Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11355/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination sent**
on 8 July 2013	**on 10 July 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M OMAR FARUK (also known as FEROZ BUHYAN)

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) This determination refers to parties as they were in the First-tier Tribunal.

2) In the identity of Feroz Buhyan, a citizen of Bangladesh born on 8 September 1983, the appellant entered the UK as a student in 2011. He did not study. The police arrested him as an overstayer on 16 October 2012.

He then said that his real identity is M Omar Faruk, a citizen of Bangladesh born on 8 September 1983, and he sought asylum.

3) The respondent refused the claim for reasons explained in a letter dated 6 December 2012. The respondent declined to accept that the appellant is M Omar Faruk, and rejected his account that he was at risk of persecution on return to Bangladesh.

4) The respondent also considered the claim under Article 8 of the ECHR, within the terms of Appendix FM of the Immigration Rules, on the basis of his relationship with Lorna Riddoch, a UK citizen. The respondent found that Ms Riddoch was not the appellant's partner as defined in the Rules, and that in any event their relationship was not genuine and subsisting.

5) The appellant appealed to the First-tier Tribunal. By determination dated 28 March 2013, First-tier Tribunal Judge Debra Clapham accepted that the appellant's true identity is M Omar Faruk, but rejected his account of any involvement in political activity and his claim to be at risk on return. The determination concludes thus:

> 86. I also considered the appellant's claim in terms of Article 8. I note that the respondent considered the Article 8 claim in terms of Appendix FM … and found that the appellant does not meet the requirements because his partner is not a partner as defined in the Rules. I have also considered the matter in terms of the general jurisprudence of Article 8 and on both accounts I find that the appellant has family life as claimed.
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> 87. Ms MacNamee on behalf of the Home Office sought to show … that the appellant and his alleged partner were inconsistent … However, it seemed to me that the parties were consistent in relation to their account of their social life. I found Ms Riddoch to be genuine in that she has a strong affection for the appellant. Both she and the appellant narrated how they became engaged and both were also clear that they discussed marriage in November last year. They were also consistent in relation to when they last went out socially and they were both also consistent insofar as both narrated that he helps Ms Riddoch with her shopping.
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> 88. … Ms Riddoch cannot easily relocate to Bangladesh. She has severe medical problems and she also appears to have a close relationship with her own family in the UK.
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> 89. … The appellant's immigration history is far from satisfactory … there are credibility issues in relation to his asylum claim but I consider that Ms Riddoch is genuinely fond of the appellant … it would be disproportionate to expect the appellant to leave the country and relocate in the circumstances … Ms Riddoch would be severely and detrimentally affected by his departure … their relationship is genuine and subsisting.
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> 90. I dismiss the appeal on asylum grounds.
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> 91. I dismiss the appeal on humanitarian protection.
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> 92. I allow the appeal under Article 8.

6) The SSHD's first ground of appeal to the Upper Tribunal is that the judge erred in law by failing to consider the Rules as a detailed expression of government policy. The Article 8 sections of the Rules reflect the respondent's view as to where the balance lies between individual rights

and the public interest, and reflect the broad principles of Strasbourg and domestic jurisprudence. The Secretary of State therefore expects the courts to defer to her view, endorsed by Parliament, of how proportionality should be considered in an individual case.

7) Ground 2 is that the Article 8 outcome is unreasoned, or inadequately reasoned.

8) Mr Mullen submitted that the judge failed to give any consideration to the case under Article 8, so far as incorporated in the Rules, and failed even to conclude which of the appellant's identities was reliable. The appellant used different identities and had an appalling immigration history. Mr Mullen accepted that the judge's conclusion that there is a genuine and subsisting relationship was not attacked in the grounds. He also accepted that the judge, on much recent authority, was correct in considering Article 8 separately from the Rules. He said it was not clear what weight was given to the appellant's immigration history in considering the freestanding Article 8 claim. The only point on which there was a conclusion in the appellant's favour was that his partner was genuinely fond of him. However, this was a short lived relationship and there was no explanation of why the proportionality balance should be struck in the appellant's favour. On the authority of Izuazu (to which no direct reference was made; it is [2013] UKUT 45 (IAC), produced for the appellant) there had to be weighty reasons for a decision in the appellant's favour in such a case, and there was no such reason here. The determination should be set aside and the decision remade in the Upper Tribunal. For that purpose, Mr Mullen invited the Upper Tribunal to admit into evidence a copy certificate of approval issued to a Nigerian citizen on 25 February 2009 for his proposed marriage with Ms Riddoch.

9) It became common ground that such a certificate of approval for marriage was issued, that Ms Riddoch did marry the Nigerian citizen, that they subsequently divorced, and that on 7 June 2013 she married the appellant.

10) Mr Mullen submitted that the Upper Tribunal should have been made aware of the sponsor's marriage history, and that successive marriages to two much younger overseas nationals within a short period of time gave grounds for suspicion that these were marriages of convenience. This undermined any significance to be given to the relationship in striking the proportionality balance. A fresh decision should be made, dismissing the appeal.

11) Mr Winter acknowledged that the judge had not expressly dismissed the appeal under the Immigration Rules, although she ought to have done so. However, it was plain that parties were agreed at the hearing before her that the case did not meet the terms of the Immigration Rules, and there was no need for her to delve into these any further. She was also bound to consider the case outwith the Immigration Rules, on which point there are now several authorities, but she did not need to rehearse these either. Mr

Winter said that the matter is now governed by MS [2013] CSIH 52, the conclusions of which are summarised at paragraph 30. The question was whether the appellant had shown a "good arguable case" to be dealt with outside the Rules, which she had done. Although that case was not reported until after the judge's decision, the other cases pointed at in a similar direction, and she had in fact asked herself the correct question, which was simply whether the case succeeded under Article 8. Error by failing expressly to dismiss the case under the Rules was immaterial. An expert Tribunal should in general be assumed to have taken the correct approach, and on appeal the Upper Tribunal should be slow to interfere.

12) On the second ground, Mr Winter submitted that the reasoning was brief but adequate. The judge made a clear finding that there was a genuine relationship, which was not attacked in the SSHD's grounds of appeal. The facts before the judge had been that Ms Riddoch has an elderly mother, children and grandchildren and makes weekly visits to the grave of a deceased daughter. There was also evidence of her medical condition. It had not emerged in evidence that she was previously married to another non-UK citizen. A statement by Ms Riddoch had not been before the First-tier Tribunal, although she gave oral evidence. It appeared that she had not been asked any question which would lead to disclosure of her marital history. There was no reason why she or the appellant should have thought it relevant to volunteer the information. The matter would in any event have been on the records of the Home Office, and non-emergence had no sinister implication. If the determination were to be set aside and remade, the decision should again go in the appellant's favour. It was further to be taken into account that as an EU citizen Mr Riddoch could not be expected to relocate to Bangladesh. If the appellant were to be removed, there would effectively be a permanent separation. Mr Winter also pointed out that at paragraph 80 the judge accepted that the appellant's identity is as he now claims.

13) I reserved my determination.

14) Judges are not required to set out all the case law which forms the background to their decisions, particularly when they do not have any opposed legal submissions to resolve. The respondent's position in the refusal letter and in the first ground of appeal is effectively that the Article 8 consideration is co-extensive with the Rules, but there appears to have been little if any discussion by representatives of the correct legal approach to this issue at the hearing. However, it was clearly implicit in the appellant's approach that although he could not meet the specific requirements of Appendix FM, his case nevertheless had to be considered outwith the Rules. That is correct. In the absence of submissions, I do not consider the judge had to say any more than she did. She should be given credit for familiarity with the leading cases on the topic of greatest current interest in this jurisdiction, and she did in effect focus on the question whether the appellant had a good arguable case outside the Rules.

15) The respondent does not succeed in showing either absence or inadequacy of reasoning. The respondent has not suggested that the conclusion is one at which no reasonable judge could have arrived. The material factors on each side were plainly before the judge. The concluding paragraphs explain why she came down on the side she did.

16) The judge should have dismissed the appeal under the Rules, but the omission is of no practical significance.

17) The respondent may think the outcome over-generous, but the attack upon it at ground two is in substance no more than a disagreement.

18) The SSHD's appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal shall stand.

Date
Judge of the Upper Tribunal