



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA126232014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 May 2016**

**Decision & Reasons
Promulgated
On 9 June 2016**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MR DIPENDRA SHRESTHA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Reid, Counsel instructed by Kothala & Co
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nepal called Dipendra Shrestha whose appeal is OA/12623/2014. He was born on 4 February 1988 and applied on 21 August 2014 for entry clearance. The Judge of the First-tier Tribunal classified that as entry clearance as the spouse of the sponsor but that does not entirely encapsulate the nature of the application. The applicant

made an application under paragraph 194 of the Statement of Changes in the Immigration Rules and those provided:

“194. The requirements to be met by a person seeking leave to enter the United Kingdom as the partner of a person with limited leave to enter or remain in the United Kingdom ... are that:

(iii) each of the parties intends to live with the other as his or her partner during the applicant’s stay and the relationship is subsisting”.

2. Although there are also accommodation requirements, it is accepted that those accommodation requirements are met and the only issue related to the question as to whether or not the parties intended to live with each other during the applicant’s stay. At the material time it appears that the applicant’s stay was valid until 4 April 2015 but was subsequently extended until a date sometime in this year.
3. The Entry Clearance Officer’s decision made on 10 September 2014 was on the basis that the decision maker accepted that the marriage was valid, and it was also noted that the appellant’s wife as his sponsor had made two trips to Nepal in the period 2006 and 2010 but that, apart from those two trips, she had remained in the United Kingdom as a domestic worker. That was relied upon in part by the decision maker as showing an absence of a subsisting relationship. However I am bound to say that from my experience that is a pattern of return-home visiting which is not unusual where an individual is working in the United Kingdom and has, on occasions, returned to her home country.
4. The decision however was made under paragraph 194. That was looked at by the Entry Clearance Manager in a decision that was made on 19 December 2014. Once again, that makes reference to paragraph 194 of the Immigration Rules. The judge however appears to have overlooked the terms of paragraph 194 and dealt with it as if this were an Article 8 claim by reference to Appendix FM. That is simply wrong. It was a paragraph 194 application. However, the judge applying Appendix FM looked to consider whether the relationship between the applicant and their partner must be genuine and subsisting and whether the applicant and their partner must intend to live together permanently. Whilst it is clear there is a correlation between the relationship and the application that was made, it does not seem to me that a determination which is made on an entirely different footing can be sustainable, notwithstanding the findings that were made by the judge in relation to some parts of the oral evidence.
5. The problem that I face with this application is that if there is no subsisting relationship as originally claimed by the respondent, then inevitably that meant that, at the time this application was made, the parties were separated and their marriage was at an end. This would have meant that the decision to sponsor the appellant made by his spouse was made

notwithstanding the fact that they were separated and had nothing more to do with each other and was, in short, a thorough-going fraud. If that were the case then it was the intention of the appellant to enter the United Kingdom on the basis of his having no relationship with his wife, presumably therefore having no intention of living with her during the period of her visa, living somewhere other, presumably not relying upon her earnings to support him, inferentially working without leave, inferentially supporting himself both in terms of accommodation and maintenance by his own resources, and then remaining at the conclusion of her visa unlawfully. I have to say that strikes me as being a most speculative approach to the application and the appeal. It seems much more likely that the application was made on the basis that this was a valid marriage, that the sponsor had visited Nepal in circumstances where it can properly be inferred she visited her spouse; where the sponsor elected to support the application made by the appellant and where the appellant himself provided information as to what was his intention, (namely to join his wife in the United Kingdom). This is a much more likely reason for this application being made and suggests that it is entirely genuine. I simply find it impossible to accept that the respondent on the material before him was able to reach the decision that this whole application was a sham.

6. For these reasons I consider that the First-tier Tribunal Judge was wrong in her approach to the statutory regime that she was meant to apply. All that the appellant had to establish was that, during the relatively short period of the applicant's stay, they were going to live together and it was entirely speculative to consider that the application was a fraudulent one.
7. For these reasons I set aside the decision of the First-tier Tribunal Judge and substitute a decision allowing the appeal under paragraph 194 of the Immigration Rules. There is no viable Article 8 claim.

DECISION

The decision of the First-tier Tribunal contains an error on a point of law and I set it aside.

I allow the appellant's appeal under paragraph 194 of the Immigration Rules.

No anonymity direction is made.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
12 May 2016