



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/21981/2013
& OA/21983/2013

THE IMMIGRATION ACTS

Heard at Field House
On 1 March 2016

Decision and Reasons Promulgated
On 16 March 2016

Before

Deputy Upper Tribunal Judge Pickup
Between

Davinder Kaur
Taranjit Singh
[Anonymity direction not made]

Appellants

and

The Entry Clearance Officer New Dehli

Respondent

Representation:

For the appellants: Mr G Davison, instructed by YY
For the respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Moore promulgated 21.4.15, dismissing their linked appeals against the decision of the respondent, DATED 20.11.13, to refuse entry clearance to the United Kingdom as the partner and dependent child pursuant to Appendix FM of the Immigration Rules. The Judge heard the appeal on 13.4.15.

2. First-tier Tribunal Judge Hollingworth refused permission to appeal on 4.11.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Bruce granted permission to appeal on 10.1.16
3. Thus the matter came before me on 1.3.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Moore to be set aside and remade on the basis of the existing evidence and unchallenged factual findings of the First-tier Tribunal.
5. The appellants applied for entry clearance as respectively spouse and child of their sponsoring husband in the UK. The applications were refused by the Entry Clearance Officer because of alleged false representation as to the sponsor's claimed employment with Skyways Shopfitters Ltd, following checks with HMRC, and secondly, because the Entry Clearance Officer was not satisfied that the first appellant and the sponsor were in a genuine and subsisting relationship.
6. After considering the evidence Judge Moore was satisfied that the sponsor had been and continued to be employed as claimed and that the wage slips provided were genuine and reliable. However, Judge Moore was not satisfied that the relationship between the first appellant and sponsor was genuine and subsisting, for the reasons set out between §21 and §24 of the decision. In essence, the judge relied on the absence of evidence of telephone calls between 2001 and 2010. The sponsor made no visit to India following marriage in 1998 until 2010. The judge concluded that there was no meaningful or genuine contact between them.
7. In summary the grounds of application for permission to appeal assert in general terms that the First-tier Tribunal erred in its approach to the evidence of the claimed relationship between first appellant in India and sponsor in the UK.
8. In granting permission to appeal, Judge Bruce found arguable error in the judge's approach to the issue of telephone contact, referring to Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041 (IAC), and noting that the judge found there had been no attempt by the appellants to deceive, one of the reasons relied on by the Entry Clearance Officer in doubting the genuineness of the relationship.
9. I am satisfied that the First-tier Tribunal erred in its approach to the evidence and in particular that the judge lost sight of the fact that the genuineness of the relationship was to be assessed as at the date of the refusal decision in November 2013. At §23 of the decision Judge Moore stated that it would be fair to point out that since 2010, "and more recently in the last couple of years the contact and communications between the appellant and sponsor have increased. I am however satisfied that such an increase in contact between the appellant and sponsor cannot be viewed in isolation, and must be put in context, that is to say that the appellant and sponsor

have been married for sixteen years, and that up until 2010 there was little or no contact such as to reflect a subsisting relationship.”

10. The judge went on at §24 to accept that since 2010 there have been a number of money transfer payments by the sponsor to the appellants and that he has made two visits to stay with his wife and family in India for periods of two and three months respectively. As they were not produced in evidence, the judge was unable to take a view of photographs relied on by the Entry Clearance Officer as having the appearance of being staged.
11. I find that the judge was overly influenced by the absence of evidence of contact between the appellants and the sponsor in the period between marriage and 2010, so as to discount what can only be considered to be substantial evidence of a subsisting relationship post 2009 and continuing to the present day, including telephone contact, visits to India and money transfers. It is important to note that absence of evidence of contact up to 2009 does not mean that there was no such contact. The sponsor explained that he did not return to his wife and family because he did not obtain indefinite leave to remain until 31.12.09. Thereafter, as the judge accepted at §22, he made a visit within months in 2010 and a further visit in 2011.
12. Whilst the judge was entitled to consider the evidence in the round as a whole and reach conclusions as to the nature of the relationship, I find that the judge lost sight of the fact that at the relevant date there was good evidence that the relationship was still alive and genuine. In reality, the period between 2001 and 2009/10 was not determinative to the issue as to whether the relationship was subsisting in 2013. I further find that there is insufficient reason demonstrated in the decision to discount or ignore the more recent evidence. All the judge says about that is it has to be placed in context of the absence of evidence during the earlier period. The reverse should also be true, but that does not appear to have been the judge’s approach. Further, it does not follow that because the relationship was perhaps dormant before 2010, it cannot be genuine and subsisting now or in 2013. The decision is therefore an unbalanced assessment of the evidence and thus amounts to an error of law and must be set aside and remade.
13. In remaking the decision I preserve the findings of the First-tier Tribunal in relation to employment of the sponsor. On the evidence as was available to the First-tier Tribunal I am satisfied that the appellants have discharged the burden of proof, the balance of probabilities, that the relationship between the first appellant and the sponsor is genuine and subsisting as at the date of the refusal decision in 2013. There is ample evidence of contact including two visits to them in India, telephone contact, and money transfers. The sponsor has produced further evidence of further visits to his family in India and further evidence of contact. Whilst it is post-decision evidence, it is arguable that it is admissible to demonstrate the nature of the relationship as at the date of refusal in 2013. Whether with or without this further evidence I am satisfied that the appellants have discharged the requirements of Appendix FM and thus the appeal should be allowed, for the reasons set out above.

Conclusions:

14. I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade by allowing the appeals.

I set aside the decision.

I re-make the decision in the appeals by allowing the appeal of each appellant.



Signed

Deputy Upper Tribunal Judge Pickup

Dated **13 February 2017**

Deputy Upper Tribunal Judge Pickup

Consequential Directions

15. Forthwith on receipt of this decision the respondent shall issue entry clearance [provided the respondent is satisfied there are no circumstances arising after the date of this determination / the decision under appeal which make it necessary to refuse to do so].

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 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 a whole fee award.

Reasons: The appeals have been allowed.

A handwritten signature in black ink, appearing to read 'D. Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

13 February 2017