



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/21301/2013

THE IMMIGRATION ACTS

Heard at Glasgow
On 19 November 2015

Decision and Reasons Promulgated
On 23 December 2015

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

MR IMRAN HANIF

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by Gray & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1) This is an appeal against a decision by a panel of the First-tier Tribunal comprising Judge of the First-tier Tribunal J C Grant-Hutchison and Judge of the First-tier Tribunal A M S Green. The panel dismissed an appeal against a refusal of entry clearance by the respondent.
- 2) The appellant was born on 2 January 1981 and is a national of Pakistan. He applied for entry clearance to join his wife, Mrs Shabana Kauser, who is the sponsor in this appeal. The decision under appeal is dated 31 October 2013, although the refusal decision was subsequently revised by the respondent. The issues before the First-tier Tribunal were, first, whether the appellant satisfied the maintenance requirements of the Immigration Rules and, second, whether the relationship between the appellant and the sponsor was genuine and subsisting and the couple intended to live together in the

UK. At the hearing before the First-tier Tribunal the respondent conceded on the basis of documentary evidence from HMRC that the income threshold under the Immigration Rules was met. It was not accepted, however, that the appellant satisfied the related evidential requirements set out in Appendix FM-SE. This was because there were minor discrepancies between the wage slips provided on behalf of the sponsor and the corresponding entries credited in her building society pass book. The discrepancies amounted to 12p per month or £1.44 per year.

- 3) The sponsor gave evidence before the First-tier Tribunal. She explained that she spoke to her husband several times a week. The majority of the calls were conducted via Skype or Viper. These were internet calls and were much cheaper than mobile or landline calls. She did occasionally call the appellant using her mobile phone. She had been using her mobile to demonstrate for evidential purposes how often she telephoned her husband. She also used telephone cards.
- 4) The First-tier panel accepted that the sponsor telephoned her husband using a combination of Skype, Viper and her mobile phone. The panel were unable to make a finding, however, as to how often and for how long the sponsor spoke to the appellant using these methods of communication. The panel considered that it would have been possible and reasonably practicable for the sponsor to have produced call log records generated by Skype and Viper to substantiate her evidence that the bulk of her communication with the appellant was conducted by these means but she did not do this.
- 5) The panel noted that the appellant applied for entry clearance in May 2013, some three years and two months after her marriage to the sponsor. There was little evidence to support the existence of a matrimonial relationship at the time when the refusal decision was made. The panel expected that to demonstrate a subsisting matrimonial relationship there would be evidence of regular contact and signs of companionship, emotional support, affection and an abiding interest in each other's welfare and well-being. There was evidence from the sponsor that she had travelled to Pakistan to spend time with the appellant since the marriage. She had been to Pakistan from 15 February to 29 March 2013. She stated that she had stayed with the appellant when she was in Pakistan. The panel accepted that the sponsor had visited Pakistan at this time but there was no supporting evidence showing that she had stayed with the appellant for some or all of the time. The panel noted that there were no statements or letters from family, friends or neighbours in relation to this visit or the time the appellant and the sponsor claimed to have spent together. The appellant did not establish any more than the bare fact of the visit. He last saw the sponsor on 29 March 2013. There was only limited evidence to establish the nature and quality of contact between them. The appellant produced the sponsor's mobile telephone bills and his call records covering a period from May 2013. There was no other evidence to support the existence of a matrimonial relationship between the date of the marriage and the date of the application. Accordingly, the panel was not satisfied that the relationship between the appellant and the sponsor was genuine and subsisting and that they intended to live together in the UK.

- 6) The panel referred also to the discrepancy in respect of the evidence of financial requirements under Appendix FM-SE. The panel pointed out that the appellant could not meet these requirements as the sponsor's wage slips did not correspond exactly to the credits shown on her building society statements. The discrepancy was very small and the panel accepted the sponsor's evidence that she did not know about this until it was brought to her attention shortly before the hearing. However, there was no provision whereby this discrepancy might be disregarded under Appendix FM-SE and accordingly the appeal failed on this ground also.

Application for permission to appeal

- 7) In the application for permission to appeal it was pointed out on behalf of the appellant that the panel accepted that the marriage was valid. It was an arranged marriage. The panel accepted the sponsor's evidence that she telephoned her husband using either Skype, Viper or her mobile phone. It was contended that the panel erred by finding there was insufficient evidence of regular contact. The productions for the appellant included mobile telephone bills for the sponsor for the period from November 2013 to June 2014 and telephone invoices for September and October 2014. It was contended that the panel erred in finding that this evidence was not in existence at the time when the decision was made and the respondent could not therefore have been aware of the type and regularity of the contact between the sponsor and the appellant.
- 8) The application continues that at paragraph 18 of the decision it was recorded that the appellant had provided telephone records showing a total of 28 highlighted calls to the UK number given for the sponsor, together with telephone cards. The panel erred by finding that the telephone bills and evidence of contact through Skype and Viper should not have been taken into account in terms of the test in DR (ECO: post-decision evidence) Morocco [2005] UKIAT 00038. There was in addition evidence of the sponsor having visited the appellant in Pakistan.
- 9) In relation to the financial requirements the application pointed out that the respondent had conceded that the appellant met the income threshold on the basis of documents from HMRC. There was a very small discrepancy between the sponsor's wage slips and the credit entries in her building society passbook, amounting to 12p per month. Given that the discrepancy was so minor the panel should have allowed the appeal under Appendix FM-SE. This would have been on the basis that missing information was verifiable in terms of Appendix FM-SE, sub-paragraph D(d)(iii), from other documents submitted with the application. The minor discrepancy was verifiable from the HMRC correspondence and other financial evidence lodged.
- 10) Permission to appeal was granted on the basis that in relation to the subsistence of the marriage it was arguable that the Tribunal had applied too high a standard of proof. In view of the evidence available in the context of an arranged marriage it was arguable that the panel had erred in concluding that a matrimonial relationship did not exist.

- 11) In relation to the second ground, it was arguable that the once the respondent had conceded that the income threshold had been met, as verified by HMRC, then the appellant had met the requirements to which the documents related.
- 12) A rule 24 notice dated 11 March 2015 was lodged on behalf of the respondent. This stated that at paragraph 22 of their decision the panel had given sound reasons for finding the marriage was not subsisting, in accordance with the relevant case law. In addition, the requirements in Appendix FM-SE were not met.

Submissions

- 13) In his submission on behalf of the appellant, Mr Winter referred us to the decision in Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041 and submitted that the panel in the present appeal had made the same error as the First-tier Tribunal in Goudey by failing to take account of evidence in the form of telephone cards to show communication between the couple. There was evidence of telephone contact between June 2012 and January 2013, which pre-dated the refusal decision, and this was to be found at Appendix R of the Home Office bundle. Phone cards were used by the sponsor, as recorded by the panel at paragraph 20 of the decision. The panel accepted that there was telephone contact. The panel should have been aware of the cultural context in terms of this being an arranged marriage.
- 14) It was pointed out that before the First-tier Tribunal it was not suggested that any apparent lack of contact between the appellant and the sponsor was explained by the marriage having been an arranged one. The parties instead relied upon contact by telephone to show that the marriage was subsisting and that they intended to live together.
- 15) In response, Mr Winter pointed out that in granting permission to appeal the judge in question had stated that it was arguable the panel had applied too high a standard of proof. This was consistent with the error in Goudey. This was a legally recognised marriage in which both parties wanted to be together. It was improbable that the calls recorded would have been to anyone else. The evidence of the sponsor was connected to the evidence of the appellant.
- 16) Reference was made to call records relating to the appellant at Appendix R of the respondent's bundle. The question was raised as to whether any of the calls recorded were to the telephone numbers of the sponsor. Mr Winter acknowledged that this had not been established. Mrs O'Brien pointed out that the refusal decision referred to 28 highlighted calls. There did not, however, appear to be any highlighted calls in the documentary evidence in the respondent's bundle. Mr Winter submitted that there were highlighted calls in the second and third inventories for the appellant. However, the First-tier Tribunal had not been given evidence relating to the sponsor's landline number.
- 17) Turning to the financial requirements, Mr Winter submitted that there had been a concession on behalf of the respondent on the basis of HMRC documents showing that

the earnings of the sponsor exceeded the minimum income threshold. There was a 12p discrepancy between each of the sponsor's wage slips and the credits to her building society account. No explanation for this discrepancy had been provided. Mr Winter sought to rely on Appendix D(d)(iii) of Appendix FM-SE, which was quoted on page 5 of the decision at paragraph 14. The discrepancy constituted "missing information" but this was verifiable from other documents submitted with the application.

- 18) Having heard from Mr Winter, we did not consider it necessary to hear from Mrs O'Brien on behalf of the respondent.

Discussion

- 19) The position in this appeal is that the First-tier Tribunal was not satisfied on the evidence before it that, at the date of the decision appealed, against the appellant and sponsor were in a genuine and subsisting relationship and intended to live together in the UK. The panel accepted that the sponsor telephoned the appellant using a combination of Skype, Viper and her mobile telephone but were unable to make a finding as to how frequently and for how long the appellant and the sponsor used these methods to communicate with one another. The panel derived little assistance from such evidence of telephone contact as was before the respondent at the date of decision. This comprised telephone cards, which did not show any numbers called, and telephone records for the appellant. The telephone records for the appellant were for a limited period and did not identify in a readily ascertainable manner whether the appellant had been calling the sponsor.
- 20) There was evidence before the First-tier Tribunal showing that the sponsor visited Pakistan in February and March 2013. The First-tier Tribunal expected more evidence, however, in relation to this visit, in addition to the sponsor's own testimony, than simply her reservation details and boarding pass. The panel considered it significant that evidence was not provided from family, friends or neighbours in relation this visit and any time the appellant and the sponsor might have spent together. The evidence before the First-tier Tribunal did not, in the view of the panel, show the existence of a genuine and subsisting relationship and an intention by the parties to live together in the UK.
- 21) To counter this finding it was argued, first, that the First-tier Tribunal applied too high a standard of proof; second, that they fell into the error identified in Goudey; and third that they disregarded post-decision evidence. This third point was not pursued strenuously by Mr Winter at the hearing before us. Even if the evidence was admissible in terms of section 85A, as relating to the circumstances appertaining at the time of the decision, which the First-tier Tribunal questioned, this evidence, such as it was, was produced only after the appellant and the sponsor were notified that the appellant's application had been refused by the respondent.
- 22) On the second point, there is nothing of substance in the decision of the First-tier Tribunal to satisfy us that too high a standard of proof was applied. The First-tier Tribunal referred, at paragraph 19 of the decision, to the case of Naz (subsisting

marriage – standard of proof) Pakistan [2012] UKUT 00040. In that case the standard of proof was clearly set out as the balance of probabilities and although the Tribunal did not refer to the case in relation to this specific point, it is apparent that the case was before them. In considering whether this standard of proof was met, the First-tier Tribunal was entitled to have regard to any deficiencies or omissions in the evidence before them, as identified in the decision.

- 23) So far as the decision in Goudey is concerned, it was accepted in that case that evidence of telephone cards was capable of being corroborative of a contention by the parties that they communicated by telephone, even though such data did not confirm the particular number the sponsor was calling in the country in question. It was not a requirement that the parties also wrote or texted each other. This proposition was put forward, however, on the basis that there were no countervailing factors generating suspicion as to the intentions of the parties. It was only on this basis that evidence of telephone cards might be considered sufficient to discharge the burden of proof. In the present appeal the First-tier Tribunal considered there were grounds for questioning whether the evidence of contact between the sponsor and the appellant was consistent with the existence of a genuine and subsisting relationship. Evidence of telephone cards would not by themselves satisfy other deficiencies in the evidence in respect of the nature of the relationship.
- 24) The conclusion we come to is that the First-tier Tribunal was entitled for the reasons which were given to find that the appellant had not shown that there was a genuine and subsisting relationship between the appellant and the sponsor and that they intended to live together in the UK. It was for the First-tier Tribunal to make findings on this matter according to the evidence before it and its findings can be disturbed only if it made an error of law. On the basis of the submissions we have heard, we are not satisfied that an error of law was made and accordingly the findings by the First-tier Tribunal shall stand.
- 25) We would point out, however, that there is no suggestion in the findings made that the appellant has attempted to deceive the respondent or the immigration authorities in the UK. It may be that there is evidence in existence to show that the relationship requirements of Appendix FM are met, even though this evidence was not before the First-tier Tribunal. This would still leave, however, the unexplained discrepancy over the sponsor's wage slips. On this particular issue we do not consider it necessary to give further consideration to the findings made by the First-tier Tribunal, which on the basis of the evidence and explanations offered before it, should stand.

Conclusions

26) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

27) We do not set aside the decision.

Anonymity

28) The First-tier Tribunal did not make an order for anonymity. We have not been asked to make such an order and we see no reason of substance for doing so.

Signed

Date

Upper Tribunal Judge Deans