



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

Appeal Number: OA/17005/2012

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 September 2013**

**Determination  
Promulgated**  
On 18 September 2013

**Before**

**UPPER TRIBUNAL JUDGE MOULDEN**

**Between**

**MR KHEM KUMAR ALE**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - NEW DELHI**

Respondent

**Representation:**

For the Appellant: Mr C Howells of counsel instructed by N C Brothers & Co

For the Respondent: Mr I Jarvis a Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Nepal who was born on 26 May 1981. He has been given permission to appeal the determination of First-Tier Tribunal Judge Graham dismissing his appeal against the respondent's decision of 17 August 2012 to refuse to grant him entry clearance to settle in the United Kingdom as the spouse of his sponsor Rubi Lingden under the provisions of paragraph 281 of the Immigration Rules.

2. The respondent refused the application on the basis that in the absence of the original marriage certificate there was no satisfactory evidence to establish that the appellant and the sponsor had entered into a valid and legal marriage. Furthermore, given the absence of evidence of contact between them, the respondent was not satisfied that they intended to live together permanently as spouses and that their marriage was subsisting.
3. The appellant appealed and the judge heard the appeal on 5 June 2013. Both parties were represented and the sponsor gave evidence. By this stage the original marriage certificate had been provided. The judge considered the evidence as to the validity of the marriage but concluded that there had been no valid marriage because the sponsor had married before she was 20 years of age which was not permitted even with parental consent. She went on to find that there was insufficient evidence to support the claim that the couple had been in a relationship since 2008 or that they were in a subsisting marriage. The appeal was dismissed under the Immigration Rules and on human rights grounds.
4. The appellant sought and was granted permission to appeal. The judge assessed the position and reached her findings as to the validity of the marriage in paragraph 16 to 18. She said that the evidence was confusing and I agree. It is common ground that at the date of the marriage the appellant was over 20 and the sponsor 19. There appear to be two parallel systems affecting the validity of marriages in Nepal. One is the Muluki Ain (Country Code) 2019 (1963 in our calendar) which appears to indicate that marriage is illegal unless both parties have reached the age of 18 whilst between 18 and 20 parental or guardian consent is required. The other is the Marriage Registration Act 2028 (1971) which appears to indicate that marriage is not legal unless both parties have reached the age of 20 but without any provision for consent at an earlier age.
5. The Presenting Officer submitted to the judge that as the Country Code preceded the Marriage Registration Act the provisions of the latter should be preferred, presumably on the basis that the last in point of time was the most likely to be the correct law. The judge adopted this submission as her conclusion in paragraph 18 finding that marriage was not legal under the age of 20 even with parental consent. As a result the appellant and the sponsor were not legally married.
6. I find that this is both factually incorrect and too simplistic an approach in that it fails to take into account all the evidence before the judge. The report from the Centre for Reproductive Rights dated 26 April 2013 which was before the judge indicates that after a review in 1994 the Country Code was amended to change the legal age of marriage to 18 years with parental consent and 20 years without. This is supported by footnote 495 to the Country Code

which indicates that this provision was not in the original version of the Code and that the change was made by the 11th Amendment. These factors provide a strong indication that the provisions of the Country Code in the version before the judge post-dated the provisions of the Marriage Registration Act, not the other way round.

7. Furthermore, in reaching her conclusion the judge did not address the other evidence before her which, I accept, was not straightforward. The Tweet from the United States Embassy in Kathmandu says that the marriage age in Nepal is 20 for both men and women. At the hearing before the judge both representatives accepted that the statement from the advocate in Nepal was incorrect and it is no longer relied on. The report from the Centre for Reproductive Rights states, with reasons, that the legal age for marriage is 18 with parental consent and 20 without. This is also the view of the Plan Asia Regional Office report which, significantly, also states that the change came with the 11th Amendment to the Nepalese Country Code.
8. I find that in relation to assessing the validity of the marriage the judge erred in law by making a factual error at the core of her conclusion and by failing properly to assess all the evidence before her.
9. I also find that the judge erred in law in relation to her assessment of whether the appellant and the sponsor intended to live permanently with each other and whether their marriage was subsisting. She concluded that there was insufficient evidence to support such conclusions but appears to have done so on the basis of the documents without considering or making any findings in relation to the oral evidence of the sponsor. In paragraph 15 she recorded the appellant's representative's submission that she should find the sponsor to be a credible witness. Unfortunately, there are no findings as to the credibility of the sponsor or her evidence.
10. Part way through Mr Howell's submissions Mr Jarvis conceded that the judge made errors of law and that her decision should be set aside. I agree and so find. As the sponsor was present, with an interpreter and it was not suggested that any further documentary evidence was required I suggested and the representatives agreed that I should hear oral evidence from the sponsor and re-determine the appeal without adjournment.
11. At this point Mr Jarvis made an important concession on behalf the respondent; it was now accepted that the appellant and the sponsor had entered into a valid marriage. As a result the only outstanding point in issue was that under paragraph 281 (iii); whether each of the parties intended to live permanently with the other as his or her spouse and the marriage was subsisting.

12. I heard oral evidence from the sponsor which is set out in my record of proceedings. She gave evidence in chief and adopted her witness statement. She was cross-examined at some length by Mr Jarvis. Entirely properly a large part of his cross-examination consisted of taking the sponsor through the minutiae of dates, places, family names and addresses. I cannot recall when I last heard a witness give, from memory, what Mr Jarvis conceded were almost perfectly accurate answers. She also produced another photograph other than the wedding photographs showing that she and the appellant had met in Nepal since their marriage.
13. At the end of the sponsor's evidence I heard submissions from Mr Jarvis. He said that he did not challenge the sponsor's evidence. He accepted her evidence and conceded that, as a result, I should allow the appellant's appeal. In the circumstances I did not call on Mr Howells to make any submissions.
14. I have not been asked to anonymise this determination and see no good reason to do so.
15. I find that it was both fair and appropriate for Mr Jarvis to concede firstly the validity of the marriage and subsequently the appeal. I find that the appellant has established to the required standard of the balance of probabilities that he meets the requirements of paragraph 281 of the Immigration Rules.
16. Having concluded that the judge erred in law I set aside her decision and remake it by allowing the appellant's appeal under the Immigration Rules.

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Signed  
Upper Tribunal Judge Moulden

Date 13 September 2013