Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00762/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th September 2018	**On 5th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MRS KUBRA YASMEEN

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Z Raza,Counsel,instructed by Maher and Co
For the respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Pakistan born on 3 October 1984. She applied for entry clearance for settlement as the wife of her sponsor, Mr Mohammed Iftar. He is

originally from Pakistan. He came here as a student and has been granted indefinite leave to remain.

2. The application was refused by the respondent on 2 December 2016.It was not accepted that the marriage was genuine and subsisting, with the parties intending to live together permanently. Furthermore, the financial requirements were not met. The sponsor was required to demonstrate earnings by the specified proofs of £18,600. He stated that from October 2016 he was earning £18,720 employed by a business trading as Executive Services. A member of the respondent's staff contacted his employer on 23 November 2016 and the same day spoke to the sponsor. Discrepancies in the 2 accounts were identified. There was also no evidence of the business being registered with Companies house.

3. On reconsideration the entry clearance manager accepted that the relationship was genuine. This then left the financial issue.

4. Her appeal was heard by First-tier Tribunal Judge Devittie at Taylor House on 22 February 2018. In a decision promulgated on 26 March 2018 it was dismissed. The judge recorded that the appellant had meantime made another application which was refused on 20 November 2017.

5. At the time of hearing the sponsor stated he had changed jobs and was now earning £19,550 the year. The judge said that the documentary evidence about this income was unsatisfactory. Reference was made to the original discrepancies when the respondent contacted his then employer. The purpose behind the call was to test the genuineness of the employment. The judge said that this in turn called into question the genuineness of the new employment. The sponsor's employer had not attended. At hearing the sponsor produced further evidence about his new employment but the judge commented that the documents were not stamped and had not been seen by the respondent.

6. Permission to appeal was granted on the basis that in assessing the appellant's article 8 rights the judge should have considered this new employment of the sponsor when considering the proportionality of the decision.

Consideration

7. Schedule 9 of the 2014 Act amended section 85(4) of the Nationality, Immigration and Asylum Act 2002. This provides that in an appeal under section 82(1) `the tribunal may consider… any matter which[it] thinks relevant to the substance of the decision, including… any matter arising after the date of decision.' In terms of the immigration rules the issue was whether the appellant met the rules at the time of the decision. New evidence can be introduced which shows that at that time the rules were met. In the present instance the subsequent evidence is not further evidence going to establish this. It relates to a different timescale and the crew set out in appendix FM SE have to be complied with. The subsequent evidence produced relates to employment post decision. As such this cannot be relevant to

whether the rules were met at the time of decision but may be relevant towards the overall proportionality of the decision.

8. First-tier judge Judge Devittie did not refuse to consider the evidence in relation to new employment. The judge was critical of the apparent production of this evidence at a late stage. It was not referred to in the grounds of appeal. The bundle produced was not date stamped. The judge at paragraph 7 refers to salary slips in respect of the period 8 July 2017 to 25 November 2017 and salary slips January 2018 as well as tax returns for 2016 and 2017.

9. The judge at paragraph 9 noted that the sponsor's employer did not attend nor was there any statement in relation to the allegations made in the refusal letter. Mr Raza sought to amend the grounds of appeal on the basis that there was a mistake of fact on the part of the judge in that the appeal bundles in fact did contain a statement from the original employer. Ms J Isherwood did not oppose the change to the grounds but submitted that the letter was brief and did not adequately address the issues arising.

10. The presenting officer's point was that the additional evidence submitted at hearing did not address the concerns of the entry clearance officer. Rather, it was an attempt to make a fresh claim based on different evidence and was making the judge the primary decision maker.

11. It is not clear from the decision if both the parties were represented although in the narrative the judge refers to counsel handing in documents on behalf of the appellant.

12. At paragraph 8 the judge makes the point that Ms Isherwood has made. The refusal is dated 2 December 2016 and the respondent raises discrepancies about the original claimed employment including the interview by telephone. The refusal sets out conflict between the evidence of the sponsor and that of his employer intended to test the genuineness of the employment. There was concern that the employment claimed in the application was not genuine. The accounts apparently differed about the appellant's probationary period and his duties. The judge did not find the subsequent evidence assisted. The judge concluded by saying that the refusal was not disproportionate albeit it was accepted the relationship with genuine and subsisting. The possibility of a fresh application was alluded to.

13. I do find merit in the points made by Ms Isherwood and there is a danger of being distracted by a suggestion that the judge did not consider the new evidence produced which was not the case.

14. I was advised by that Mr Z Raza that the subsequent unsuccessful application has been appeal and is due to be heard in December 2018. The appeal is restricted to consideration of the appellant's article 8 rights. It is correct that the judge did not refer to the letter from the original employer. There is also mention in the grounds of appeal that his employer at that stage was not in fact the limited company and

therefore the reference to searches companies office would have been unproductive in any event. The judge does not refer to this.

15. My conclusion is that a material error of fact in the decision has been demonstrated in that the judge indicates there was no supportive evidence in relation to the original employment whereas in fact there was. The letter from the employer would have to be evaluated. This may not make any difference to the ultimate outcome but is something which will have to be determined.

16. Given the acceptance of a genuine relationship and the change of employment the interests of justice best served by setting this decision aside with a view to remitting the appeal for rehearing. If possible, it should be heard at the same time as the appeal in relation to the subsequent refusal. In this way the judge hearing the case have a complete picture in considering the proportionality of the decision.

Decision

A material error of law has been demonstrated in the decision of First-tier Tribunal Judge Devittie. Consequently, that decision can no longer stand. The appeal is remitted for a de novo hearing in the First-tier Tribunal

Francis J Farrelly
Deputy Upper Tribunal Judge Date: 25 October 2018

Directions.

1. Relist for a de novo hearing excluding First-tier Tribunal Judge Devittie. Every effort should be made to have the appeal hearing listed at the same time as the appeal of the subsequent decision. The respondent should advise the tribunal of the relevant reference number and any information about the listing arrangements. If this cannot be done then it is preferable this appeal is not heard until after the appeal in relation to the subsequent application is dealt with. In this situation the judge hearing the present appeal should be provided with a copy of the original decision in the subsequent application and a copy of any appeal decision.

2. The appellant's representative is to provide a fresh bundle containing all the documentary evidence relied upon in relation to employment.

3. If at all possible a presenting officer should attend at the hearing.

4. There would appear to be no need for an interpreter. If there is in the appellant's representative should advise the tribunal.

5. A hearing time of no more than 1 ½ hours is anticipated

Francis J Farrelly
Deputy Upper Tribunal Judge