Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19420/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th April 2015	**On 23rd April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MRS SHUKRIA HALEEMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jaisri, Counsel instructed by Sky Solicitors Ltd
For the Respondent: Miss A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan whose date of birth is recorded as 1st September 1983. On 21st June 2013 she made application for entry clearance as a partner having regard to Appendix FM of the Immigration Rules. On 23rd September 2013 the Entry Clearance Officer refused the application pursuant to paragraph 320(11) of the Immigration Rules on the

basis that the Appellant had used deception in stating that she was married in an attempt to establish ties to the United Kingdom. Additionally the evidence produced by the Appellant to the Entry Clearance Officer was not sufficient to satisfy him or her that she, the Appellant, and the Sponsor were in a genuine and subsisting relationship.

2. On 10th November 2014 the appeal of that decision came before Judge of the First-tier Tribunal Abebrese but not until the Entry Clearance Manager had had a chance to review the decision of the Entry Clearance Officer in the light of the grounds bringing the matter before the First-tier Tribunal. In those grounds it was submitted that the Entry Clearance Officer (as opposed to the Entry Clearance Manager) had incorrectly cited paragraph 320(11)(iii) whereas in fact the appropriate Rule should have been 320(11)(iv), the difference being whether the Appellant had been an illegal entrant or had used deception, although in fact it was always the case so far as the Secretary of State was concerned that deception had been employed.

3. Judge Abebrese heard evidence from the Sponsor and concluded that paragraph 320(11)(iv) applied and in so finding found that there had been deception and by implication that there had been aggravating circumstances about which I shall say rather more in a moment. Additionally Judge Abebrese found as a fact that the relationship between the Appellant and the Sponsor was not genuine and was not subsisting and then set out at paragraph 12 of his Statement of Reasons the explanation for the finding.

4. Not content with the Decision by Notice dated 19th December 2014 the Appellant made application for permission to appeal to the Upper Tribunal. There were a number of grounds but they were premised largely on the assertion that Judge Abebrese had made findings based upon an interview which had not been provided to the judge.

5. On 12th February 2015 Judge of the First-tier Tribunal Hollingworth granted permission. He did so giving his reasons as follows:

> *"1. At paragraph 9 the judge has referred to the Tribunal finding that the evidence given during the screening interview was an indication that she [the Appellant] was indeed married and that when she subsequently denied that she had never been married in the United Kingdom this was an attempt to frustrate the authorities further in the use of deception. The full screening interview was unavailable.*
>
> *2. An arguable error of law has arisen in the context of drawing inferences from extracts from an interview given the absence of the totality of the interview. The Appellant was not in possession of the full copy of the interview and was not therefore in a position to argue the construction to be placed upon any answer or the totality of the answers. It is made perfectly clear at*

paragraph 5 of the permission application that a copy of the interview was not served on the Appellant's representatives."

6. Judge Hollingworth did not address the other grounds. Though he did not refuse permission in respect of them, he does not appear to have granted it. Be that as it may, on 24th February 2015 the Secretary of State filed and served a notice pursuant to Rule 24 of the Upper Tribunal Procedure Rules 2008. In that reply was an extract of the Presenting Officer's note to the effect that the documents in respect of which complaint was made to the effect that they had not been handed up at the hearing, had in fact been served at the hearing. Faced with that reply, under cover of a letter of 9th March 2015 the Appellant's solicitors wrote to the Upper Tribunal filing Amended grounds.

7. For whatever reason those Amended Grounds and the correspondence attaching to them were not placed before a Judge of the Upper Tribunal. Very fairly, however, Miss Fijiwala did not take exception to those Amended Grounds being relied upon. That is not to say that she accepted or conceded there was merit in them but she was content for the Appellant to have the opportunity to rely upon them and so they fall to be considered, by consent, though in any event under the general management powers under the Tribunal Procedure (Upper Tribunal) Rules 2008 I have power to allow grounds to be amended.

8. In substance the Appellant now argues that the application of 320(11) or more particularly the approach taken by the judge to it was flawed, because the Rule is in two parts. The Rule provides as follows:

"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); <u>and</u> (my emphasis)

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."

9. Rule 320(11) provides grounds on which entry clearance to the United Kingdom should normally be refused. It follows that the Secretary of State had a discretion. In pursuing this line of argument Mr Jaisri placed before

me the guidance in relation to 320(11) and reminded me of the guidance in the case of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440**. It is clear from that guidance that a judge should turn his or her mind to whether there is an aggravating feature and whether the aggravating feature is sufficiently aggravating so as to justify refusal.

10. In the instant case the matter was dealt with at paragraph 10 of the Statement of Reasons. It is not in dispute that the Appellant lied. Indeed that is not challenged. The judge refers to a lie at paragraph 7. Though grounds do not challenge the finding it is fair to say that an explanation was forthcoming. As to the aggravating features Miss Fijiwala on behalf of the Secretary of State points to the precarious immigration history of the Appellant, though in fact the judge went further in noting that the Appellant had already been found in an earlier appeal not to be credible. I put that to one side because Miss Fijiwala did not rely on that. She pointed to the precarious immigration history and relied on that only.

11. I agree with Mr Jaisri that the judge did not adequately address the aggravating features. However were I to find that that was material then I note that the Entry Clearance Manager noted that not only had deception been used but that the Appellant had failed to comply with removal directions and had to be removed at public expense on an earlier occasion. Those were said to be aggravating circumstances and in fact Mr Jaisri, when we together considered what the Entry Clearance Manager had to say, accepted that the Entry Clearance Manager appeared to have addressed the matter rather more than the judge, providing a proper basis for the decision. Were I to remake the decision based on the 320(11) point, given those aggravating features identified by the Entry Clearance Manager I would find that they were sufficient to find that the appeal should be dismissed on that basis subject to any human rights considerations.

12. However, in my judgment any error is not material in this case because it is common ground that the Appellant did not meet the requirements generally to rely on Appendix FM so that if she were to have succeeded at all it would have to have been on the basis of the wider application of Article 8 ECHR and then in respect of family life. If there was no family life then there could be no interference with it. In this case the judge found that there was no genuine and subsisting relationship. It was argued by Mr Jaisri that the judge had had insufficient regard to the evidence of the Sponsor and had made inadequate findings. I disagree. It is trite law that a judge does not need to set out each and every aspect of the evidence but the judge had the opportunity to assess the Sponsor and the Sponsor gave evidence.

13. It is clear to me reading the Statement of Reasons as a whole and in particular paragraph 12 that the judge, contrary to what is submitted on behalf of the Appellant, did have regard to the evidence of the Sponsor. It is also clear to me that the judge in making a finding took into account the fact that the Appellant had lied and was therefore a witness whose

evidence had to be looked at with some care. She started at a disadvantage but that was her own fault. She had demonstrated that she was a person who could not be assumed to be a reliable witness. One had to look elsewhere, in addition of course to the evidence that she gave, and treat it, as I have already said, with care. As it was, looking at the evidence as a whole, for the reasons which are set out at paragraph 12 of the Statement of Reasons the judge found that the evidence was insufficient, the burden being upon the Appellant to demonstrate that there was a genuine and subsisting relationship.

14. It is to be borne in mind that it is a question of meeting a standard of proof. The evidence was not sufficient on that point. It may be that a future application made with better evidence will achieve better results so far as the Appellant is concerned. I do not know but it was open to this judge to find as he did. The grounds insofar as they touch upon the nature of the relationship of the Appellant and the Sponsor in fact amount to no more than disagreement with the findings open to the judge and, absent a finding that the relationship existed as between the Appellant and the Sponsor, the Article 8 appeal never got off the ground. It was not necessary for the judge to go any further: WK (Article 8 – expulsion cases - review of case-law) Palestinian Territories [2006] UKAIT 00070

15. In the circumstances any error of law in this statement of reasons is not material. The appeal to the Upper Tribunal is dismissed.

Notice of Decision

The appeal to the Upper Tribunal is dismissed.

Signed **Date**

Deputy Upper Tribunal Judge Zucker