



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05985/2013

THE IMMIGRATION ACTS

Heard at Field House
On 1 July 2014

Determination Promulgated
On 14 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR AJIT SINGH
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr J Babarind, Legal Representative, Hatten Wyatt
For the Respondent: Mr P Nath, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision by an Entry Clearance Officer to refuse him entry clearance as the partner of a person present and settled here. The

First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of India, whose date of birth is 7 October 1944. On 23 January 2013 an Entry Clearance Officer in New Delhi gave his reasons for refusing the appellant's application for entry clearance as a partner under Appendix FM of the Rules. He advanced three grounds of objection.
3. The first was that as evidence of his marriage to his sponsor in 1960, he had enclosed any refusal certificate confirming that the marriage was solemnised on 3 February 1960, but as he was not of the prescribed age at the time of his marriage, his application to register it under the Hindu Marriage Act 1955 was refused. So the Entry Clearance Officer was not satisfied that the marriage to the sponsor was legally valid.
4. The second ground of objection was that he had not shown that his relationship with his sponsor was genuine and subsisting or that they intended to live permanently together in the UK. His reasoning was that in 1994 his sponsor applied for a family visit visa. When she travelled to the United Kingdom she immediately sought indefinite leave to remain outside the Rules. She had remained in the United Kingdom until she was granted ILR on 25 November 2009. He had provided no evidence at all to demonstrate that they had had any contact during their extensive separation, nor had he explained why he was only now seeking to join her in the United Kingdom. The lack of evidence of any intervening devotion or contact during their time apart, or of evidence that they had reunited as he claimed, left the Entry Clearance Officer unable to be satisfied that the relationship with his sponsor was genuine and subsisting, or they intended to live together permanently in the UK.
5. The third ground of objection was non-compliance with the financial requirements. His sponsor was not exempt from the financial requirements. On the evidence provided, his sponsor had a weekly income from her pension of £125.40 per week, which amounted to £6,520 per annum. She had no other source of income. In order to qualify for entry clearance, the appellant and his sponsor required £46,200 in savings (shortfall $\times 2.5 + £16,000$). The minimum balance in the sponsor's Halifax account pass book in the past six months was £91.44. There was some evidence that he held fixed deposits in India, but the certificates provided did not show funds that had been held continuously for the past six months, and so could not be considered.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The appellant's appeal came before Judge Maciel sitting at Hatton Cross on 17 March 2014. Mr Shane of Counsel appeared on behalf of the Entry Clearance Officer. Hatten Wyatt was on record as the appellant's representatives, but they did not attend the hearing. The sponsor also did not make a personal appearance. Instead, Mr Lalli Sidhu attended court, and handed up a letter from the appellant's representatives dated 14 March 2014 requesting an adjournment. They requested a 21 day adjournment due to the fact that the appellant's sponsor was unable to attend due to her poor health. The letter went on to attribute the lateness of the application

to the fact that the sponsor had been in India since 28 January 2014, and had only arrived back in the UK on 11 March 2014. The letter further described Mr Sidhu as the sponsor's registered carer. The letter, which was not received by the court service by fax as was suggested on the face of the document, was accompanied by a number of other documents, which the judge discusses in her subsequent determination.

7. The judge received evidence from Mr Sidhu. He said that the doctor was aware that the sponsor was required to come to court, but the doctor had said he could not give her a sick note. Mr Shane opposed the adjournment application, as there was no medical evidence to excuse the sponsor's attendance at court. The judge indicated to Mr Sidhu that she was not minded to adjourn, and requested him to telephone the solicitors to find out when they could attend. Mr Sidhu did not return to the court. The judge later received a letter from the representatives confirming they did not have instructions to attend at the hearing. They asked an adjournment be granted as the issue of whether or not the sponsor was suffering from dementia was fundamental to the outcome of the case, and to her ability to give evidence.
8. The judge decided to proceed with the hearing in the absence of the sponsor, for the reasons given in paragraph 5 of her subsequent determination. The judge went on to find that the appellant had not discharged the burden of proving that he was validly married to the sponsor, or that the marriage was subsisting. However, she found that the financial requirements of Appendix FM of the Rules were met by virtue of the fact that the sponsor was in receipt of attendance allowance, and that this exempted the appellant from proving an income or savings at a certain level. The judge dismissed the appeal under the Rules and under Article 8.

The Grant of Permission to Appeal

9. On 21 May 2014 First-tier Tribunal Judge Shimmin granted the appellant permission to appeal as it appeared that the judge might not have taken full account of all the evidence when considering the adjournment and the decision.

The Rule 24 Response

10. On 9 June 2014 Mr John Parkinson of the Specialist Appeals Team settled a Rule 24 response on behalf of the respondent. There was no adequate medical evidence to demonstrate that the sponsor was unable to attend. Medical evidence cited did not support the assertion that the sponsor was physically unable to appear at the hearing, despite being able to travel to India. The judge did not procedurally err in proceeding with the hearing. The judge was entitled to apply the weight that she chose to the evidence before her. The grounds did not disclose any material error of law.

The Hearing in the Upper Tribunal

11. For the purposes of the hearing before me, the appellant's representatives filed a supplementary bundle of documents, and Mr Babarind sought to have them

admitted under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Babarind also relied on **MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC)**, where a presidential panel ruled as follows:

- (i) Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal to be set aside.
- (ii) A successful appeal is not dependent on the demonstration of some failing on the part of the First-tier Tribunal. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered, with resulting unfairness (**E&R v Secretary of State for the Home Department [2004] EWCA Civ 49**).

12. I drew the parties' attention to the fact that the judge had found in the appellant's favour on the financial requirement by reference to the evidence as it stood at the date of the appeal hearing, and not by reference to the circumstances appertaining at the date of the refusal decision. One of the documents produced by Mr Sidhu at the hearing in the First-tier Tribunal was a letter from the DWP informing the sponsor that she was entitled to attendance allowance. However, this letter is dated 2 September 2013, which was over six months after the refusal decision.

13. I received submissions from both Mr Babarind and Mr Nath on the implications of the judge's error, and upon the other issues raised in the grounds of appeal and the grant of permission.

14. In **MM**, the panel considered the governing principles relating to every litigant's right to a fair hearing. The panel distilled four principles from **R v Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344**. For the present purposes, it was only necessary to refer to the third and fourth principles:

- (iii) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety which, in its view, made no difference to the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.
- (iv) The reviewing or appellate Court should exercise caution in concluding the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

15. The panel went on to rule at paragraph [22] as follows:

We consider it is important to emphasise in appeals of the present kind the criterion to be applied is not that of reasonableness ... the present case is a paradigm of its type. Judge Levin's conduct at the hearing at first instance was beyond reproach. The irregularity which has been exposed is entirely unrelated to how the hearing was conducted. The judge cannot possibly be faulted for the non-emergence of the solicitor's letter ... However, as the authorities demonstrate clearly, the criterion to be applied on review or appeal is fairness, not reasonableness.

16. The supplementary bundle for the hearing in the Upper Tribunal contains the judgment of the High Court of Delhi in **Lajja Devi v The State [2012] (193) DLT 619**. Mr Babarind relies on this authority as establishing the following proposition, set out in his skeleton argument:

In respect of marriage of a female less than 18 years of age or a male of less than 21 years of age, marriage is voidable and not void. The marriage will become valid if no steps are taken by such 'child' within the meaning of Section 2(a) of the Prohibition of Child Marriage Act 2002, (under Section 3) seeking a declaration of marriage as void.

17. In the covering letter that the Specialist Appeals Team received on 13 June 2004, the appellant's representatives asked the Specialist Appeals Team to state whether they still maintained the appellant's marriage was not valid in the light of this decision of the Delhi High Court.
18. The authority was not relied on before the First-tier Tribunal, and so the judge is beyond reproach in not taking it into account. Potentially the authority could be relied on to establish an error of law, either on the basis outlined in **MM** or more persuasively on the basis that the law always speaks. I do not however consider it is necessary for me to rule on the point, as there are other issues which are in controversy, the resolution of which is determinative of the outcome of this appeal.
19. There was no procedural irregularity in the judge's conduct of the hearing. The judge has given adequate reasons for finding, on the evidence before her, that it was appropriate to proceed with the hearing in the absence of the sponsor. Her solicitors had indicated they had no instructions to attend the hearing. At the same time, there was no evidence before her to suggest that the sponsor was unable to attend court. Despite seeing her doctor since her arrival, he refused to issue a certificate stating she could not attend court. In the circumstances, the sponsor had not provided a good reason not to attend the court. In relation to the issue of dementia, it appeared that this had been an historical issue raised which needed reviewing, and there was no evidence that the outcome of previous assessments had any impact on the sponsor's ability to give evidence.
20. I take into account the additional evidence relating to the sponsor's medical condition which is contained in the supplementary bundle. I find that this evidence only serves to reinforce the findings made by the judge. On 20 March 2014 Dr Moran of Pelham Medical Practice stated:

This lady attended the surgery on 13 March and again on 18 March. She seems to have right sided lower back pain radiating down her leg. I have prescribed some Tramadol for her. She also suffers with vascular dementia and hypothyroidism.

21. In retrospect, it was pure speculation on the part of Hatten Wyatt that the sponsor's condition of "vascular dementia" might impact on her ability to give oral evidence. The suggestion was not maintained in argument before me by Mr Babarind, and it is wholly unsupported by the medical evidence which has been provided. Mr Babarind maintained that the judge ought to have granted an adjournment because

of the sponsor's mobility issue. But the judge was entitled to attach considerable weight to the fact that the doctor had refused to issue the sponsor with a sick note excusing her attendance at court to give evidence. Part of Mr Sidhu's evidence before the First-tier Tribunal was that the doctor had said he could not provide a report on the sponsor's medical condition as it would take a couple of weeks to do so. But no report has since been forthcoming which adds anything to what was before the First-tier Tribunal. In short, the medical evidence remains the same. The sponsor has ongoing medical problems, but they are not such as to impact on her ability to give evidence or to attend court. This is borne out by the fact that the sponsor attended the hearing before me. Even retrospectively, there is no medical evidence to show that she had a good excuse for not attending the hearing in the First-tier Tribunal.

22. While I am prepared to accept that the outcome of the appeal on the issue of subsistence of marriage might have been different if the judge had granted an adjournment, there is no antecedent procedural irregularity or unfairness such as to give rise to an error of law. There is also no merit in the suggestion that the judge did not adequately consider the documents in the appellant's bundle before reaching the conclusion that on the documentary evidence the appellant had not discharged the burden of proving that the marriage was genuine and subsisting.
23. The principle of *res judicata* does not apply in this jurisdiction, and so the adverse finding made by the First-tier Tribunal on the issue of subsistence of marriage will not be determinative in a fresh application. In such an event, the Entry Clearance Officer will have to treat the application on its merits, and he will also have to recognise that the earlier adverse finding was reached without the Tribunal having the benefit of receiving oral evidence from the sponsor.
24. The appeal was doomed to fail in any event due to non-compliance with the financial requirement. Although there was no cross appeal by the Entry Clearance Officer against the judge's finding on this issue, the error was a **Robinson** obvious one and it is so stark that the Upper Tribunal could not ignore it, particularly when considering whether the alleged errors of law on the part of the judge were material to the ultimate outcome.
25. The application for entry clearance was made on the basis that the sponsor was not exempt from the financial requirements, so the analysis conducted by the Entry Clearance Officer in the refusal decision was entirely appropriate. Counsel for the Entry Clearance Officer rightly maintained before the judge that the financial requirements were not met. It appears that the judge went away and of her own motion decided that the sponsor was exempt from the financial requirements, as the sponsor was receiving an attendance allowance. However, she overlooked the fact that she had to consider the circumstances appertaining at the date of the refusal decision, and not the circumstances appertaining at the date of the appeal hearing.
26. The judge's error of law in respect of the financial requirement is not however material, as she did not err in law in dismissing the appeal on the ground that the

appellant had not discharged the burden of proving that the marriage was subsisting. Accordingly, the decision of the First-tier Tribunal does not contain an error of law such that the decision should be set aside and remade.

Decision

The decision of the First-tier Tribunal did not contain an error of law such that the decision should be set aside, and the decision therefore stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed

Date

Deputy Upper Tribunal Judge Monson