



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01979/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21st August 2018

Decision & Reasons Promulgated
On 10th September 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

AFTAB [S]

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Miss S Jegarajah, instructed by Prime Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 27th September 1982. He seeks entry clearance to join his spouse, Mrs Farida Begum, a person lawfully residing in the United Kingdom.
2. The Entry Clearance Officer, by a decision of 16th January 2016 as reviewed on 11th April 2017, refused to grant leave to enter.

3. Essentially the decision set out three grounds of refusal. It was not accepted that the relationship was genuine and subsisting. It was not accepted that the sponsor met the financial requirements as required under the Immigration Rules, and it was not accepted that the appellant was exempt from the English language requirement also as requested under the Rules.
4. The appellant sought to challenge that decision by way of an appeal to the First-tier Tribunal. That appeal came before First-tier Tribunal Judge Telford on 8th November 2017. In the decision dated 13th December 2017 the appeal was dismissed, the concerns of the respondent being upheld.
5. Subsequently an appeal to the Upper Tribunal against that decision was granted. The matter duly considered by Deputy Upper Tribunal Judge Lever in a decision of 15th May 2018, as promulgated on 22nd May 2018.
6. The Tribunal decision was set aside to be remade by the Upper Tribunal. Findings in respect of financial matters were directed to stand subject to any further evidence that might be adduced.
7. Thus it falls to me to remake the decision. I have regard to the bundle of documents as presented and to the arguments presented on behalf of the respective parties.
8. In terms of context this appeal has somewhat of a history.
9. According to the statement of the appellant he met the sponsor on 7th August 2007 and they married on 11th August 2007.
10. In January 2008 the appellant applied for entry clearance which was refused.
11. In 2010 between January and March the sponsor visited him in Pakistan. Subsequent to the visit a further application for entry clearance was made and refused.
12. A child is born to the relationship on 23rd October 2010.
13. In 2013 between 13th May 2013 and 23rd September 2013 the sponsor and child visited Pakistan.
14. On 11th October 2016 there was a third application for entry clearance which is refused on 16th January 2017. This is the operative refusal for the purposes of the appeal. Further, in 2017 between 28th June and 4th September the sponsor and son visited Pakistan.
15. The sponsor herself had arrived in the United Kingdom on 2nd December 1999 to join her then husband. They were divorced on 22nd May 2006. She met the appellant on 7th August 2007 and married him on 11th August 2007. She lives in a council property with [MA], her son. She has lived there for some seven years.

16. She describes herself as having relatives in the United Kingdom. The brother-in-law, namely the brother of the appellant lives and works in Birmingham with his son and his wife (she came to join him three years ago upon a visa to do so).
17. Living in Ilford is the appellant's sister, living with her husband and four children. It is the evidence of the sponsor that she is on good terms with both relatives and indeed her son enjoys the company of his cousins. Currently [MA] is living in Birmingham during the holidays.
18. In terms of her own relatives the sponsor has a brother who is a British citizen who lives in London but currently visiting Pakistan. She has another brother in Pakistan and she had a sister who unfortunately died.
19. The sponsor in her statement states that she met the appellant on 7th August 2007 and married on 11th August 2007. It was an arranged marriage as the appellant was an extended family member of her father's cousin. It was attended by family members. Although it was an arranged marriage she also loves her husband because he is an honest, caring and simple-minded person. The appellant in his most recent statement mirrors that expression.
20. The nature of the original application made for entry clearance and the reasons for its refusal are not before me at this hearing. What is in issue is whether it was in fact a genuine marriage or merely one to facilitate the appellant joining his siblings in the United Kingdom. To be set against that in fairness to the appellant is the length of the relationship said to have subsisted despite many setbacks in the eleven years. On the one hand it may be argued that that simply reinforces the persistence of the appellant to come to the United Kingdom for his own purposes, alternatively it may be said that the persistence to come is testimony to the nature of the relationship.
21. Mrs Kelchure-Cole, who is a social worker, prepared a written report in support of the application dated 31st September 2016. That report places the marriage within a somewhat different context, as can be seen from paragraphs 4.3 and 4.4 in particular. In that account the sponsor says at the end of her first marriage she returned to visit her family and it was during this trip that she met the appellant. The marriage was a "love marriage" but was a marriage against both families wishes. The appellant went against his family wishes because she was older than him and a divorcée, he was "brave" and went against cultural norms and they got married. However, it was the sponsor's contention that being a divorcée and marrying for love it was unlikely, if she returned to Pakistan, that she and her son would be accepted back in either family or the community.
22. If indeed it was a love marriage it raises the question as to how she and the appellant first became acquainted. If she met him for the first time on 7th and they married on the 11th, it scarcely gave very much time for that love relationship to develop, particularly if as she claimed the family were opposed to the relationship.

23. It is somewhat difficult to reconcile what the sponsor had to say to the social worker with the reality her subsequent actions. In the course of her evidence to me the sponsor was at pains to indicate that her in-laws did not like her and it was for that reason that she felt unable to return to live in Pakistan. However, the reality is that for nearly three months in 2010, five months in 2013 and three months in 2017 the sponsor lived with the appellant at his family home, the last two periods also with [MA]. If there had been such opposition to the sponsor as claimed, by his family, why did the family accommodate the sponsor for such periods?
24. When asked why, following the refusal of entry clearance in 2008 she had not returned to live with the appellant in Pakistan, the sponsor cited the difficulties with her in-laws as the reason.
25. Clearly [MA] was conceived during the subsequent visit in 2010 and no doubt the sponsor was pregnant with [MA] at the time that the second application for entry clearance was made. However, once again there are no documents before me in relation to that matter and it would be unfair in those circumstances to conclude that the pregnancy featured in any way in that application. It is easy to suggest that a pregnancy would be an additional tool in order to use that to obtain entry clearance. If such an occurrence was not used for that purpose, such would perhaps tend to support that the child was genuinely wanted and therefore a matter capable of showing a genuine and subsisting relationship.
26. The prolonged period of some six years before the next application for entry clearance raises once again the question as to why the sponsor would not have returned to live with the appellant. Her explanation remained consistent as to the lack of support from the in-laws. She also contended that she was frightened that her young son would be exposed to illnesses, that his life chances were better in the United Kingdom. It is to be noted that the son is a British citizen. It also seems to me to be a matter to be held in favour of the sponsor and appellant that there was a visit of some length paid in 2013. That was not linked with any application for entry clearance. The visit was not used as a tool for any application. Such perhaps indicates that it was for a genuine purpose of a visit, thereby capable of supporting the contention that there was indeed an existing relationship. Indeed, the third visit was made after the case for entry clearance had been refused rather than as a precursor to support it. That also perhaps tends to indicate a genuineness in the relationship rather than the reverse.
27. If it had been the intention of the appellant initially to use his marriage to the sponsor as a way of entering England to join his family it is perhaps somewhat surprising that after ten years of failing to achieve that purpose he remained with the sponsor and has not sought to find another. That too, together with the length of the relationship is a matter which, in my opinion, should be held as a factor in favour of a subsisting relationship.

28. The sponsor has given evidence as to her close involvement of herself and her son with the appellant's brother and his family and the appellant's sister and her family. It is said to be a fairly close knit family organisation and, as I have indicated, the sponsor's son was with the brother-in-law's family during the holiday. I find that closeness of the family connection is also a matter supportive of a subsisting relationship with the appellant.
29. Reliance is also placed on communication as between the sponsor and the appellant. Details have been produced of frequent messages passing from June through to August 2018. Photographs have also been produced showing the contact between the appellant and his son and the sponsor.
30. It is of course important to have evidence of communication for 2016, 2017 rather than just in the few months immediately prior to making the application.
31. In that connection I note the evidence of the many telephone calls spanning the period of 2015 to 2016, in particular.
32. The report of Mrs Kelchure-Cole of 31st September 2016 is very helpful. It indicates strongly from observation the affection which the son has for the appellant and the desire to communicate, one with the other.
33. Taking all matters into consideration, and particularly that of communication and length of relationship, I find on the balance of probabilities that this is a genuine and subsisting marriage.
34. In terms of finances I note that from 2015 until May 2018 the sponsor was in part-time employment as a cleaner for the Training Centre in Green Street. In employment she earned some £6,800.00 a year. In addition she would receive various sums ranging from a few hundred pounds to £500.00 from the appellant's brother, to help with significant out-of-pocket expenses.
35. Since May 2018 she has been employed full-time (40 hour week) with Golden Oriental Foods at the Wembley branch. Her duties involve collecting the items which are the subject of the order from the various warehouse shelves and having them ready to be processed as an order.
36. The sponsor indicated that currently she is able to undertake this particular job and work full-time because there is a neighbour who is now able to take her son to school and collect him, which was not the position previously.
37. Mr [SS] gave evidence to the effect that he was a branch manager for Golden Oriental Foods in the Birmingham branch. There was also a Wembley depot with a head office in Colchester. The company is a subsidiary of a larger company which employs some 1,000 employees. There are some 40 to 50 employees in the Wembley branch.

38. The nature of the business is a retail business and a wholesale delivering to restaurants. Somebody will take the order that is to be collected or delivered. The responsibility of the sponsor is to collect together the goods for the order. Thereafter others will process it.
39. The witness insisted that it was a genuine job that had arisen because the general manager of the branch had been looking for staff. Naturally, as he was intimately involved with the business, he suggested his sister-in-law, the sponsor. The sponsor indicated that it was her intention to keep that job as it was well-paid. Indeed, Ms Jegarajah presented her calculations that taking the past two months earnings as a guideline the sponsor would earn approximately £21,000.00 in a year.
40. Mr Tufan invited my attention to the way in which the finances had been dealt with by the family before the First-tier Tribunal Judge, particularly at paragraphs 14 to 20 of that decision. The sponsor had not been offered a job with the Golden Oriental Foods at that stage, nor indeed had there been any suggestion made that she would be offered a job. The suggestion that was made was that the appellant would be offered a job, was a suggestion which was not found to be credible. He invites me to find that the job is simply not genuine and is designed to facilitate the application.
41. The witness insisted that it was indeed a genuine job that had been given to the sponsor. The reason that one had not been offered before was because of her situation looking after her son and secondly that the vacancy had not arisen.
42. In the course of the hearing the bank accounts of the sponsor were presented, particularly to show the payments in of the earnings from Golden Oriental Foods as set out in the various payslips that had been presented. The bank statements themselves covered quite a period – 2018 and 2017. It is fair to note in favour of the sponsor that the accounts seem to be well-managed and notwithstanding the fairly modest earnings, which she was then receiving, there was usually between £5,000 and £9,000 in the account. Such perhaps speaks to her careful dealing with finance.
43. The payslips themselves of the more recent employment are detailed. The net monthly income varying according to various factors, but generally around the £1,000 to £1,3,00 per month. No suggestion has been made that the wage slips are otherwise than genuinely prepared and processed through the proper accountancy practices. No doubt the sponsor attained the job through the offices of her brother-in-law who was well-placed to influence the decision. In terms of employment however I find no reason to doubt that it is otherwise than genuine employment.
44. The difficulty facing the appellant in this case is of course that that employment has only commenced for two months. Normally the expectation before any application is made under the Immigration Rules is that such employment has been in existence for six months. It is obviously the case that the longer the employment has been lasting the greater the possible likelihood of it continuing.

45. In favour of the appellant's ability to continue that employment is the fact that she has been in regular employment for many years. The fact which may militate against that is her ill-health. It was difficult to understand clearly from the witness as to precisely what was involved in the job. The sponsor is slight of build and it may be difficult for her to physically collect the larger or heavier items that are involved in an order. Therefore, whether she would be able to continue that type of work for those significant hours over an extended period is a matter of some speculation.
46. In terms of the suggestion of third party support that was offered by her brother-in-law. It was considered by the First-tier Tribunal on the previous occasion, that the evidence which the witness gave on that matter was somewhat vague. He indicated to me that he could advance the sponsor similar sums that had been advanced before, in the region of £200-£300 a month given his own family situation circumstances. In the absence of any detailed calculations as presented, I do not find that such a sum could be expended on a monthly basis, but rather from time to time on an ad hoc basis as in the past. Such payments however would by no means constitute a substantial income of a guaranteed nature. If, for whatever reason, the sponsor was unable to continue the work at the level of 40 hours or more employment, I do not find that the additional funds available to her from her brother-in-law would keep her earnings to the requisite level to meet the Immigration Rule requirement.
47. Having heard the sponsor's brother-in-law indicate the nature of the business with which he is involved and the role which he has in it, I find it credible that were the appellant to come to the United Kingdom he would be offered a position, particularly as a driver in that company. Evidence was given indeed by the witness that he was to be given promotion, and it is likely therefore that he would be influential in securing the appellant a job. If that were to be the result then of course the sponsor would be able to reduce the amount of time which she spends in working. I note also in favour of the appellant that he does have the necessary IELTS certificate dated 27 April 2016
48. Thus in summary I accept that it is a genuine job that has been made available to the sponsor and that it is her current genuine desire to continue that job at its current level. However, there are grave reservations as to whether that would be feasible in the long term, but as I have indicated were the appellant to come to the United Kingdom I have no doubt that he would find work with the same company and the joint income would not be far short of that which was required.
49. Ms Jegarajah urges me to find that in fact the appellant does satisfy the Immigration Rules and to allow the appeal on that basis. It seems to me that that is somewhat simplistic as clearly the manner in which the finances have been presented do not meet the immigration requirements under FM SE as these were not satisfied as at the time of the application. Clearly, however the ability of the appellant and/or sponsor to merge their finances and not be a burden upon the state is a relevant consideration of the wider aspect of Article 8.

50. My attention was drawn to **MM (Lebanon & Ors) [2017] UKSC 10** in which the financial requirement of £18,600 was considered by the Supreme Court. It was considered within the new Appendix FM within the policy guidelines as set out by the respondent.
51. It was noted that before the introduction of the MIR the Immigration Rules require broadly that the parties will be able to maintain and accommodate themselves and any dependants "adequately in the UK without recourse to public funds". Such included social housing and most welfare benefits, but not NHS, education and social care.
52. Practical difficulties arose in how that was to be monitored and implemented and hence a different policy and the more specific financial requirements. The Supreme Court went on to consider the new Rules and guidance.
53. Significantly it was noted at paragraph 19 of the judgment that the Immigration Rules would not cover all the situations in which a person may have a valid claim to enter or remain in the United Kingdom as a result of his or her Article 8 rights.
54. The court indicated that in certain aspects the instructions would require revision because they seek to impose a restrictive approach outside of the Rules. The court noted at paragraph 99 in particular:-

"Certainly, nothing that is said in the instructions to case officers can prevent the Tribunal on appeal from looking at the matter more broadly. ... There is nothing to prevent the Tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it."

The point was also made in relation to the Rules themselves that they were to some extent unlawful in failing to reflect the duty in respect of the welfare of children under Section 55 of the 2009 Act.
55. In that connection I bear in mind the best interests of [MA]. Now approaching 8 years of age having lived all his life in the United Kingdom and indeed is a British citizen.
56. I take into account significantly the report of Mrs Kelchure-Cole and of his express wish to be reunited with his father and indeed, more significantly, the emotional response which was noted to the contact with the appellant. He is very much involved with the family of the appellant's brother and sister and enjoys the company of their children. Such can only reinforce in his mind in common sense the absence of the appellant from his own life given the presence of the parents and children of the other two families. The report speaks of the importance of having the appellant in his life, both for his development growing up but also his emotional development. It seems to me that that is a very powerful picture in this case and a compelling circumstance.
57. It is suggested of course that the sponsor and [MA] can go to Bangladesh and live with the appellant. Clearly, as a British child, in accordance with **Zambrano** and indeed falls with the respondent's own policy, it would be unreasonable to expect a British

child to do so without good reason. In this particular case the sponsor has lived in the United Kingdom for many years, has a council house of her own and has managed her life. He too has grown up in the English culture and is undergoing schooling in England. In the circumstances it is entirely understandable that the sponsor wishes to remain in the United Kingdom. Given the nature of the report that was prepared I find that it is of the utmost urgency that the situation is resolved, particularly the importance of the father/son relationship that has been established and which needs to grow and develop. It is in the interests of the appellant as father, but more particularly so for [MA], as his son.

58. I have also found that the relationship as between the appellant and sponsor is a genuine and subsisting relationship and I make a similar finding also between father and son.
59. In terms of where the relationship should be conducted, what is indicated is that it should be conducted in the United Kingdom so far as the best interests of [MA] is concerned. Also in practical terms the extended family of the appellant, namely his brother and sister-in-law and his sister and brother-in-law have their families firmly based in the United Kingdom and clearly it would be important for family life to be established with them in the United Kingdom. It would not be practical, and indeed possible for them to relocate back to Pakistan.
60. Thus not only is the relationship between father and son important, but also that between the sponsor and indeed between the wider family groupings.
61. In terms of finances, it is open to me to come to a broader conclusion as to the finances and not simply bound by the prescriptive amounts to the Rules. As I have indicated, the sponsor is well-able to manage her finances and has surplus funds notwithstanding her modest income. I find that she has the intention to work further at increased hours, and in any event that there will be a job available to the appellant were he to come to the United Kingdom. I do not find therefore that in practical terms that his coming to the United Kingdom will involve an increased burden upon the state. The sponsor lives in a council house and has done so for many years, and no doubt the appellant will be permitted as her husband to live in that house as well.
62. I find therefore that it would be unreasonable and indeed impractical for family life to be conducted in Bangladesh. Having considered all the factors which I have highlighted above and taking particular account of the public interest to ensure proper immigration control, I consider that it would be a disproportionate infringement of the appellant's human rights and that of his family, to continue to prevent the appellant from joining his family in the United Kingdom. The welfare of [MA] is, in my view, a primary consideration and in the circumstances of this case it is a very compelling factor which should, on the issue of Article 8, stand in favour of the appellant.

Notice of Decision

63. In the circumstances the appeal is allowed on the basis of Article 8 of the ECHR.
64. I have been invited to direct the Entry Clearance Officer to grant entry clearance. Such is not generally held to be a proper course to take, but I would urge the Entry Clearance Officer to act upon this decision without delay.
65. No anonymity direction is made.

Signed

A handwritten signature in black ink, appearing to read "P. Q. King", is written over a horizontal line. The signature is enclosed in a thin black rectangular box.

Date 6 September 2018

Upper Tribunal Judge King TD