Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08703/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 November 2014	**On 1 December 2014**
Prepared 27 November 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

MUHAMMAD SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – PAKISTAN

Respondent

Representation:

For the Appellant: Ms H Price, Counsel, instructed by Eden Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is a spouse entry clearance appeal that was initially dismissed. Following a hearing at Field House on 19 September 2014 I decided that the decision fell to be set

aside. My reasons for doing so were set out in an error of law decision and directions. This also set out the immigration history, and is as follows.

I. The appellant was refused entry clearance to settle in the UK with his wife, the sponsor Nasreen Ahktar. The date of decision was 13 March 2013. The appeal was dismissed by First-tier Tribunal Judge D S Borsada, following a hearing in Birmingham on 16 April 2014.

II. Permission to appeal was refused on 10 June 2014 by First-tier Tribunal Judge Tiffen, but was then granted by Upper Tribunal Judge Hanson on 7 August 2014. In granting permission the Upper Tribunal Judge referred to **Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC)**, in which it was held that evidence of telephone cards was capable of being corroborative of the contention of parties that they communicated by telephone, even if the cards did not confirm the particular number that the sponsor was calling in the country in question. In addition the determination in **Goudey** held that, where there were no countervailing factors generating suspicion as to the intention of the parties, telephone card evidence may be sufficient to discharge the burden of proof on the claimant. Having noted this, Upper Tribunal Judge Hanson commented that the determination in this appeal arguably lacked adequate reasons as to the existence of such countervailing factors. It was also noted that an arguable issue arose in relation to evidential flexibility, and whether the decision maker should have done more to request missing documents, or missing information from documents, before refusing the application (Appendix FM-SE para D(b)(i)(bb)).

III. The sponsor attended the hearing before me, but I did not hear from her because the hearing consisted of submissions by both sides as to whether there had been an error of law. The submissions by both sides at the hearing concentrated on three issues. The first was whether adequate reasons had been given for the judge's finding that there was not a genuine and subsisting relationship (**SS (Sri Lanka) [2012] EWCA Civ 155**). The second was whether the approach to the telephone card evidence amounted to a legal error of the type identified in the **Goudey** case. The third was whether the judge's findings in relation to the financial evidence were supported by adequate reasons.

IV. The main submission by Ms Price, for the appellant, was that the judge, in paragraphs 6 and 7 of the determination, had done little more than agree with the Entry Clearance Officer, and with submissions made at the hearing. Other evidence, which supported the appellant's case, was not mentioned or referred to. No account had been taken of positive evidence, no reasons for suspicion or countervailing factors had been identified, and the judge had not given any indication of what evidence he had taken into account in reaching the adverse findings.

V. Mr Avery's main submissions were that the judge was entitled to make findings by reference to his own earlier summary of the reasons for refusal and submissions at the hearing. The appellant and the sponsor had not provided much evidence for him to consider. The judge had not taken the sponsor's absence from the hearing, through illness, to be an adverse factor. In respect of the sponsor's employer's letter, and her payslips and bank statements, requirements of specified evidence were not met, and it had not been shown that the judge was wrong to accept this part of the refusal.

Error of Law

VI. I have decided that there was an error on a point of law that was material to the outcome.

VII. The first ground of refusal rejected the statements made by the appellant and the sponsor that they were in a genuine and subsisting relationship and that they intended to live together in the UK. The current appeal has distinct similarities to the **Goudey** case, and I accept that the appellant has established that the judge in this appeal made a similar error to that identified by Mr Justice Blake, then President of the Upper Tribunal, in that case. The following comments are made in paragraph 10 of the **Goudey** case.

VIII. "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."

IX. In my view the above comments have direct application in this appeal. Whilst I accept that the judge was entitled to make findings by referring to his preference for submissions made on behalf of the respondent at the hearing, nevertheless if those submissions that he accepted are analysed the telephone card point was central. The only other reasons given for rejecting the genuineness of the relationship was that there had been no visits by the sponsor to the appellant in Pakistan since 2012, and the application had not been made earlier. These are not matters that could be

classified as countervailing factors within the approach suggested by the **Goudey** case. At paragraph 12 of that case it was decided that it would be an error of law to find that the requirement to show a subsisting marriage imposed 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. It was specifically decided that there was no requirement to show evidence of "intervening devotion" in the form of letters or texts. Paragraph 12 finished with these words:

> "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."

X. In this appeal, referring to the matters raised in the refusal, and the submissions made at the hearing, it is hard to see that there were any countervailing factors capable of providing an evidential foundation for the suspicion that the couple were not in a genuine and subsisting marriage. It is notable that it appears to have been accepted throughout that the couple were married in Pakistan in 2011, as shown in the various documents and photographs, that they spent a month together after their marriage, and that the sponsor returned and spent another month with her husband in 2012.

XI. I have considered whether the error in relation to the telephone card evidence, and the lack of countervailing factors justifying suspicion, was an error that was not material to the outcome because of the financial aspect. I have decided that it was material, in the sense that an adverse finding as to the genuineness of the marriage was of significance in any event, but I have also decided that there are concerns about the financial aspect.

XII. The judge dealt with the financial ground of refusal in a brief paragraph [7] consisting of two sentences. This merely amounted to an indication that he agreed with the respondent's grounds of refusal and submissions, and that this had not been sufficiently addressed by the appellant. In my view this cannot be said to amount to adequate reasoning, even when allowing for the ability of a judge to summarise submissions and then indicate which ones he preferred. The formula may be sufficient to amount to adequate reasons where issues are tightly and clearly defined, but on this aspect there was a range of financial evidence submitted with the application, and with the appeal, and detailed submissions had been made by both sides. There is also no mention of the evidential flexibility aspect in the summary at paragraph 3.II of the determination, with the result that this is an aspect that was not dealt with at all in the determination.

XIII. I have therefore decided that the judge's decision falls to be set aside for error of law, and that the decision is to be remade, with no findings preserved.

XIV. I have considered whether the matter should be remitted for a fresh hearing at the First-tier Tribunal, or whether the decision can be remade in the Upper Tribunal. Having considered the Practice Statement I have decided that the normal course of remaking in the Upper Tribunal is appropriate. Although further fact finding is necessary, it is not extensive. In my view there is adequate evidence already on the first ground of refusal. The second ground is more complex, but is nevertheless a matter that can be considered in a remaking hearing.

Decision

XV. The decision is set aside since there has been a material error on a point of law, and the appeal is adjourned for a remaking hearing in the Upper Tribunal.

2. At the start of the remaking hearing, at which the respondent was represented by Mr Bramble rather than Mr Avery, who had been the representative at the error of law hearing, I was informed that the sponsor was not present because she had travelled to Pakistan to visit the appellant. Ms Price, for the appellant, indicated that her instructions were to proceed, and that her view of it was that this was not problematic, because the remaining issues turned on documentary evidence.

3. Following a brief discussion it was accepted by Ms Price that I had set aside the decision with no findings preserved, and had not made any findings in relation to remaking. Mr Bramble, for the respondent, was in a position to indicate that the subsisting marriage aspect of the refusal was not being pursued. He took this position in light of the **Goudey** point that had been the basis on which permission to appeal had been granted, and the main issue in the error of law decision, but this also appeared to be supported by the fact that the appellant had travelled to Pakistan for a further reunion with her husband.

4. It was therefore agreed between the parties that the remaining issues raised in the refusal, dated 12 March 2013, had been concerned with specified evidence, in particular Appendix FM-SE, paragraph 2(b) and (c). These related to documents required to establish income from salaried employment. The first issue was that the employer's letter had not contained the required information. The second issue was that the personal bank statements corresponding to the wage slips (which were accepted) did not show that the salary had been paid into the bank account.

5. Following the directions given at the end of the error of law decision the appellant's representatives had obtained a further letter from the sponsor's employer. This

confirmed that the sponsor had been paid in cash, rather than through a transfer to her account, but Ms Price accepted that the employer's letter obtained after the error of law hearing was still missing some of the information required in Appendix FM-SE, 2(b).

6. Following an opportunity for both sides to take instructions, and for Mr Bramble to obtain case files that he had not been provided with, the parties indicated what their positions were on the bank account question. Mr Bramble, for the respondent, accepted that the words "showing that the salary has been paid into an account" in Appendix FM paragraph 2(c) could be complied with by a person who was paid in cash. There would still be a need for a correspondence to be shown between the cash payments on wage slips, and payments of cash into the account. Ms Price, for the appellant, indicated that her position would be that such a correspondence, showing regular payments of the salary into the account, could be shown. Ms Price also indicated that the solicitors could obtain a further letter from the sponsor's employer adding the various pieces of information that had been omitted both from the original letter provided with the application, and the letter obtained following the error of law hearing.

7. Ms Price also made submissions in relation to the discretion provided by paragraph D of Appendix FM-SE, which provided for evidential flexibility in Appendix FM cases. Her position was that the refusal, despite not having mentioned such a discretion, had in fact exercised it, through using the words "not satisfied", and as a result the Tribunal could now exercise any discretion on the basis that there was jurisdiction to decide whether a discretion within the Immigration Rules should have been exercised differently. She did accept, however, that there was no specific mention in the refusal, or in the Entry Clearance Manager's review, about paragraph FM-SE(d), or about any aspect of the discretion contained within it, either concerned with contacting an applicant for missing information, or granting an application despite the absence of a specified document.

8. Mr Bramble, for the respondent, then developed submissions at some length to the effect that any employer's letter not submitted with the application was inadmissible in the appeal. His submission was that Appendix FM-SE D (the evidential flexibility provisions) produced a "timeline", and had the effect of rendering any evidence not submitted with the application inadmissible in the appeal process. This submission appeared to draw an analogy with student and other points-based cases in which there was a requirement to show a particular level of funds for a period of time leading up to an application. Mr Bramble did accept, however, in the course of discussion, that this was an entry clearance appeal under Appendix FM, and that it was not a points-based system case.

9. As for the other points at issue Mr Bramble's submissions were as follows. There remained items of information missing from the employer's letters. The bank statements did not show that the earnings had been paid into the account regularly. None of the discretionary aspects in paragraph FM-SE D were applicable, and even if

a discretion had been considered it could have made no difference, because there was insufficient evidence.

10. Ms Price, for the appellant, made submissions as follows. The bank statement at page 97 of the appellant's bundle did show regular deposits of the sponsor's salary. This was after the sponsor was told to pay her salary into the bank, and this predated the refusal. Before that time the appellant had operated on a cash basis. The evidential flexibility Rules applicable showed that the decision maker could have asked for further documents, or could have granted the application even if some documents were missing. This was not a points-based case. She provided and referred to the April 2014 IDI, which she said had not materially changed since the decision, in relation to evidential flexibility in Appendix FM-SE cases. She relied on Appendix FM-SE D(b)(ii) which gave the decision maker discretion to ask for a document where a specified document had not been submitted. The decision was not in accordance with the law for a failure to consider a discretion that was available under the Rules. It was significant that there were no allegations suggesting that any of the documents were not genuine. In relation to Article 8 Ms Price relied on the original detailed grounds of appeal, and she also asked me to consider Article 8 before turning to consider the not in accordance with the law point.

11. At the end of the hearing I gave the appellant's representative seven days to submit a further letter from the employer, with seven days thereafter for the respondent to make further written submissions, or alternatively to request a resumed hearing to allow further oral submissions to be made.

12. A further employer's letter was provided within the seven days, with a copy sent to the respondent by fax. By 20 November 2014, something over seven days after the further letter was provided, I was informed that nothing further had been heard from the respondent.

Decision and Reasons

13. In remaking the decision I have decided that the appeal falls to be allowed to the limited extent that the decision was not in accordance with the law, and the application remains outstanding.

14. I will start by considering the remaining matters in the refusal, and the position under the Immigration Rules. The issue of subsisting relationship and intention to live together in the UK was, correctly in my view, conceded on behalf of the respondent. What remained were the points about the missing information on the employment letter, and the lack of bank statements showing that the salary had been paid into an account in the sponsor's name.

15. On the first issue, the employer's letter, I am satisfied that the letter that has now been provided, dated 10 November 2014, does contain all of the information required by Appendix FM-SE. The letter shows the sponsor's employment and gross annual

salary, the length of her employment, the period over which she has been paid the level of salary relied upon in the application; and the type of employment.

16. I have considered the submissions made about the admissibility of this letter. It appears to me that the letter is admissible evidence because it is concerned with the circumstances appertaining at the time of the decision. It is therefore evidence that falls within Exception 1 in section 85A of the Nationality, Immigration and Asylum Act 2002. It is not evidence that falls within Exception 2. This is because, as was accepted at the hearing, the immigration decision taken by the Entry Clearance Officer did not concern an application "of a kind identified in Immigration Rules as requiring to be considered under a 'points-based system'". The submission that paragraph D of Appendix FM-SE, which concerns evidential flexibility, could somehow override section 85A of the 2002 Act, and place non-points based system entry clearance appeals in the same category as in-country points-based system appeals, where evidence is inadmissible if not submitted with the application, appears to me to be misguided. Neither does it appear to me to be arguable that the employer's letter somehow can be equated with a points-based system timeline case. The simple point to bear in mind is that an entry clearance appeal can only be concerned with the circumstances of the date of decision. The information in this letter clearly contains information that establishes what the sponsor's financial circumstances were at that date.

17. The sponsor provided wage slips for a six month period, with an employer's letter. The missing items of information from the employer's letter have now been remedied. What remains to be decided is the issue of the bank statements.

18. There was confusion between the parties as to what bank statements were in fact submitted with the application. It is unclear whether the bank statements that were submitted were included in the respondent's bundle. The single sheet at page 97 of the appellant's bundle, referred to by Ms Price, appears not to have been submitted. It is the case, however, that it contains deposits for £294 each, and that two of these predated the application, and the other two predated the decision. There were then some further pages. The account given was that the sponsor was unaware of the difficulties that would be created by her operating her life on a cash basis, and that she only started paying her salary into her account regularly when she was given legal advice that this was necessary for the purposes of the application.

19. I cannot accept the submission made on the appellant's behalf that this evidence is sufficient to comply with the requirements of the Rules. Although the issue of payment in cash was accepted not to be a problem in itself, the requirement in the Rules was that a personal bank statement should correspond to the same period as the wage slips, and that they should show that the salary had been paid into an account. The situation here is that bank statements appear not to have been provided for the six month period covered by the wage slips, and corresponding payments only occurred at the very end of the period. The first payment was made on 21 December 2012, and the application date was 26 December 2012. By the time of

the decision in March 2013 there were about eight deposits of her weekly salary. In my view this cannot be said to satisfy the requirement of personal bank statements covering the same period as the wage slips showing that the salary had been paid into an account. Having said that, however, I accept the submission made on the appellant's behalf that Appendix FM-SE paragraph D does contain a discretion that should have been considered. In particular there was a discretion under paragraph D(e). This applied where a decision maker was satisfied that there was a valid reason why a specified document could not be supplied. Here the issue was that the sponsor could not meet the requirements because of her use of cash. In these circumstances the decision maker could have exercised discretion not to apply the requirement for the document, or to request alternative or additional information or documents to be submitted by the applicant, if satisfied as to this being a valid reason, a point to which I will return.

20. The situation here is that the Rules appear to be designed to ensure that the information contained in wage slips is supported by other items of evidence. The requirement was for three items which should have corresponded with each other. The appellant has been able to provide two, but not the third. In my view the explanation given should be seen as a valid reason. Once it is accepted that there is no fixed requirement for a sponsor to be paid by bank transfer, then it appears to me that it must be valid for a sponsor to choose to spend her wages using the cash that she has paid. If the Rule was a rigid one then the matter would be simple, but the Rule is flexible in two ways. The first is that there is no rigid requirement that a person must be paid by bank transfer; and the second is that there is a discretionary element allowing an application to be granted despite an item of specified evidence being lost or missing. The issue here is exactly that contemplated at paragraph D(e), because it is a situation where the specified documents, namely bank statements showing corresponding payments, could not be supplied (and never could have been).

21. The Rules contemplate the exercise of discretion in two ways. The first is to grant the application anyway, not applying the requirement for the particular document; and the second is to request alternative or additional information or documents. It appears to me that it would have been open to the decision maker to follow either course, but what was not permissible was to fail to recognise that there was a discretion to be exercised, and as a result fail to exercise that discretion at all.

22. If the discretion had been exercised the application might have succeeded on the basis that the wage slips and employer's letter were sufficient, perhaps with some verification checks being conducted in order to address any concern that the wage slips might not be accurate or genuine. Alternatively other documents, such as a contract of employment; P60s; or other tax documentation, could have been requested to offer additional support to the wage slips and employer's letter.

23. I do not accept the submission made on the appellant's behalf that I should regard the refusal as one in which the discretion was in fact exercised. In my view the only

proper reading of the refusal has to be that there was no mention whatsoever of Appendix FM-SE paragraph D, and that there was a failure to exercise a relevant discretion within the Immigration Rules.

24. I have considered the submission to the effect that consideration of the discretion would have made no difference for other reasons. I do not accept that submission because, once the genuineness point falls away, the only remaining issues concerned the employer's letter and the bank statements. The first of these could have been remedied on the basis of the discretion to grant applications despite minor evidential problems, where a document did not contain all of the specified information required. The bank statements issue could potentially have been remedied using the discretion applicable where specified documents could not be supplied for valid reasons. In any event the points related to the same central issue, namely whether the sponsor's income had been properly established through documentary evidence.

25. I have considered the request made on the appellant's behalf that I should deal with Article 8 before the submission about the decision not being in accordance with the law. I have decided that that would not be the correct approach. An Article 8 assessment could only follow from clear findings that there was a failure to comply with the Immigration Rules. In this case that does not appear to me to be established. There was a concern underlying this submission about the extent of any further delay. My view on this, however, is that there will in any event inevitably be a need for the Entry Clearance Officer to look at the current financial circumstances of the sponsor. The appeal has been concerned only with the date of decision, in March 2013, and that is now some time ago. The Entry Clearance Officer will now need to look at the current circumstances, and will not be restricted to looking back in time to the previous decision date. The Entry Clearance Officer will therefore be able to look at the recent bank statements; the sponsor's P60 documents (including the most recent P60 showing that the sponsor earned gross pay of £18,964.78 in the tax year to 5 April 2014); and the most recent employer's letter, dated 10 November 2014, which contains all of the information required. It would also, presumably, not be a difficulty for the sponsor to provide a sequence of further up-to-date payslips.

26. In short it appears that the application is likely to succeed, unless there is something unexpected of which I have not been made aware. Documentary proof of the current income should not now pose the difficulties that have been discussed. It has now been conceded that this is a genuine and subsisting relationship and that the couple intend to live together. The sponsor has remained in the same employment throughout. Her salary of £18,750 per year was already sufficient, but she had a pay rise to £18,964.78 on 6 March 2013. Her employment as a production supervisor is permanent. All other requirements, including English language and accommodation, appear to have been accepted. The sponsor also provided evidence of savings of around £5,000, but in view of her gross annual income there was no need for her to rely on these.

27. I have considered whether there is any need for anonymity in this appeal, and have decided that there is not. No application was made for a fee award. It appears to me that there were deficiencies on the appellant's side in respect of the evidence submitted with the application, but on the other hand there were deficiencies in the decision in that an important aspect of the Appendix FM-SE Rules was not considered, namely the discretion at paragraph D. In the circumstances it appears to me that it would be fair to make a fee award for one-half of the £140 paid for the appeal.

Notice of Decision

28. The First-tier Tribunal's decision dismissing the appeal is set aside for the reasons given above. The decision is remade as follows.

29. The decision was not in accordance with the law, on the basis that there was a discretion within the Immigration Rules that should have been exercised. As a result the application made remains outstanding, awaiting a lawful decision.

Signed Date

Deputy Upper Tribunal Judge Gibb

TO THE RESPONDENT
FEE AWARD

Having remade the decision in this appeal by allowing it I have decided, for the reasons given above, to make a fee award in the sum of £70, one-half of the fee paid for the appeal.

Signed Date

Deputy Upper Tribunal Judge Gibb