Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/15107/2013

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 5th August 2014	**On 6th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

HAFIZA BIBI

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

For the Appellant: **Dr Thorndike, Counsel, Central Chambers**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION ON ERROR OF LAW
AND DIRECTIONS

1. The Appellant is a national of Pakistan date of birth 27th June 2013. She appeals with permission the decision of First-tier Tribunal Judge M. Davies to dismiss her appeal against the Respondent's decision of the 27th June 2013 to refuse to issue her with entry clearance as the spouse of a person present and settled in the United Kingdom.

Background and Matters in Issue

2. The Sponsor is a Mr Sajjad Ali, an Afghani who is now a British national. Mr Ali arrived in the United Kingdom in 2001 and claimed asylum. In the course of that claim he declared that he was married with three children. He was refused asylum but remained in the UK and eventually gained indefinite leave under the 'legacy' programme.

3. In 2011 he travelled to Pakistan and married the Appellant, whose origins are from Afghanistan but is now resident in Quetta. She made an application for entry clearance as a spouse. In support of that application the Appellant submitted what purported to be a divorce certificate relating to Mr Ali and his first wife. On the 16th August 2011 the application was refused. The ECO acknowledged the divorce certificate but since it had not been issued by the Union Council was not satisfied that it demonstrated a lawful dissolution of marriage; as such the Sponsor was still married to his first wife and was not free to marry the Appellant. The ECO considered that the marriage contracted on the 16th August 2011 was not valid.

4. On appeal to the First-tier Tribunal the evidence for the Appellant took an entirely new turn. In a statement dated 7th September 2011 Mr Ali said the following:

> "I did not tell the truth when I made a statement in support of my claim [for asylum] in September 2001. I said I was married with three children on the advice of another Afghani who said it would assist my case. It did nothing of the sort. It was a very stupid thing to do but I was naïve at the time.
>
> I was granted ILR under the legacy provisions in 2010 and took the opportunity to travel to Pakistan to marry. Recalling what I had said nine years earlier, I felt trapped. Out of fear for my wife's situation and frankly not knowing what to do, I eventually decided to try and resolve the problem by approaching an Imam in Quetta through an agent.
>
> The objective was to secure a document purporting to be from my "wife" stating she divorced me. The name Fatima Ali was made up. I was single when I arrived. I have not married anyone else but Hafiza Bibi. I have no children"

5. The Appellant herself made a statement stating that prior to the marriage she had been informed by Mr Ali that he had previously lied to the British authorities about having a family. She was upset, as was her father, but as they satisfied themselves that he had never in fact been married, they proceeded with the marriage. She knew that he had obtained some kind of "legal document" which he said would "sort it all out" but she did not know that it was a false divorce certificate.

6. The First-tier Tribunal (Judge Frankish) took an extremely dim view of all this. In his determination dated 23rd February 2012 Judge Frankish had to navigate his "way through a veritable morass of lies", which he numbered as 1) the Sponsor making an unfounded asylum claim, 2) claiming to be married, 3)

obtaining a fake document, 4) having the fake document attested by an Imam, 5) presenting the fake document to the Respondent and 6) persuading the Appellant to collude with the deception. He found that the Appellant had clearly known that the VAF contained deception, having had regard to the inconsistent evidence presented before him. The Appellant claims to have known about the problem prior to her marriage, whereas the Sponsor's oral evidence was that she knew nothing about it until he completed the VAF on her behalf. Needless to say, Judge Frankish dismissed the appeal. He did not consider Article 8 to be engaged.

7. The Upper Tribunal refused permission to appeal.

8. In March 2013 the Appellant made a new application. The ECO refused it with reference to paragraphs EC-P.1.1(c) and S-EC.1.5 of Appendix FM, the material part of which reads:

> S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S- EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.

The ECO was further not satisfied that this was a genuine and subsisting marriage.

9. The appeal came before Judge Davies. The Appellant's case was that she and her husband were very sorry for the lie previously told but they had now told the truth and that they should be allowed to be together as this was a genuine marriage. It was advanced on her behalf that Pakistan was not safe for Hazara Afghans and that they would not be able to live together in Pakistan.

10. Judge Davies found that the Sponsor and Appellant had both lied previously, and that the evidence about when the Appellant knew of the deception continued to be inconsistent. Judge Davies did not accept the Appellant or Sponsor to be credible, and on that basis found that they were not in a genuine or subsisting relationship. He did not accept that there were any protection issues relating to Pakistan. As to Article 8 Dr Thorndike for the Appellant conceded that she did not meet the requirements of the Rules. Judge Davies did not consider that the facts merited consideration of Article 8 "outside of the Rules".

11. The grounds of appeal are that the First-tier Tribunal erred in making credibility findings based on errors of fact, failing to take relevant evidence into account and reaching a decision that was, overall, perverse. The Respondent opposes the appeal on all grounds.

Error of Law

12. The grounds of appeal take issue with Judge Davies' finding that the Appellant knew about the deception in respect of the 2011 visa application. There is nothing in this. There may be errors of fact in the way that the evidence is recorded in the determination but I have read the evidence as it developed before Judge Frankish and Judge Davies and it is quite clear that the Appellant and Sponsor have given wholly inconsistent evidence from the outset about what she knew and when. Both Judges found that she knew about the deception when she made the application and there is nothing in the decision, evidence nor grounds of appeal that leads me to interfere with that finding. I proceed on the basis that the Appellant was aware of the deception in her 2011 VAF.

13. The finding that this is not a genuine and subsisting marriage is not however sustainable. Paragraph 23 of the determination states "taking into account the credibility of both the Appellant and Sponsor I do not accept that they are in a genuine and subsisting marriage". This fails to take relevant matters into account. There was evidence before the First-tier Tribunal of telephone contact between the pair. There was evidence of enduring association in that the Sponsor has been trying to get her into the country for over three years. There were detailed witness statements and photographs of the parties together. It is accepted that they have entered into a marriage. None of that evidence was considered. I therefore set that finding aside. On the evidence before me I am satisfied on the balance of probabilities that this is a genuine marriage and that the parties do intend to live together.

14. The real issue in this appeal is whether the Appellant's conduct has been such that she should be refused entry as Mr Ali's spouse. At the hearing I pointed out to the parties that this determination gives no consideration to the central ground for refusal, the mandatory rejection under paragraph S-EC.1.5. As I set out above that paragraph provides that applications **must** be refused where the applicant's presence would not be conducive to the public good. I enquired as to whether there was any guidance, specifically in the context of Appendix FM, on what that actually meant. Neither Mr McVeety nor Dr Thorndike was able to assist but agreed that I could look at any relevant policy guidance or instructions post-hearing. I have done that, and have been unable to identify any such material which might assist me in determining what kind of conduct this provision is directed at.

15. From looking at the preceding parts of the section, it might be said that the kind of behaviour liable to attract a mandatory refusal would be very serious indeed: for instance S-EC.1.2 pertains to subjects who have a deportation order in force against them; paragraphs S-EC.1.3-1.4 are concerned with criminal convictions; S-EC.1.5 with those who have caused "serious harm" to others. This would suggest that the suitability requirements are aimed at those who have contravened our laws in a serious way. Conversely S-EC.1.6 provides for refusal where the applicant has failed without good reason to attend an

interview, suggesting a rather less serious threshold for engagement of the suitability criteria.

16. The difference for this Appellant must surely be that if she had failed on this occasion because she had not attended an interview, one presumes that this would not be cited against her in a future application: it is however certain that in this instance, paragraph S-EC.1.5 will surely be raised in response to any further application. As I pointed out to the parties, this is very different from the previous framework under the Rules. If a party used deception in an application for entry clearance as a spouse under paragraph 281 of the Rules, he or she would be refused with reference to paragraph 320(7A). However any future application would not be tainted by the previous application, since the then Rules specifically precluded the Respondent from relying upon 320(7B) in spouse applications.

17. This determination does not address any of these issues. There is no direction on what "conducive to the public good" might mean in this context, nor any specific findings that the test has been met on these facts. These omissions go to the heart of the appeal and the decision in the appeal must be re-made to that extent. I will do this following a further hearing.

18. The parties are directed to serve skeleton arguments, authorities and supporting documents (ie policy statements etc) dealing with the following matters:

    i) Does the burden of proof lie on the Respondent to show that the Appellant's exclusion is conducive to the public good?

    ii) Does the Appellant's conduct in this case merit refusal on this ground?

    iii) Does the Appellant have any (arguable) residual Article 8 case if the answer to ii) above is yes?

Decisions

19. The determination of the First-tier Tribunal contains an error of law and it has been set aside save that the findings of the Tribunal in respect of deception are preserved.

20. The decision is to be re-made before me.

Deputy Upper Tribunal Judge Bruce
27th September 2014