



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/01850/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 27 April 2018**

**Decision & Reasons
Promulgated
On 09 May 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**DEEPAK DANGAL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Benitez, Counsel instructed by Edwin Co LLP
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal and his date of birth is 11 July 1988.
2. The Appellant came to the UK on 30 October 2009 having been granted entry clearance which expired on 23 January 2012. He was granted entry clearance under the points-based system. His leave expired on 23 January 2012. Prior to his leave he made an application for leave to remain as the spouse of a settled person in the UK, Caroline Dangal. This application was refused on 18 June 2013. The Appellant's appeal against this decision was allowed on 7 November 2013. Following this he was granted leave to remain on 11 December 2013 until 11 December 2015. He made an

application for indefinite leave to remain on 16 November 2015 and this was refused by the Secretary of State in a decision of 31 December 2015.

3. The Appellant appealed against this decision. His appeal was dismissed by Judge of the First-tier Tribunal J K Swaney in a decision dated 2 June 2017 following a hearing on 12 May 2017. Permission was granted to the Appellant by First-tier Tribunal Judge Andrew in a decision of 25 January 2018.
4. The UT received an email from Caroline Dangal on 16 March 2018 stating that she and the Appellant were no longer living together and that she does not see him. She saw him on three times last year. They are not living together and she does not know where he is working or living. She intends to issue divorce proceedings. The UT sent the email to the parties prior to the hearing on 12 April 2018. At the hearing I was handed a statement from Ms Dangal stating that the email had been sent after an intense argument and sleep deprivation. She had menopausal symptoms which caused her to feel unwell and angry with the Appellant. She asked for the previous communication to be withdrawn as it did not accurately reflect their relationship. They continue to love and support each other. This communication was not material to the error of law matter and I disregarded it.

The Decision of the First-tier Tribunal

4. The judge heard evidence from the Appellant and his wife. The judge referred to the Appellant's wife as Ms Willoughby. It may be that she has changed her name since that hearing, but nothing turns on this. The judge made the following findings:-

“42. The appellant and his wife remain married. They both state that their relationship is continuing and that there have been no gaps in their relationship. There was evidence of their contact up to the date of decision. The appellant and his wife both provided their mobile phone records which show very limited voice calls between them, but show numerous, regular text messages both from the appellant to his wife and vice versa. I accept that the appellant and his wife maintain regular contact by text message and that they did so as at the date of decision.”

The judge recorded that the Appellant and his wife do not live together and that they had not done so since 2014. The judge heard evidence that the Appellant had worked in Bournemouth in a restaurant however the restaurant closed down and he could not find alternative employment there. Following this, he worked in Bradford for approximately a year and a half before moving to London in around May 2016 where he remained employed.

5. The judge recorded at [44] that the Appellant's evidence was that he had travelled from Bradford to Bournemouth every two weeks whilst he was

working in Bradford. However, the judge concluded that there was no other evidence to support this.

6. The judge went on to find the following:

“45. I note that the appellant worked in Bradford for one and a half years according to his evidence from November 2014. This would mean that he worked in Bradford until approximately May 2016. The bank statements therefore cover a very limited proportion of that time and the transactions were not two weeks apart or in any particular pattern that suggested regular travel as claimed. The appellant stated at interview that he has a friend in Bradford who has family in Bournemouth and that he would travel to Bournemouth with him some of the time. There was no evidence from this person to confirm this. I do not accept the appellant travelled to Bournemouth from Bradford every two weeks as claimed although I accept he may have made occasional visits.”

7. The judge heard evidence relating to a will. He found that the Appellant was not able to state correctly when it was created and he demonstrated a superficial knowledge about the terms of it whilst his wife gave accurate evidence supported by documentary evidence on the subject.

8. The judge recorded that the Appellant's evidence was that he had not worked in Bournemouth since 2012 although the Appellant's wife's evidence was that she thought that he had looked for work in Bournemouth as recently as 2015.

9. The judge found that the Appellant's evidence and that of his wife concerning the intention to open a restaurant in Bournemouth together to be inconsistent. The judge in respect of the Appellant's living arrangements stated as follows:

“49. I accept that many couples spend time apart each week as a result of work commitments. There can be many reasons for this. In the case of the appellant I find that is relevant to his intention to live with his wife permanently in the future. On the appellant's own evidence he has made no efforts to find work in Bournemouth since 2012. Even if it was more recently than this given that his job in Bournemouth did not end until November 2014, on his own evidence he did not attempt to find work in Bournemouth when his job in Bradford came to an end.

50. This does not in my view demonstrate an intention to desire to live with his wife in Bournemouth. The appellant has worked in restaurants and stated several times in his evidence that he is a 'restaurant man'. I accept that this is his preferred field of employment however it would appear he may have transferable skills that he could use to find employment either elsewhere in the hospitality or catering industry or in some other industry, for

example his managerial skills. There is no suggestion he has tried this so as to find a way that he and his wife could continue to live together in Bournemouth.”

10. The judge recorded that the Appellant’s wife’s evidence was that she had previously rented out her house and lived in rented accommodation and that there was no evidence that she and the Appellant had considered this as an option to enable them to live together whilst the Appellant was working in London. The judge took into account the Appellant’s wife’s evidence that she does not have any friends aside from a neighbour and her family does not live in Bournemouth.
11. The judge found an inconsistency in the evidence between the Appellant and his wife about plans to move to Southend-on-Sea which would be closer to London.
12. In respect of the Appellant’s evidence relating to journeys between London and Bournemouth the judge found as follows:

“53. The appellant and his wife stated that the appellant travels to Bournemouth on a Monday and stays there until Wednesday when he returns to London. I note there was evidence in the form of National Express booking confirmation showing trips to Bournemouth on the following dates: 28 November 2016 to 30 November 2016; 5 December 2016 to 7 December 2016; 12 December 2016 to 14 December 2016; 22 December 2016 to 27 December 2016; 9 January 2017 to 12 January 2017; 30 January 2017 to 1 February 2017; and 23 January 2017 to 25 January 2017. This is a period of approximately two months that post-dates the decision under appeal considerably. I do not consider that this evidence is indicative of the situation as it was at the date of decision. I have already set out above my findings about the appellant’s travel between Bradford, which is where he was working at the time of the decision and Bournemouth.”

13. The judge at [54] found that the Appellant’s name was added on to the British Gas account for no other purpose than to bolster his case.
14. The judge found at [55] that the Appellant and his wife demonstrated reasonably detailed knowledge of each other’s circumstances and that they lived together after their marriage until November 2014. In addition, the judge found that there had been ongoing contact between them on a regular basis, mainly via text messages and that the Appellant did travel to Bournemouth although not as frequently as claimed up to the date of the decision. The judge concluded that “on this basis I find the Appellant and his wife have a subsisting relationship on some level” however, the judge went on to find that the relationship was not anything more than a friendship.
15. The judge found as follows:

- “56. There was very little evidence that the appellant and his wife share a life together. The appellant and his wife stated that he contributes to bills; however there was no evidence to support this assertion. I take account of the fact the appellant claimed to provide cash to his wife, which would give rise to difficulties providing evidence. However I also take into account the appellant’s evidence that his wife had her own money and her evidence that her bills are low and that she retained control of them because she owns the house. I find on the balance of probabilities they do not have shared financial resources.
57. There was little or no evidence of public acknowledgement of their marriage. I accept the appellant’s wife has taken his name as evidenced by her passport. Balanced against that, there was very limited evidence of them engaging in social activities together; and aside from discussing the possibility of setting up a business and some visits by the appellant to Bournemouth, there was little evidence that the plan and organise their lives jointly.
58. The appellant and his wife stated that they tend to spend their time together with each other and if separated for most of the week, this is perhaps understandable. However I balance that against the fact that the appellant’s telephone records show a large volume of text messages to people other than his wife (in some cases more than 700 messages in a single day) suggesting he has a circle of friends and that some may remain in Bournemouth. Aside from some limited evidence the appellant and his wife spent with some of his friends prior to their marriage, there was no evidence they have continued to enjoy a public social life together after their marriage.
59. The appellant and his wife largely communicate by text message. They call each other very occasionally based on the telephone records before me and their oral evidence. It is true they have some face to face contact during visits however the most contact between the appellant and his wife is limited to short text messages, which by its nature I find is largely superficial.”

The judge attached little weight to greeting cards in the Appellant’s bundle because few of them contained any kind of personal message and used the terms husband and wife which, according to the judge, gave the appearance that they were produced to support a relationship rather than as genuine tokens of that relationship (see [60]).

16. The judge concluded at [61] that the marriage was not genuine and subsisting although there was a relationship of friendship between the parties.
17. The judge concluded at [62] that the Appellant did not intend to live with his wife permanently. The judge concluded that there had been a change of circumstances since leave was granted.

18. The judge found at [63] that neither party to the marriage had taken active steps to live together despite expressing an intention to do so. The judge found that there had been opportunities in 2014 and 2016 but the Appellant on his own evidence did not take steps to find work in Bournemouth. The judge found “I accept things may have been difficult in the past in terms of finding employment in Bournemouth, however the economy has improved since then and things may have changed”. The judge found that the Appellant on his own evidence had not made enquiries about what might have changed or what opportunities there might be for employment in Bournemouth.
19. The judge found that the Appellant’s wife had thought about how they could live together but the Appellant did not mention this in evidence and did not appear to have thought seriously about how he and his wife could live together in the future. The judge found that if the Appellant living together with his wife is contingent on them setting up a business together, without consideration of other alternatives, this was strongly suggestive of a lack of intention to live together (see [64]).
20. The judge at paragraph 65 stated:

“65. I find that as at the date of decision the appellant did not satisfy paragraph 287(a)(ii) or (iii). This means the respondent was correct not to grant him indefinite leave to remain under the Immigration Rules.”

The Grounds of Appeal

21. The grounds of appeal assert that the judge erred in considering the position at the date of decision whereas the appeal was an in-country appeal and the relevant date was the date of the hearing.
22. It is asserted that the judge failed to take into account the evidence of Keshan Paudel (page 251 of the Appellant’s bundle). It is asserted that the judge placed “undue weight” on the fact that the parties had produced no evidence of a “public social life together after their marriage” because the evidence of the Appellant and his wife was that when he returned home to Bournemouth they enjoyed spending quality time together (this was explained at page 2 of Ms Willoughby’s witness statement). The judge did not take into account the photographic evidence and failed to have regard to the evidence that the couple were private who preferred spending time together rather than enjoying an active social life.
23. The grounds assert that the judge placed undue weight on the fact that the parties had a joint will which was instigated by the Appellant’s wife.
24. It is asserted that the judge placed undue weight on the evidence that the parties were not currently living together and failed to place due weight on the evidence of the Appellant’s frequent visits to his wife in Bournemouth.

25. The judge speculated in respect of the economy and the Appellant's ability to find work in Bournemouth.

Submissions

26. I heard oral submissions from both Ms Benitez and Mr Nath. I have taken these into account when considering whether or not the judge erred.

Conclusions

27. The Appellant's case is that the judge assessed the position at the date of the decision and not the hearing. Ms Benitez referred me to examples of this in the decision. The Appellant in support relied specifically on [42], [53] and [65]. I asked Ms Benitez to identify post-decision evidence that the judge did not consider and she submitted that the judge did not consider the evidence of trips made by the Appellant from London to Bournemouth set out at [53]. The judge did not take into account the mobile phone records.
28. It is not arguable that the judge did not take into account the evidence of post-decision journeys between London and Bournemouth. The judge accepted that the trips had been made as evidenced by the post-decision receipts. She considered the evidence and accepted that the Appellant had made post-decision journeys between London and Bournemouth. This was a piece of the evidence that the judge considered when assessing the issues in the case. The point she made at [53] is that the post-decision evidence was generated with an appeal in mind. This was a finding open to her, in the light of the evidence of less frequent trips having been made before the decision (see [55]). Prior to the Appellant moving to London he worked and lived in Bradford (from November 2014 until approximately May 2016). The judge did not accept his evidence to have made journeys to Bournemouth every two weeks (see [45]).
29. A proper reading of the judge's decision makes it clear that the judge did not consider that she could not take into evidence that post-dated the decision. She clearly did take it into account, including the evidence of journeys to Bournemouth and a utility bill (see [54]). The Appellant stated that his name was added to the account in 2016. The judge found that it was added to support the appeal.
30. At [42] the judge accepted that the parties were in regular contact by texting. I am not troubled by the reference to the date of the decision in this paragraph because the reality is that the judge considered all the material evidence relating to phone records. I have taken into account [58] and [59] of the decision where the judge engaged with mobile phone records. There is nothing in the judge's decision which would suggest that there was post-decision evidence that she failed to consider.

31. Whilst the judge referred to the date of the decision at [42], [53] and [65], a proper reading of the decision makes it abundantly clear that she considered all the evidence before her and concluded that at the date of the hearing (and the date of the decision) the relationship was not genuine and subsisting and the parties did not intend to live together permanently.
32. There is no mention in the decision of the evidence of Keshan Paudel. I have taken into account the evidence of this witness. It is skeletal and wholly lacking in detail. The undated six line letter purports to attach a copy of the author's passport. The evidence is of little probative value. The failure of the judge to refer to it does not necessarily lead to a conclusion that she failed to take it into account. In any event, the evidence is not material to the outcome.
33. The judge was entitled to attach weight to the evidence that the Appellant and his wife do not live together. Whilst I accept that the judge's observations about the economy were speculative, they were not determinative of the outcome in this case. The judge accepted that many couples spend time apart because of work commitments. However, in this case she found that it undermined the Appellant's intentions to live with his wife permanently. It was the Appellant's own evidence that he had not looked for work in Bournemouth since 2012. The judge did not consider the issue of the parties not living together in a vacuum. There were other problematic areas with the evidence. For example, the Appellant's wife mentioned that they had discussed plans to live nearer to the Appellant's work (see [52]), but he did not mention this in his evidence. Their evidence differed in respect of plans to open a restaurant in Bournemouth (see [48]). The mobile phone records revealed that they called each other occasionally (see [59]). The Appellant was not familiar with the terms of his wife's will.
34. The judge was entitled to attach weight to the lack of social activities which would support a marriage (see [57]). Whilst the evidence was that they enjoyed spending time together, this would not explain why there was no evidence that they plan and organise their lives together (see [57]). In this context the judge was entitled to consider the Appellant's extensive social life as evidenced by the text message records. The grounds insofar as they challenge these findings are a disagreement with the findings of the judge and do not identify an error of law in the decision.
35. As a matter of fact, the Appellant and his wife had not lived together since 2014. However, it is unarguable that this was determinative of the outcome. It was nonetheless a factor to which the judge was entitled to attach weight when considering the evidence as a whole. It is unarguable that the judge did not consider the photographic evidence. It is not necessary for the judge to mention each piece of evidence. The judge found that they have a relationship and that it was "at some level" subsisting (see [67]) and that the marriage was in the past genuine and subsisting.

36. For all of the above reasons I conclude that there is no error of law in the decision of the judge. The decision to dismiss the appeal under the Immigration Rules and Article 8 is maintained.

No anonymity direction is made.

Signed Joanna McWilliam

Date 3 May 2018

Upper Tribunal Judge McWilliam