Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/23248/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 September 2018	**On 25 September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MALIK SALMAN IDREES
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan, Counsel, instructed by Sky Solicitors
For the Respondent: Mr Lyndsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. No anonymity order is made.

2. The appellant is a national of Pakistan. The appellant entered the United Kingdom on February 8, 2011 with leave to enter as a Tier 4 (General) Student. That leave was subsequently extended until April 19, 2015.

3. On March 18, 2015 the appellant married the sponsor and on April 18, 2015 he applied for leave to remain as a spouse. The respondent refused that application in a decision dated October 4, 2016.

4. The appellant lodged grounds of appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Graves (hereinafter called "the Judge") on February 2, 2018 and in a decision promulgated on February 22, 2018 the Judge allowed his appeal on the basis article 8 ECHR was engaged and that requiring the appellant and sponsor to relocate abroad would amount to a disproportionate interference in the sponsor's family and private life which outweighed the public interest in removal.

5. The respondent appealed this decision on February 28, 2018. Permission to appeal was granted by Judge of the First-tier Tribunal Holmes on June 4, 2018.

6. The matter came before me on July 13, 2018 and on that date I found there was an error in law because whilst I accepted the Judge was entitled to look at the appeal under article 8 I found that in carrying out the proportionality assessment in paragraph 49 of the decision the Judge did not attach any weight to the fact the appellant had used deception, in 2012, to extend his stay. This was a significant deception as without it the appellant would not have been able to remain in this country.

7. In adjourning the matter to today's date, I preserved the following findings of fact made by the First-tier Judge:

   (a) The appellant is in a genuine relationship with his wife.

   (b) When submitting his 2012 application for leave to remain the appellant used a fraudulent TOEIC certificate.

   (c) The appellant could not satisfy the Immigration Rules because section S-LTR 1.6 of Appendix FM of the Immigration Rules applies.

   (d) The appellant gave vague and shifting evidence and discussions he had with his family about his marriage.

   (e) The Judge did not accept the appellant's family had rejected his marriage.

   (f) There was little evidence about ties either the appellant or sponsor had in the United Kingdom as there were no letters of support and minimal photographs.

   (g) The appellant's wife has no cultural, religious, educational or linguistic ties to Pakistan.

(h) The appellant's wife has lived in the United Kingdom and is independent and self-supporting. She does not speak Urdu. She has continuing relationships with family in the United Kingdom.

8. Additional material was lodged by the appellant's representatives on July 6, 2018 and September 14, 2018 consisting of evidence of cancellation of the appellant's Nepalese passport from the Nepalese Embassy, a copy of the Nepal Citizenship Act 2063 (2006) together with statements from appellant and sponsor dated September 9, 2018.

9. I was also handed the Country Information and Guidance Pakistan: Interfaith Marriage, January 2016 Report which both parties wished to refer to.

10. It was common ground that the issue for this Tribunal to decide was whether it would be disproportionate to require the appellant and his wife to leave the United Kingdom to go and live in either Pakistan or Nepal or in the alternative to require the appellant to leave the United Kingdom and reapply for entry clearance.

SUBMISSIONS

11. Mr Lyndsay acknowledged the new evidence that had been served but referred to Section 11 of the Nepal Citizenship Act which clearly enabled the appellant's wife to reapply for citizenship of Nepal albeit she would have to relinquish her British citizenship. He submitted it would not be unreasonable to expect her to do so.

12. Mr Lyndsay submitted that the appellant could not satisfy the Immigration Rules because Section S-LTR 1.6 applied. He submitted the appellant could return to Pakistan either on his own and make a fresh entry clearance application or alternatively return with his wife to live in Pakistan.

13. He invited the Tribunal to take into account the following:

(a) The deception had been significant and there was a public interest in maintaining immigration control.

(b) The appellant's immigration status had always been precarious and this was a factor known to both the appellant and his wife when they began their relationship.

(c) Little weight should be attached to any private life created at a time when the appellant's immigration status was precarious.

(d) The policy document on interfaith marriages demonstrated that it was not illegal for the appellant to marry a non-Muslim woman. Even if there was discrimination he submitted there was protection available and there would be no requirement for the appellant's wife to

convert. Section 5.1.2 made clear that intermarriage in Pakistan was common place and that whilst there were problems for Muslim women wanting to marry non-Muslim men there were no reciprocal problems when a Muslim man wanted to marry a non-Muslim woman. The Judge had previously rejected the appellant's claim that his family were against his marriage and he therefore submitted that there were no insurmountable obstacles to the appellant returning.

14. Mr Khan invited me to find that there had been insurmountable obstacles and that section EX.1 of Appendix FM was engaged albeit he accepted that as there had been a finding of deception the appellant could never succeed under this section in this application.

15. Mr Khan accepted that some interfaith marriages were legal but pointed out that as the appellant's wife was a Hindu their marriage would be deemed unlawful and the appellant's wife would face significant problems due to deep seated discrimination and societal prejudice. In such circumstances internal relocation would not be possible. Mr Khan submitted the appellant and wife would be unable to settle in Pakistan.

16. Mr Khan further argued that because of the new evidence that had been submitted the appellant and his wife would be unable to settle in Nepal because his wife no longer had Nepalese citizenship unless she renounced her British citizenship which he submitted would be unreasonable bearing in mind she had lived here since 2005.

17. Finally, he argued that any independent entry clearance application was bound to fail because it would be refused because of the appellant's earlier deception.

FINDINGS

18. This is a matter whereby the facts were properly considered by the First-tier Tribunal and at paragraph 28 of my earlier decision I preserved certain findings which I have set out at paragraph 7 above.

19. Both representatives agreed that this Tribunal would have to decide whether it was disproportionate to require the appellant (a) to return alone to Pakistan and make an entry clearance application; (b) and his wife to live their lives in Pakistan or (c) and his wife to go and live in Nepal.

20. It has been accepted that this is an appeal outside of the Immigration Rules under article 8 ECHR and in considering whether article 8 is engaged I have had regard to the principles of Razgar [2004] UKHL 00027, subsequent case law on family life and section 117B of the 2002 Act.

21. Mr Khan submitted that to require the appellant to Pakistan and submit an appropriate entry clearance application was disproportionate because the appellant would receive a mandatory refusal under paragraph 320(11) HC 395.

22. Part 9 of the Immigration Rules deals with general grounds for refusal. Rule A320 states-

> "Paragraphs 320 (except subparagraph (3), (10) and (11)) and 322 do not apply to an application for entry clearance, leave to enter or leave to remain as a Family Member under Appendix FM…."

23. Paragraph 320(11)(iv) HC 395 states:

> "Where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by 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 re-documentation process."

24. The appellant clearly would fall with in subsection (iv) but unless there are other aggravating circumstances paragraph 320 HC 395 would not mean an automatic refusal.

25. I have also considered whether the option of living in Nepal would be available to the parties. Section 11 of the Nepal Citizenship makes it clear the appellant's wife has the option of reapplying for Nepalese citizenship.

26. The third possibility would be for the appellant and his wife to both relocate to Pakistan. Mr Khan has submitted that this is not a possibility because the appellant's wife is a Hindu and whilst interfaith marriages are common in Pakistan a marriage between a Muslim male and a Hindu female he submitted such a marriage would not be viewed as legal as they would face significant problems. Contained within the Country Information and Guidance report January 2016 is the approach decision-makers are invited to take when considering whether a person who has entered and interfaith marriage would be at risk of persecution.

27. Section 1.1.2 of that document states that interfaith marriage "includes a marriage between a Sunni Muslim and a Hindu. Section 2.2.1 makes it clear that marriages between different faiths and sects in Pakistan are not uncommon although not all are considered legal. Muslim men can marry other Muslim, Christian or Jewish women but according to section 7.1.1 Islamic law does not recognise Muslim marriages to Hindus although there were reportedly cases of such marriages occurring and there were allegations of Hindu women and girls forcibly converted to Islam and married to Muslim men.

28. At section 3.1.2 of that document it is recognised that not all interfaith marriages are legal and this could make it difficult for women in such marriages to access services but this treatment would not reach a level of severity to amount to persecution or serious harm. Section 3.1.3 highlights the fact that in individual cases there may be a specific risk but as the First-tier Tribunal concluded, and it is a preserved finding, the appellant's family had no issue with his marriage, so this potential risk would not apply in this case.

29. The guidance does not say that Islamic law does not recognise a marriage between a Muslim male and a Hindu woman but such marriages are not illegal. There is a difference between a marriage not been recognised and a marriage being illegal as evidenced by the fact that a marriage between a Muslim woman and a non-Muslim male is considered illegal.

30. I am therefore satisfied that in principle it would be possible for the appellant and his wife to relocate to Pakistan.

31. Having considered the possible alternatives in this appeal (as distinct from allowing the appeal) I now turn to the practical consequences of these on the appellant and his wife.

32. I am not required to make a specific finding under section EX.1 of Appendix FM of the Immigration Rules because this appellant cannot satisfy the Immigration Rules for the reasons set out above. Section EX.2 of Appendix FM of the Immigration Rules defines "insurmountable obstacles" as "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

33. There would be no insurmountable obstacles to family life either taking place in either Pakistan or Nepal so even if I was tasked with making a finding under the Rules the appeal would fail.

34. The appellant and his wife married in March 2015. They have lived together since and I accept they are in a genuine and subsisting relationship. If the appellant was required to leave the United Kingdom there would be an interference with that family life and any private life the appellant had built up at that stage. However, such a decision to require the appellant to leave would be in accordance with the law and for the purposes of maintaining immigration control.

35. The issue ultimately is one of proportionality namely whether it would be disproportionate to require the appellant (and his wife if she were to accompany him) to leave the United Kingdom.

36. Dealing firstly with a possible life in Nepal whilst I accept there are no insurmountable obstacles to them enjoying a family life together there I am satisfied that it would not be reasonable to expect the appellant's wife

to relinquish her British citizenship in light of the fact she has lived in this country for the last 13 years. Whilst I accept she spent a considerable time living in Nepal, before she came here, I accept she has no direct ties to Nepal and more importantly she is not entitled to return to live there because she is no longer a citizen of that country. I therefore find this is not an option open to the Tribunal.

37. The remaining options, other than for the appellant to remain here, are for the appellant to return to Pakistan either on his own or with his wife.

38. The appellant can make an entry clearance application in the knowledge that there is no mandatory refusal in his case. The suitability requirements under section S-EC of Appendix FM of the Immigration Rules do not prevent the appellant being granted entry clearance unless it is refused under section S-EC 1.5 of Appendix FM of the Immigration Rules. I accept that it is possible the respondent could refuse a future application under that section but that would be a matter for the respondent to consider in a subsequent application.

39. The third option is for the appellant to return to Pakistan with his wife. I have already addressed the issue of whether there were any insurmountable obstacles to this taking place I am satisfied there are none.

40. In assessing the proportionality of such a decision, I take into account the preserved findings. Whilst the appellant's wife may experience some practical difficulties due to the fact she does not speak Urdu this is a case where both she and the appellant speak a common language. There would be no reason why the appellant could not obtain work especially as it has previously been found that he has retained family ties.

41. The appellant and his wife married in full knowledge that the appellant did not have leave to remain in the United Kingdom. They would have been aware that there was every possibility the appellant would have to leave the United Kingdom when his leave expired, and I note they married shortly before the expiry of his leave.

42. Even if they are financially independent and able to speak English these are neutral factor.

43. However, when considering the background to this relationship I cannot overlook the fact that this relationship was formed following the appellant's use of deception in 2012. Without that deception he would not have extended his stay and his relationship would have then been formed whilst here unlawfully.

44. Section 117B(1) of the 2002 Act makes it clear that the maintenance of effective immigration control is in the public interest. I am required by statute to give this significant weight.

45. In considering whether it would be reasonable or proportionate to require the appellant to leave this country, either with or without his wife, I have had regard to all matters set out above and have concluded that despite the matters highlighted by Mr Khan it would not be disproportionate to require him to leave the United Kingdom and return either with or without his wife.

46. There are no dependent or qualifying children in this case and the appellant cannot benefit from the respondent's February 2018 family migration policy or section 117B(6) of the 2002 Act. Without any exceptional or compelling circumstances, I am satisfied the public interest requires the refusal of this application.

DECISION

47. I have previously set aside the First-tier Judge's decision on July 13, 2018. I remake the decision and dismiss the appeal on human rights grounds.

Signed Date 21/09/2018

Deputy Upper Tribunal Judge Alis

FEE AWARD
TO THE RESPONDENT

I do not make a fee award as I have dismissed the appeal.

Signed Date 21/09/2018

Deputy Upper Tribunal Judge Alis