



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/08108/2014
OA/08109/2014
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THE IMMIGRATION ACTS

Heard at Field House
On 21 September 2015

Decision & Reasons Promulgated
On 22 September 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

SUNITA DEVI
VAISHALI THAPA
AYUSH KUMAR THAPA
[No anonymity direction made]

Appellants

and

The Entry Clearance Officer New Dehli

Respondent

Representation:

For the appellants: Mr I Hussain, instructed by Syeds Law Office Solicitors
For the respondent: Ms E Savage, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the linked appeals of the appellants against the decision of First-tier Tribunal Judge Flower promulgated 20.2.15, who dismissed his appeal against the decision of the Entry Clearance Officer to refuse entry clearance to the United Kingdom as the spouse and children of the sponsor settled in the UK, pursuant to Appendix FM of the Immigration Rules. The Judge heard the appeal on 30.1.15.

2. First-tier Tribunal Judge De Haney granted permission to appeal on 20.2.15.
3. Thus the matter came before me on 21.9.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out herein, I find there was no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Flower to be set aside. In essence, in respect of all but one of the grounds of appeal, they amount to either misunderstanding of the decision or are no more than a disagreement with the findings of fact and an attempt to reargue the case, including with further evidence.
5. Judge Flower found at §25 that the appellants had failed to discharge the burden on them to demonstrate that the child appellants are related to the sponsor as claimed. At §29 the judge found “so little evidence of a subsisting marriage that I find the sponsor has failed to discharge the burden of proof.” In fact, the burden is on the appellant and not the sponsor, but it comes to the same conclusion.
6. The grounds of application for permission to appeal in effect claim that the judge erred in finding that the marriage did not subsist, that the children were not related to the sponsor and that evidence provided by the landlord could not be taken into account.
7. In granting permission to appeal, Judge De Haney considered, “The finding that the marriage does not subsist under the immigration rules, at paragraph 29, is not easily reconciled with the judge’s findings that family life can continue, “in the same way as he has chosen to do for the past decade or more,” paragraph 31.” With respect to Judge De Haney, I disagree. The suggestion that family life can continue means no more than it can continue to the very limited extent that there is any family life between them given the occasional visits (only two since 2010), no earlier application, and only limited telephone or Internet or other communication. The judge rejected the sponsor’s claim that documents he had submitted had been lost by the respondent.
8. Mr Hussain submitted that there was a discrepancy between the finding at §19 that the sponsor is validly married to the first appellant and the subsequent finding that the marriage is not subsisting. I do not accept that there is any inconsistency in the decision. There is a clear difference between a lawful marriage validly entered into and one that is no longer subsisting. The judge gave cogent reasons open to her on the evidence for finding the evidence as to the subsistence of the marriage insufficient to discharge the burden of proof. There was very limited evidence of contact between them. Whilst the judge accepted the sponsor had visited India on some 7 occasions since 2004, at §28 she found no credible evidence of money remittance, which was in any event less than £100 a year, and noted that the sponsor had no real explanation for why no application for entry clearance had been made previously.

9. Mr Hussain relied on Goudey (subsisting marriage –evidence) [2012] UKUT 41, where the Upper Tribunal held that subsisting marriage means that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted. It also held that evidence of telephone cards is capable of being corroborative of a claim to telephonic communication. “Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant.”
10. I find no inconsistency between Goudey and the decision of the First-tier Tribunal. Clearly, Mr Hussain does not understand the difference between the formality, or validity, of a marriage and the subsistence of the matrimonial relationship. Save for the issue of accommodation, all of the evidence to which Mr Hussain directed my attention was specifically taken into account in the decision. Mr Hussain’s submissions were in the main essentially to the effect that the judge should have made a different decision on the evidence. He said that the decision goes against the weight of the evidence.
11. Whilst a different judge may have reached a different conclusion, the appellants have to demonstrate that the decision contained such error of law that it should be set aside. They have to show that the decision was perverse, irrational, unsupported by the evidence, or that the judge failed to take into account some material evidence that would have resulted in a different outcome to the appeal. I find that the judge has taken all relevant evidence into account. Every matter raised by Mr Hussain is referenced and taken into account by the judge. The conclusions of the judge were ones open to her on the evidence and for which cogent reasoning has been given.
12. In respect of the issue as to whether the children are related to the sponsor as claimed, Mr Hussain sought to introduce recently obtained DNA evidence. However, that evidence was not before the Tribunal and could not have been taken into account by the judge. The fact that there may now be conclusive evidence of the relationship does not in itself demonstrate an error of law in the decision of the First-tier Tribunal. That there are children, that there are photographs of them, and non-contemporaneous birth certificates is certainly relevant, but it remains open on the very limited overall evidence before the judge to conclude that the appellants have not discharged the burden of proof to show that they are related as claimed. It is for the appellants to discharge that burden and in doing so to demonstrate that documents submitted are reliable. I am satisfied that all of these matters were properly considered and taken into account by the judge, in the round, taken as a whole. No error of law is disclosed.
13. At §30 the judge was not satisfied that there would be adequate accommodation for the appellants and the sponsor in the UK. Whilst the judge accepted that the accommodation in which the appellant is living would be large enough, a concern was raised by the respondent as to whether the landlord would consent to three further people residing at the address. As a result of this issue being raised in the

refusal decision, the appellants produced a letter of consent from the landlord. However, Judge Flower concluded that as this letter postdated the decision by several months it could not be taken into account. Whilst the judge was correct to note that as an out of country appeal the Tribunal is limited to considering the circumstances prevailing at the date of decision, post-decision evidence which relates to those circumstances remains admissible. I also note that the tenancy agreement submitted with the application permits up to three adults living at the property. Mr Hussain submitted that in the light of that provision consent from the landlord for the three appellants was not necessary.

14. Whilst I find that there is an error of law in relation to the accommodation issue, it is not material as the other grounds of appeal have failed and thus the appeals would have been dismissed in any event.

Conclusions:

15. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such as to required the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed on all grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an anonymity order. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal of each appellant has been dismissed and thus there can be no fee award.

A handwritten signature in black ink, appearing to read "James L. Pickup". The signature is written in a cursive style with a large initial "J" and "L".

Signed

Deputy Upper Tribunal Judge Pickup