



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14285/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 3rd September 2018

Decision & Reasons Promulgated
On 14th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ATIYA ASLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

UK VISAS - SHEFFIELD

Respondent

Representation:

For the Appellant: Mr M Symes of Counsel instructed by Hunter Stone Law
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant is a female citizen of Pakistan born 30th December 1985. She appeals against a decision of Judge Pickup (the judge) of the First-tier Tribunal (the FtT)

promulgated on 30th November 2017 following a hearing on 14th November 2017. The judge dismissed the Appellant's appeal against refusal of entry clearance as the spouse of a person settled in the UK.

2. The Appellant had applied for entry clearance as the spouse of Abdul Aziz Shaik to whom I shall refer as the Sponsor.

The Refusal

3. The application was refused on 4th May 2016. The Respondent considered the application with reference to Appendix FM of the Immigration Rules. The decision was refused with reference to paragraph 320(11) of the Immigration Rules. The Respondent found that the Appellant had obtained a TOEIC English language certificate by deception. This certificate had been obtained while the Appellant was in the UK. The Respondent set out the Appellant's immigration history which is summarised below.
4. The Appellant first entered the UK in 2011 as a Tier 4 Student with leave to remain until March 2013. In February 2013 she made a further application for leave to remain which was refused. She successfully appealed that decision and the Secretary of State was ordered to re-make the decision.
5. The decision was re-made on 9th December 2013 and again refused. The Appellant appealed, and her appeal was allowed.
6. The Appellant then decided to leave the UK voluntarily. On 15th January 2015 the Appellant left the UK voluntarily and returned to Pakistan. In December 2014 the Home Office discovered that in her application for leave to remain made in February 2013 the Appellant had used an English language certificate that had been fraudulently obtained, as she had employed a proxy test taker for the speaking part of the test.
7. On 11th March 2015 the Appellant applied for entry clearance as a Tier 5 religious worker indicating in her application form that she was married to Raja Abdul Saeed. This was despite claiming she was in a relationship with the Sponsor since July 2013. That application was refused on 20th March 2015 on the basis of the fraudulently obtained English language certificate.
8. On 15th July 2015 the Appellant applied for entry clearance on the basis of being a fiancée of the Sponsor. That application was refused on 30th September 2015.
9. The Appellant and Sponsor then married in Pakistan on 2nd January 2016 and in February 2016 she applied for entry clearance, which application is the subject of this appeal.
10. The Respondent invoked paragraph 320(11) on the basis that the Appellant had overstayed in the UK and there were other aggravating factors such as using a fraudulently obtained English language certificate in an application for leave to remain, and making frivolous applications.

11. The application was not refused with reference to the suitability requirements for entry clearance, the Respondent accepting that these requirements were satisfied.
12. The application was refused with reference to the eligibility requirements as the Respondent did not accept that the Appellant was validly divorced from Raja Saeed before marrying the Sponsor. Therefore the marriage was not valid.
13. The Respondent relied upon E-ECP.2.6, not accepting that the Sponsor and Appellant had a genuine and subsisting relationship, E-ECP.2.7, not accepting that the couple had entered into a valid marriage, and E-ECP.2.10, not accepting that the couple intended to live permanently together in the UK.
14. The Respondent was satisfied that the financial requirements and English language requirements of Appendix FM were satisfied.
15. With reference to Article 8 of the 1950 European Convention on Human Rights the Respondent did not accept that the Appellant had family life with the Sponsor and therefore Article 8(1) was not engaged. In the alternative if family life was established, the Respondent's view was that the decision was proportionate under Article 8(2). No satisfactory reason had been given as to why the Sponsor would be unable to travel to Pakistan to live with the Appellant. The Respondent was satisfied that refusal of entry clearance was justified by the need to maintain effective immigration control.
16. The refusal decision was reviewed and maintained by an Entry Clearance Manager on 1st November 2016.

The First-tier Tribunal Hearing

17. The judge heard evidence from the Sponsor and two further witnesses, described as friends of the Sponsor. The judge found that the Appellant was validly divorced and therefore her marriage to the Sponsor was valid. The judge was satisfied that the Appellant and Sponsor have a genuine and subsisting relationship. The judge found that the Appellant had used deception in her application for leave to remain in 2013 by using an English language certificate which had been obtained by fraud.
18. The judge found that paragraph 320(11) was satisfied by the fraudulent use of the English language certificate and was satisfied that aggravating features existed. The judge found that the Appellant had not been an overstayer. The judge found that the aggravating feature required to satisfy paragraph 320(11) was the application made by the Appellant in March 2015, in which she applied for entry clearance as a religious worker. The judge found that the religious worker application made in March 2015 was a "deliberate attempt to obfuscate and that the Appellant at the very least had been economical with the truth". The Appellant in that application had confirmed that she was married to Raja Saeed and that they remained living together. The judge found that becoming a religious worker was not the true or genuine purpose of the application and she was using the application as "no more than a device to gain entry to the UK to further her relationship with the present Sponsor". The judge found that the application was disingenuous, and contained misleading information with the sole

intent of gaining entry to the UK to marry the Sponsor. At paragraph 43 the judge records that the Respondent was justified in relying on concerns about this religious worker application as aggravating circumstances justifying the exercise of discretion to refuse the application under paragraph 320(11).

19. With reference to Article 8 the judge found that the Appellant could not satisfy the Immigration Rules, and concluded that the public interest outweighed the Article 8 rights of the Appellant and Sponsor, and therefore the decision to refuse entry clearance was not unjustifiably harsh, and was proportionate.

The Application for Permission to Appeal

20. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds are lengthy and will not be repeated here. In brief summary it was contended that the judge had materially erred in law in finding that the Appellant had obtained an English language test certificate by deception. It was contended that the judge had materially erred in law in considering paragraph 320(11).
21. It was noted that the Respondent had contended, in the refusal decision, that the Appellant had made frivolous applications as she had been served with a notice prior to her departure from the UK notifying her that she was considered to have used deception in relation to obtaining the English language test certificate. In addition, the Respondent did not accept that the Appellant's marriage to the Sponsor was genuine or valid.
22. The judge found that the Appellant had not been served with any notice prior to her departure from the UK and found that the Appellant and Sponsor had a genuine and subsisting relationship and were legally married.
23. It was contended that the judge had erred at paragraphs 40-42 when considering the application for entry clearance as a religious worker. It was submitted that the judge had found that she had exercised deception in relation to that application. It was submitted that this finding was unfair as this had not been put to the Appellant, and this was something that the judge had raised, without giving the Appellant notice.
24. The case that the Appellant was meeting regarding refusal was that she had made frivolous applications, not fraudulent applications. The judge did not make it clear to the Appellant or her representative that he was considering making a finding that the Appellant had deliberately misled the Respondent in relation to the religious worker application. The Appellant was therefore not given an opportunity to address these concerns by way of evidence and submissions. The judge found a lack of evidence in relation to the religious charity who had offered the Appellant a post as a religious worker. It was submitted that the lack of evidence stemmed from the fact that this was not raised as an issue in the refusal. Again, it was stressed that the Respondent's reason for refusal was the making of frivolous applications, not that the Appellant had deliberately set out to mislead the Respondent.

25. With reference to the religious worker application it was pointed out that at the date of that application the Appellant was in fact married to Raja Saeed and therefore that evidence was not misleading. They were divorced after the application was submitted. It was submitted that the judge erred in concluding that the Respondent's assessment under paragraph 320(11) was sound because the judge had found that the aggravating features relied upon by the Respondent did not exist. That is with the exception of frivolous applications, and the judge had not found that frivolous applications had been made, but made a finding not raised in the refusal, that the religious worker application was an attempt to mislead the Respondent.

Permission to Appeal

26. Permission to appeal was initially refused by Judge Manuell of the FtT who found no arguable error of law.
27. The application was renewed and permission to appeal was granted by Upper Tribunal Judge Rintoul although on limited grounds. Judge Rintoul found no error of law in the conclusions of the judge that the Appellant had exercised deception in order to obtain an English language test. Permission to appeal was granted in the following terms;

"It is, however, arguable that if, as is averred at [11], the judge did not give the Appellant the opportunity to comment on the matters upon which he relied to conclude that there had been aggravating circumstances, his decision involved the making of an error of law, if these points had not been taken by the Respondent.

It is therefore also arguable that the Article 8 findings involved the making of an error of law, given that they are predicated on the sustainability of the findings in respect of paragraph 320(11) of the Immigration Rules".

The Upper Tribunal Hearing - Error of Law

28. In making oral submissions Mr Symes relied upon the grounds upon which permission to appeal had been granted. It was submitted that the judge had erred materially in considering paragraph 320(11). It was accepted that there was a finding that the Appellant had used deception in an application for leave to remain in the UK, but the judge had failed to find any other aggravating circumstances which would justify refusal under paragraph 320(11). Mr Symes emphasised the point made in the grounds, that the judge had raised issues not relied on in the refusal decision, in that the judge had found that the Appellant had not been truthful in making the religious worker application, and had deliberately attempted to mislead the Respondent. The Appellant did not have an opportunity to provide evidence or make submissions on that point.
29. Mr Tan submitted that the judge had not materially erred.
30. Mr Tan accepted that the decision of the FtT did not disclose that frivolous applications had been made and therefore it could not be said that frivolous applications were an aggravating feature with reference to paragraph 320(11), but submitted that the judge

was entitled to make the finding that the religious worker application represented an aggravating feature and therefore did not err in law in finding that paragraph 320(11) applied. In any event, Mr Tan pointed out that the judge had refused the application with reference to Article 8 and so the dismissal of the appeal was not simply because paragraph 320(11) applied.

31. Mr Symes responded by submitting that the Article 8 assessment was flawed because the judge had made a finding that paragraph 320(11) applied.
32. The decision prepared by the judge is thorough and comprehensive, and it is evident that it has been prepared with care. However, I am persuaded that the judge materially erred in law in his consideration of paragraph 320(11).
33. The judge found that the aggravating features relied on by the Respondent in the refusal decision did not apply, in that the Appellant did not overstay in the UK, and was not aware before she left the UK that a decision had been made to remove her for fraud (paragraph 38).
34. The judge found the Appellant and Sponsor to have a valid marriage and a genuine and subsisting relationship, and an intention to live together permanently.
35. In my view the findings made by the judge at paragraphs 40–42, are unsafe. I accept that the Appellant did not have an opportunity to answer the conclusion that she had deliberately set out to mislead the Respondent by making the religious worker application and was applying for an ulterior motive. The case that the Appellant was meeting was that the applications were frivolous, not fraudulent. The Respondent in the refusal had not made any allegation of deception or fraud in relation to the religious worker application. Therefore the judge erred in law, in not giving the Appellant the opportunity to comment on matters relied upon in relation to the religious worker application, which the judge found to be aggravating circumstances.
36. For the reasons given above I set aside the decision of the FtT but preserve the finding that the Appellant had obtained the English language test certificate by deception. The other findings that are preserved, are that the Appellant did not overstay, was not aware prior to her removal from the UK that a decision had been made to remove her in relation to deception, and that the Appellant and Sponsor have a valid marriage, a genuine and subsisting relationship, and intend to live permanently with each other.
37. I was invited by both representatives to re-make the decision without a further hearing which I agreed was appropriate. I agreed to admit further evidence on behalf of the Appellant, there was no objection from Mr Tan. This evidence was a letter from Bahu Trust dated 20th August 2018, confirming that the Trust had offered the Appellant the post of religious worker.

Re-making the Decision

38. I re-make the decision based on the evidence before the FtT and the additional evidence referred to above from Bahu Trust.

39. This is an appeal against refusal of a human rights claim. The Appellant relies upon Article 8 of the 1950 Convention. In deciding this appeal I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali [2016] UKSC 60.
40. The burden of proof lies on the Appellant to establish her personal circumstances and why the decision to refuse her human rights claim interferes disproportionately in her family life rights. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout. I begin by considering paragraph 320(11) which is set out below;
- (11) where the applicant has previously contrived in a significant way to frustrate the intentions of the rules by:
- (i) overstaying; or
 - (ii) breaching a condition attached to his leave; or
 - (iii) being an illegal entrant; or
 - (iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and
- there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.
41. In PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) it was held that in exercising discretion under paragraph 320(11) the decision maker must exercise great care in assessing aggravating circumstances said to justify refusal. Regard must be had to the public interest in encouraging those unlawfully in the UK to leave and seek to regularise their status by an application for entry clearance.
42. As stated in paragraph 14 of that decision, if the aggravating circumstances are not truly aggravating there is a serious risk that individuals will continue to remain in the UK unlawfully and not seek to regularise their status. The effect then is likely to be counter-productive to the general purposes of the relevant rules and to the maintenance of a coherent system of immigration.
43. The finding by the judge that the Appellant did not overstay is preserved. It is not contended that the Appellant breached a condition attached to her leave when in the UK, nor that she was an illegal entrant. It is, however, the case that she used deception when she applied for leave to remain, by using an English language test certificate that had been obtained by deception, as she had employed a proxy test taker.
44. I do not find that the aggravating circumstances referred to in paragraph 320(11) apply. I do not find that the entry clearance application made in March 2015 as a

religious worker can fairly be described either as a frivolous application, or as an attempt to mislead the Respondent. With reference to Raja Saeed, I find this is technically correct, as at the time of application the Appellant was still married to that individual, and her divorce occurred subsequently, and she married the Sponsor in January 2016 which was after the religious worker application was refused on 30th September 2015. The judge made reference to a lack of evidence in relation to the offer of a position as a religious worker. I find this has now been answered by the letter from Bahu Trust dated 20th August 2018. I accept the information contained therein. I therefore accept that the Trust is a registered charity and that the Appellant applied for a religious worker post in August 2014 and was interviewed and offered the role. As she did not have settled status she was advised by the Trust that she could not be issued with a certificate of sponsorship but she would have to return to Pakistan and make an application for entry clearance.

45. The Trust held the role for the Appellant while she applied for entry clearance, but when entry clearance was refused, the role was re-advertised and subsequently accepted by another person. I am satisfied that Bahu Trust holds an A rated Sponsor Licence. I also accept that the Trust has made enquiries with colleagues in Pakistan, and the Appellant is currently volunteering for the Trust in Pakistan by teaching young children.
46. The burden of proving that paragraph 320(11) applies is on the Respondent and the standard of proof is a balance of probabilities. While it has been proved that the Appellant exercised deception in making an application for leave to remain in the UK, it has not been proved that there are other aggravating features and I therefore conclude that this application for entry clearance should not have been refused by reference to paragraph 320(11).
47. I note that the application for entry clearance was not refused on suitability grounds. It is specifically stated in the refusal decision that the suitability entry clearance requirements are satisfied.
48. The findings made by the FtT that the marriage is valid, and that the couple intend to live permanently with each other and are in a genuine and subsisting relationship are preserved. This is because those findings were not challenged by the Respondent. Therefore E-ECP.2.5, 2.6, and 2.10 are satisfied.
49. The Respondent accepted in the refusal decision that the financial requirements and English language requirement of Appendix FM are satisfied.
50. Turning to Article 8, I am satisfied that family life exists between the Appellant and Sponsor. The judge found at paragraph 50 of the FtT decision when considering Article 8 that the Appellant had not been able to show that she met any of the requirements of the Immigration Rules. That is incorrect, as the Respondent initially accepted that the financial requirements were satisfied as were the English language requirement and the suitability requirements. The judge went on to find that the eligibility requirements were satisfied.

51. Therefore I find that the requirements of the Immigration Rules, set out in Appendix FM, which relate to entry clearance as the partner of a person settled in the UK are satisfied.
52. What I must consider is the public interest, because the Appellant used deception in a previous application for leave to remain. I have regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. This confirms that the maintenance of effective immigration controls is in the public interest. It is in the public interest that individuals seeking to enter the UK can speak English and are financially independent. The Respondent accepts there would be financial independence and the Appellant has the required ability to speak English. These are therefore neutral factors in the balancing exercise.
53. The relationship between the Appellant and Sponsor was not formed when the Appellant was in the UK unlawfully.
54. The deception occurred prior to 2013 when the proxy test taker was employed, and in 2013 when the English language test certificate was submitted with an application for leave to remain. The Appellant has not been convicted of any criminal offences. There have been no further examples of deception since 2013. The Appellant left the UK voluntarily in January 2015, in order to regularise her immigration status.
55. Substantial weight must be accorded to the need to maintain effective immigration control, but I must attach weight to my conclusion that the Appellant satisfies the requirements of the Immigration Rules. Balancing the act of deception that occurred in excess of five years ago, with the efforts made by the Appellant to regularise her immigration status, and the fact that Appendix FM is satisfied, I conclude that the public interest does not require the Appellant to be excluded from the UK, and the decision to refuse entry clearance is in the circumstances disproportionate and breaches Article 8 in relation to the family life rights of the Appellant and Sponsor.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

There has been no request for anonymity and I see no need to make an anonymity direction.

Signed

Date 6th September 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

As I have allowed the appeal I have considered whether to make a fee award. I make no fee award. The appeal has been allowed because of evidence considered by the Tribunal that was not before the initial decision maker.

Signed

Date 6th September 2018

Deputy Upper Tribunal Judge M A Hall