Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/11427/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 September 2014	**On 8 September 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

Mr KULDEEP SINGH
(NO ANONYMITY DIRECTION MADE)
Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mrs A Hayre, Counsel
(instructed by Bespoke Solicitors)

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DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Molloy on 15 July 2014 against the determination of First-tier Tribunal Judge Britton who had allowed the Respondent’s appeal against the Entry Clearance Officer, New Delhi’s decision to refuse his application for entry clearance as a post flight spouse under paragraph 319L of the Immigration Rules. The determination was promulgated on 6 May 2014.

2. The Respondent is a national of Afghanistan, born on 1 January 1984. His sponsor is also of Afghan nationality. She has humanitarian protection in the United Kingdom. His application was refused in summary because his adverse immigration history indicated that the marriage was simply being used as a means to gain re-entry to the United Kingdom, from which he had been recently removed at public expense. It was not accepted that the Respondent intended to live with his sponsor permanently. Nor was it accepted that the Respondent and the sponsor would able to maintain and accommodate themselves adequately without recourse to public funds.

3. Permission to appeal was granted because it was considered arguable that the judge had not attached sufficient weight to the Respondent’s adverse immigration history.

4. Standard directions were made by the tribunal, indicating that the appeal would be reheard immediately if a material error of law were found.

Submissions – error of law

5. Mr Tufan for the Appellant relied on the grounds on which permission to appeal had been granted. The real issue was the reasoning of the judge’s ultimate decision in his determination. Most of the determination consisted merely of a summary of the evidence. There was no real analysis in the three or so paragraphs in which the judge’s findings were set out, at the end of the determination. Even those findings were inadequately explained, in that the judge had

stated that he had doubts as to the Respondent's intentions, but did not say what they were and how those doubts had been resolved in the judge's mind. The determination should be set aside and the decision remade.

6. Mrs Hayre for the Respondent submitted in summary that the findings which the judge had made were open to him. There had been some commentary on the evidence in the course of the determination. Although less than ideal, the determination was adequate and should stand unchanged. There had been an abundance of evidence to show that the marriage was genuinely arranged for its own sake and not simply as a means of enabling the Respondent to return to the United Kingdom.

Material error of law finding

7. The tribunal stated at the conclusion of submissions that it found material errors of law in the determination, such that it had to be set aside and remade. The tribunal agreed with Mr Tufan that the reasoning was wholly inadequate. The Appellant was not in a position to say why the appeal had been allowed, nor what weight had been given to the Respondent's adverse immigration history.

8. The appeal was reheard immediately, by way of submissions.

The rehearing

9. For this section of the determination, as this is the rehearing of the Appellant's appeal against the Entry Clearance Officer's decision, the tribunal will refer to the parties by their original designations in the interests of clarity. The Appellant's bundle of documents was available and reference will be made to it as necessary. The burden of proof lay on the Appellant to the ordinary civil standard. The tribunal is confined to examining the evidence as it stood at the date of the Entry Clearance Officer's decision, subject to DR (Morocco) [2005] UKAIT 00038.

10. Mr Tufan for the Respondent (the Secretary of State) was content to accept that the judge had made findings which were sustainable in respect of maintenance and

accommodation. Those findings did not require to be reopened. Otherwise Mr Tufan relied on the notice of refusal and the Entry Clearance Manager's review. The issue was the Appellant's immigration history and how that sat with his intentions towards his marriage to the sponsor. The evidence pointed one way, however devoted to her husband the sponsor might feel and however much her own intention was to live with him. The appeal should be dismissed.

11. Mrs Hayre for the Appellant accordingly confined her submissions to the live issue of intention. Mrs Hayre referred to the Appellant's bundle, which contained his witness statement declaring his intention. This was not a love match, but rather an arranged, traditional marriage in which the families of both bride and groom had been closely involved. That could be seen from the letter in the Appellant's bundle from the sponsor's grandmother, who supported the match and had later given her blessing to the Appellant, as a photograph produced from the wedding recorded. The album of wedding photographs showed that both families had been present in significant numbers at the wedding. This was not an event which had been staged, but a genuine marriage.

12. The Appellant had been in the United Kingdom illegally but he had been removed. He might have faced a ban under paragraph 320(11) of the Immigration Rules but that would not apply under paragraph 320(7C). He had no criminal record and there were no "aggravating factors" as explained in Chapter 26.1.8 of the IDS, e.g., absconding. The Appellant had set out his adverse history at the time of his entry clearance application. The evidence before the tribunal proved that both parties had the requisite intention and that paragraph 319L of the Immigration Rules was satisfied. The appeal should be allowed.

13. Both advocates had helpfully narrowed the issues, to the extent that only the Appellant's intention to live permanently with his sponsor remained live for determination. Although Mrs Hayre raised paragraph 320(11) of the Immigration Rules in her submissions, that discretionary ground of refusal had not been raised by either the Entry Clearance Officer or the Entry Clearance Manager. While the Appellant's adverse immigration history might well be thought to have justified paragraph 320(11) as aground of refusal, that was not done. It would

have to have been raised in express terms. It is not for the tribunal to take such discretionary points of its own motion, as (to state the obvious) the tribunal is not the primary decision maker. Applying RM (Kwok On Tong: HC 395 para 320) India [2006] UKAIT 00039, the tribunal is only concerned to see whether all parts of the relevant substantive immigration rule is met.

14. Intention is never easy to establish. There are a number of relevant factors which arise in the present appeal. For the moment, the tribunal will disregard the Appellant's immigration history. The Appellant and sponsor are of the same religion, which is a minority religion in global terms. They are of the same nationality, and are very close in age. They may be inferred to have a similar background, which relevantly includes the well known history of discrimination against Sikhs in Afghanistan under the Taliban regime in particular. Their marriage was arranged in accordance with their cultural traditions, as the Appellant explained at paragraph 6 of his witness statement. Their wedding was celebrated in accordance with custom, elaborately, with family members from both sides as guests. The Appellant therefore went through a very public ceremony of commitment to the sponsor. He would be expected by both families to honour his commitment, and encouraged to do so. Absent the Appellant's adverse immigration history, there could only be one rational conclusion drawn from that evidence, i.e., that the Appellant intends to live with his sponsor permanently as her spouse.

15. What then is the proper weight to give to the Appellant's adverse immigration history? Paragraph 320(11) was not raised, as noted above. The Appellant's adverse history shows a strong wish to live in the United Kingdom. That is in itself reasonable, as some parts of the dwindling Afghan Sikh population have made their way to the United Kingdom in the past decade. Some have been granted asylum, while others like the sponsor have been granted humanitarian protection. There is thus a genuine United Kingdom connection. There is no reason in principle why the Appellant's wish to marry a co religionist approved by his family should not coincide with his own preference to live in the United Kingdom, given that there are serious doubts as to the viability of his homeland. The tribunal finds that evidence of the genuine nature of the marriage and the circumstances in which it was arranged are sufficient to overcome the adverse history. It is important

to underline that this finding in no way condones nor excuses the Appellant's past misconduct and the waste of public time and resources which he has caused.

16. The tribunal accordingly finds that the Appellant's intentions are genuine. He satisfies paragraph 319L(iii) of the Immigration Rules. His appeal is allowed.

DECISION

The making of the previous decision involved the making of a material error on a point of law. It is set aside and remade as follows:

The original Appellant's appeal is allowed

Signed **Dated**

Deputy Upper Tribunal Judge Manuell

TO THE SECRETARY OF STATE FEE AWARD

The appeal was allowed and so there can be no fee award

Signed **Dated**

Deputy Upper Tribunal Judge Manuell