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

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision and Reasons Promulgated**
On: 18th May 2015	**On 29th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

HAFIZA BIBI
(no anonymity direction made)

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:
For the Appellant: **Ms Faryl, Counsel instructed by TM Fortis Solicitors**
For the Respondent: **Mr Harrison, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellant is a national of Pakistan date of birth 16th January 1989. 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 with Pakistani nationality. 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 like her and her husband 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. Following a hearing in August 2014, at which the Appellant was represented by Dr Thorndike and the Respondent by Mr McVeety, I found there to be an error of law such that the decision of the First-tier Tribunal must be set aside. My reasons were as follows.

13. 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.

14. 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.

15. 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.

16. 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 mandates 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.

17. 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. This was, one presumes, in recognition of the obligation under Article 8.

18. 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.

The Re-Made Decision

19. Following the error of law decision I directed that at the resumed hearing the parties should 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?

20. It is a great pity that by the time the matter was relisted in May nobody had served a skeleton, authorities or any relevant supporting documents in accordance with my directions. In addition the case could not proceed until 3.45 because Ms Faryl was otherwise engaged.

21. Issue (i) was resolved by consent. Mr Harrison accepted that the burden of proof lay on the Respondent to show that the Appellant's exclusion was justified on the grounds that it was 'conducive to the public good'. This is consistent with the burden always falling on the Respondent in respect of paragraph 320 of the Rules: JC (Part 9 HC395, burden of proof) China [2007] UKAIT 00027. As for the standard, it was at the higher end of the spectrum of a balance of probabilities, as confirmed in JC:

> "13. So far as the standard of proof is concerned, we consider that what the Immigration Appeal Tribunal said in Olufosoye [1992] Imm AR 141 still holds good: "insofar as the justification consists of deception or other criminal conduct the standard of proof will be at the higher end of the spectrum of balance of probability" (see also R v IAT ex parte Nadeem Tahir [1989] Imm AR 98 CA). This approach reflects that of the House of Lords in R v Secretary of State for the Home Department ex p.Khawaja [1984] AC 74 and is consistent with subsequent case law (see e.g. Bishop [2002] UKIAT 05532). In R (AN & Anor) v Secretary of State for the Home Department [2005] EWCA Civ 1605 Richards LJ stated at [62]: "Although there is a single *civil standard of proof* on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proven, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities".

22. Mr Harrison further accepted that bar this suitability requirement, all the other substantive requirements of the Rules (as set out in Appendix FM) were met.

23. In respect of the second question the parties were less sure. Mr Harrison produced an internal Home Office document entitled '*General Grounds for Refusals RFL:03*' but none of the guidance therein appeared relevant to this case. Ms Faryl had nothing to say beyond relying on a skeleton prepared by Dr Thorndike for the previous hearing, in which it is pointed out that the consequences of mandatory refusal are very serious and submissions made as to why the Appellant's exclusion cannot be said to be 'conducive to the public good'. The reasons given are that "nobody has been harmed by the submission of a false document"; the deception related wholly to her sponsor's earlier conduct and not to the validity of her marriage; the deception was revealed by the Sponsor entirely voluntarily and had he not done so the Respondent would have been none the wiser; both Appellant and Sponsor are deeply remorseful, genuinely in love and would face serious obstacles in trying to establish themselves together in Pakistan. He is without any permission to live in Pakistan, has no connections there and she is living in conflict-ridden Balochistan where Shi'a Hazaras are subject to attack by Sunni extremists.

24. The term "conducive to the public good" has, in the pre-Appendix FM past, been interpreted to require fairly serious reasons for exclusion. For example, persons have been refused entry clearance where the Secretary of State has personally deemed their presence "socially harmful" by virtue of their toxic

political views[1], where serious criminality such as drug importation has been involved[2], in the interests of national security[3] or foreign policy[4], or where public policy demands it so[5]. It has consistently been held that the discretion of the Entry Clearance Officer to apply this ground for refusal is a wide one[6]. It is not however a provision which should be applied for trivial reasons. It should be borne in mind that there are a number of other entirely discretionary (as opposed to mandatory) grounds for refusal which can be invoked instead. It has been held that a relevant consideration would be whether the conduct, character or associations concerned would justify deportation[7].

25. What then, if any, difference is there in the application of the new scheme? As I noted in my 'error of law' consideration, paragraph S-EC.1.5 does not appear to contemplate a potential violation of Article 8 where a genuine and subsisting marriage is involved, unlike the old 320(7A)/320(7B) scheme which would have previously applied in this instance. The parties had been unable to find any Home Office policy documents setting out the current guidance on what "conducive to the public good" might mean as far as the Respondent is concerned. At the hearing a simple Google search managed to unearth quite a few.

26. The document entitled 'Immigration Directorate Instruction Family Migration Appendix FM Section 1.0a: *Family Life (as a Partner or Parent): 5-Year Routes'* notes that the 'general grounds for refusal' set out in part 9 of the Immigration Rules do not, for the most part, apply to applicants under Appendix FM, whose admissibility to the UK is considered under the 'suitability' criteria. Those sub-sections of paragraph 320 which do continue to apply to persons seeking entry clearance as partners are (3) failure to produce identity document, (10) passport not recognised by the UK, and (11) where the applicant has contrived in a significant way to frustrate the intentions of the Immigration Rules for instance by using false representations in an application for entry clearance. Paragraph 320(11) is a discretionary ground for refusal, and it would appear from this guidance that it is one which the Entry Clearance Officer in this case could at least have considered.

27. Where consideration is to be given to exclusion on conducive grounds the reader is referred to the paper entitled 'General grounds for refusal Section 1

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[1] R (ono Farrakhan) v SSHD [2002] EWCA Civ 606 (Nation of Islam leader)

[2] Villone v SSHD [1979-80] Imm AR 23 (drugs discovered in baggage on arrival)

[3] GI v SSHD [2011] EWHC 1875 (Admin) (SIAC case involving allegations of links of Islamic extremists)

[4] Lord Carlile & Ors v Secretary of State for the Home Department [2012] EWHC 617 (Admin) (exclusion of Iranian dissident on the grounds that Iran may take retribution if the ban was lifted)

[5] R v IAT (ex parte Ajaib Singh) [1978] Imm AR 59 (a man seeking entry to marry a 14 year old girl)

[6] See for instance Ivlev, R (on the application of) v Entry Clearance Officer, New York [2013] EWHC 1162 (Admin) at 59

[7] Olufosoye v SSHD [1992] Imm AR 141, R v ex parte Cheema [1982] Imm AR 124, CA.

of 5: *about this guidance, general grounds for refusal and checks'* in which (at page 100) the following guidance is given to decision-makers:

> This page explains what the Immigration Rules say about when exclusion is conducive to the public good, which is a general ground for refusal.
>
> **What the rules require**
>
> If it is conducive to the public good not to admit a person to the UK because of their character, conduct or associations you must consider refusing entry or leave to remain.
>
> Such a person may include:
>
> - a member of a proscribed group
> - a person suspected of war crimes or crimes against humanity
> - a person whose presence is undesirable because of their character, conduct or associations
> - a person whose presence might lead to an infringement of UK law or a breach of public order

28. It will be observed that this admittedly non-exhaustive list of examples does not include a previous reliance on a false document, and that the kind of conduct required to properly invoke the provision appear to be at the extreme end of the spectrum of misconduct. I have also had regard to the "General grounds for refusal Section 2 of 5: *Considering entry clearance*". This advises Entry Clearance Officers to check for evidence of:

> - adverse behaviour (using deception, false representation, fraud, forgery, non- disclosure of material facts or failure to cooperate)
> - non conduciveness, adverse character, conduct or associations (criminal history, deportation order, travel ban, exclusion, non-conducive to public good, a threat to national security)
> - adverse immigration history (overstaying, breaching conditions, illegal entrant, using deception in an application)
> - adverse health (medical reasons)

Again, a distinction is drawn between false representation, which here falls under the heading "adverse behaviour" rather than "non-conduciveness" which covers matters such as national security. The broader term "conduct character or associations" is not defined, although at page 21 of the 'Immigration Directorate Instruction Family Migration Appendix FM Section 1.0a: *Family Life (as a Partner or Parent): 5-Year Routes'* it is noted in this context that "the applicant can meet the suitability requirements even where there is some criminality".

29. Perhaps most apposite of all is the internal policy instruction document entitled 'When can I refuse on character, conduct or associations?' published in November 2013. The titular question is answered:

> 'Paragraphs 320(19) and S-EC.1.5. provide for a discretionary refusal of entry clearance on account of a person's conduct, character or associations. ECOs must be aware that there maybe more than one factor which would lead to the application being refused on character, conduct or associations grounds. While a person does not necessarily need to have been convicted of a criminal offence, the key to establishing refusal in this category will be the existence of reliable evidence necessary to support the decision that the person's behaviour calls into question their character and/or conduct and/or associations such that it makes it undesirable to grant them entry clearance.
>
> A non-exhaustive list could include:
>
> Low-level criminal activity. Association with known criminals. Involvement with gangs. Pending prosecutions. Extradition requests. public order risks. Prescribed organisations. Unacceptable behaviours. Subject to a travel ban. War crimes. Article 1F of the refugee convention. Deliberate debiting. Proceeds of crime and finances of questionable origins. Corruption. Relations between the UK and elsewhere. Assisting in the invasion (*sic*) of the immigration control. Hiring illegal workers. Engaging in deceitful or dishonest dealings with Her Majesty's Government.'

And further:

> Examples of the types of cases where refusal under 320(19) may be appropriate include:
>
> - where a person's admission could adversely affect the conduct of foreign policy;
> - where the person's admission would be contrary to internationally agreed travel restrictions (for example, UN sanctions or EU measures) but the relevant resolution or common position has not been designated under the Immigration (designation of travel bans) order 2000. If it has been designated under the order, section 8B(1)(b) of the 1971 Act must be used to refuse LTE;
> - the person is a threat to national security;
> - there is reliable evidence the person has been involved in or otherwise associated with war crimes or crimes against humanity. It is not necessary for them to have been charged or convicted a person's admission might lead to an infringement of UK law or a breach of public order;

- a person's admission might lead to an offence being committed by someone else, for example, extreme views that if expressed may result in civil unrest resulting in an infringement of UK law.

When determining if a refusal under 320(19) is warranted the ECO must also take into account any human rights grounds and ensure that the refusal is both proportionate and reasonable.

30. None of this caselaw or guidance leads me to conclude that the circumstances in this case are ones which could properly lead to this wife of a British national, who otherwise meets all the requirements of the Immigration Rules, being excluded on the grounds that her conduct, character or associations makes it undesirable to grant entry clearance. The conduct relied upon is confined to the fact that she knowingly signed a VAF containing false representations to the effect that her husband had previously been married and divorced. In fact he was never married at all. Whilst I wholly reject Dr Thorndike's submission that there was 'no harm done' by this attempted deception the Entry Clearance Officer does appear to have failed to take into account all of the relevant factors, including i) that this is a genuine marriage ii) that the attempted deception was only unveiled by the Sponsor and Appellant and but for their candour might never have come to light iii) the procurement of the false document was by the Sponsor and not her. In his submissions at the 'error of law' stage Dr Thorndike asked me to give some weight to the fact that as a relatively uneducated Hazara woman living in Balochistan the Appellant may not have been in a position to argue with her new husband – or indeed father – about whether she should sign the VAF.

31. Deception and other forms of interference with the operation of immigration control are serious matters. The production of false documents is capable of undermining the entire system and a great deal of taxpayers money is deployed in the detection and prevention of such fraud. I have given substantial weight to that fact. However having considered all of the circumstances in this case I am not satisfied that the Respondent has shown the Appellant's exclusion to be conclusive to the public good. The poor conduct was confined to one instance of attempted deception, which was admitted before the Tribunal. This is a genuine marriage and that one instance, in a previous application, cannot justify refusal to grant entry clearance.

Decisions

32. The decision of the First-tier Tribunal contained an error of law and it is set aside.

33. I re-make the decision in the appeal by allowing it under the Immigration Rules.

34. I was not asked to make a direction as to anonymity and on the facts I see no reason to do so.

Deputy Upper Tribunal Judge Bruce
15th June 2015