Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/15235/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 18th July 2014	**On 19th December 2014**

Before

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

Between

PANCHALI RAY

Appellant

and

AN IMMIGRATION OFFICER, GLASGOW AIRPORT

Respondent

Representation:
For the Appellant: Mr H Ndubuisi, of Drummond Miller Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a national of India. She arrived at Glasgow airport on 13 May 2013, holding a valid Indian passport containing entry clearance granted to her as a spouse. She was refused admission. She appealed. Her appeal was heard by Judge P Grant-Hutchinson in the First-tier Tribunal and dismissed. She now appeals, with permission, to this Tribunal.

2. There is a considerable history to this appeal. The appellant originally entered the United Kingdom in 2000 as a spouse (not the spouse of her present husband). After the break down of her marriage, she met Mr Marco Morana in about 2008. She applied for leave to remain on the basis of her relationship with him. That application was apparently refused. Part of the reason for the refusal appears to have been that she had used forged documentation in connection with the application. She was removed from the United Kingdom in January 2010. Mr Morana went to India and he and the appellant were married there in June 2011.

3. Mr Morana returned to the United Kingdom, and the appellant sought entry clearance to join him. Her application was refused by the Entry Clearance Officer. She appealed, and, shortly before the appeal was determined, the Entry Clearance Officer withdrew the refusal decision for reconsideration. On reconsideration, however, the decision was unchanged. The appellant appealed again. Her appeal was heard on 21 August 2012 before Judge Kempton in the First-tier Tribunal. Judge Kempton concluded in favour of the appellant the principal matter of dispute, which was whether there was a subsisting relationship between the appellant and Mr Morana. She therefore allowed the appeal. The Entry Clearance Officer initiated further enquiries, but granted entry clearance in April 2013 in pursuance of the judge's decision.

4. Using that entry clearance, the appellant embarked for the United Kingdom. On arrival she was interviewed. Also interviewed was a Mr Reza, whose baggage contained the appellant's handbag, although the appellant said she had only happened to run in to him at the airport in India. Mr Morana was interviewed by telephone. Immigration Officers at various grades required for the making of such decisions concluded that the appellant and Mr Morana did not have a subsisting relationship of husband and wife. The appellant was issued with a notice of decision, which, so far as relevant, reads as follows:

> "You hold a current Spouse entry clearance but I am satisfied that either false representations were employed or material facts were not disclosed for the purpose of obtaining the visa/entry clearance, or a change of circumstances since it was issued has removed the basis of your claim to admission.
> These being from the information available to me at this time, I do not believe your marriage to be genuinely subsisting.
> …
> I therefore refuse you leave to enter the United Kingdom/I therefore cancel your continuing leave. If your leave was conferred by an entry clearance, this will also have the effect of cancelling your entry clearance.
> …."

5. The appeal against that decision occupied two days of hearing in the First-tier Tribunal. Evidence was taken from the appellant, from her husband, from Mr Reza, and from two Immigration Officers. The judge concluded that, indeed, there was no subsisting relationship between the appellant

and Mr Morana, and therefore that the appellant had no claim to admission. The judge also dealt with a number of allegations about the procedure adopted by the Immigration Officers. He concluded that nothing untoward had occurred. There is now no challenge against his findings in that respect.

6. What is, however, challenged is his conclusion in relation to the substantive issue. The primary complaint is that he misplaced the burden of proof and in other respects misunderstood his task. In paragraph 18 of his determination he wrote as follows:

> "The burden of proof is on the Appellant and the standard of proof is the balance of probabilities. In determining this appeal I am not restricted to those facts and circumstances appertaining at the time of the decision appealed against."

7. The issues raised by the grounds are as follows. First, the burden of proof of establishing either false representations or a change of circumstances is not on the appellant: it is on the respondent. Secondly, there is indeed a restriction on the circumstances which may be considered in an appeal of this nature. Thirdly, the refusal appeared to have been under paragraph 321 of the Statement of Changes in Immigration Rules, HC 395 (as amended), whereas only paragraph 321A could have been applicable. The judge therefore should have found that the decision was not in accordance with the Immigration Rules or otherwise not in accordance with the law. Fourthly, it was not open to the judge to undermine the decision of Judge Kempton that the marriage was subsisting. Fifthly, the judge was therefore not entitled to consider afresh whether the marriage was subsisting. Sixthly, the judge's conclusions on that issue were in any event speculative and not supported by the evidence.

8. Following the grant of entry clearance to the appellant, the provisions of Articles 3(1) and 4(3) and (3A)(c) of the Immigration (Leave to Enter and Remain) Order 2000 (SI 1161/2000) have the effect that on arrival in the United Kingdom, the appellant was to be treated as having been granted, before arrival, leave to enter for the period of validity of her entry clearance, in this case until 8 July 2016. The Immigration Rules distinguish between the possibility of refusing leave to enter to a person who merely has entry clearance, and the cancellation of a person's leave to enter which is in force on his arrival. The former is dealt with in paragraph 321; the latter in paragraph 321A. Paragraph 321 is, for the reason just indicated, not relevant in the present case. The material parts of paragraph 321A are as follows:

> "321A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply:
> (1) there has been such a change in the circumstances of that person's case, since the leave was given, that it should be cancelled; or

> (2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave, or in order to obtain documents from the Secretary of State or a third party required in support of the application; or
> [There are four more possibilities, none of which apply to the present case]."

9. Paragraph 321 permits the refusal of leave to enter "only where the Immigration Officer is satisfied that" either the same circumstances as set out in paragraph 321A(2) apply, or "a change of circumstances since [entry clearance] was issued has removed the basis of the holder's claim to admission"; there are again additional factors not relevant to the present appeal.

10. It is convenient to look first at the question whether either the terms of the notice issued to the appellant, or the treatment of the appeal before the First-tier Tribunal, was vitiated by failure to identify and apply the correct paragraph of the rules. Neither paragraph is specified in the decision itself, the terms of which we have set out above. The wording of the first paragraph of the notice is similar to that in paragraph 321(ii), but is not inappropriate for a decision under paragraph 321A(1). The wording of the refusal, the closing words of the extract above, evidently invites a choice between the words on each side of the oblique stroke: but neither has been chosen to the exclusion of the other. In his submissions, Mr Ndubuisi accepted that the argument based on the form of the notice of decision was in truth limited to a complaint about the failure to strike out one or other of those phrases.

11. If the failure to make a clear choice between paragraph 321 and paragraph 321A were, in the circumstances of the case, capable of making a real difference to the way in which the case was argued, we should have little hesitation in finding a legal error in either failing to specify which paragraph was applicable, or specifying the wrong one. But, in truth, there can be no such complaint here. If the matter is subject to discussion at all (a question to which we return), the sole issue is whether the relationship between the appellant and her husband was, at the date of her use of the entry clearance, a subsisting relationship of husband and wife. If it was not, there was simply no basis upon which she should have been admitted as a spouse. For these purposes the difference in the wording between paragraph 321(ii) and 321A(1) makes no difference: the cessation of the relationship is clearly a change of circumstances which is "such … that [the leave] should be cancelled". No doubt it is desirable that decisions are made on a formally correct and detailed basis: but, here, the failure to do so had no perceptible impact upon the appellant or upon the conduct and fairness of the appeal. We reject the grounds insofar as they are based on that point.

12. The next question for consideration is the extent to which the relationship between the appellant and Mr Morana was open for determination at all, given that the appeal against the refusal of entry

clearance had been determined by Judge Kempton in the appellant's favour. It is right that her determination should be regarded as concluding the issues she determined. It is therefore necessary to identify those issues. The appeal before her was an appeal against the refusal of entry clearance. The refusal was, as we have indicated, the second refusal. It was dated 1 February 2012. The appeal to the First-tier Tribunal against that decision was governed by ss 85 and 85A of the Nationality, Immigration and Asylum Act 2002, which prevented reliance upon evidence of matters after the date of the decision. Judge Kempton's decision was accordingly a decision that the appellant and Mr Morana had the subsisting relationship of husband and wife on 1 February 2012. It is not, and it could not be, a decision that they had that relationship at any subsequent date. It clearly cannot be assumed that a couple who have such relationship on 1 February 2012 are to be regarded as necessarily having the same relationship on 13 May 2013. On the other hand, it is clear that the force of Judge Kempton's determination reduces almost to vanishing point the possibility of asserting that the parties were not in that relationship at the date of the refusal of entry clearance. If it should be that they are no longer in that relationship, it must be because circumstances have changed since 1 February 2012.

13. Such a change, if it has taken place, might have been before or after the issue of entry clearance. That is because, in the present case, there was a considerable interval between the original refusal, and the grant of entry clearance following the appeal. If the relationship ceased to be subsisting after 1 February 2012, but before the issue of the present entry clearance, that is a change of circumstances which should have been brought to the Entry Clearance Officer's attention before the present entry clearance was issued: failure to bring it to the Entry Clearance Officer's attention would, we are confident, be failure to disclose a material fact. Clearly, nobody ought to think of accepting an entry clearance as a spouse, even after a successful appeal, if, by the time the entry clearance is issued, he or she is no longer in a subsisting spousal relationship with the sponsor. Thus, a change of circumstances in that period would merit refusal under paragraph 321A(2): the default would have been "in relation to the application for leave", because it occurred before the application was granted. If, on the other hand, the circumstances changed between the grant of entry clearance and its presentation to an Entry Clearance Officer, that would be a change of circumstances since the entry clearance was issued, and would merit a decision under paragraph 321A(1).

14. Whichever of those two circumstances precisely is in play, again makes no real difference in the context of this appeal. Judge Kempton's decision was not, and could not be a decision about the relationship of the appellant and Mr Morana for all time. Accepting her decision as governing the position on 1 February 2012, it was clearly possible for circumstances to have changed. If circumstances had changed in the way alleged, a decision cancelling the leave under one or other sub-paragraphs of paragraph 321A was clearly a possibility.

15. Further, the decision now under appeal is not a decision refusing entry clearance: it is, as set out in the notice of decision, a decision which is treated as a refusal of leave to enter. That provision is contained in paragraph 2A(9) of Schedule 2 to the Immigration Act 1971. An appeal against a refusal of leave to enter is not governed by ss 85 and 85A of the 2002 Act. Neither the evidence that can be adduced, nor the issues to be determined are limited by the date of the decision under appeal.

16. For those reasons it was clearly open to Judge Grant-Hutchinson to consider whether there was a subsisting relationship of husband and wife between the appellant and Mr Morana at the time of the appellant's arrival in the United Kingdom. He was entitled to look at that matter on the basis of the evidence before him, with no restriction other than that of relevance. The question was essentially whether the relationship identified by Judge Kempton was current at the time of the appellant's arrival.

17. Neither we, nor Mrs O'Brien (who appeared for the respondent) required any persuasion that the burden of proof in relation to the matters set out in paragraph 321A lies on the respondent. To the extent that the judge imposed the burden on the appellant, he made an error of law. Under these circumstances our next task, under s 12(2)(A) of the 2007 Act, is to decide whether his determination should be set aside.

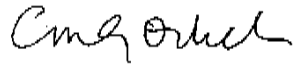
18. The evidence upon which the respondent relied was copious. The appellant, when first questioned, said that her husband was in Spain: she later said that he was in Abu Dhabi, which turned out to be correct. His evidence was that he was seeing his son there; she said he was doing a course there. She did not know the name of his children, including the son he was visiting. She did not know how long he was going to be away. It is very unclear why she chose to travel at the date she did, given that her husband was away from the United Kingdom on her arrival. She did not know her husband's phone number, despite claiming to be in regular contact with him. She claimed not to have a telephone, indeed, although one was found in her handbag in Mr Reza's baggage. That baggage also contained material showing a number of payments through Mr Reza. They were not the subject of any satisfactory explanation other than on the basis that they appeared to be clear evidence of payments by the appellant, through Mr Reza, to Mr Morana in connection with her immigration. Telephone interviews with the sponsor were unsatisfactory because they were interrupted, apparently by the sponsor, but it appears clear that the sponsor was not able to give a consistent or accurate account of his wedding to the appellant, nor to explain the payments to or through Mr Reza.

19. Nor did the appellant provide remotely satisfactory explanations for these difficulties. Her claimed difficulty with the language of questioning cannot sit with her ability to understand and speak fluently when it suits

her (she has lived in the United Kingdom for over ten years). And the fact that there have been virtually no meetings between the appellant and the sponsor since their marriage, (and that the appellant's present travel would not lead directly to meeting him), is essentially unexplained.

20. The judge concluded that the Immigration Officers who gave evidence before him were telling the truth, and that the appellant, her husband and Mr Reza were not. Those are assessments which to do not depend on the placing on the burden of proof. With or without those assessments, reading the evidence as we do, we consider it wholly inconceivable that a judge applying the burden of proof correctly would have come to a conclusion other than that the respondent had established that there was not, at the date of the appellant's travel, a subsisting relationship of husband and wife between her and Mr Morana. They did not have anything approaching the commonalty of knowledge and interests of a married couple, and provided wholly inadequate explanations for the difference in their accounts of the facts.

21. For these reasons we conclude that the judge's wrong assignment of the burden of proof really makes no difference at all to the outcome of these proceedings. The evidence as a whole makes it perfectly clear that the appellant had no proper basis for admission as Mr Morana's wife. Taking Judge Kempton's determination as the starting point, that shows that there had been a change in circumstances since 1 February 2012. Whether that change took place before or after the issue of entry clearance does not very much matter: in either case, the decision under paragraph 321A was amply merited and, in our judgment, inevitable. It follows that this appeal must be dismissed and we dismiss it.



C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 16 December 2014