Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00784/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 23 September 2014	**On 30 September 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

FAJILABANU FARUK GULAM PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER
PAKISTAN (ISLAMABAD)

Respondent

Representation:

For the Appellant: Mr Wray, Counsel, from Kings Court Chambers
For the Respondent: Mr D Mills, Senior Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant was granted permission to appeal against the decision of First-tier Tribunal Judge Stott (the Judge), who dismissed the Appellant's appeal against the decision of the Respondent to refuse her leave to enter as the spouse of Mr Yasin Patel, the Sponsor, under Appendix FM to the Immigration Rules. The only issues before the Judge were (i) whether the marriage was subsisting and the parties intended to live together permanently (paragraphs EC-P.1.1 (d) and E-ECP.2.6 and 2.10 of Appendix FM) and (ii) whether the maintenance provisions were met (paragraphs E-ECP.1.1 (d) and E-ECP.3.1 of Appendix FM). The date of application was 1 October 2010 and the date of decision is 14 November 2012.

2. As to maintenance, the Sponsor claimed that he was previously employed by Best Connection Company and that since 1 June 2012 had been employed by Rapid Manufacturing Company (the current employer). He provided a P60 from Best Connection and payslips from Rapid Manufacturing Company for July to September 2012. In relation to his current employment, bank statements were provided but the Sponsor claimed that, because he was paid in cash, he paid in only the balance of his salary after payment of his expenses.

3. The Judge found that the Appellant had not established that (i) she and the Sponsor were in a genuine and subsisting relationship [16], (ii) the Sponsor was in salaried employment with Rapid Manufacturing Company as claimed and (iii) the funds paid into the Sponsor's bank account were his salary from Rapid Manufacturing Company [11].

4. In the grounds of application, it is submitted that the Judge materially misdirected himself in law because:

    a. The Judge found it "peculiar" that a limited company paid its employees in cash; it was a lawful method of payment, the Sponsor provided all the evidence that was available to him and could not have provided any more. The Judge therefore erred in failing to consider this evidence and his findings were therefore perverse; and

    b. The Judge found that the remittances sent by the Sponsor to the Appellant were 'strong evidence' of a relationship but he then did not accept that he relationship was genuine and subsisting and failed to provide sufficient reasons for so finding. The Judge appeared to require evidence of mutual devotion in the intervening period but this failed to take into account the guidance in **Goudey (subsisting marriage: evidence) (Sudan) [2012] UKUT 41 (IAC)** and **GA ("Subsisting marriage") Ghana [2006] UKAIT 46**.

5. Permission was granted by Upper Tribunal Judge Goldstein, who confirmed that the renewed grounds continued to rely on the grounds of application before the First-tier Tribunal but that these "demonstrated that the First-tier Tribunal Judge may have made an error of law in failing to give adequate reasons for his findings on material matters and raises arguable issues as to whether he was entitled in law to reach the conclusions he did for the reasons given."

6. A Rule 24 response opposing the application was filed by the Respondent.

The Hearing

7. Relying on the grounds of application, at the hearing, Mr Wray submitted that the Judge found that the money transfers were 'strong evidence' of a relationship and made 'ambivalent' findings regarding evidence of the Appellant's commitment to the Sponsor because evidence of the Appellant's commitment to the Sponsor was missing. However, in the context that the marriage was an agreed marriage (that is, agreed

between the families of the Appellant and Sponsor), the Appellant's role would be of a more passive nature than a western style romantic relationship. He submitted that the Judge's findings were unreasonable.

8. As to maintenance, Mr Wray submitted that the Appellant was unable to provide evidence of his salary being paid into his account because he was paid in cash but he provided his payslips and a letter from his employer. This was contrary to the Respondent's own policy which provided that cash in hand was acceptable provided it was established that NI contributions etc were paid and the Sponsor had provided his payslips. If this was correct, his current employment should not be discounted and the financial requirements were met. He submitted that the Judge had therefore materially misdirected himself and his decision was not sustainable.

9. When asked if he had a copy of the Respondent's policy, he stated that he did not but that it was on the Respondent's website and was referred to in the context of self employment. He submitted that payments in cash were not unlawful and in the 1950s it was the normal method of payment of wages. He submitted that it was unreasonable to require everyone to be paid by BACS.

10. Mr Mills submitted that it could not be said that there were positive findings regarding the relationship due to remittances but that the findings on contact were 'ambivalent' or 'contradictory'. There was usually evidence that pointed in both directions and the Judge had to decide which evidence was more persuasive. He found that there was lack of contact and lack of visits. The guidance in **Goudey** must be seen in the context of the facts of that case; what was significant in that case was that the couple had become engaged, married and put in an application for entry clearance within a short space of time and there was little intervening time during within which to establish devotion. However, in the Appellant's case, they had met in 2007, and married in 2011 and there were no visits in between or since marriage and little evidence of contact. The Judge gave adequate reasons for his decision at [13 – 16].

11. As to maintenance, Mr Mills submitted that the specific requirements of the Rules have to be met. The guidance referred to related to self-employment and discretion to make payments in cash does not extend to employees; the rationally justifiable policy purpose behind it was to enable income to be demonstrated in a specific way. It was to be sure that the claimed income was actually earned. There was nothing to prevent the Sponsor from asking to be paid by BACS; it was not an insurmountable obstacle. There was no basis to bend or set aside this Rule.

12. With regard to Article 8, Mr Mills submitted that in the grounds of application it is submitted that the Judge failed to conduct a proportionality assessment under Article 8. However, the Judge dealt with Article 8 at [17], finding that the parties knew that they would need to satisfy the Immigration Rules and given his findings in relation to relationship and maintenance, his decision was not disproportionate. Even if the only outstanding issue was maintenance, if the Appellant was now able to satisfy that requirement, the decision would still not be

disproportionate because all she would need to do was submit a fresh application.

13. In reply, Mr Wray submitted that the findings made by the Judge pointed to a genuine subsisting relationship because the Sponsor had explained why an application for entry clearance was not made sooner and why he did not visit. He submitted that the length of time, the betrothal and family arrangements would make it unthinkable that the Appellant would not intend to reside with the Sponsor permanently. As to Article 8, he submitted that although Mr Mills 'had a point', to require the Appellant to submit a new application was to place an unreasonable burden on the Appellant because at the time of the application, the parties were not aware of the Rules and the Rules must be flexible.

Decision and reasons

14. Having considered the submissions, I find that:

    a. The Judge provided adequate reasons for his finding that the Appellant had not established that she was in a subsisting relationship and intended to live permanently with the Sponsor. Given the lengthy separation between them, it was necessary for them to provide evidence to establish that this requirement was met. The Judge considered all the evidence before him (remittances and contact) at [12 – 16] and reached his decision on the basis of the evidence in the round. The evidence of remittances was weighed against the evidence as to contact in view of the period of time under consideration. Although the Sponsor provided reasons for lack of evidence as to contact and visits, the Judge did not accept his explanations and this was open to him. **Goudey** can be (and was, by Mr Mills) distinguished on the facts.

    b. The Judge did not err in law in relation to his findings on maintenance. The Judge stated that the payment of salary in cash in a company with 24 employees, whilst not unlawful, was 'peculiar' and this observation was not unreasonable. The payment of large sums of money creates security issues associated with cash handling which are avoided by BACS payments. The Judge was not able to trace the salary in the Appellant's bank account; the fact that he was paid in cash did not prevent the Appellant from paying in the whole of his salary or, if he did not wish to do so, he could have provided an explanation as to what the shortfall had been used for. On the evidence before him, the Judge made a sustainable finding that he was not satisfied that the Appellant was employed as claimed.

15. As to Article 8, the Judge considered it on the basis there was a brief relationship between the Appellant and the Sponsor and concluded that it would not be disproportionate to refuse the application when balanced against the need to maintain firm and effective immigration control. As submitted by Mr Mills, if the Appellant is now able to satisfy the requirements of the Immigration Rules, it is not unjustifiably harsh to require the submission of a fresh application to enable the ECO to make an

assessment under the Immigration Rules. An appeal under Article 8 can only be allowed if the outcome of the decision is unjustifiably harsh (see **Nagre**).

16. I find that the grounds are a disagreement with the findings of the Judge and no errors of law are disclosed.

Decision

17. There are no material errors of law in the determination of Judge Stott and his determination must therefore stand

18. The Appellant's appeal is dismissed.

Anonymity

19. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and immigration Tribunal (Procedure) Rules 2005 and I see no reason why an order should be made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Manjinder Robertson
Sitting as Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

In light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007).

As I have confirmed the decision of Judge Stott, no fee award is made.

Signed Dated

M Robertson
Deputy Judge of the Upper Tribunal