



IAC-FH-NL-V1

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

Appeal Numbers: OA/03189/2014
OA/03191/2014
OA/03192/2014
OA/03193/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 28th April 2015 and 30th June 2015**

**Decision & Reasons Promulgated
On 8th July 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**SATINDER KAUR
KAWALJIT KAUR
MANJINDER SINGH
GURMINDER SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Faryll of Counsel instructed by Beechwood Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellants' appeal against the decision of Judge Caswell made following a hearing at Bradford on 14th October 2014.
2. The sponsor came to the UK in 2006 as a religious worker married at that time to the first appellant Satinder Kaur. He returned to India for visits but divorced her in 2008 and married an English woman. That marriage broke down in early 2013 and the sponsor remarried the first appellant.
3. She applied for entry clearance with their three children, the three other appellants, but was refused on the grounds that the sponsor could not meet the maintenance requirements of the Rules. The Entry Clearance Officer, as a result of checks conducted with colleagues in HMRC was not satisfied that the sponsor was employed as claimed, since HMRC had no record of him paying tax during the relevant period.
4. Shortly before the hearing the Presenting Officer raised a second issue, namely the subsistence of the marriage.
5. The judge wrote as follows:

"On the issue of the subsistence of the marriage I accept that there is an odd background here. The Sponsor certainly did divorce from the first-named Appellant, married an English woman, and then was divorced from her and remarried the first-named Appellant. There is a confusing history of the whereabouts of two of the children as well with the application for entry clearance being made at a time when their mother remained in India in the same village as the children yet the Sponsor was saying at the time that he had sole responsibility for them.

There is evidence of extensive contact between the Sponsor and the Appellants in the Lycamobile records. This does not necessarily show an intention for husband and wife to live together permanently if they are allowed to join the Sponsor, however. There is a certain amount of other evidence in the form of photographs for instance but overall the evidence for the subsistence of this marriage is sparse. Against the unusual background already outlined I am not satisfied that there is a subsisting marriage here, where each of the parties to it intends to live permanently with the other as husband and wife."
6. The judge also recorded that it may well be that the sponsor was unaware of Chapeltown Mini Market's failure to pass on the tax which they were deducting from his payslips to the Inland Revenue, but even if this was the case it did not mean that the employment was legal. She dismissed the appeals under the Rules and with respect to Article 8.
7. The appellants sought permission to appeal which was granted by Judge Cruthers on 29th December 2014.
8. On 12th January 2015 the respondent served a reply defending the determination.

Consideration of whether there is an error of law

9. I am satisfied that the judge did err in law for the following reasons.
10. First, in her assessment of the evidence relating to this marriage. Mr Diwnycz made no submission in relation to the judge's findings. I agree with Ms Faryll that she did not take into account all of the relevant evidence when assessing the present relationship, no doubt influenced by the complexities of their past. There were pages and pages of evidence of telephone calls, and evidence of remittances being sent by the sponsor to the family and as well as many photographs of them together. Moreover the couple have three children and there was evidence from the sponsor, both in his witness statement and presumably in oral evidence, of a reconciliation.
11. Second, she seems to have accepted that the sponsor himself was not aware of his employer's failures with respect to the Inland Revenue. The refusal refers to the suitability requirements. The question of whether the sponsor was culpable or whether he was an innocent party needs to be resolved in order to decide whether the refusal should be maintained on suitability grounds, which is of course discretionary and not mandatory.
12. Finally, the judge said that the employment had to be "legal" in order to qualify under the Immigration Rules. It is not entirely clear what is meant by that or whether any final resolution has been made as to whether the employers were acting illegally. They are presently under investigation but at the present time it is not established whether they have committed a criminal offence or whether innocent mistakes have been made.
13. The decision of Judge Caswell is set aside.
14. It must be re-made but it was not possible to complete the hearing today because Mr Diwnycz was not able to get the information which he needed from the Inland Revenue.

The resumed hearing

15. At the resumed hearing Mr Diwnycz produced a witness statement from an officer of HMRC dated 3rd June 2015 providing details of information held on HMRC systems in relation to the sponsor. It states that he earned £5,760 in the tax year 2008/2009, no employment recorded in the tax years 2009/2010, 2010/2011, 2011/2012 and 2012/2013.
16. In 2013/2014 he is recorded as having earned £8,157.66 at Paul's Supersave Limited with tax deducted of £1,629.60. At R & D 2 Pizza Limited he earned £1,478.69 with tax deducted of £295.40 and at Yorkshire Doughball Limited trading as Dominos Pizza £1,822.89 with no tax deducted.

17. In the tax year following the date of decision he is recorded as having earned £845 at MW Marketing Solutions Limited with tax deducted of £169, £5,765.72 at Pendas Way Off Licence with £1,152.80 deducted, £4,427.42 at Chapeltown Mini Market Limited with no tax deducted, £4,106.90 at R & D 2 Pizza Limited with £586.20 deducted and £1,165.38 at Pauls Supersave Limited with tax deducted of £233.
18. That information is, sadly, in direct contradiction to another letter provided by HMRC dated 2 June 2015 which records the sponsor as having earned £19,818.24 at Chapeltown Mini Market from 2010/2011. Under the column unhelpfully headed 'tax' a figure of £2,667.60 is given. For 2011/2012 with the same employer his pay is recorded as having been £9,729.98 with tax of £1,196. For 2012/2013 again with Chapeltown Mini Market his pay is recorded as being £19,585.33 with tax of £2,263.80.
19. For the tax year covering the date of decision he is shown as receiving £1,478.69 from R & D Pizza Limited with tax of £295.40, £8,157.66 from Paul's Supersave Limited with tax of £1,629.60, £1,822.89 from Yorkshire Doughball Limited with no tax and £18,341 from Chapeltown Mini Market with tax of £1,813.20.
20. The total is erroneously marked as £28,800.24 for the pay (it should be £29,800.24) and £3,738.20 for the tax.
21. Mr Diwnycz said that he did not wish to cross-examine the sponsor either in relation to the subsistence of his marriage or in relation to his tax affairs. He accepted that according to the sponsor's payslips tax was being deducted by Chapeltown Mini Market. So far as the other employment was concerned he accepted that for the tax years 2013/2014 tax was recorded as having been deducted but he said that that did not mean that it was being paid. He suggested that tax deducted on the witness statement referred to tax being deducted from the payslips rather than tax being received by the Inland Revenue. He agreed that it was not possible to reconcile the witness statement from HMRC, which said that no employment was recorded for the tax years 2009/2013, with the Inland Revenue's letter of 2nd June 2015 which sets out full details of his employment in 2010/2011, 2011/2012 and 2012/2013 as being with Chapeltown Mini Market.
22. Ms Farryl asked me to rely on the letter of 2nd June 2015 which she said was supported by other evidence from the Inland Revenue.
23. First, there is a letter dated 23rd October 2014 to the sponsor which states that:

"As requested in the letter I would advise you that as per our records your 2013 to 2014 pay and tax information for R & D 2 Pizza Limited was pay of £1,478.69 with tax of £295.40 and for Paul's Supersave Limited was pay £8,157.66 and tax of £1,629.60."
24. Those figures are identical to the figures produced in her letter of 2nd June 2015.

25. Second, she relied on the HM Revenue and Customs tax calculation for the tax year 2013/2014 which records the sponsor's total income as £29,800 and tax paid of £3,738.20 which are the same figures as in the letter of 2nd June 2015, making allowance for the arithmetical error in that letter, which reads £28,800 and not £29,800.
26. Third, she relies on the letter from HM Revenue and Customs dated 30th September 2014 which confirms that the sponsor's income tax liability for all tax years up to and including the 2012/2013 tax year can be treated as cleared and up to date.
27. That letter also states:

"It appears that Chapeltown Mini Market may have failed to operate PAYE correctly and as advised in my colleague's letter of 4th August 2014 this is currently under review with our employer complaints team. Their review may take some time to complete. It does however appear clear that you have tried to bring your tax affairs up to date and the problem of any under deduction of tax for the 2013 to 2014 tax year may well lie with Chapeltown Mini Market.

I would advise that where we establish that the employer has failed to act in accordance with the PAYE Regulations we may ask them to make good the shortfall of tax."

Findings and Conclusions

28. The letter of 2nd June 2015 from HMRC is corroborated by two other documents from them, namely the letter of 23rd October 2014, which gives the same figures and the tax calculation for the tax year 2013/2014 dated 2nd November 2014 which gives the correct total figure for the sponsor's employment, albeit that there is an arithmetical error in the letter of 2nd June 2015. Accordingly I rely on it as being the proper reflection of the sponsor's earnings for that tax year.
29. In order to meet the maintenance requirements of the Immigration Rules the sponsor needs an annual income of £27,200. On the evidence, I conclude that he earned £29,800.24 and therefore meets the relevant requirements.
30. An issue arose before the previous judge in relation to the legality of that employment. It seems to have been argued before her that the sponsor's employment was not legal because his employer was not passing on the tax which was deducted from the sponsor's wages to HMRC. Reliance was placed upon the evidential requirements under Appendix FM which states that all income and savings must be lawfully derived.
31. Mr Diwnycz did not pursue that line of argument today. It is not being argued here that the sponsor was party to any fraud and indeed HMRC itself in their letter of 30th September 2014 appears to have come to the conclusion that the fault lies with Chapeltown Mini Market. HMRC has not concluded its investigations and at this stage it is not possible to say whether there has been any criminality on the part of

the employer. Certainly however the remedy, so far as HMRC is concerned, is to require the employer and not the sponsor to make good the shortfall in tax. Indeed it is clear that the sponsor has taken all reasonable steps to try to ensure that his affairs are in order.

32. Mr Diwnycz accepted that the phrase “lawfully derived” refers, for example, to involvement in a criminal enterprise, or not having the right to work in the UK, neither applicable here.
33. Mr Diwnycz did not seek to cross-examine the sponsor in relation to the subsistence of the marriage and said that he was content to leave the matter in my hands. He did not seek to challenge in any way the substantial evidence of contact between the couple, namely the telephone calls, the remittances, the photographs and their three children.
34. I find it more probable than not that the parties intend to live together as husband and wife and that this is a subsisting relationship.
35. The Entry Clearance Officer, on the basis of the information before him, was not satisfied that the appellant’s various employments were genuine. On the basis of the evidence now provided by HMRC, I am satisfied that the sponsor was working as claimed. I am also satisfied that his employer’s failure to pass on the tax which was being deducted from his payslips was without his consent and knowledge. He should therefore not be refused on suitability grounds.
36. Accordingly the requirements of the Immigration Rules are met.
37. **Notice of Decision**
38. The original judge erred in law. Her decision has been set aside. It is re-made as follows. The appellants’ appeals are allowed.

Signed

Date

Upper Tribunal Judge Taylor