



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

Appeal Number: OA/13797/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1<sup>st</sup> August 2014**

**Determination**

**Promulgated**

**On 4<sup>th</sup> August 2014**

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

**MR HUSEN ALI HASAM MUSAJI**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - MUMBAI**

Respondent

**Representation:**

For the Appellant: Miss A Carver (instructed by Westkin Associates)

For the Respondent: Mr P Deller (Senior Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. This is an appeal to the Upper Tribunal, with permission, by the Respondent with regard to a determination of the First-tier Tribunal (Judge Kainth) promulgated on 20<sup>th</sup> May 2014. For the sake of clarity and continuity however, I shall continue to refer to the Entry Clearance Officer as the Respondent and Mr Musaji as the Appellant.
2. The Appellant is a citizen of India born on 26<sup>th</sup> January 1984. He made an application for leave to enter the UK as a spouse under Appendix FM of the Immigration Rules. The application was rejected in a decision dated 29<sup>th</sup> May 2013.

3. The Appellant appealed and the appeal came before the First-tier Tribunal on 6<sup>th</sup> May 2014.
4. The refusal was on the basis that the Entry Clearance Officer was not satisfied that the Appellant's relationship with his Sponsor was genuine and subsisting or that they intended to live permanently together in the UK. That was the sole issue.
5. The First-tier Tribunal heard oral evidence from the Sponsor and was shown wedding and engagement photographs together with evidence of the Sponsor's visits to India and of text, e-mails and "WhatsApp" communications. At paragraph 31 the Judge says:-

"Both the Sponsor and Appellant provided a wealth of documentary evidence in support of their relationship which commenced as early as March 2012. I have been provided with itemised telephone records for both parties for the period 31st January 2013 to 1st March 2014. This covers a period of 396 days of telephone calls made between the parties to each other. Save for 55 days, (sic) the Sponsor had not called the Appellant, only 18 of those days have no documentary evidence in the bundle showing alternative contact, i.e., the use of e-mails, "WhatsApp" or other electronic communication. The itemised telephone calls clearly identify that many calls last in excess of one hour and there are multiple calls on most days, often at different periods throughout the day."

6. At paragraph 32 judge says:-

"In addition to the above there is also evidence of e-mail contact for the relevant period which can be found within the Appellant's bundle at pages 35 to 44 and covers the period 16th April 2013 through to 9th September 2013.

7. At paragraph 33 the judge states:-

"The Appellant's bundle identified an exchange of communication between the parties by "WhatsApp" and via the communication vehicle "Tango" which I am told and I have no reason to disbelieve is similar to Skype."

8. At paragraph 34 the judge refers to having seen evidence within the Appellant's bundle of a joint holiday between the parties and he accepted evidence that the Sponsor's daughter had spent time with the Appellant.
9. At paragraph 36 the Judge comments that the Respondent had made a quantum leap in determining the marriage is not subsisting by making reference to weak and unsupported reasons for refusal. The Respondent had failed to follow her own guidelines, which the Judge set out, in assessing and addressing such matters. He found the Sponsor a credible witness who provided detailed and comprehensive answers to all questions that were asked of her. He also noted that the various witness

statements, relied upon dealt with all the fundamental issues and questions which were raised within the adverse decision letter. The Judge commented that “this is not one of those appeals where the Appellant and Sponsor failed to address all or part of the grounds of refusal”.

10. On the basis of the documentary evidence and the oral evidence the judge found that the Appellant had clearly shown he met the requirements of appendix FM and allowed the appeal under the Rules.
11. The grounds on which the Respondent sought and was granted permission to appeal are:-
  - (i) That the wife had previously been married in an Islamic ceremony and there was no documentary evidence of the divorce and that whilst such a marriage is not recognised under UK law, the question of whether or not it had terminated went directly to whether the new marriage is genuine and subsisting.
  - (ii) The Sponsor and Appellant had failed to discharge the burden of showing they intended to live together as husband and wife.
  - (iii) The judge allowed the Appellant’s representative to hand in, at the hearing, a large volume of further evidence, after the close of the Home Office Presenting Officer’s submissions. The Home Office Presenting Officer was not given the opportunity to see the majority of that evidence as it had not been disclosed to him. That was a procedural error.
  - (iv) It is open to the Sponsor to travel to India to see the Appellant and their relationship can be maintained by visits and modern methods of communication and the circumstances are not compelling or exceptional.
  - (v) The Secretary of State relies on Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 (Admin) submitting that the judge failed to identify any exceptional circumstances
12. So far as Ground 1 is concerned, it is wholly without merit. The validity of the marriage was not questioned in the refusal and neither was there any suggestion that she was still married to her first husband under Islamic law. In any event the judge found at paragraph 41 that he accepted the Sponsor’s evidence that she had undergone an Islamic marriage and an Islamic divorce in 2009 and pointed out that her evidence was not challenged when she said that her former husband had remarried and had children.
13. With regard to Ground 2, this does not identify any error of law on the part of the judge and is merely a general assertion and thus without merit.

14. Ground 3 refers to what, if it had happened, would have amounted to a procedural error and thus an error of law. However, there is no evidence before me from the Home Office Presenting Officer who represented the Entry Clearance Officer before the First-tier Tribunal. There is nothing in the determination, the file or more particularly the judge's Record of Proceedings to indicate that there was any objection at the hearing to any documentation being admitted nor any application for an adjournment. It is too late to make a complaint now if none was made at the time and furthermore, in the absence of evidence from the Home Office Presenting Officer I am not satisfied that a large volume of further evidence was in fact submitted after submissions.
15. Grounds 4 and 5 are irrelevant as this appeal was allowed under the substantive Immigration Rules and not on the basis of family life. The Appellant met the substantive requirements of the Rules for entry as a spouse and so Grounds 4 and 5 are misconceived.
16. Mr Deller accepted in particular, that Ground 2 could not be advanced and did not seek to persuade me that Ground 1 had force, particularly as it do not form part of the refusal.
17. The judge of the First-tier Tribunal made a decision based upon the evidence, oral and documentary which is fully reasoned. I could discern no error of law.
18. The appeal to the Upper Tribunal is dismissed.

Signed

Date 1<sup>st</sup> August 2014

Upper Tribunal Judge Martin