assisted by legally qualified persons who would be expected to be aware that the Regulations make it clear that no application is made until the fee is paid and who should have

ensured that the application was either accompanied by the fee or made 28 days before the Rule change. The Appellant had the alternative of making her visa application by courier or FedEx and accompanied by the fee payment when it would have been stamped as received on the date given by the courier.

15. With respect to the substantive issue she said that the judge made findings open to him on the evidence. The Sponsor was not accepted to be a credible witness and the judge's conclusions were sustainable.

Findings and Conclusions

16. This application was made on 19th July, after the Rules were changed, when the fees were paid.

17. Regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 provides

> "Where an application to which these Regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee."

18. The Appellant's professional advisors were therefore aware or should have been aware, of the relevant date for consideration of the application.

19. Mr Janjua submits that it is discriminatory against Indian applicants that the British High Commission India is unable to accept online payments and therefore European applicants had an advantage in that they would have been able to submit an application on the same date as an Indian applicant but have their application considered under the old Rules.

20. This argument would have had more force if it could properly be argued that the Appellant was taken by surprise and that she could have had no reasonable expectation that the application would be considered under the new Rules. However Janjua & Associates were plainly aware that the British High Commission could not receive card payments and therefore could and should have advised the Appellant to make the application 28 days before 9th July 2013 or to submit by courier and accompanied by the relevant fee. The Appellant had been in a position to make the application which she did since March 2012 and, had she done so more promptly, the application would have been considered under the old Rules.

21. There is no generalised duty on an entry clearance officer to inform each Appellant of an imminent change in the Immigration Rules. Immigration advisors are expected to keep themselves informed of the relevant Rules and Regulations and to advise their clients accordingly. The fact that other embassies were able to take card payments does not make the actions of the High Commission in India unlawful as discriminatory or unfair because every party knew precisely what the position was. Moreover the Appellant had two distinct alternatives available to her namely to make the application earlier or in another way.

22. Mr Janjua is simply wrong to say that the High Commission entered into a contract with the Appellant to consider the application under the old Rules on 6th July 2012 since no consideration i.e. the fee, was paid until 19th July 2012.

23. So far as this Appellant is concerned the date is in any event immaterial since the requirement that there be a subsisting marriage in which both parties intended to live with each other is the same under the old Rules as the new. The judge made sustainable findings that there was not. He found that there was no record of his claimed visit to India in 2010 and discrepant evidence as to whether the Sponsor and Appellant used a mobile phone number or a landline to communicate.

24. The Appellant's representative's submissions were recorded in the determination and there is no mention of the present submission that the mere fact that the application was made in itself shows that this is a subsisting marriage. The judge could not be expected to deal with submissions which were not made to him. In any event it is not made out. If that were the case no application could ever be properly refused on subsistence grounds.

Decision

25. The original judge did not err in law and his decision stands. The Appellant's appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor