Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/18611/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 24 October 2014	**On 31 March 2015**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

MR KIRILL STAUNE

Appellant

and

ENTRY CLEARANCE OFFICER – MOSCOW

Respondent

Representation:

For the Appellant: Mr A Boyd, Temple & Co Solicitors
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal S Taylor dismissing an appeal against refusal of entry clearance as a visitor.

2) The appellant was born on 2 July 1988 and is a citizen of Russia. The application giving rise to this appeal was made on 22 August 2013, when the appellant sought entry clearance for the purpose of visiting his wife, Sofya Belousova, a Russian citizen studying at the Glasgow School of Art. In refusing the application the respondent stated that the appellant had made a false declaration in a previous application for entry clearance. A review dated 8 January 2014 by the Entry Clearance Manager refers to an earlier application dated 14 October 2012 in which it was said the appellant

neglected to declare that he had an acquaintance present in the UK, namely his Russian girlfriend (now his spouse) who had been studying in Glasgow since 2011. On the basis that the appellant had made a false declaration in his previous application, the current application was refused under paragraph 320(7B) of the Immigration Rules with a 10 year automatic refusal period for further applications from the decision of October 2012.

3) The appeal was considered by the First-tier Tribunal without a hearing. The judge had before him a letter dated 23 October 2013, seemingly from Ms Belousova, in which she explained that at the time of his earlier application the appellant was not sure if she would agree to marry him and he was even unsure of her location. He preferred not to disclose the real nature of his visit as he thought this might lead the Entry Clearance Officer to make enquiries of Ms Belousova and this would alert her to his visit.

4) The judge found there was no scope for the exercise of discretion in paragraph 320(7B). Where the applicant had previously used deception then the subsequent application had to be refused unless there was a human rights factor outside the Immigration Rules. The appellant and Ms Belousova were now married but the exception in favour of a spouse seeking settlement did not apply as Ms Belousova had limited leave and the application was for a visit and not for settlement. Article 8 had been considered by the respondent and it had been concluded that the parties could still meet as there was no limitation on Ms Belousova visiting the appellant in Russia.

5) In the application for permission to appeal it was contended that the appellant had in his latest application disclosed everything that he was required to disclose. He had also disclosed this information in his previous applications. He had been interviewed by telephone in respect of a previous application. It was alleged that he had made a false declaration in an application before that by stating that he had no friends or family in the UK. It was explained by the appellant, and by Ms Belousova, that Ms Belousova was neither a friend nor family at the time. Ms Belousova was no more than an acquaintance and the appellant was not even sure she was in the UK. The Judge of the First-tier Tribunal was wrong to find that the appellant had acknowledged that he did not give a truthful answer in a previous application. The appellant had never accepted that he had used deception. Permission to appeal was granted on the basis of these grounds.

6) A Rule 24 notice was submitted on behalf of the respondent stating that on the evidence the judge was entitled to find that the refusal under paragraph 320(7B) was justified. The sponsor's letter indicated that the appellant had not been truthful although the appellant sought to justify the reasons for that. It was contradictory to suggest that the sponsor was only an acquaintance of the appellant when the letter from Ms Belousava indicated more than that.

7) At the hearing before us Mr Matthews acknowledged that the earlier application for entry clearance from October 2012 was not before the First-tier Tribunal and was not available for us to examine. There was no record of the interview carried out with the

appellant. Mr Matthews indicated that he had a document verification report but he acknowledged that this had not been before the First-tier Tribunal. He accepted that it was for the respondent to establish deception.

8) It was noted that no application had been made to adduce further evidence.

9) Mr Matthews further pointed out that the application was made after the change to the rights of appeal for family visit visa applications. It was noted, however, that Article 8 was raised in the grounds of appeal to the First-tier Tribunal.

10) For the appellant Mr Boyd submitted that there was no deception or dishonesty.

Discussion

11) The Judge of the First-tier Tribunal appears to have been unaware as to the limited jurisdiction of the Tribunal in this appeal. The application giving rise to the present appeal was made on 22nd August 2013 after the coming into force on 25th June 2013 of section 52 of the Crime and Courts Act 2013, which amends the Nationality, Immigration and Asylum Act 2002 so that an appeal against refusal of a family visit visa may be made only on the grounds of human rights or racial discrimination (The Crime and Courts Act 2013 (Commencement No 1 and Transitional and Savings Provision) Order 2013, SI 2013/1042). The Judge of the First-tier Tribunal erred in law by disregarding this restriction on the Tribunal's jurisdiction. The judge had no jurisdiction to consider the appeal under the Immigration Rules. Accordingly we set the decision aside and re-make it below in relation to Article 8 only.

12) So far as Article 8 was concerned, the Judge of the First-tier Tribunal found that Article 8 was not engaged because there was no restriction on the sponsor visiting the appellant in Russia. The appellant and Ms Belousova had not expressed an intention to live together as husband and wife in the UK and the purpose of the application giving rise to the appeal was for a visit for a limited period.

13) On this point we consider that the judge's reasoning was correct. The decision refusing entry clearance was not disproportionate because of the nature of the visit which was intended and because the appellant and the sponsor did not intend to live together in the UK. This was intended to be a visit of limited duration only and there was no restriction on the sponsor visiting the appellant in Russia, the country of which they are both nationals.

14) There is, however, an aspect of the respondent's case which causes us concern. This is the finding that the appellant used deception in making an application for entry clearance in October 2012. As Mr Matthews acknowledged, we did not have before us evidence to establish what the appellant said or omitted to say about Ms Belousova in relation to the application for entry clearance of October 2012, upon which the respondent sought to found the allegation of deception. It is clear from a Visa Application Form (VAF) dated 4 September 2013, which was before us, that the

application form asks about family members or other relatives in the UK. The appellant's position is that at the time of the October 2012 application Ms Belousova was neither a family member nor a relative. At most she might have been described as the appellant's girlfriend, although the appellant himself seems to have been uncertain at that point about the status of the relationship. He was also uncertain as to the whereabouts of Ms Belousova at the time of his proposed visit. He thought it was possible, as he had sought to explain and as Ms Belousova had explained in her letter, that she had returned to Russia to visit her parents.

15) The situation at the time of the October 2012 application was that the appellant was a young man who hoped to locate his girlfriend in the UK, where she was studying, and propose to her, but at the time he made his application for entry clearance he did not know whether she would accept his proposal or whether she was even in the UK. These facts, on the basis of the evidence set out before us, which does not include either the VAF of October 2012 or any interview record, hardly seems to constitute a basis for establishing an attempt to obtain entry clearance by deception, as the respondent has maintained.

16) The documentary evidence refers to a telephone interview conducted with the appellant on 20 May 2013 but, as Ms Belousova states in her letter of 23 October 2013, this was an interview in connection with a later application made in May 2013 and not in respect of the application of October 2012 in which it is alleged deception was used. We have no record before us of what precisely was said at the telephone interview.

17) It seems that when the appellant was interviewed by telephone on 20 May 2013 he acknowledged that when making his application in October 2012 he did not disclose his intention to see Ms Belousova and to ask her to marry him. At no point, however, does any consideration appear to have been given to the crucial question of whether the appellant was under any obligation to disclose this intention when completing the VAF in October 2012. The VAF asked him only about family members or other relatives in the UK, and not about friends. At the time he made the application Ms Belousova was not related to the appellant and was not even his fiancée.

18) Similarly, the letter dated 23 October 2013 from Ms Belousova appears to have been written on the basis that the appellant was under some obligation to disclose his intention to see Ms Belousova and ask her to marry him when he applied for entry clearance in October 2012. It might be argued that this was a material fact in relation to the application but it would have been material only if there was evidence suggesting that the appellant intended to remain in the UK with Ms Belousova in breach of any leave he might have been given. There is no evidence that this was the appellant's intention.

19) Accordingly we are far from satisfied on the evidence before us that the respondent has an adequate basis for concluding that the appellant attempted to use deception when making his application for entry clearance in October 2012.

20) No application for anonymity has been made and we do not consider that any order to this effect is appropriate

Conclusions

21) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

22) We set aside the decision.

23) We re-make the decision in the appeal by dismissing it under Article 8, subject to the reservations as to the respondent's position which we have expressed.

Fee Award **(**Note: This is not part of the determination)

As the appeal has been dismissed, no fee award can be made.

Signed Date

Upper Tribunal Judge Deans