Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20154/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 30th September 2013	**On 9th October 2013**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

AWRNG ARIF ALI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Ahmed of A1 Immigration Services
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Kelly made following a hearing at Bradford on 21st June 2013.

Background

2. The Appellant is a citizen of Iraq born on 21st January 1986. She applied for entry clearance to come to the UK as a spouse but was refused under paragraphs 281 and 320(7A) of the Immigration Rules.

3. The initial decision was made in June 2012 but never served. A fresh decision, and the subject of this appeal, was made on 7th October 2012. The Entry Clearance Officer was not satisfied that the Appellant was married to a person present and settled in the UK nor that she had passed an English language test in speaking and listening from ESOL approved by the Secretary of State for this purpose nor that she intended to live permanently with her partner and that the marriage was subsisting and finally that she would not be maintained adequately in the UK without recourse to public funds.

4. Judge Kelly found in favour of all aspects of the Appellant's case save for maintenance. He was satisfied that the couple were lawfully married and that, since a child had been conceived, the marriage was subsisting as at the date of decision and the couple intended permanent cohabitation as spouses. He was also satisfied, in view of the Entry Clearance Manager's concession that the Appellant's English language certificate was valid as at the date she sat the test, that those requirements of the Rules were met.

5. The judge recorded that the Sponsor's original plan had been to wait with his new bride in Jordan pending the grant of her application for entry clearance. He had been working for Kam Jeans and City Valets and sought and was granted leave of absence from work by his employers for a total of four weeks, three weeks of which were paid. However the processing of the application took much longer than the Sponsor had anticipated.

6. He wrote:

> "Having informed his respective employers of the position by telephone he understood that, whilst neither employment would be held open for him pending the uncertain date of his return, each of his employers would nevertheless be happy to re-engage him if there happened to be a vacancy at that time."

7. He recorded that the Sponsor returned to the UK on 4th October 2012 and did in fact take up employment again with his previous employers.

8. The judge wrote as follows:

> "At paragraphs 10 and 11 of a witness statement that he prepared for the purpose of these proceedings the Appellant purports to confirm that he had resumed his employment with Kam Jeans and City Valets by the date of the decision. This does not however accord with his oral testimony at the hearing and neither does it accord with the documentary evidence that is before me.

Both of these are to the effect that the Appellant was only re-engaged by his former employers after the decision (see for example the letter from the proprietor of City Valets dated 13th June 2013 which clearly states that the Sponsor resumed his employment with them on 13th October 2012). I therefore find that the Appellant was without employment or income at the date of the decision and that re-engagement by his former employers (as in fact subsequently occurred) was at that time far from assured."

The Grounds of Application

9. The Appellant sought permission to appeal on the grounds that the judge made a mistake of fact in using the word 're-engage' because that word had not been mentioned by either of the two employers. The judge misunderstood the clear documentary and oral evidence. The word 'resume' correctly identifies what the Sponsor was doing by taking a break from employment whilst abroad and resuming upon return to the UK. The basis of the finding that the Sponsor's ability to provide adequate financial support for himself and the Appellant was far from assured and was not supported by the evidence. No end date for each of the respective employments was ever provided and no P45 was ever issued by either of the employers. Moreover, within the letter dated 13th June 2013, City Valets state, "the period of absence was due to his travel to Jordan to meet his wife". This confirms the assertion that the time abroad was absence from employment and not the end of employment or re-employment. The other letter, dated 11th May 2012 confirmed that the job was secure and permanent. No challenge was made either in the grounds or in submissions to the decision in respect of Article 8.

10. Permission to appeal was initially refused by Designated Judge Murray on 16th July 2013 but upon application to the Upper Tribunal was granted by Upper Tribunal Judge McGeachy on 14th August 2013.

11. The Respondent was not able to serve a reply because the determination was not attached to the grant of permission.

Submissions

12. At the hearing Mr Diwnycz initially maintained that the determination was sustainable, referring to the reference at paragraph 6 to enquiries having been made at the Department for Work and Pensions to the effect that the Sponsor was in receipt of Jobseekers Allowance from 23rd April 2012 to 2nd May 2012.

13. Mr Ahmed had never seen the report from the DWP and briefly took instructions from the Sponsor who strenuously denied that he had ever claimed Jobseekers Allowance. I offered Mr Ahmed the opportunity of an adjournment so that the Sponsor could obtain his own evidence in relation to benefits which he had claimed in the past.

14. That proved unnecessary because Mr Diwnycz told me that he was not relying on the document because the decision letter of October made no reference to it although the one in June had done.

15. On that basis he accepted that the judge had erred in law both because he had made reference to the document from the DWP which was not relied upon by the Respondent and because of the reasons stated in the grounds.

16. The decision is set aside because the judge relied on irrelevant material namely a document submitted in relation to a decision which was never served and superseded by a decision which made no reference to it.

Findings and Conclusions

17. Mr Diwnycz indicated that he had no wish to cross-examine the Sponsor. He relied on the Entry Clearance Officer's decision which stated that the Entry Clearance Officer was not satisfied that the Sponsor was in receipt of the income stated or in the employment claimed.

18. The Sponsor's evidence is that he had been employed as a warehouse assistant with Kam Jeanswear Limited since September 2009 earning on average £752.19 per month. He has provided a number of payslips from Kam Jeanswear, including for the period after he went to Jordan which are marked "holiday pay". He was also employed part-time as a warehouse assistant with City Valets earning approximately £115 per week, making a total weekly income from both jobs of £304.38 per week.

19. No issue was taken by the judge who heard oral evidence from the Sponsor in relation to whether he was working as claimed and Mr Diwnycz stated that he did not wish to cross-examine the Sponsor about whether he had been genuinely working.

20. Neither was any issue taken with the adequacy of the Sponsor's earnings. His total weekly outgoings as set out in the schedule produced after the hearing were £131.48 including rent, Council tax food and utility bills. His disposable weekly income was £172.90, well above the income support level for a couple.

21. The sole issue was whether he had in fact given up employment in May 2012 and then was fortunate enough to be re-engaged or whether he had an agreement that he could take paid and unpaid leave before resuming his employment with the two companies.

22. The letter from City Valets, in referring to a "period of absence" clearly indicates that it was the intention of both parties that the Sponsor would be resuming his employment upon return. The Sponsor strenuously denied that he had given evidence to the effect that he understood that neither employment would be held open for him, and I can see nothing in the judge's Record of Proceedings which casts that into doubt.

23. The letter from Kam Jeanswear is more ambivalent and is written in the past tense. However the clear evidence from the Sponsor, which Mr Diwnycz decided not to challenge by way of cross-examination was that he simply resumed his previous employment when he returned from Jordan which was always his and his employer's intention.

24. As at the date of decision he could properly be described as being employed by them.

25. That being the sole issue in the appeal, it should be allowed. However the Sponsor would be wise to obtain confirmation from the DWP that he did not claim Jobseekers Allowance at any relevant period since, although this was not an issue in the appeal before me it may be of concern when an Entry Clearance Officer is considering whether to issue entry clearance.

Decision

26. The decision of the judge is set aside. It is re-made as follows. The Appellant's appeal is allowed.

Signed Date 8th October 2013

Upper Tribunal Judge Taylor