Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
OA/15752/2012

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THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 March 2013	**On 18th June 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR GULZAR SINGH
MRS GIAN KAUR

Appellants

and

ENTRY CLEARANCE OFFICER NEW DELHI

Respondent

Representation:

For the Appellant: Mr R Rai of counsel instructed by Gills Immigration Law
For the Respondent: Ms J Isherwood a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of India. They are husband and wife. The first was born on 1 October 1930 and the second on 6 May 1933. They have been given permission to appeal the determination of First-Tier Tribunal Judge Hodgkinson who dismissed their appeals

against the respondent's decisions of 12 July 2012 to refuse to grant them entry clearance to the United Kingdom for the purpose of settlement with their son and sponsor Balraj Singh under the provisions of paragraph 317 of the Immigration Rules.

2. The respondent refused the application not being satisfied that the appellants had shown that they were financially wholly or mainly dependent on the relative present and settled in the UK or that they could be accommodated adequately together with any dependents without recourse to public funds in accommodation which the sponsor owned or occupied exclusively. The application was also refused on Article 8 human rights grounds.

3. The appellants appealed and the judge heard the appeal on 20 March 2013. Both parties were represented and the judge heard oral evidence from the sponsor and the sponsor's daughter-in-law, Mrs Dhillon. Her father, Mr Ghoman provided a witness statement but did not give evidence.

4. At the hearing the appellants' counsel conceded that the grounds under the Immigration Rules and Article 8 stood or fell together and if the appellants did not succeed under the former then they would fail under the latter.

5. Whilst accepting that the sponsor had provided the appellants with some financial support the judge found that the appellants had not established that they were financially wholly or mainly dependent on the sponsor. He touched on the issue of accommodation, finding that it was not necessary to consider this in detail if the appellants failed in relation to financial dependency, but indicating that they were likely to be able to satisfy this requirement. He dismissed the appeal under the Immigration Rules and on human rights grounds.

6. The appellants applied for permission to appeal which was granted by a judge in the First-Tier Tribunal. The grounds argue that the judge erred in law. Firstly, by failing to give sufficient weight to the evidence of the sponsor and the other witness. Secondly, procedural unfairness by not indicating that he was concerned by the absence of Mr Ghoman so that the appellants' representative could address these concerns. Thirdly, failing properly to evaluate Mr Ghoman's evidence and the documents submitted by him or to indicate that he had concerns about these matters; failing to take into account the other evidence of funds taken to India for the appellants; failing properly to assess the evidence as to the appellants having domestic servants; failing properly to assess all the evidence and submissions about the telephone interview with the first appellant; failing to give the appellants the opportunity to address his concerns about documents which he concluded had been prepared on the "same machine" and requiring evidence that the sponsor's brother had no income other than his pension.

7. I have been provided with the authorities of Markem Corporation v Zipher Ltd [2005] EWCA Civ 267 and In the Matter of Mumtaz Properties Ltd [2011] EWCA Civ 610.

8. Mr Rai said that the main point in the grounds arose from the judge's treatment of unchallenged evidence. Whilst the sponsor was cross-examined Mrs Dhillon was not. In paragraph 33 of the determination the judge referred to "one element which I have referred to below". What followed did not make it clear what this was. The points raised by the judge in the determination should have been put to the two witnesses. The appellants' representatives could have asked for an adjournment in order to deal with the points but only if the judge had told them what they were. The point as to the typeface in the documents was prejudicial.

9. Mr Rai referred me to paragraphs 56 to 61 of Markem Corporation and 40 to 41 of Mumtaz Properties. He argued that the judge made no clear finding as to the credibility of the two witnesses. He asked me to find that the judge erred in law, to set aside the decision and to send it back to the First-Tier Tribunal for rehearing.

10. Ms Isherwood submitted that there was no material error of law. No evidence from Mr Ghoman was put before the respondent so that there was no opportunity for the respondent to take a position on this. At the beginning and the end of the telephone interview the first appellant said that he had no complaints or problems. The element(s) referred to by the judge in paragraph 33 were, as appeared later, the methods of money transmission to the appellants and the extent of their dependency on the sponsor.

11. As to the question of whether the judge should have raised at the hearing the points on which he relied in his determination, Ms Isherwood submitted that it was not for the judge to put every point to the appellants' representatives, particularly if it related to matters which the appellants had not put before the respondent with their applications. The appellants were on clear notice as to the areas which they needed to address, the judge's concerns related to these areas and it was for the appellants to prove their case. I was asked to find that there was no error of law and to uphold the determination.

12. In his reply Mr Rai summarised the appellants' case by saying that is a matter of fairness the appellants were entitled to know the case facing them as it was perceived by the judge. I reserved my determination.

13. Much of the evidence provided by the appellants for the hearing before the judge had not been submitted to the respondent with the application. The appellants' bundle before the judge runs to 151 pages and the witness statements postdate the decision. In this common situation the reasons for refusal could not be expected to

address much of the evidence before the judge. The reasons for refusal made clear the requirements of the rules about which the respondent was not satisfied and the judge did not stray outside these.

14. I find that the judge did not fail to give sufficient weight to the evidence of the sponsor and Mrs Dhillon. Apart from the inconsistency referred to in paragraph 42 relating to the servants who helped the appellants, which the judge regarded as only "potentially" damaging to credibility, he accepted most of their evidence, leading to the conclusion in paragraph 50 that the sponsor provided the appellants with some financial support. The challenge in paragraphs 4 and 5 of the grounds of appeal is in general terms and amounts to no more than an alternative basis of assessment which identifies no error of law in the reasoning and assessment carried out by the judge.

15. The absence of Mr Ghoman was a matter raised at the hearing, as appears from paragraph 36. Mrs Dhillon was asked why he was not present and explained that he was working. It matters not that it is not clear who asked the question. The appellants were represented by solicitors and competent counsel who would have been aware of the issues which the appellants needed to address. The claim that Mr Ghoman was a regular conduit for money from the sponsor to the appellants was an important element of the appellants' case. It should not have taken the appellant by surprise that his absence, with the consequence that he could not be cross-examined, was a factor which the judge was likely to take into account; the more so if, as I find, the judge was entitled to consider that the receipts produced by Mr Ghoman did not provide any clear explanation as to how some parts of the money transfer process took place. The question as to why Mr Ghoman did not attend the hearing should have put the appellants' counsel on notice that there could have been an application for an adjournment. His evidence was an important part of seeking to establish the extent of the support for the appellants from the sponsor. The respondent could not have addressed the evidence of Mr Ghoman because, at the time of the decision, there does not appear to have been any evidence from him.

16. I can find no-fault with the judge's reasoning in paragraph 42 relating to the servants who assisted the appellants or that he should have put his concerns to the appellants' representative. It was the sponsor's oral evidence that the appellants had servants working for them. Once this had been said it should have been obvious to all, including the appellants' counsel, that this was an important factor going to the question of whether the appellants had anyone in India to care for or assist them. Whether this piece of evidence was given in chief or cross-examination the appellants' counsel would have had the opportunity to explore and clarify the situation. It was relevant against the background of the picture

portrayed by the appellants and the sponsor in evidence and referred to by the judge in paragraphs 14, 19 and 23. It was said that the appellants were living on their own in India and finding it difficult to look after themselves and their home, were unable to go to the doctor, needed to be looked after every day and were living "in the most exceptional destitute circumstances".

17. I can find no-fault with the judge's assessment of the telephone interview of the first appellant set out in paragraph 43 to 45 or the conclusion that what the appellant said was correct notwithstanding the later claims to the contrary. There is no indication that the judge failed to have in mind the age of the appellants, apparent from the first paragraph of the determination, and I note as submitted by Ms Isherwood that at the beginning and the end of the interview the appellant indicated that he was happy with the way in which it had been conducted. In the absence of a statement from the second appellant saying how her evidence might have differed from that of her husband I do not find any force in the statement that she should also have been interviewed.

18. What the judge said in paragraph 46 about some of the appellants' documents having been produced on the same machine was not treated as "determinative" and the judge was entitled to regard it as "a factor of relevance".

19. The factors referred to by the judge in paragraphs 47 and 48 relating to the financial circumstances of the appellants' son in Canada were material in the light of the first appellant's evidence in his interview that both sons were employed and both were supporting him. In his written evidence the son in Canada said that he was retired and did not have a regular income apart from his pension. Documentary evidence about his financial circumstances, including, for example bank statements, might have supported his contention that he had no income from employment.

20. I do not find much assistance from the cases of Markem or Mumtaz beyond the principle that the judge must act fairly. This is not a jurisdiction and not an appeal in which the parties' cases are set out in precise pleadings. The respondent's refusal gave a sufficiently clear indication of the areas in which the appellants failed and which they needed to address. It could not deal with the large amount of evidence submitted later. I find that none of the factors relied on by the judge did or should have taken the appellants by surprise. There was nothing of substance on which the judge relied in reaching his conclusions which should have been put to the appellants. I find that in line with paragraph 41 of Mumtaz the judge's findings were fair to the witnesses (and the appellants). The evidence relied on was known to the parties and the issues to be decided were clear.

21. This is a lengthy, detailed and careful determination. I find that the judge reached conclusions open to him on all the evidence. There is no error of law and I uphold his determination.

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Signed Date 14 June 2013

Upper Tribunal Judge Moulden