



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/05243/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 19<sup>th</sup> April 2018**

**Decision &  
Promulgated  
On 11<sup>th</sup> May 2018**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**NIKESH KAUSHIKBHAI PANCHAL  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P Saini of Counsel, instructed by Vision Solicitors  
For the Respondent: Mr P Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Gibbs promulgated on 13 June 2017, in which the Appellant's appeal against the decision dated 28 January 2016 to refuse his application for entry clearance to the United Kingdom as a spouse was dismissed.
2. The Appellant is a national of India, born on 17 March 1990. The Appellant had previously entered the United Kingdom as a Tier 4 student in 2009 with leave to remain until 1 July 2013 but that leave was curtailed to end on 22 September 2012. The Appellant was encountered and arrested for overstaying on 23 November 2012, following which he sought to judicially review the decision to curtail his leave. The Respondent accepted that

there was a mistake in the curtailment and the date of curtailment was changed to 15 June 2013. The Appellant was then granted further leave to remain as a Tier 4 general student to 30 October 2015, but on 28 February 2015 he was encountered working in breach of his conditions, arrested and cautioned as a person liable to be detained pending removal. On 10 March 2015 the Appellant voluntarily departed from the United Kingdom and then applied for entry clearance to the United Kingdom as the spouse of Anu Gurung, the sponsor.

3. The Respondent refused the application on 28 January 2016 for three reasons. First, the application was refused under paragraph 320(11) of the Immigration Rules because the Appellant had previously worked in breach of the conditions of his grant of leave to remain as a student and had used deception when arrested in relation to that. The Respondent considered that there were sufficiently aggravating circumstances to justify a refusal under this provision. Secondly, the application was refused under paragraphs E-ECP.2.6 and 2.10 of Appendix FM of the Immigration Rules because the Respondent did not accept that the Appellant was in a genuine and subsisting relationship nor that they intended to live together permanently in United Kingdom. Thirdly, there was insufficient evidence to establish that the sponsor met the financial requirements in paragraph E-ECP.3.1 of Appendix FM. In particular, self-employed income had not been verified with HMRC and without it the income requirement was not satisfied.
4. Following receipt of the notice of appeal, an Entry Clearance Manager reviewed and maintained the decision on 3 May 2016. The same reasons for refusal were given and in addition it was noted that in relation to the financial requirements, the sponsor's self-employment had not existed for a full financial year such that the evidential requirements of Appendix FM-SE could not be satisfied. Further, the refusal of entry clearance did not amount to a disproportionate interference with the right to respect for private and family life under Article 8 of the European Convention on Human Rights.
5. Judge Gibbs dismissed the appeal in a decision promulgated on 13 June 2017. Although she found that the refusal under paragraph 320 (11) of the Immigration Rules was not sustainable, she did not find that the Appellant had established that he was in a genuine and subsisting relationship and was unable to find that the financial requirements were satisfied by the documents submitted with the original application in accordance with Appendix FM-SE of the Immigration Rules. The appeal was dismissed on human rights grounds on the basis that there was no family life to engage Article 8 of the European Convention on Human Rights.

### **The appeal**

6. The Appellant appeals on the basis that the First-tier Tribunal erred in law in failing to consider all of the material submitted with the Appellant's application for entry clearance and the sponsor's evidence at the hearing. In particular, that the Respondent had not, contrary to Rule 24(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provided a full copy of the Appellant's application to the Tribunal and Judge Gibbs failed to take into account that evidence had been submitted to the Respondent, even if not before her, and failed to take into account the sponsor's oral evidence of contact.
7. Permission to appeal was granted by Judge Appleyard on 28 December 2017 on all grounds.
8. At the oral hearing, on behalf of the Appellant it was submitted that the error of law in the First-tier Tribunal's decision was that Judge Gibbs was under the impression that documents had not been provided with the entry clearance application when in fact they had. This was a misapprehension of fact which was material to the outcome of the appeal. In particular, the Appellant had submitted photographs and records of *viber* and *whatsapp* messages, which it was accepted were not before the First-tier Tribunal, but had been requested from the Respondent and should have been provided by him in accordance with the procedure rules. At the date of the First-tier Tribunal hearing, some, but not all of the photographs submitted with the entry clearance application had been returned to the Appellant and were available to him, as were the record of messages and communication and it was accepted that there was some culpability on the part of the Appellant not to produce these documents in support of his appeal.
9. In relation to the financial requirements, it was accepted that there was no specific appeal against the findings adverse to the Appellant on this point but the evidence that was available was sufficient to show that the financial requirements had been met including documentation with invoices and bank statements for self-employed income. In any event, if the decision is set aside and remade this would form part of the overall assessment under Article 8 of the European Convention on Human Rights.
10. On behalf of the respondent, the Home Office Presenting Officer submitted that the grounds of appeal could not amount to a material error of law. The only point that could really be taken against the First-tier Tribunal is that they should not have proceeded to hear the appeal in the absence of documents from the Entry Clearance Officer. However, the documents that were submitted with the application were not necessarily determinative and there was still a lack of evidence of the relationship. Further, the Appellant could have produced most, if not all, of that evidence and addressed the concerns as to the genuineness of the relationship. It cannot be a material error of law for the First-tier Tribunal to find that the Appellant had not established her case in the circumstances.

11. In relation to the financial requirements, it was submitted that Appendix FM-SE, paragraph 7 required evidence for a full financial year, which had not, on the facts at the date of application, yet occurred, such that self-employed income could not be taken into account to meet the overall requirements in this case in any event.

### **Findings and reasons**

12. In consideration of the grounds of appeal set out above, it is necessary to set out more fully the reasons of Judge Gibbs in dismissing the appeal on the basis that there was no genuine and subsisting relationship and that the financial requirements had not been met. The relevant parts of the decision as to the relationship are as follows:

*"24. For the reasons that I have set out above I do not place any weight on the ECO's assertion that the appellant did not mention his relationship with Ms Gurung when he was detained.*

*25. However, what I do find significant is the lack of evidence before me regarding the totality of the relationship, particularly as the couple are aware that this forms the central part of the reasons for refusal. The couple claim to have been in a relationship since 2013 and yet no evidence has been provided (as noted by the ECO) of this. I find that in this digital day and age the fact that the appellant has not provided photographs of the couple together in the UK, messages and/or emails exchanged during their relationship, or called or provided witness statements from friends and/or colleagues (Ms Gurung still works at Subway) corroborating their relationship casts very significant doubt in my mind on the genuine nature of their relationship.*

*26. I also find that there is lack of evidence regarding the couple's apparent cohabitation in 2015. Although the ECO refers to the fact that the appellant was living at the same address as Ms Gurung no evidence of this has been provided before me, I find it very significant that neither the appellant nor Ms Gurung refer to cohabitation their witness statements, and that Ms Gurung did not refer to this in her oral evidence.*

*27. I place weight on the fact that since the appellant left the UK on 10 March 2015 Ms Gurung has only seen him once, for two weeks, when they were married. Despite being aware that the credibility of their relationship is an issue I do not have before me any wedding photographs, or evidence of ongoing contact. I am also not persuaded, in the absence of more specific reasons and evidence, that Ms Gurung has been unable to visit her husband since August 2015, because of work.*

*28. Taking all of these factors into account I am not persuaded that on the balance of probabilities the couple are in a genuine subsisting relationship or intend to live with one another.*

*29. I uphold the refusal under Paragraph E-ECP.2.6 & 2.10 of Appendix FM of the Immigration Rules."*

13. The reasons set out by Judge Gibbs focus on the lack of evidence before her of the claimed relationship between the Appellant and the sponsor and the only reference to material not being in front of the Entry Clearance Officer is in relation to the lack of evidence dating back as early as 2013 which is when it was said the relationship started. The latter is not said to be inaccurate, the Appellant relies only on there having been wedding photographs and evidence of ongoing contact before the Respondent. It is not in dispute that such documents had not been provided to the First-tier Tribunal by either party. The Appellant does not suggest that any of the further types of evidence referred to by Judge Gibbs as lacking before her were in fact provided either to the Respondent or to the First-tier Tribunal. Even at its highest and had the photographs and records of communication been before the First-tier Tribunal, there would still be a lack of evidence as to their relationship and claimed cohabitation, lack witness statements from friends and lack of reasonable explanation for no visits since their marriage. The sponsor's oral evidence does not detract from or outweigh those reasons given.
14. As can be seen from the reasons set out above, there is in fact no misapprehension of the facts and no reliance on a lack of documents submitted to the Respondent as suggested in the grounds of appeal. What in fact the Appellant is seeking to do is construct an error of law by the Judge for failing to take into account documents which were not before her, but which could have been. This is not a case such as in MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC) where a document which the Respondent relied upon had not been provided to the Tribunal, but one where documents available to both parties had not been provided by either. In relation to the Respondent, this is a breach of the procedure rules and in relation to the Appellant, it is a failure to establish his case before the First-tier Tribunal.
15. It is important to note that although the Appellant states that the Respondent was requested to provide a copy of the documents submitted with the application to the First-tier Tribunal, most, if not all, of those documents had already been returned to the Appellant by the time of the hearing and were therefore available for him to submit in support of his appeal. No explanation has been given at all as to why this was not done, nor why it could not have been done and in fact Counsel went so far as to accept some level of culpability on the Appellant's behalf for failing to advance a positive case before the First-tier Tribunal.
16. It is also important to note that at no stage did the Appellant seek any directions from the First-tier Tribunal for the Respondent to provide the documents submitted with his entry clearance application, nor was there any request for an adjournment of his appeal hearing to allow the Respondent or him to submit such documents. Counsel for the Appellant suggested that this had not been done prior to the appeal hearing in the optimistic hope that the Respondent would attend with the documents on the day, however that provides no explanation as to why an adjournment was not sought on the day when it was clear that no further documents

had been submitted and no representative for the Respondent was in attendance.

17. In the circumstances outlined above, there can be no error of law by the First-tier Tribunal for failing to consider documents which had not been submitted to it, nor any error of law in proceeding in the absence of a bundle of documents from the Respondent where there was no request to adjourn the hearing and no reason why the Appellant could not have provided most, if not all, of those documents in any event. The reasons given in paragraphs 24 to 29 of the decision accurately reflect the evidence before the First-tier Tribunal and disclose no error of law and no procedural failing. The appeal is therefore dismissed and the decision of the First-tier Tribunal is confirmed.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

2<sup>nd</sup> May 2018

Upper Tribunal Judge Jackson