



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00095/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 12 November 2018

Decision & Reasons Promulgated
On 14 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

TIRATH SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER,
NEW DELHI

Respondent

Representation:

For the Appellant: Ms Rutherford of Counsel instructed by One Immigration
For the Respondent: Ms Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Khawar promulgated on 20 October 2017 in which he dismissed the appeal of the Appellant against a refusal of entry clearance.
2. The Appellant is a citizen of India born on 2 January 1984. He applied for entry clearance as the spouse of Ms Palvinder Kaur (date of birth 15 July 1989), an Indian national living in the United Kingdom with indefinite leave to remain. The Appellant had previously been present in the United Kingdom for a considerable period of time, and shortly before his departure from the UK had undergone a

religious marriage ceremony with Ms Kaur on 12 December 2015. He returned to India and made an application for entry clearance from there.

3. The application for entry clearance was refused for reasons set out in a Notice of Immigration Decision dated 1 December 2016. The application was refused with reference to the financial requirements of Appendix FM of the Immigration Rules, and also with reference to paragraph 320(11) of the Rules by reason of the Appellant's poor immigration history (the details of which are set out on the face of the Notice of Immigration Decision). So far as the financial requirements are concerned the Respondent was not satisfied that the Appellant's sponsoring spouse satisfied the requirements of the Rules essentially for the following reasons:

"You state in your application that your sponsor is employed and that her income is £22,100 per annum as a supervisor with Classic India Ltd. I note the following discrepancies regarding your sponsor's employment:

- *Your sponsor's employer's online account state that the business holds cash of £1,204. In interview you state your sponsor supervises 35 employees of this business. I do not find it credible that this business is able to employ your sponsor to the amount of £22,100 per annum or to employ 35 additional members of staff.*
- *Your sponsor's pay slips list the payment method as a credit transfer, while the deposits to your sponsor's bank accounts are actually cheques.*
- *On occasions in your sponsor's bank statement she has paid three to four times instead of once.*
- *Payslip dated 13/08/16 to the amount of £347.29 arrives in your sponsor's account on 18/08/16 and to the amount of £347.49 despite the payment method being cheque.*
- *Payslip dated 16/07/16 to the amount of £347.29 arrives in your sponsor's account on 18/08/16 and to the amount of £347.49 despite the payment method being cheque.*

Payslip dated 02/07/16 to the amount of £347.49 arrives to the amount of £347.29, despite the payment method being cheque.

- *Payslip dated 25/06/16 to the amount of £347.29 arrives in your sponsor's account on 27/06/16 and to the amount of £347.49 despite the payment method being cheque.*

Payslip dated 04/06/16 to the amount of £347.49 arrives in your sponsor's account on 06/06/16 and to the amount of £347.29 despite the payment method being cheque.

- *Payslip dated 28/05/16 to the amount of £347.29 arrives in your sponsor's account on 31/05/16 and to the amount of £347.49 despite the payment method being cheque.*
 - *Payslip dated 07/05/16 to the amount of £347.49 arrives in your sponsor's account on 10/05/16 and to the amount of £347.29 despite the payment method being cheque."*
4. The Notice of Immigration Decision also gave consideration to Article 8 of the ECHR, but considered that the decision to refuse entry clearance was proportionate in all the circumstances.
 5. The Appellant appealed to the IAC on human rights grounds.
 6. Before the First-tier Tribunal the issue in respect of paragraph 320(11) of the Immigration Rules was conceded by the Presenting Officer. Accordingly the live issue before the First-tier Tribunal was in respect of the financial requirements of the Rules. This was the case even though the appeal was based on human rights grounds because - as is apparent from the decision of the First-tier Tribunal Judge - the Appellant essentially put his case on the basis that because he met the requirements of the Rules it would constitute a disproportionate interference with the mutual family life enjoyed with his partner to refuse to allow him to join her in the UK: e.g. see paragraph 37 of the decision of the First-tier Tribunal.
 7. The First-tier Tribunal Judge found against the Appellant on this point. In doing so it is apparent that the Judge had consideration to each of the various bullet points in the Notice of Immigration Decision, and in respect of some of them found that the Respondent had not made good his case. Nonetheless, the Judge was concerned about the pattern of payments to Ms Kaur from her supposed employer, both prior to the date of decision and as revealed in evidence that post-dated the decision that was filed in support of the appeal. The Judge's conclusion on this issue is summarised at paragraph 32 of the decision in these terms:

"However, on the above evidence ... I am not satisfied that the Appellant has discharged the burden of proof upon him to establish that the Sponsor is in full-time employment and genuinely earning her claimed salary of £22,100 per annum. In my judgment the frequency of credits made to the sponsor's bank account are not consistent with an individual receiving weekly income in the ordinary course of events within a normal employer/employee relationship. No explanation is provided either by the sponsor or the employer as to why the sponsor continues to receive credits of alleged income into her Bank account which do not follow the normal weekly pattern reasonably to be expected from a weekly income despite the fact that since January 2017 the appellants [sic.] income is received by a bank transfer. There is also no explanation for withdrawal of large sums of cash from the sponsors account at or about the same time as alleged

income credits being made to her account. Therefore on the totality of evidence I'm not satisfied that the appellant has discharged the burden of proof upon him to establish that the sponsor is genuinely employed and earning £22,100 per annum. I am not satisfied the Appellant has discharged the burden of proof to establish he meets the financial requirements of Appendix FM".

8. Having reached this conclusion in respect of the financial requirements - which as I say was the key live issue between the parties once the issue in respect of paragraph 320(11) had been conceded - the Judge went on to make some observations in respect of the status of the Appellant's marriage under the heading 'Legal Recognition of Marriage' (paragraphs 33-36).
9. The Judge noted that the religious ceremony conducted in the United Kingdom prior to the Appellant's departure for India would not have been recognised as a valid marriage within the UK, having been confined to a religious ceremony and there not having been a duly registered civil ceremony in the UK. The Judge also gave some consideration to whether in the alternative the Appellant could satisfy the definition of 'partner' by reference to a period of cohabitation akin to marriage but found that the evidence did not support this. Accordingly the Judge took the view that, irrespective of the position in relation to the financial requirements, *"the Appellant cannot possibly succeed in this appeal as his marriage is not legally recognised in the United Kingdom"* (paragraph 35).
10. The Judge notes at paragraph 36 that consideration was given to reconstituting the hearing in order to hear submissions on this point - which it was acknowledged had not formed any basis of the Respondent's refusal decision. The Judge - it seems to me understandably in the circumstances and context of his other findings - took the view that little would be achieved by reconvening the hearing when the appeal fell to be refused with reference to the financial requirements in any event. Accordingly the Judge dismissed the appeal on Article 8 grounds.
11. The Appellant sought permission to appeal to the Upper Tribunal. Permission was refused in the first instance by First-tier Tribunal Judge Parkes on 4 December 2017, but was subsequently granted by Deputy Upper Tribunal Judge McGeachy on 25 January 2018.
12. I am grateful to the helpful and realistic way in which both representatives dealt with the issues before me today. In particular in due course Ms Aboni offered no meaningful resistance to the appeal for reasons that I will explain in due course.
13. I have set out above the Judge's summary of the reasons for rejecting the Appellant's case with reference to the financial requirements of Appendix FM. Essentially

paragraph 32 of the First-tier Tribunal's decision sets out three strands of reasoning. The first two are interrelated and are in respect of the frequency of credits to Ms Kaur's bank account - whether sourced from cheques received from her employer or later by bank transfers. The third 'strand' is freestanding: it relates to the apparent withdrawal of large sums of cash from the Ms Kaur's account at or about the time of the income credits being made. The Judge's comment in this regard at paragraph 32 is 'picking up' from the Judge's observation at paragraph 30:

"In addition closer examination of the Sponsor's bank accounts reveals large cash sums being withdrawn from her bank account at or about the same time or within a few days of the alleged income being credited to her account. This raises the spectre of the same funds simply being re-circulated. No explanations were proffered for the large sums of money being withdrawn during this appeal".

14. It is pleaded in the grounds of challenge that this point was not raised during the hearing before the First-tier Tribunal Judge. Indeed I can identify nothing in the Record of Proceedings that suggests that any questions were put by either the representatives or the First-tier Tribunal Judge seeking explanation or clarification as to withdrawals from Ms Kaur's bank account. The focus of the questioning of Ms Kaur at the hearing before the First-tier Tribunal was in respect of discrepancies in the methods of payment, the supporting evidence from the employer, and the irregular frequency of payments of credits into her account. Ms Aboni, who has had the opportunity of reviewing the notes of the Respondent's Presenting Officer before the First-tier Tribunal, confirms that she can identify nothing in those notes that might suggest that the Presenting Officer raised any issue, or asked any questions about, this point. Nor can I see anything in the Judge's Record of Proceedings to suggest that either party made any submissions on this issue. In the circumstances it would appear to be a matter of which the Judge probably became cognisant upon "closer examination" of the Ms Kaur's bank accounts after the hearing - and therefore not a matter in respect of which there was any exploration, or in respect of which Ms Kaur was invited to offer an explanation.
15. It is clear from paragraph 32 that this factor in the appeal was a material element in the overall consideration of the credibility of the Ms Kaur's claim to be employed on a salary of £22,100. It seems to me that that means that the evaluation of the financial circumstances was reached in breach of natural justice, and that the breach of natural justice was material to the overall assessment.
16. This leaves the issue in relation to the legal status of the marriage - which the Judge expressly acknowledged had not been raised by the Respondent, and had necessarily not been a matter of discussion during the course of the hearing. In this regard the Appellant has responded by saying that although he had indeed undergone a religious ceremony in the UK before leaving (which in and of itself might not be a recognised valid marriage in the UK), he had subsequently after return to India registered his marriage with the usual officials in the government of Rajasthan. In

this context, in support of the application for permission to appeal, he submitted his marriage registration certificate which does indeed indicate that both he and Ms Kaur had their marriage registered on 10 November 2016 shortly before the application for entry clearance.

17. Ms Aboni has not sought to make any issue of this, and fully acknowledges that the Entry Clearance Officer did not raise this issue. She made it clear that the concern of the Respondent was in respect of the financial requirements not the status of the relationship between the Appellant and Ms Kaur.
18. Accordingly the Judge's assessment as to the status of the marriage is not such that would provide an alternative basis to permit his decision to stand.
19. In the circumstances I find material error of law and set aside the decision of the First-tier Tribunal.
20. The 'live' issue that remains in these proceedings is that of the financial circumstances of Ms Kaur. Although Ms Rutherford attended with further evidence no such evidence had been either filed or served. Moreover it is said that Ms Kaur requires the assistance of an interpreter. As such it was not possible to proceed to remake the decision in the appeal today. In any event because these matters go to the heart of credibility it was common ground between the representatives that the most appropriate forum for remaking the decision in the appeal is back before the First-tier Tribunal in front of any Judge other than Judge Khawar. I agree with that suggestion.
21. It is a matter now for the Appellant to decide what if any further evidence he wishes to file in support of his appeal, and whether or not Ms Kaur wishes to make available her employer as a supporting witness - bearing in mind that notwithstanding the error of law the Judge of the First-tier Tribunal identified some concerns with respect to the pattern of receipt of payment and irregularities in the supporting evidence from the employer that still require to be considered very carefully in evaluating whether the Ms Kaur is genuinely in receipt of the salary claimed. As regards the withdrawals of sums of cash from Ms Kaur's bank account, this will ultimately be a matter for consideration by the next judicial decision-maker: suffice to say presently that it is a matter in respect of which the Appellant and Ms Kaur may wish to file some further evidence by way of explanation - however I make no prescriptive directions as to what evidence should or should not be filed. General directions will be adequate: it is a matter for the parties to determine what they wish to bring forward in respect of the issues in the appeal.

Notice of Decision

22. The decision of the First-tier Tribunal contained a material error of law and is set aside.

23. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Khawar.

24. No anonymity direction is sought or made.

Signed:

Date: 2 January 2019

Deputy Upper Tribunal Judge I A Lewis