Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: OA/03238/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated:**
On 25 October 2013	**On 28th October 2013**

Before

Upper Tribunal Judge Kekić

Between

Subghatullah Ahmadi
(anonymity order not made)

Appellant

and

Entry Clearance Officer

Respondent

Determination and Reasons

Representation
For the Appellant: Mr A Fouladvand, Legal Representative
For the Respondent: Mr S Allen, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission by First-tier Tribunal Judge Nicholson on 12 September 2013 in respect of the determination of First-tier Tribunal Judge Plumptre dismissing the appeal for entry clearance as a spouse on 12 July 2013.

2. The appellant is an Afghan national born on 1 January 1990. He was removed from the UK on 13 July 2011 but prior to that married the sponsor, Faria Nasiri (a British citizen who came here from Afghanistan in 2004), on 23 April 2011. He made his application as a spouse on 11 October 2012; the reason for the delay is unclear but the effect was to bring him within the new rules which came into force on 9 July 2012. Although he maintained he had not been known by any other identity, fingerprint checks revealed that he had used three other identities in addition to that now provided and two different dates of birth in his attempts to enter. Details are set out in the notice of refusal dated 12 December 2012.

3. The ECO considered that he had failed to disclose facts material to his application and that he had contrived in a significant way to frustrate the intentions of the rules. Additionally, the maintenance requirements of the rules were not met. The application was refused under paragraph 320(11), paragraph EC-P.1.1 (c) and (d), E-ECP 3.1 and S-EC.2.2 (b) of Appendix FM. The sponsor visited the appellant in Afghanistan between 22 September 2011 and 18 October 2011 and on 15 June 2012 gave birth to a son.

Appeal hearing

4. At the hearing before me on 25 October 2013, Mr Fouladvand summarised his lengthy grounds into two concise criticisms; first, the judge had failed to consider the discretionary element in paragraph 320(11) and, second, that this meant that her assessment of Article 8 was flawed because she relied on the 320(11) finding when undertaking the balancing exercise.

5. Having considered the evidence, the grounds, the submissions made by the parties and the determination, I conclude that the judge did not make any errors of law and that the grounds seek to promote a very weak case.

6. Although Part II of the permission application purports to set out “grounds” and numbers the first one: “Irrationality”, there is no ground two so I can only presume all the following paragraphs are designed to establish the alleged irrationality. The grounds warn of the high threshold to be reached before a finding on deception can be made. I would likewise say that to succeed in an irrationality challenge requires the crossing of a very high threshold. That has certainly not been done in this case.

7. It was argued by Mr Fouladvand that the judge failed to consider the determination of the Upper Tribunal in PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC). This case was not placed before the judge nor was it relied upon in submissions.

Mr Fouladvand submitted that nevertheless the judge was obliged to consider the law, however he fails to explain the significance of this decision to the appellant's case. In the case of PS, paragraph 320(11) was used to refuse his application solely because he had entered illegally and sought unsuccessfully to remain indefinitely. There had been no finding on whether there were any aggravating circumstances such as whether he had absconded or used false identities and indeed he had left the UK voluntarily rather than being subject to removal. Not surprisingly the Tribunal warned of the importance of a careful consideration of aggravating circumstances. That is all that can be gleaned from PS. Failing to refer to it where there has been consideration of such factors, does not amount to an error of law.

8. The judge sets out paragraph 320 (11) at paragraph 7 of her determination and notes it involves discretion. Additionally, prior to that, at paragraph 3, she refers to the appellant's complaint that discretion should have been exercised differently. Paragraph 320(11) suggests various examples of what "aggravating behaviour" could mean, in addition to either overstaying, breaching a condition of leave, being an illegal entrant or using deception. These factors are said to be 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. It is not disputed that the appellant was an illegal entrant or that he used multiple identities and different dates of birth in order to try and cross into the UK from France. The evidence shows that in February 2009 he absconded and stopped reporting and that an attempt to remove him in non 2009 failed because he was "disruptive". He was later detained after his asylum appeal was dismissed as a fabrication and had to be removed from this country. At paragraphs 30-31, the judge noted that the appellant had used multiple identities and had absconded. At paragraph 38 she found he had remained without leave after his appeal was dismissed. The first two factors alone are to be found from the list of "aggravating factors", let alone the additional factors of being disruptive and frustrating removal and of putting forward a bogus asylum claim, remaining without leave after a failed asylum appeal and having to be removed. He also lied to the immigration service about when he left Afghanistan as the evidence shows at the time he claimed to be in Afghanistan, he had been fingerprinted in France. Given the judge's clear findings of fact, it is difficult to see how the outcome would have been any different even if she had looked at paragraph 320(11) in further detail as specifically referred to discretion, as Mr Fouladvand would have liked.

10. The appellant clearly knew that he had used false identities when attempting to enter the UK, as the judge found. He did not refer to these other identities on his visa application form. The case for deception has been proved. Even if this was not specifically referred to in these terms by the judge, the outcome would have been the same if she had, given the findings she made. I do not therefore accept that the judge erred in her assessment of Article 8. This is an appellant with an appalling immigration history and no stranger to deception.

11. The other complaints in the grounds regarding the balancing exercise take matters no further. Contrary to what is argued, the judge did look at the best interests of the child as a primary consideration, found the baby was very young, had never met his father and that his best interests were to remain with his mother. As for where that might be, that was a matter for the sponsor and appellant to decide. This is not a case where the sponsor has been born and brought up in Britain. She has spent more years of her life in Afghanistan than in the UK and the judge found that her formative years had been spent there. She returned there before her marriage to the appellant "for a holiday" and she encountered no problems and could "go anywhere"(according to the appellant's evidence in Judge Greasley's determination). Her ties cannot be completely broken as she travelled to attend her brother's wedding. Her marriage to the appellant took place only a few months prior to his detention and so the duration of family life was found to be limited. There was no evidence as to the "grievous impact" of the separation on the sponsor and her child, as is maintained in the grounds. The judge herself commented on the limited evidence and cannot be faulted for failing to find that lives would be "destroyed" as the grounds argue.

12. Criticism is also made of the judge's comment that the appellant had not provided a witness statement. It is argued that he is "stranded" in a village and therefore unable to provide any witness statement. Plainly that is not the case. He was able to provide a sample for DNA testing as recently as May 2013 when he gave his address as Kabul and that is where he was living in October 2012 when he made his visa application. His wife visited him last year and claims to be in touch with him over the telephone on a daily basis. His solicitors have plainly taken instructions from him as indicated from their letter of 10 July 2013. Quite how it is claimed he is "stranded" in the middle of nowhere, when the evidence indicates that he is in Kabul, is unclear.

13. The judge properly considered the evidence and took all relevant factors into account. Her findings and conclusions are sustainable.

14. It is accepted that the appellant does not qualify to remain within the immigration rules as the maintenance requirements cannot be met.

15. An anonymity order has not been sought and therefore one has not been made.

Decision

16. The First-tier Tribunal did not make any errors of law and the decision to dismiss the appeal on immigration and Article 8 grounds stands.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

25 October 2013