Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06753/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st September 2017	**On 5th October 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR ALBERT DANKSHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Lemer, Counsel instructed by Lupins Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant applied for permission to appeal against the determination of First-tier Tribunal Judge Parkes who dismissed his appeal against the respondent's decision to refuse his application for entry clearance. That decision was taken on 2nd September 2015. The appellant made an application for entry clearance as a spouse. The grounds were as follows.

Ground (i)

The First-tier Tribunal accepted that the appellant was in a genuine and subsisting relationship with the sponsor who is a national of Kazakhstan. The sponsor was able to maintain the appellant and met the substantive requirements of Appendix FM. The focus of the decision was on Article 8. It was contended that the judge erred in his approach to the burden of proof and reference was made to **AB (Jamaica) [2007] EWCA Civ 1302** specifically at paragraphs 7 and 31. At paragraph 31 it stated:

> *"31. The breach of immigration control involved no fraud or concealment was not protracted and was owned up to. The marriage was genuine, subsists and provides a family not only for Mr and Mrs Brown but for her two adolescent girls now settled here. Mr Brown is here not by leave but by right, was born here, has work and housing here and, so far as the evidence goes, has neither lived nor has accessible roots anywhere else. If, as is accepted,* ***the obligation under art. 8(2) rested on the Home Secretary to show that it was proportionate to expect him to emigrate to Jamaica*** *if he wanted to preserve his marriage, not only was there no evidence about the availability of work or accommodation in Jamaica but, when offered the opportunity, the Home Office presenting officer declined to ask Mr Brown any questions about this or anything else.".*

In effect the judge erred in his approach to the burden of proof. So far as there was a burden of proof in relation to proportionality it rested with the Secretary of State. If there was a paucity of evidence that did not matter if the burden was on the Home Office under Article 8(2).

Ground (ii)

The judge legally erred in his failure to take into account relevant factors when exercising discretion. The Tribunal erred in concluding in relation to paragraph 320(11) HC 395 as amended, that to exclude the appellant from the United Kingdom , would not amount to a disproportionate breach of Article 8. There was a failure to take into account material factors. Specifically at paragraph 17 the judge had concluded:

> *"17. The parties would prefer to live in the UK as the alternatives in Kazakhstan and Albania are not, for a number of reasons, preferable although there is no evidence that they could not live in either of those two countries or that relocation would be unduly harsh or that there would be insurmountable obstacles to their doing so".*

The sponsor's witness statement had expressly set out very significant difficulties arising from proposed relocation. There was an absence of suitable accommodation and a lack of any employment opportunities in Albania. There was a failure to make reference to these matters and whilst the decision concluded that relocation would be neither unduly harsh nor give rise to insurmountable obstacles there was no reference to the accommodation or employment. The judge merely concluded at [19] to [20] that the simple act of making an application was insufficient to 'wipe the slate clean in every case' and that there was 'an element of deterrence' in the case.

2. The appellant did not seek to argue that merely leaving the United Kingdom in an attempt to regularise his status should be sufficient to require discretion to be exercised in his favour. It was noted however that the judge accepted that the refusal of entry clearance could not be maintained indefinitely and that at some point, continued exclusion would be unlawful. The appellant had been separated from his wife for 19 months. No reference was made to the period of separation which was in excess of nineteen months. It was incumbent on the Tribunal to consider whether the 19 month period was sufficient period of separation, the appellant did not seek to argue that merely leaving the UK was sufficient to require discretion to be exercised in his favour but, if the period of separation was insufficient the judge should have given reasons.

The Hearing

3. Mr Lemer emphasised the points made in the grounds and advanced that the result was that the reversal of the burden of proof did have an effect and made a difference to the conclusions of the judge.

4. With reference to ground (ii) Mr Lemer specifically referred to paragraph 17 where the judge states:

> *"17. There is no dispute that the marriage is genuine and subsisting or that the Sponsor can afford to maintain the Appellant in the UK and that the requirements of Appendix FM were met in the application. The parties would prefer to live in the UK as the alternatives in Kazakhstan and Albania are not, for a number of reasons, preferable although there is no evidence that they could not live in either of those two countries or that relocation would be unduly harsh or that there would be insurmountable obstacles to their doing so".*

5. Mr Lemer also referred me to the relevant paragraphs in the witness statement of the sponsor. Particularly at paragraph 11, she states that she travelled to Albania and to the house of his family in the village which was one bedroomed, in the mountain and in the middle of nowhere. She noted that she felt very uncomfortable at the time and felt sorry for his family because they lived in poverty. At paragraph 16, as Mr Lemer pointed out in the sponsor's statement, she stated the following:

> *"16. It is therefore impossible to live in Albania with the current unemployment rate we would not be able to secure any jobs. I have been living in the UK for approximately 10 years and I have a established job. I have been in my current employment for 10 years and earn around £37000 per annum. I get paid accommodation allowance on the top as the company pays for my rent. I won't be able to have this opportunity anywhere else. I also believe that UK has become my home and I want to spend my life here with my husband. We have made many friends and had a good circle when we married.*
>
> *17. I become very depressed when this application was refused, as I was left lonely and also developed some health issues. I wanted Albert to come soon so that we can start a family. I want to have a child but it is not possible to commit to a child*

> *when the father is not around. I want my child to have both parents around him. When we married we could have a child but we made a decision not to because he had no status and I was the only bread winner of the family, I couldn't afford to go on maternity".*

6. Mr Lemer pointed out that the judge's approach to the burden of proof resulted in him omitting consideration of relevant aspects of the case put by the appellant and sponsor.

7. A further issue which was very relevant was the length of separation in the matter. At this point the judge acknowledged that there was a point after which it would become proportionate but the judge had nowhere made any reference to the length of the separation, which was nineteen months at the date of decision but had increased now to 27 months.

8. **AB (Jamaica)** confirmed that the burden of proof in proportionality rested with the Secretary of State and that had been acknowledged in the Rule 24 response.

9. On reflection Mr Nath submitted that the point was not straightforward, and not as straightforward as set out in the Rule 24 response and it was for the appellant to provide some evidence.

10. Mr Lemer rejoined that in **AB (Jamaica)** the point was that the Home Office failed to cross-examine on the point of evidence but in this instance it was clear in the witness statement that there were specific difficulties to the appellant returning to Albania but the judge simply missed it. The Secretary of State declined to pursue the matter. There was no engagement with the sponsor's evidence and the approach the judge took would have made a difference. It was not inevitable having taken into account relevant factors that the result would be the same.

11. I was also referred to **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)** and the care that needed to be taken in relation to such matters. The head note reads as follows:

> *"In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise* ***great care in assessing the aggravating circumstances*** *said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance".*

12. In response Mr Nath pointed out that the judge had highlighted the very poor immigration history of the appellant and the judge at paragraph 17 had given and made an opinion on the option of the alternative of the appellant living in either Albania or Kazakhstan.

Conclusions

13. At paragraph 2 the First-tier Tribunal Judge stated

> *'In this appeal the burden of proof lies on the appellant. In order to succeed the appellant must show that on a balance of probabilities that the decision involves a disproportionate breach of human rights.*

14. I was referred, by way of contrast, to paragraph 7 of **AB (Jamaica) v Secretary of State for the Home Department [2007] EWCA Civ 1302** which reads:

> *"7. Secondly, however, the onus which §5(b) of the policy places on the settled spouse to demonstrate undue hardship has no analogue in art. 8(2). The proportionality of a prima facie breach of the Convention right is to be gauged objectively on whatever evidence is available. So far as there is a burden of proof in relation to proportionality, counsel for the Home Secretary accepts that it rests on the state".*

I note that the proportionality, as stated by Mr Justice Sedley, should be gauged objectively on what evidence is available.

15. As in **Huang [2007] UKHL 11** at paragraph 20:

> *"20. In an article 8 case where this question 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. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in Razgar above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal,* ***that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority****. That is still his expectation. But he was not purporting to lay down a legal test."*

The exercise rather than attributing burden of proof emphasises that there is a need to balance the interests of society with those of the individuals and groups. Indeed **Huang** quoted **Razgar** specifically paragraph 20 and that the judgment on proportionality:

> *"Must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference would call for careful assessment at this stage".*

16. In the light of the above it would appear that the overall exercise is one of viewing the evidence objectively and '*striking a fair balance*', but even if the approach in **AB (Jamaica)** is correct, although I accept that in his opening remarks the judge may have erred in his assessment of the approach to justifying the decision, it would appear that at [15] he was aware that the *'issue is whether, at this stage, the appellant's continued exclusions is proportionate'* and indeed at [16] the judge reasons

> *'The more serious the dishonesty and length of its being maintained are clearly relevant issues in assessing proportionality of an Appellant's exclusion. The more serious the efforts to undermine the system and the longer that the pretence is maintained the greater the justification for the exclusion of the appellant for a longer period'*

17. It would thus appear from a careful reading of the decision that despite the injunction at the outset of the decision, that in practice the judge the facts in the light of 'justification for the exclusion' rather than the appellant justifying the decision.

18. As the Rule 24 response from the Home Office stated, "*it is accepted that the appellant did not bear the burden in terms of the Article 8 assessment*". That statement is a relatively opaque statement and does not detract from the fact that it is for the party who proposes a fact has to prove that fact on the balance of probabilities. It may well be that the onus of demonstrating that proportionality is *justified* rests with the Secretary of State but it is still the case that the onus rests with the appellant on the balance of probabilities to substantiate the points that are made and the facts to be made in their favour. It is correct that the proportionality must be justified on the part of the Secretary of State but the facts which should be taken into account on the part of the appellant must be proved on the balance of probabilities, and indeed the positive fact where it is asserted should be the responsibility of the appellant to prove.

19. Further, an important difference between **AB (Jamaica)** and this particular case are the facts. At paragraph 31 in **AB (Jamaica)** Lord Justice Sedley had this to say:

> "*31. The breach of immigration control involved no fraud or concealment, was not protracted and was owned up to. The marriage was genuine, subsists and provides a family not only for Mr and Mrs Brown but for her two adolescent girls now settled here. Mr Brown is here not by leave but by right, was born here, has work and housing here and, so far as the evidence goes, has neither lived nor has accessible roots anywhere else. If, as is accepted, the obligation under art. 8(2) rested on the Home Secretary to show that it was proportionate to expect him to emigrate to Jamaica if he wanted to preserve his marriage, not only was there no evidence about the availability of work or accommodation in Jamaica but, when offered the opportunity, the Home Office presenting officer declined to ask Mr Brown any questions about this or anything else*".

20. In that case the breach of immigration control involved no fraud or concealment. It was not protracted and was owned up to. There appeared to be no question about the underlying facts of that case, and indeed the Home Office were offered the

opportunity to cross examine which was declined. At paragraph 33 of **AB (Jamaica)** it is asserted that the paucity of evidence from the appellant of potential hardship did not matter if the burden was on the Home Office under Article 8(2) to show there was little or none.

21. With reference to ground (ii) in this case the appellant had been refused under the Immigration Rules (having met Appendix FM but refused under paragraph 320(11). The judge found that there was no evidence that relocation would be either unduly harsh nor give rise to insurmountable obstacles. The judge was presented with the evidence in a witness statement from the appellant's sponsor to the effect that they could not relocate to Albania from whence the appellant emanates. There was nothing in the witness statement to suggest that they could not return to Kazakhstan.

22. At paragraph 16 of the sponsor's witness statement she merely states:

> *"16. It is therefore impossible to live in Albania with the current unemployment rate we would not be able to secure any jobs. I have been living in the UK for approximately 10 years and I have a (sic) established job".*

23. What the judge had to say about the evidence of the sponsor is:

> *"The parties would prefer to live in the UK as the alternatives in Kazakhstan and Albania are not, for a number of reasons, preferable although there is no evidence that they could not live in either of those two countries or that relocation would be unduly harsh or that there would be insurmountable obstacles to their doing so".*

24. Mr Lemer argued that the judge had failed to take into account the evidence of the sponsor but the judge clearly referred at [17] to the "number of reasons" that had been cited by the appellant and I am not persuaded that the judge has failed to address the evidence. He framed his response to the evidence of the sponsor in the alternative, and I note that the appellant's case was that she retained family in Kazakhstan. Indeed recorded at paragraph [12] is the sponsor's oral evidence that

> *'with regard to Kazakhstan where the sponsor is from originally she still has family there and goes for work to meet clients. When she visits her employers pay for the flights. There would not be the opportunities there. Asked if they had discussed what would happen if the appeal failed she paused and went on to say that it would be difficult'.*

25. That does not reveal the same difficulties with accommodation and employment as set out in relation to Albania. This was not a paucity of evidence or lack of cross examination but the sponsor referring to mere 'difficulties' in relocating to Kazakhstan not more.

26. The context of this appeal is that the judge was obliged to consider the Article 8 claim taking into account the immigration history of the appellant and the appellant's fulfilment or otherwise of the Immigration Rules. The Secretary of State's case, and justification for the decision, was made through the analysis of the Immigration

Rules which effectively sets out her position in relation to Article 8 – or the justification for her decision thereof.

27. In relation to paragraph 320(11) I accept that it was found in **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440** that the decision-maker must exercise great care in assessing the aggravating circumstances said to justify refusal, and, must have regard to the public interest encouraging those unlawfully in the UK to seek leave to regularise their status. It was argued that the judge had failed to appreciate or spell out the length of time that the parties would be parted, but the judge specifically noted **PS** at paragraph 15 and noted that the issue at this stage was whether the appellant's continued exclusion was proportionate. The judge recorded the fact that the appellant had made a number of applications without success whilst in the UK and that he had left the UK in May 2015 following his refusal of a spouse application. There can be no doubt that the judge was aware of the length of separation of the appellant and sponsor.

28. As the judge pointed out, however, in paragraph 13 there were a number of aggravating features referred to in the body of the Rule including absconding, the use of a false identity or identities, and make frivolous applications. At [13] the judge spells out

> "13. *The situation that the Appellant finds himself in is entirely of his own making. It is not surprising that the ECO took a dim view of his immigration history. Paragraph 320(11) is not mandatory but there are a number of aggravating features referred to in the body of the rule including absconding, the use of a false identity or identities and making frivolous applications. The list is not complete and the making of a fraudulent asylum application would also be an aggravating feature.*
>
> 14. *His use of the Balkan conflict as a cover for economic migration whilst not unique is a clear abuse of a process designed to assist those in distress and in need of international protection. It is clearly a serious piece of dishonesty on his part which he maintained for some considerable period of time and even sought the benefit of the legacy programme under the false identity. It appears that he was not honest with the Sponsor either to begin with although that was corrected fairly early on however his use of the false identity continued in his dealings with the Home Office until 2014".*

As the judge pointed out the actions of the appellant

> "*was a serious piece of dishonesty on his part which he maintained for some considerable period and he even sought the benefit of the legacy programme under a false identity and was not even honest with the sponsor".*

The appellant made an application for asylum as a Kosovan when he was in fact Albanian and continued to use his false identity from 2001 to 2014. As the judge pointed out at paragraph 16

> *"The more serious the dishonesty and length of its being maintained were factors which were clearly relevant issues in assessing proportionality of an appellant's exclusion. The more serious the efforts to undermine the system and the longer that the pretence is maintained the greater the justification for the exclusion of the appellant for a longer period".*

29. As the judge again repeated at paragraph 19 the application of paragraph 320(11) must reflect "*the seriousness of the behaviour of the appellant in his efforts to evade the controls that actually applied in the circumstances*".

30. Although Mr Lemer centred on the sentence in the decision

> *"I am not prepared that the simple of act leaving to make an application is enough to effectively wipe the slate clean in every case",*

it is not just that statement which supports the judge's reasoning but also that he found the appellant's behaviour and dishonesty to be serious and long standing. That finding is repeated at paragraph 20, noting that the appellant could have rectified his position by leaving "*many years before he finally got round to doing so*". The judge also identified that the appellant's behaviour was at the "*significantly more serious end of the scale of possibilities*". Finally, although the judge had noted at paragraph 2 that the burden of proof lay with the appellant and was clearly incorrect in his approach that the balance of probabilities that the decision involved a disproportionate breach of human rights ultimately in the application made clear at paragraph 20

> *"the decision was justified and in the circumstances it cannot be said that the exclusion of the Appellant is inappropriate or that there are circumstances that would require his admission".*

31. The judge had clearly set out the appellant's immigration history and was fully aware of the time that the appellant and his spouse had been parted stating:

> *"The appellant's immigration history was set out starting with his illegal entry and false claim to asylum in a Kosovan identity and his remaining illegally following the refusal of his claim and the dismissal of his appeal following his refusal to attend. From 2010 a number of applications had been made without success. He had left the UK in May 2015 following the refusal of a spouse application".*

32. I am not persuaded that the judge must give further reasons for justifying a further period of separation. What it is important to remember is that Section 117 must be taken into account in any Article 8 exercise and that includes commencing a relationship when it is known that the status of the appellant was precarious. That includes the development of a relationship through the case of **Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC)** and it is the case that the sponsor would have known that the appellant had entered illegally, remained illegally and claimed asylum in a false name.

33. The judge effectively noted a number of aggravating features in the body of the Rule and which would appear to have been fulfilled by the appellant. The appellant not only used a false identity, made numerous applications including a legacy application which the judge identified, but also made a fraudulent asylum application would also be an aggravating feature. The appellant had also absconded between 2003 and 2010, albeit that that was referred to obliquely by the judge.

34. On an overall reading of this decision I can accept that the direction at paragraph 2 was possibly an error but the judge clearly found that the appellant's behaviour was at the significantly more serious end of the scale of possibilities and that the sponsor knew of the appellant's immigration status when she developed the relationship with him and married him. As such I am not persuaded that he judge needed to give further reasoning to justify the separation. On the judge's own findings which had taken into account the relevant factors, on an objective assessment of proportionality, the Secretary of State had justified her decision.

35. As such, I find there is no material error in the approach to Article 8 and that the judge did take into account the relevant factors and made adequate findings when considering the exercise of discretion.

Notice of Decision

The First-tier Tribunal made no material error of law and the decision shall stand.

No anonymity direction is made.

Signed *Helen Rimington* Date 4th October 2017

Upper Tribunal Judge Rimington