Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16770/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2015	**On 7 July 2015**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FARUK RUSTEMI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr R Thoree, Thoree & Co Solicitors

DECISION AND REASONS

1. The respondent is a citizen of Macedonia and his date of birth is 4 December 1979. I shall refer to the respondent as the appellant as he was before the First-tier Tribunal.

2. The appellant made an application for entry clearance on 19 November 2012 in order to join his British citizen spouse, Catherine Graham. The application was refused for

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a number of reasons on 25 July 2013. The decision was maintained by an Entry Clearance Officer on 18 February 2014. The appellant appeals against the decision and his appeal was allowed by Judge of the First-tier Tribunal C Newberry in a decision that was promulgated on 19 January 2015 following a hearing on 8 September 2014. Permission to appeal was granted by First-tier Tribunal Judge Parkes in a decision of 10 March 2015.

3. The application was refused by the Entry Clearance Officer pursuant to S-EC.2.2(b) of Appendix FM of the Immigration Rules. This reads as follows:-

> "S-EC.2.2. Whether or not to the applicant's knowledge – ...
>
> (b) there has been a failure to disclose material facts in relation to the application."

4. The substance of the decision was that according to the Entry Clearance Officer in the appellant's application form at Q55 he was asked whether he had ever been deported, refused or otherwise required to leave any country including the United Kingdom in the last ten years, to which he answered "no". Thus, he failed to mention that he had been removed from the UK in 2005.

5. He was also asked in the application form to provide details of all his trips to the United Kingdom in the last ten years. He stated in answer to this that he came to London in 2010 and left in 2012. However, he failed to mention that he had made a trip to the UK before this visit as evidenced by his being encountered by immigration officials at Gatwick Airport in 2009.

6. It was further noted by the Entry Clearance Officer that there was no record of him ever having applied for a visa to come to the United Kingdom and that the passport which he submitted with his application which was issued on 30 September 2009 did not contain any information to suggest that it was used either to enter or exit the UK between 2010 and 2012. It is also alleged that the appellant was encountered at Gatwick Airport on 12 August 2009 attempting to embark on a flight to Pristina and claiming that he had entered the United Kingdom three weeks previously on a flight from Germany using a Macedonian passport and that he did not have to see an Immigration Officer on arrival. It was noted by the Entry Clearance Officer that the passport that he presented on that occasion contained one stamp and that it was an exit stamp from Macedonia in 2006. Further it is alleged that in 2009 Macedonian nationals still required a visa in order to enter Germany.

7. The Entry Clearance Officer did not accept that the marriage was genuine and subsisting.

8. Before the First-tier Tribunal there was a statement from Mrs Catherine Graham and in relation to the issue under S-EC.2.2(b) of Appendix X her evidence was as follows:

> "3. Faruk and I noted the contents of the refusal letter. Faruk first came to the UK in 1998 and claimed asylum. His application for asylum was refused sometime in 2000 and he overstayed. Faruk was encountered by the Immigration Authorities and was removed to Pristina on 29 September 2005. In 2006, Faruk entered the UK again clandestinely. Faruk returned to Macedonia on 12 August 2009. On this occasion Faruk was encountered at Gatwick Airport when he was embarking a flight to Pristina. Faruk entered the UK again clandestinely in 2010 and returned to Macedonia in October 2012.
>
> 4. Faruk entered the UK clandestinely three times. The first time, he entered the UK and claimed asylum as he was called up for his military service and as an ethnic Albanian he did not want to serve in the Macedonian army. During the years that Faruk was in the UK there has been a lot of tension between ethnic Albanians and Macedonians. Faruk did not want to be involved and entered the UK twice clandestinely to escape the pressures from his own community. Faruk told me that initially he did not think much of it, but now he is ashamed and feels very guilty for entering the UK illegally. Of course, this is no justification but just an explanation as to why he embarked on these long and dangerous trips to enter the UK illegally."

9. In addition there was before the First-tier Tribunal a letter form the appellant of 6 September 2004 which states, in relation to the issue under S-EC.2.2(b) of Appendix FM as follows:-

> "I now know that what I did in entering the UK illegally was wrong. At the time I was very young and I was trying to get away from a hostile situation in Macedonia that was getting increasingly difficult to live in. Many of my friends were leaving the country for the UK and I joined them to get away from the ethnic tension in the country.
>
> This is no justification for what I did, and as I have got older I realise that this was not the right way to behave. I am ashamed of my behaviour and very sorry for what I did."

10. The judge heard evidence from the appellant's wife, Catherine Graham. He found that she was perfectly candid about her husband's immigration record but made the point not only of his contrition but also that it was a relatively long time ago. The judge went on to find that the sponsor was honest and truthful noting that she holds a senior position in the Institute of Cancer Research. He attached weight to the sponsor's evidence. He went on to find as follows:-

> "13. The Entry Clearance Officer recognises in his review that where a party makes false statements this would normally lead to a refusal, but there is a 'discretion for the deciding authority'.

14. Having looked at the evidence in the round and heard the wife (which the Entry Clearance Officer was not able to do) my judgment is that this application should be allowed to enable what I consider to be a genuine and subsisting marriage to continue without the barrier of separation, which would inevitably occur due to the wife's demanding professional life.

15. This decision in no way condones the appellant's past behaviour, but I am satisfied as to his contrition and do not consider that the public interest is served by preventing the parties continuing their married lives together."

11. The grounds seeking leave to appeal maintain that the judge did not adequately reason the decision in accordance with the Immigration Rule which requires in these circumstances that such an application will normally be refused.

12. Mr Thoree submitted that the judge heard evidence from the appellant's wife and he accepted it and the judge had discretion whether or not to allow the appeal and it was a matter for him. The Entry Clearance Officer did not find that the marriage was genuine and subsisting, but the judge found in the appellant's favour in this respect.

Error of law

13. In my view the judge materially erred. Where S-EC.2.2.(b) is engaged as it clearly is in this case, according to S-EC.2.1. the applicant will normally be refused on grounds of suitability. In this case it is a fact that the appellant failed to disclose material facts in the application form. There was no evidence before the First-tier Tribunal which dealt with that particular issue. The evidence related very generally to his immigration history, but not the failure to disclose. The judge reached a conclusion that discretion should be exercised in the appellant's favour without engaging with the issue of failing to disclose material facts. In light of the decision, the appellant's immigration history and the failure to disclose which can only have been intentional and indeed there is no evidence that it was not the decision to exercise discretion in the appellant's favour is inadequately reasoned. I have taken into account Mr Thoree's submissions and I acknowledge that the judge found that the marriage was genuine and subsisting and that he accepted the evidence of the sponsor; however the judge did not properly engage with S-EC.2.2.(b) and focused on the appellant's immigration history generally accepting that he was remorseful. The judge did not adequately reason why in this case discretion should be exercised in favour of the appellant whilst cases of this nature should normally be refused on grounds of suitability.

14. I set aside the decision of the First-tier Tribunal to allow the appeal under the Rules pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and I went on to re-make the decision pursuant to Section 12(2)(a)(ii) of the 2007 Act. Neither party had submitted further evidence in accordance with the standard directions to the parties.

15. Article 8 of the 1950 Convention was raised in the grounds of appeal before the First-tier Tribunal. This was not determined by the First-tier Tribunal and it is incumbent upon me to determine this ground of appeal. The First-tier Tribunal found that the sponsor was a credible witness and there is no need for me to go behind those findings. The marriage is genuine and subsisting. The couple met in October 2011 on line and they married in Skopje on 9 November 2012. She has two adult children from a previous marriage and she has a well-paid job, working for Cancer Research. Her witness statement of 27 August 2014 indicates that from March 2012 she has been working for the Institute of Cancer Research on a salary of £50,000. In the sponsor's witness statement her evidence is that her mother, who lives in Yorkshire, was diagnosed with cancer in January 2013 and had major surgery in February 2013 resulting in ongoing radiotherapy. The sponsor visits her regularly and due to her mother's condition she has been unable to travel and spent time with her husband as much as they both would have liked.

16. In following the approach outlined by the House of Lords in the case of R v SSHD ex parte Razgar [2004] UKHL 27 it is obvious that the first three questions of the first three tests of the five identified by Lord Bingham of Cornhill should be answered in the affirmative. It is obvious that excluding the appellant interferes with his and his wife's right to respect for family life and I follow the decision in Shamin Box [2002] UKIAT 02212 that the obligation imposed by Article 8 is to promote the family life of those affected by the decision. On the facts of this case the decision to refuse the appellant entry clearance interferes with his and his wife's private and family lives and the interference is of sufficient gravity potentially to engage the operation of Article 9.

17. The Entry Clearance Officer did not determine whether or not the appellant could meet the maintenance requirement of the Rules. However the judge accepted the sponsor's evidence which would establish that he would be able to meet the maintenance requirement of the Rules. However, he cannot meet the suitability requirements of the Rules relating to entry clearance and family life with a partner. That he cannot meet the requirements of the Immigration Rules are a weighty consideration in favour of the respondent but in no way is it determinative of the appeal.

18. In the leading case of Huang [2007] UKHL 11, Lord Bingham said at para 20:-

> "In an article 8 case where this question [i.e. the question of proportionality] is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide."

19. A state is entitled as a matter of international law and subject to its treaty obligations to control the entry of aliens into its territory and their residence there. An appellant cannot normally succeed if all he can show is that he or she would prefer to conduct his family life in the host member state.

20. I must consider Article 8 and proportionality through the prism of Section 117B of the 2002 Act. The maintenance of effective immigration control is in the public interest and little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.

21. I have taken into account paragraph 16 of the judgment in Huang v SSHD [2007] UKHL 11 which reads as follows:-

> "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on....".

22. In this case there are weighty factors in the respondent's favour. The appellant's conduct is obviously relevant in terms of his previous immigration history and his more recent tendered failure to disclose facts in his application form. He has acted in a way that undermines immigration control. The appellant and the sponsor's relationship started at a time when the appellant's status here was unlawful. Whilst I appreciate that the marriage is genuine and subsisting and it will be difficult for the sponsor to leave her mother, adult children and career, there was no evidence before the First-tier Tribunal and there is no evidence before me relating to the degree of difficulty the sponsor would have in relocating to Macedonia in order to live with the appellant.

23. The appellant has never lawfully been in the UK although he has been here it seems on a number of occasions.

Notice of Decision

24. The appeal is dismissed under the Immigration Rules.

25. The appeal is dismissed under Article 8 of the 1950 Convention on Human Rights.

26. No anonymity direction is made.

Signed Date

Upper Tribunal Judge McWilliam