



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14428/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre  
On 8<sup>th</sup> September 2017

Decision & Reasons Promulgated  
On 19<sup>th</sup> September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR SARMAN RAMA ODEDARA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr J Collins (Counsel)

For the Respondent: Mr A McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge C Ferguson, promulgated on 23<sup>rd</sup> May 2017, following a hearing at Taylor House on 10<sup>th</sup> May

2017. In the determination, the judge dismissed the appeal of Mr Sarman Rama Odedara, whereupon the appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of India, and was born 2<sup>nd</sup> August 1983. He appealed against the decision of the Respondent Entry Clearance Officer dated 26<sup>th</sup> November 2015, refusing his application for entry clearance to join his spouse, Ms Soniya Gogan Sundavada, a British citizen present and settled in the UK.

### **The Appellant's Claim**

3. The Appellant's claim is that he and the Sponsor have known each other since 2005, and they married each other on 30<sup>th</sup> January 2012, making an application for entry clearance on 29<sup>th</sup> September 2015. Although they had seen each other since March 2012, they remained in contact through phone calls, photographs, and Virgin media telephone bills were submitted, to this effect. The Appellant's sponsoring wife had not been able to travel to India since their marriage because she was struggling to find employment, and she had to meet the financial requirement of being able to show £18,600 income per annum. There was, however, enough evidence submitted of their contact, according to the appellant and his sponsoring wife.

### **The Judge's Determination**

4. The judge had regard to the leading Upper Tribunal Judge first in **Goudey [2012] UKUT 41**, and **Naz [2012] UKUT 40** in coming to his decision. He observed that although there was post-decision evidence of regular contact between the parties, he had to bear in mind that, "By that stage the Appellant and the Sponsor knew that the lack of contact was no reason for refusing entry clearance so they had a strong incentive to provide evidence of contact to support the appeal" (paragraph 28). Nevertheless, the judge went on to make a clear finding that, "Much of the oral evidence was not challenged by the Respondent during the hearing ..." (paragraph 29).
5. Nevertheless, the judge concluded that he could not be satisfied that the relationship between the parties was genuine and subsisting. This was despite the fact that the judge "did not place much weight on the fact that the Sponsor did not travel to India between 2012 and 2016 because clearly she had very little income and I accept she was focused on meeting the financial requirement" (paragraph 29).
6. Notwithstanding this, however, the judge went on in the next breath to say that, "I note, however, that the Sponsor is unable to explain why they had not applied for the Appellant to come to the UK as a visitor" (paragraph 29).
7. Secondly, although there was evidence of 23 phone cards produced by the Appellant to demonstrate that they had been in regular contact through making telephone calls with each other, the judge concluded that, "One would expect to see either more

calling cards or further evidence of calls from the Sponsor's mother's mobile phone" (paragraph 30).

8. The appeal was dismissed.

### **The Grant of Permission**

9. On 30<sup>th</sup> June 2017, permission to appeal was granted by the Tribunal on the basis that, it was not in dispute that the parties had entered into a marriage on 30<sup>th</sup> January 2012, and arguably, as set up in the Grounds of Appeal, the judge's approach to the evidence displayed an erroneous approach to the relevant burden and standard of proof. The respondent argued he failed to identify any matter that would generate suspicion as to the intention of either party to the marriage, and arguably no reason is identified that would allow the judge to reject the evidence before here as untrue.
10. On 13<sup>th</sup> July 2014 a Rule 24 response was entered to the effect that it was open to the judge to find that the Appellant and the Sponsor are not in a genuine and subsisting relationship and have taken a holistic view of the evidence presented at the hearing.

### **The Hearing**

11. At the hearing before me on 8<sup>th</sup> September 2017, Mr Collins, appearing on behalf of the Appellant, relied upon his well crafted grounds of application. He repeated what he had said before the judge below, namely, that, with respect to why the communication between the parties was so limited, "There is no paramount model of contact in the relationship" (paragraph 25). He also stated that, the judge was wrong to quibble with the fact that only 23 phone cards were produced, because in this case if every telephone card and telephone bill had been produced, this would have spanned a period of some five years and that this was "illogical and irrational".
12. In any event, no proper or adequate findings are made with respect to the telephone cards and other evidence of telephone contact which was produced before the judge.
13. Moreover, the judge made no findings at all on the evidence of the witnesses called, because there were three witnesses who gave evidence, and the wife's auntie, Devanand Theba, actually attended the wedding in 2012 and she stated at paragraph 6 of her statement that, "They are a couple, completely in love and committed to each other".
14. For his part, Mr McVeety, appearing on behalf of the Respondent Entry Clearance Officer, submitted that he would have to agree that the judge had fallen into error in her approach to the evidence before her.

### **Error of Law**

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, whilst the

judge refers, quite properly to the two leading decisions of the Upper Tribunal in Goudey and in Naz, she fails to adhere to the principles as set out in those cases.

16. Goudey stands for the proposition that there has to be evidence that the matrimonial relationship is continuing at the relevant time, but this does not mean that there has to be production of particular types of evidence indicative of a mutual devotion between the parties. The suggestion that 23 phone cards were not enough, and that more should have been produced is irrational, in the absence of any suspicious circumstances pointing to the marriage being one which was contrived in order to frustrate the application of the Immigration Rules. It is also irrational because it requires, as Mr Collins submitted, that the parties keep phone cards for the duration of a five year period, during which they had not been able to see each other.
17. This was particularly the case given that the judge had already accepted that the failure of the Sponsor to make another visit to India after her marriage was not in itself suspicious because she had to save up enough monies in order to be able to meet the financial threshold requirement.
18. The decision in Naz stands for the proposition that post-decision evidence is admissible to show that the marriage is subsisting. There is nothing in that decision which suggests that parties have a higher threshold to satisfy, namely, that of explaining why, in circumstances where there would be every incentive in a genuine marriage to continue contact with each other, they have to prove a negative, namely, that they are not remaining in contact in order to simply bolster a weak marriage claim.
19. Finally, the suggestion by the judge that, in circumstances where “much of the oral evidence was not challenged”, the marriage could still not be accepted as being one which was “genuine and subsisting”, even where the Sponsor could not travel between 2012 and 2016 because “she had very little income”, that she had to, “explain why they had not applied for the Appellant to come to the UK as a visitor” (paragraph 29), is again unwarranted.
20. Not only is there absolutely no requirement in a marriage case, even where the parties have been separated from each other for many years, that an application is made from the country overseas to come to the UK as a visitor, but as Mr McVeety agreed with me, when I put this matter for consideration by both sides, an application to enter as a visitor, would in all probability be refused, because the Entry Clearance Officer in New Delhi would not, on a balance of probabilities, be satisfied that the appellant intended to return back to India, after visiting a wife whom he could not otherwise visit, because the wife could not show the requisite £18,600 savings.
21. This is assuming that the sponsoring wife had the funds (which she had been prudently saving up in order to sponsor his spouse’s application to join her on a permanent basis) to support his temporary visit to her as a visitor.

22. A prudent wife may well have taken the view that it was not practicable to embark on such a course when what she really wanted to do was to save up enough money to sponsor his application to come to the UK on a permanent basis as her husband.
23. I have remade the decision on the basis of the findings of the judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

**Notice of Decision**

24. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.
25. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

18<sup>th</sup> September 2017

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have decided considered to make a reduced fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

18<sup>th</sup> September 2017