IAC-AH-LEM

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06201/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Decision & Reasons Promulgated**
On 15th January 2016	**On 19th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS HARJIT KAUR
(ANONYMITY DIRECTION NOT MADE

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr M Mohzam (Solicitor)
For the Respondent: Mr David Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge H Narayan, promulgated on 11th December 2014, following a hearing at Stoke-on-Trent on 1st December 2014. In the determination, the judge allowed the appeal of Mrs Harjit Kaur, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of India who was born on 31st August 1991. She appealed against the decision of the Respondent refusing her application for entry clearance as the partner of a person present and settled in the United Kingdom, in a determination dated 17th April 2014.

The Appellant's Claim

3. The Appellant's claim is that her sponsoring husband travelled to India and she and he first met on 14th April 2012, during which time they were formally introduced through their respective families with a view to marriage.

4. At the time her sponsoring husband, Mr Singh, spent some time with the Appellant. Both couples contemplated marriage. The Sponsor then returned to the UK due to his employment commitments but remained in contact with the Appellant. On 7th April 2013 the couple married in a formal ceremony in accordance with their faith in the Punjab. Their marriage was thereafter registered on 10th April 2013 in India. The Appellant provided an original English language certificate test having sat the IELTS test and scored 5.0 band. She did not have any convictions or unspent convictions. Their marriage was arranged in accordance with their Sikh faith and they had met because they had been introduced by their respective families. Each of the parties intended to live together with each other as husband and wife on a permanent basis and indeed after the marriage on 7th April 2012 they resided together immediately at the matrimonial home. There was also adequate accommodation available for both parties in Wolverhampton where the sponsoring husband lived. They would be able to maintain themselves because the sponsoring husband, Mr Jasvir Singh Bains, was employed on a full-time basis as an IT hardware specialist with an international corporation since 11th June 2012 and earned a basic salary of £30,000 (see letter of application from the solicitors dated 10th March 2014).

The Judge's Findings

5. The judge heard evidence from the sponsoring husband, Mr Bains, that he telephones his wife "every day together with texts and emails from time to time together with cards and items for the past two years" (see paragraph 9). He heard evidence that he had not been to visit his wife, "as he didn't think it would take this long" (paragraph 9). The judge also heard evidence that the Sponsor "works full-time and he takes his holidays to take care of his mother when she ends up in hospital." He stated he started he started supporting his wife from the marriage. He stated the Appellant would "live with him for life" (paragraph 9).

6. The judge heard how the Sponsor gave on to give "detailed evidence of being the primary carer for his mother and his wife is not coming as a primary carer for his mother." He dealt with his job and his father being elderly and forgetful and the Appellant saying she wants to work (paragraph 10).

7. However, in his findings of fact, the judge observed that the evidence at the time of the application was limited in relation to the requirements of the Immigration Rules. He held that the Appellant could have visited his wife given that he had a well-paid job but eleven months had elapsed since he had last visited (see paragraph 16). The judge then went on to say that he would find in favour of the Appellant

> "... only because of the evidence which in fact postdates the decision of the Respondent of 17th April 2014 that the parties have proved on the balance of probabilities that this is a genuine marriage and they intend to live together as spouses. I find that the volume of phone calls and content of the text messages which are contained in the Appellant's bundle 1 and referred to by Mrs Pamma does demonstrate devotion between the parties and the settled intention to live together as at the time those communications were made" (paragraph 19).

The judge in fact went on to say that,

> "... if I had to decide to speak simply upon the evidence stopping on 17th April 2014 I would have decided that the Appellant had not proved upon the balance of probabilities that this was a genuine marriage and the parties intended to live together for the reasons set out in the Entry Clearance Manager's review and the Respondent's decision …" (paragraph 20).

Grounds of Application

8. The grounds of application state that, in allowing the appeal on the basis of postdecision evidence, the judge had erred in law because the well-known authority of **DR (Morocco) [2005] UKIAT 00038** only allows for postdecision evidence to be taken into account if it appertains to the circumstances at the date of the decision, and in this case this was not so.

9. Permission to appeal was granted on 16th February 2015 on the basis that Judge Narayan may well have misconstrued the import of **DR (Morocco)**.

The Hearing

10. At the hearing before me on 15th January 2016, the Appellant was represented by Mr M Mohzam, a solicitor, and the Respondent was represented by Mr David Mills, a Senior Home Office Presenting Officer. Mr Mills submitted that as it was the Home Office's appeal he would begin first and explain why the judge had erred in law. The refusal decision was dated 17th April 2014. The decision was then reviewed by the Entry Clearance Manager on 18th September 2014 and it was upheld. Thereafter, an appeal was lodged and it came before Judge Narayan on 1st December 2014.

11. Mr Mills explained that the authority, **DR (Morocco)** only allows for postdecision evidence to be taken account if there is a continuation of an earlier situation that is subsequently demonstrated by way of further evidence. He submitted that, "the classic example is the situation before us". However, if one looks at the authority in **DR (Morocco)** it is clear from this (at paragraph 25) that in that case,

> "... there was an issue about whether at the time of the decision, the couple intended to live together as man and wife. In the language of the statute, did the circumstances appertaining at the date of the decision include that intention".

12. The judge went on to explain that,

> "... evidence that those were then the circumstances can be provided by subsequent actions which casts light upon what the position then was. This was not the same as evidence which shows that the position was subsequently changed and that there now is an intention which previously was lacking. Evidence about a subsequent change in the intension is clearly excluded" (see paragraph 25).

13. Mr Mills went on to explain that the crucial issue was whether the Appellant at the date of the decision on 17th April 2014 had the intention, shared with her sponsoring husband, to live together as man and wife. There was no finding by the judge on this crucial issue. This was a question of fact to be determined by the judge.

14. Instead, what the judge does is to refer to subsequent postdecision evidence, which can only demonstrate a "intention" at a later time, namely, the time when the judge himself heard the appeal on 1st December 2014. **DR (Morocco)** plainly excludes such a scenario because it is expressly said in paragraph 25 that, "evidence about a subsequent change in intention is clearly excluded".

15. For his part, Mr Mohzam submitted that this was simply not the case. If one looks at paragraph 25 of **DR (Morocco)** it is plain that it allows for evidence as to what the circumstances were at the time of the decision. This is exactly what the judge also had looked at. Indeed, the Entry Clearance Manager had accepted the existence of evidence. The judge observed that, "he noted that the Entry Clearance Manager accepted there were phone calls between the two parties but disputed the relationship as there were no documents …" (paragraph 13). The judge himself observed that having looked at bundle 1 the documentation was such that it

> "... clearly shows the parties have been in touch by text from 2013 to date and by phone calls from November 2013 to date and that the Sponsor has paid in 2014 for the Appellant's courses" (see paragraph 18).

16. Finally, having looked at the evidence at the time of the decision and the evidence subsequent to the decision, the judge then concludes in his final paragraph that,

> "... because of the totality of the evidence since 17th April 2014 that the Appellant has proved on the balance of probabilities as at date of decision that they have entered into a genuine marriage and that the relationship is subsisting and they intend to live together as each other's spouse".

17. The reference to 17th April 2014 is, of course, the date when the ECO made the decision. The judge's finding here was that on the "totality of the evidence" and applying the balance of probabilities test, then "at the date of the decision" the parties had entered a genuine marriage and it was a genuine and subsisting marriage where they intended to live together.

18. Mr Mohzam submitted that this paragraph (at paragraph 21) plainly showed that on a balance of probabilities the judge had allowed the appeal by looking at the evidence in the round.

19. In reply, Mr Mills insisted that **DR (Morocco)** had not been properly applied. The phone calls were largely missing and only arose postdecision. Moreover, there were adverse credibility findings made by the judge against the Sponsor. In these circumstances, the judge ought not to have allowed the appeal.

No Error of Law

20. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, this is not by any means a situation of "a subsequent change in intention", which **DR (Morocco)** explains "is clearly excluded" (paragraph 25). This is indeed precisely the kind of case to which **DR (Morocco)** does apply. It is a case where there were already in existence precisely the kind of evidence and indicators that demonstrated that the marriage was genuine and subsisting and that the parties intended to live together as man and wife.

21. The only difficulty, if it was such a difficulty, was that this evidence was not to the degree to which the judge expected it to be. Another judge may well have disagreed with this judge's view in relation to this, and may well have said that the level of evidence that was provided in this case was enough because it indicated that the parties were in touch.

22. Be that as it may, however, what is clear, nevertheless, is that even at the date of the decision, the Entry Clearance Manager had accepted that, "there were phone calls between the two parties" (see paragraph 13). The judge himself had accepted that the evidence

> "... clearly shows the parties have been in touch by text since 2013 to date and by phone calls from November 2013. As is well-known, in the present day and age, hardly anybody writes long letters of affection by way of the traditional form of correspondence. Communication for the most part is either by text message or by telephone calls, given that almost everyone everywhere has access to a mobile telephone."

23. What is clear, in any event, is that from 2013 onwards there existed evidence both of phone calls and of text messages and this was found to be the case by the judge. Second, it is this very evidence that the judge then finds to be in existence yet again when he makes his findings in relation to postdecision evidence. The only difference is that there is now rather more copious demonstration of such evidence.

24. This is clear from his finding (paragraph 19) that,

> "I find that the volume of phone calls and the content of the text messages which are contained in the Appellant's bundle 1 and referred to by Mrs Pamma does demonstrate devotion between the parties and a settled intention to live together …"

25. Why the same level of devotion between the parties could not have been demonstrated by the text messages which were in evidence from 2013 and phone calls from November 2013 is difficult to decipher. Another judge may well have taken the view that, on a balance of probabilities, where the parties had married each other in an arranged marriage as is the custom in that part of the world and with the Sponsor in this case, that the case was made out by the Appellant.

26. Whether or not this is the case is unnecessary to determine. What is necessary to show is that the judge, having looked at the postdecision evidence, in a manner plainly allowed for by **DR (Morocco)**, came to the conclusion that taking the evidence in its entirety and as a whole, he was satisfied that on the

> "... totality of evidence since 17th April 2014 that the Appellant has proved on the balance of probabilities as at the date of decision that they have entered into a genuine marriage and the relationship is subsisting and they intend to live together as each other's spouse" (see paragraph 21).

27. In short, this is precisely the case where, **DR (Morocco)** operates because at paragraph 25 the Tribunal made it clear that, "evidence that those were then the circumstances can be provided by subsequent actions which cast light upon what the position then was".

28. It is clear that these were indeed the circumstances back in 2013 as they are indeed the circumstances now, which the evidence was designed to help cast light upon, in the same way that previous evidence had done in relation to the situation as at the date of the decision. There simply is no error of law in this case. The decision must stand.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 13th February 2016