Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14849/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 April 2015	**On 6 May 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ENTRY CLEARANCE OFFICER NEW DELHI

Appellant

and

SATWINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss Figiwala, Senior Home Office Presenting Officer
For the Respondent: Miss A Mohsin, Counsel, instructed by Marks & Marks Solicitors

DECISION AND REASONS

1. I see no need for, and do not make, an order restricting reporting about this decision.

2. This appeal comes about because the respondent, hereinafter "the claimant", made an unsuccessful application for entry clearance as a partner under Appendix FM of the Immigration Rules. His application was refused on 19 June 2013 and the claimant given a document entitled "Notice of Immigration Decision - Refusal of Entry Clearance".

3. He appealed successfully to the First-tier Tribunal and the present appellant, hereinafter "the Entry Clearance Officer", was given permission to appeal. It was said that the reasons for the First-tier Tribunal's decision were, arguably, inadequate and, in any event, the First-tier Tribunal failed to decide if the appellant could be accommodated in accordance with the rules. It was also said the First-tier Tribunal had not applied properly

section 117B of the Nationality Immigration and Asylum Act 2002 (described wrongly by the Entry Clearance Officer as "paragraph 117B of the Immigration Act 2014) which is entitled "Article 8: public interest considerations applicable in all cases".

4. Before considering the First-tier Tribunal's Determination it is necessary to look carefully at the Entry Clearance Officer's "Refusal of Entry Clearance" dated 19 June 2013 to try and unravel just what has happened in this case. For reasons that will become apparent, the Entry Clearance Officer's decision, which was upheld by an Entry Clearance Manager, is not as helpful as it could have been.

5. The Notice begins by recording, correctly, that the claimant has applied for entry clearance as a partner under Appendix FM of the Immigration Rules and that the application was considered with reference to paragraph EC-P.1.1 of Appendix FM and 320(11) of the Immigration Rules.

6. Paragraph EC-P.1.1 of the Immigration Rules is headed "Entry clearance as a partner" and is a "catch all" provision requiring that the applicant is outside the United Kingdom, that he has made a valid application for entry clearance as a partner, that the applicant "must not fall for refusal under any of the grounds in S-EC and the applicant must meet all of the requirements of Section EC-P.

7. Paragraph 320(11) is under the general heading "Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused". Paragraphs 320(8) to 320(22) (less three deleted paragraphs) create the relevant grounds. I set out below the terms of paragraph 320(11) as I need to consider them later. The Rule states that there is ground on which entry clearance should normally be refused:

> (11) Where the applicant has previously contrived in a significant way to frustrate the intention 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 agreed documentation process."

8. Having set out that reminder of the requirements of paragraph 320(11) I set out below the Entry Clearance Officer's "Reasons for Refusal" on this point.

9. The Entry Clearance Officer said:

> "You state in your application that you entered the UK in August 2004. You state that you travelled to Moscow in 2002 and then into the UK illegally via France in a lorry. You state that you met your sponsor in 2006. I note that you remained illegally in the UK and at no point during this time attempted to regularise your stay. By your own admission you worked illegally. You came to the attention of the police in 2008 and were convicted of theft on 22/01/08, this is an unspent conviction. I note that by your own admission you were imprisoned in the UK.
>
> You gave three different identities to the authorities; SINGH SATIWNDER [sic], GILL SATWINDER SINGH, SONGRA AMRINDER SINGH, along with three different dates of birth; 15/09/79, 25/12/74 and 15/09/78.
>
> You then made an in-country application on 17/12/09 for an Unmarried Partners Common-law Spouse Visa, however I note that this application was voided as an inappropriate application, as whilst this application was being processed you were extradited to Brussels on 27/10/10 from UK to serve a four year prison sentence.
>
> You have applied for settlement to join your spouse. In your visa application you have chosen not to declare: that you have made an application to the Home Office to remain in the UK in the last ten years (Q59); that you have any criminal convictions in any country (Q60), and you have not declared that you have ever been known by any other names. At interview you again chose not to declare your different identities, when asked if you ever used a different name, you stated 'No'. I note you stated as an explanation that you did not give your surname to the authorities as you were not using it, and out of confusion told them your year of birth was 1978. You failed to satisfactorily to declare that you had also used a false identity, and I do not find your explanation credible. Furthermore, you failed to declare at interview or in your application form that you have any criminal convictions in the UK.
>
> I note that you also made an application to join the Olympic Accreditation Work Force which was refused on 17/07/12. You made this application two months prior to your settlement application and have chosen not to declare this in your visa application or at interview.
>
> It is clear from the foregoing that you not only made false declarations to the Immigration Authorities but you also continued to frustrate the Immigration Rules in your attempts to remain there. I am satisfied that your persistent and continued deception is consistent with having contrived in a significant way to frustrate the intentions of the Immigration Rules. Your application is therefore one that, according to paragraph 320(11) of the Immigration Rules, should normally be refused. I have considered the circumstances of your application. However, on balance I am not satisfied that your particular circumstances are of a sufficiently compelling nature to justify my granting your application, having regard to the fact that it should normally be refused."

10. As will soon become apparent, many of the claims made above are unjustified. I set out below some comments on the Reasons for Refusal.

11. The paragraph beginning "You state in your application ..." makes the incorrect assertion that the appellant's conviction is not spent. The rehabilitation period for an offence punished by a fine is five years and so the conviction would appear to have been spent on 22 January 2013,

which is about six months before the Entry Clearance Officer's decision. I note that the application was made in 2012 when the conviction was not spent but it is plain that even this introductory paragraph to the Reasons for Refusal contains an error on a point that might be thought important.

12. Neither can I reconcile the assertion that the claimant "At no point during this time attempted to regularise your stay" with the assertion that he made an in country application on 17 December 2009.

13. The evidence that the claimant has used false identities appears to come from a "Police Certificate Issued For Entry Clearance Purposes" and answers at interview. According to the Certificate the claimant was known to the police as "Satwinder Gill" who was born on 15 September 1978 and has used the aliases "Satwinder Singh", "Satwinder Singh Gill" and "Amrinder Singh Songra". There were two dates of birth identified as being linked with his aliases. One was for 15 September 1979 and the other was 25 December 1974. It will be appreciated that, unlike the police, the Entry Clearance Officer regards "Satwinder Singh date of birth 15/09/1979" as the appellant's true identity. We are not told which dates of birth were said to be linked to which of the three alternative names.

14. I set out below the relevant questions and answers at the applicant's interview on 12 March 2013

"Q40: Have you ever used a different name?
A: No
Q:41 Official records in the UK show you have used alias names.
A: No. It was just that I was not using my surname. My surname was Gill.
Q42. Have you ever used different dobs?
A: Yes. When I was arrested the first time I gave them the wrong date of birth.
Q43: Why did you give them a different date of birth?
A: I was confused.
Q44: What does that mean, you were confused?
A: My date of birth is 79 but I told them 78.
Q45: Why did you give them a different dob?
A: It was a mistake.
Q46: Did you correct the mistake?
A: Yes, I told."

15. Firstly, this explanation, such as it is, does not begin to justify the use of the name Amrinder Singh Songra. The claimant was not asked about his alleged use of this name, and, as I read the interview, does not admit using it. No efforts appear to have been made to investigate the police report. In my experience such reports are made conscientiously and are usually reliable, but they are not infallible and given that the point was never raised with the claimant and not investigated by the Entry Clearance Officer, it is difficult to see that much weight can be given to it.

16. Similarly, the admitted inconsistency in the date of birth cried out for further investigation. The interview records suggest that the claimant remembered giving a false name. He said that he had corrected the error. It would be very interesting to know if the correction was made immediately, as might occur if there was a slip of the tongue, or only after

the error had been pointed out and if the latter, to know exactly what was said and in what circumstances. Again this is an area where further questions were appropriate. The possibility that the claimant has used an entirely different name and date of birth was not investigated or even raised with him and his explanation for giving a different date of birth, namely that it was a mistake that he corrected, was untested.

17. This neglect seriously diminishes the weight that can be attached to the Entry Clearance Officer's concerns. The evidence in the interview is as consistent with the appellant being a manipulative man who specialises in obfuscation as it is with an apprehensive man who made a silly mistake that he quickly corrected. It really was incumbent upon the Entry Clearance Officer to ask more searching questions. The role of an Entry Clearance Officer is to investigate an application, not to collect uncritically answers that would justify a refusal. Additional questions may well have either shown that the claimant did not do very much wrong or that he had embarked on a deeply dishonest course.

18. The paragraph beginning "You made an in country application ..." is inconsistent with the suggestion that he did nothing to regularise his stay.

19. However, the biggest worry is the contention that he was "extradited to Brussels on 27/10/10 from UK to serve a four year prison sentence". This is, at best, seriously incomplete. Whilst it might be right that the claimant was extradited because he was thought to be due to serve a sentence of imprisonment in Belgium, the fact is he did not serve a four year sentence of imprisonment in Belgium. If he had he would not have been able to make an application from India in July 2012 or be interviewed in March 2013 when he said that he was released by the Belgian authorities after two months (question 36). According to a letter from his solicitors dated 28 June 2012 "All criminal charges against Mr Singh [were] dropped in Brussels and Mr Singh made a voluntary departure to India". The First-tier Tribunal Judge noted at paragraph 19 of his determination that the appeal had been adjourned specifically for the Entry Clearance Officer to provide further evidence concerning the appellant's extradition and application to join the Olympic Accreditation Workforce but none had been provided.

20. It seems clear to me that the contentions that the claimant served a prison sentence in Belgium, applied to join the Olympic Accreditation Workforce and used the name "Amrinder Singh Songra cannot be substantiated and should be ignored which is essentially the view taken by the First-tier Tribunal.

21. Similarly the contention that the claimant used a false date of birth can go no further than finding that on an unidentified occasion he wrongly said that his year of birth was 1979 rather than 1978 and that he drew the attention of the authorities to his mistake.

22. The assertion that "You also continue to frustrate the Immigration Rules in your attempts to remain there" is an odd allegation to make against someone who manifestly was not in the United Kingdom.

23. More positively from the Entry Clearance Officer's perspective, is that the claimant wrongly answered question 59 on his application form "Have you made an application to the Home Office to remain in the UK in the last ten years?" in the negative when he clearly has. He applied to stay as a partner but the application was void. We are told nothing about that application. There is nothing before me to support a finding that the claimant completed the application form unsatisfactorily in respect of that application.

24. Similarly the claimant answered the question 60 "Do you have any criminal convictions in any country (including traffic offences)?" in the negative, when he has been convicted in the United Kingdom of an offence of theft. The paragraph also complains that he had not said that he had been identified by other names but did not explain where in the application form he should have offered that information.

25. I note that in the first paragraph the Entry Clearance Officer referred to the appellant having admitted that he was imprisoned in the United Kingdom but that is irrelevant. It would interesting, if inconsistent with the police evidence, if he had admitted being sentenced to imprisonment following conviction of a criminal offence. As it is the claimant has done no more than admit to being detained which is usual in the case of someone being extradited.

26. The last paragraph beginning "It is clear from the foregoing..." is revealing. The applicant *did* make false declarations to the immigration authorities. He said untruthfully that he had no convictions when he has been convicted of an offence in the United Kingdom. He further said untruthfully that he had not made a previous application to remain in the United Kingdom in the last ten years when he had made such an application, even though it was actually voided. However, the paragraph continues:

> "I am satisfied that your persistent and continued deception is consistent with having contrived in a significant way to frustrate the intentions of the Immigration Rules. Your application is therefore one that, according to paragraph 320(11) of the Immigration Rules, should normally be refused."

27. The use of the word "therefore" cannot be ignored. It is clear that the application was refused because of "persistent and continued deception". That is not a reason for refusing anything under paragraph 320(11). The terms are set out above. Paragraph 320(11) applies where there has been deception in a previous application and that is not alleged against this claimant.

28. If it was the Entry Clearance Officer's case that the claimant had to be refused with reference to paragraph 320(11) because he had previously contrived in a significant way to frustrate the intention of the Immigration Rules by being an illegal entrant and there were aggravating circumstances, namely his use of multiple identities, the refusal, whether or not justified, would have made sense. As it is it is a mess. That is neither the fault of the claimant nor the First-tier Tribunal. It would

however be clear to the First-tier Tribunal Judge, as it is clear to me, that the Entry Clearance Officer's reasons for refusing entry are not made out.

29. The First-tier Tribunal found that the claimant's criminal conduct could not be "treated as part of a programme of deception" and was not contrary to paragraph 320(11). Put simply it rejected the Entry Clearance Officer's reason for relying on paragraph 320(11).

30. The Section headed EC-P.1.1(c) – S-EC; suitability – entry clearance requirements gives two different reasons for refusal. The first is unfounded. It relies on S-EC2.5(a) but that was amended with effect from 13 December 2012 to apply only to convictions within twelve months prior to the date on which the application was decided and there is no such conviction. The theft conviction relied on was in January 2008. The second part relies on paragraph S-EC.2.2(b) which, read with S-EC-2.1, provides that an application will normally be refused where "there has been a failure to disclose material facts in relation to the application". The facts relied upon are that he failed to disclose an earlier application to remain in the United Kingdom and his criminal conviction as well as his identities. These omissions are said to be material "because they show repeated attempts to deceive the Immigration Authorities". Something is material if it might have made a difference to the outcome of the application. Given that the facts were known to the authorities, I am not sure why they were thought to be material but I do not think that it can be said that failing to disclose a criminal conviction when prompted by a direct question can ever be thought of as incapable of making a difference. Similarly an earlier application form, even if the application was voided, might disclose points that assist the Entry Clearance Officer.

31. It follows that there was a failure to disclose material facts. In such circumstances refusal is normal but the First-tier Tribunal Judge held that the failure had not "crossed the threshold of amounting to the kind of deception" that would breach the requirements of the rules. This approach was criticised and it is, frankly, clumsy but it was clearly the judge's view that an undisclosed (but now spent) theft conviction punished by a fine is not a proper reason to prevent the claimant joining his wife in the United Kingdom (see, for example, paragraph 26 of the Determination).

32. The remaining paragraphs deal with the Entry Clearance Officer's finding that the claimant had not shown a genuine relationship and had not shown that he satisfied the accommodation requirements of the Rules.

33. The First-tier Tribunal Judge was clearly satisfied that the appellant was in a genuine and subsisting relationship and gave proper reasons for that finding which have not been criticised. The First-tier Tribunal thought that the facts did come within the scope of paragraph 320(11) of HC 395 and also found that paragraph S-EC.2.2(b) applied but decided that this was a case where the normal consequence should not follow. His essential point is that there is here was a valid genuine marriage and the claimant should not be denied entry clearance because of an offence in 2008 for which he was fined and some equivocation about his identity in circumstances which have not been clearly established.

34. The First-tier Tribunal was also asked to consider the application of Section 117B of the Nationality, Immigration and Asylum Act 2002. This must be a mistaken reference to paragraph 117B(4)(b) which says that 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."

35. Although this seemed to have taxed the First-tier Tribunal considerable, I do not see that this section is in the least bit relevant to the application under appeal. It is under the heading "Article 8 of the ECHR; public interest considerations" and Section 117B is said to be "applicable in all cases". However, the appeal before me has nothing to do with human rights. The appeal was against a decision to refuse under the Rules.

36. Whether it is lawful to proscribe the weight that can be attached to a relationship in an article 8 balancing exercise by reference to when it started rather than its nature and quality remains to be seen. I do not consider it relevant to a decision such as this which is not about "weighing" for the purposes of "Article 8" but about applying the rules.

37. I have considered the grounds relied on by the Secretary of State. As I have explained above, paragraph 320(11) was not relied upon in a meaningful way by the Entry Clearance Officer and it is not the job of a Judge to redraft the Entry Clearance Officer's case. Paragraph S-EC.2.2(b) only applies to material omissions. The Secretary of State made no effort to explain why the omissions were material. The First-tier Tribunal Judge was not particularly concerned about the omissions.

38. Clearly the Entry Clearance Officer has taken a dim view of this claimant because he believed he was dealing with someone sentenced to a long term of imprisonment for people trafficking. The Entry Clearance Officer was wrong. This case is about someone with a now spent conviction for theft from a motorcar who was imprecise about his personal details and failed to disclose that he had made a void application.

39. The First-tier Tribunal was sympathetic to the appellant not giving his full details when he was detained by the police. This might be thought generous but, as I have noted, the circumstances of the use of his false name are not entirely clear. It is not a perverse or otherwise unlawful finding.

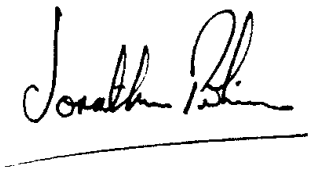
40. Moving on to the second point, the First-tier Tribunal clearly omitted to make any findings about the availability of accommodation. There was evidence before the First-tier Tribunal from the estate agent confirming that the claimant would be allowed to live at the proposed address provided he had proper immigration status. This was seen by Miss Figiwala who, realistically, could not argue against it. Clearly the First-tier Tribunal meant to make a finding about this and just overlooked it.

41. As I indicate above, I do not understand why paragraph 117B is thought to be relevant. This is not a balancing exercise but a qualification under the Rules.

42. The First-tier Tribunal did err in law. It made no finding about accommodation. I find that accommodation satisfying the requirements of the rules was available.

43. Having found no error in the findings that the First-tier Tribunal did make, and having resolved the failure to make any findings about accommodation in the claimant's failure it follows therefore that the claimant satisfies the requirements of the Immigration Rules.

44. Although I must allow the Entry Clearance Officer's appeal to the limited extent indicated above I substitute a decision allowing the claimant' appeal against the Entry Clearance Officer's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 30 April 2015