UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

THE IMMIGRATION ACTS

Heard at: Sheldon Court, Birmingham	Decision Promulgated:
On: 2 May 2014	On: 12 May 2014

Before

Upper Tribunal Judge Pitt

Between

Sukhdeep Banga

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Masih, instructed by MP Solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of India and was born on 10 November 1991.

2. This is an appeal by the appellant against the determination promulgated on 2 January 2014 of First-tier Tribunal Judge Camp which refused the appellant's appeal against the respondent's decision of 19 April 2013 to refuse leave to remain as a spouse.

3. There are two challenges.

4. The first is that Judge Camp was in error in finding at [30] and [33] that the sponsor had not shown that the money paid to her by Leicestershire County Council could be taken into account for the purposes of paragraph E-LTRP.3.2. of Appendix FM of the Immigration Rules so could not show that she had a specified gross annual income of at least £18,600.

5. The second is that the respondent had accepted when refusing the application that the appellant and sponsor were in a genuine and subsisting relationship. It had not been open to Judge Camp to go behind that without clear notice being given to the appellant so that he could address the point.

6. I was grateful to Ms Masih and Mr Mills for their submissions on a narrow but, certainly to me, novel point concerning how the sponsor's payments from Leicestershire County Council should be regarded.

7. Ms Masih maintained that the documents at pages 81, 91, 117, 118 of the appellant's first bundle of evidence (FB) showed that the sponsor was regarded by the local authority as "self-employed", that as a carer she could "earn" the money paid to her and that HMRC regarded the money paid to her by the local authority as "payments".

8. However, it appeared to me that the statement dated 9 December 2013 of Ms Sandhu, the appellant's solicitor which is at pages 5 and 6 of the additional bundle of evidence (AB) held the answer to this issue. At paragraph 6 the statement indicates that HMRC confirmed to Ms Sandhu that:

> "the income [the sponsor] receives from the council is considered as a turnover. From this turnover, any expenses she has including gas, electric, grocery bills, usage of her car, money spend on the household can be considered as expense and would be deducted from her turnover. He explained that in most cases, once the expenses have been taken out, the remainder would be taxable profit and this is why the self assessment would be completed at £0.00, as once expenses have been calculated not much if anything is left to be taxed. Donald advised for the purpose of this type of care which is provided via the Council, this is the simplest way of calculating the expenses."

9. The funds paid to the sponsor are not "income" or "profit", or earnings, therefore,

even if that is how the local authority refers to them. They are "turnover" from which significant expenses inevitably will follow such that HMRC concede that, up to a certain qualifying amount, no tax will be payable.

10. That approach is consistent with the other HMRC documents before me. Page 91 of FB shows that HMRC regarded the funds paid to the sponsor for taxation purposes as having no profit (or loss). Page 185 of AB states that for tax purposes the sponsor has made no profit. Where funds are paid by the local authority above the qualifying allowance, as the examples at page 93 of FB and page 190 of AB show, tax becomes payable as the person is deemed to have made a profit, in my view, a amount of money which could be considered as income for the purposes of the Immigration Rules. That is not the case here where the evidence is consistently that the sponsor has not paid any tax on any payments from the local authority as, in effect, the payments covered only expenses.

11. This is also the position set out in the personal accounts drawn up by the sponsor's accountants at 119 of FB. Those accounts show that almost all of the funds paid by the local authority go on "Fixed expenses" for two adults. Those adults cannot be the appellant or sponsor or members of her family. They are the two adults who live in the sponsor's home, referred to in the accountant's notes at the bottom of page 119. That is entirely consistent with the position regarding tax taken by HMRC.

12. Even if there is a percentage of the funds from the local authority which, regardless of how it is treated by HMRC, is included in the payments as the equivalent of a salary or income for the person providing housing, Ms Masih could not show me how such a percentage could be calculated from the documentation before me.

13. Where those matters are so, I did not find that Judge Camp erred in finding that the finance requirements of the Immigration Rules were not met.

14. I indicated at the hearing that it did appear to me that Judge Camp erred in failing to put the appellant on notice that he had concerns about the genuine nature of the marriage so that the appellant had an opportunity to address those concerns. Judge Camp's findings should not be relied upon as a starting point by the respondent in any future application or the Tribunal in any future appeal, therefore.

15. The error as regards a genuine and subsisting relationship could not be material, however. The application under the substantive Immigration Rules had to fail because the financial requirements were not met. In an Article 8 assessment, the requirements of the Immigration Rules and failure to meet them is the starting point in the Article 8 assessment. Here, the sponsor can be expected to return to seek entry clearance and being expected to do so cannot reach the threshold of

compelling circumstances or exceptionality; Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00460 (IAC) applied.

DECISION

16. The decision of the First-tier Tribunal does not contain a material error on a point of law and shall stand.

Signed:  Date: 2 May 2014
Upper Tribunal Judge Pitt