Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48710/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 July 2015	**On 29 September 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE McGINTY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMIT SHAH

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Presenting Officer
For the Respondent: In Person

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State but for convenience we refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of India born on 20 October 1975. On 21 September 2010 he made an application for leave to remain on human rights grounds, specifically with reference to Article 8 of the ECHR. That application was refused and a decision was made on 5 November 2013 to remove him under Section 10 of the Immigration and Asylum Act 1999.

3. His appeal against that decision came before First-tier Tribunal Judge Hopkins on 18 June 2014 whereby the appeal was allowed under Article 8

of the ECHR. The appellant's immigration history can be summarised as follows. He arrived in the UK on 28 February 2000 using a false passport in the name of Vicky Singh, entering as a visitor. He returned to India on 28 May 2000 and came back to the UK on 11 August 2000, on both occasions using the same false passport. He made an asylum claim on 25 August 2000 which was refused.

4. An application for leave to remain on the basis of marriage was also refused, on 2 March 2003. On 30 May 2005, having returned to India, the appellant applied for entry clearance in the name of Vicky Singh and using the same false South African passport. After an initial refusal he was granted entry clearance, although it is not clear on what basis. An application for indefinite leave to remain as a spouse, made on 20 December 2007, was granted, again the appellant using the false name of Vicky Singh.

5. An application for naturalisation was refused on the basis that he had obtained leave by deception, that refusal being on 20 May 2009. There then followed the application which is the subject of this appeal.

6. On 4 October 2011 the appellant pleaded guilty in the Crown Court at Leicester to obtaining leave by deception. He received a sentence of nine months' imprisonment suspended for twelve months. His indefinite leave to remain was revoked, seemingly sometime in 2009.

The findings of the First-tier Tribunal

7. First-tier Tribunal Judge Hopkins accepted that the appellant and his wife are in a subsisting relationship. Although not an express finding of fact, it is evident that he accepted that the appellant and his wife have four children. He found that they all live together. He also accepted that the appellant plays a very active part in the children's education.

8. At [33] he referred to the appellant's convictions, including the conviction for obtaining leave by deception. He also found that the appellant had previously been convicted of fraudulent use of an excise licence, driving whilst disqualified, and implicitly offences which had led up to the disqualification on 27 November 2008.

9. With reference to the application of S-LTR.1.6 of Appendix FM Judge Hopkins was satisfied that the appellant did not qualify under the Immigration Rules, the respondent being justified in concluding that his presence in the UK is not conducive to the public good.

10. Similarly, the appellant was not able to meet the requirements of paragraph 276ADE, on the basis that he had ties with India, his mother being there and the appellant having stayed with her when he was there between 2004 and 2006. He found that if forced to return he could stay with her again.

11. Having found that there were compelling circumstances not sufficiently recognised under the Rules justifying a grant of leave to remain, the judge

went on to consider Article 8. He found that the appellant's wife and children have no experience of Indian culture and do not understand the language. The children were all born in the UK. The appellant's wife's relatives, including her mother who is very ill, are also all in the UK. He found that three of the children are at school and the eldest is about to move to secondary school. It was concluded that if the appellant is removed the rest of the family would be likely to remain in the UK and that there were insurmountable obstacles to family life continuing outside the UK.

12. There was a finding that the children are British citizens, who have always lived in the UK with their mother. The appellant had demonstrated an active interest in their welfare. In relation to the youngest child, being then only 2 years and 8 months old, her emotional needs are likely to be largely met within her immediate family, particularly her mother. It was found that she is the one least likely to be affected if the appellant had to leave the family unit to go to India, or if the whole family were to move there. It was also found however, that being forced to bring up four children on her own would be a considerable burden on the appellant's wife, the children's ages ranging from 2 years and 8 months to 10 years.

13. In relation to the eldest child it was concluded that his education would be severely disrupted if he had to go and live in another country and try to fit into a different educational system, without knowledge of the language and culture. The same was found in relation to the appellant's 8 year old daughter, albeit not to the same extent.

14. It was concluded that the best interests of the children were to remain in the UK with both parents.

Submissions

15. On behalf of the respondent Mr Mills drew our attention to the decision in *R v Ahmed Benabbas* [2005] EWCA Crim 2113, in particular at [41] in terms of the public interest involved in passport offences.

16. It was conceded, however, that much of what is said in the Secretary of State's grounds amounts only to a disagreement with the decision of the First-tier Tribunal. The judge had factored in most matters and considered whether there were compelling circumstances outside the Rules in terms of whether there was the need for an assessment under Article 8 of the ECHR.

17. However, it was submitted that the judge had minimised the extent of the appellant's criminal activity, finding that the fact that the appellant did not meet the suitability criteria was outweighed by his family life. As was noted at [33] of the determination, the appellant's immigration history included a lengthy period in which he held and used a false passport, including in order to obtain indefinite leave to remain and employment. It was submitted that at [41] the judge had in effect expressed the view that his offending and immigration history were not so serious as to justify removing him. Mr Mills submitted that the Secretary of State's view as to

the public interest is deserving of significant weight. The First-tier Judge did not properly recognise that fact and that it would require a very weighty family life to outweigh the public interest.

18. The appellant, being unrepresented, sought to explain to us that although it was true that he had used a false passport for a long time, he had gone to the authorities on his own initiative. He pointed out that the judge had recognised this at [45].

19. He referred to the closeness of his relationship with his children. He pointed out that he had had no convictions in the past six years.

Our assessment

20. Mr Mills did not seek to rely on the respondent's grounds before the Upper Tribunal, accepting that in reality they amount to a disagreement with the judge's conclusions. Nevertheless, to put into context our ultimate conclusion in relation to the Secretary of State's appeal to the Upper Tribunal, we deal with the written grounds, albeit that that can be done quite succinctly.

21. It is said in the grounds that the First-tier Judge erred in law by not having regard to the Immigration Rules and that the subsequent proportionality assessment is thereby unsustainable. That ground has no merit. It is evident from the determination that the judge did have regard to the Rules, referring to them in detail and noting that the appellant does not meet their requirements. Under the consideration of Article 8 proper, at [44] it is again noted by the judge that the appellant is not able to meet the requirements of the Rules either under Appendix FM or paragraph 276ADE.

22. It is said that the First-tier Judge did not identify any compelling circumstances not sufficiently recognised by the Rules. Again, we do not agree. At [37] he stated that he had to go on to consider whether there are compelling circumstances not sufficiently recognised under the Rules justifying the grant of leave to remain. In the succeeding paragraphs is his assessment of that issue and that of Article 8 in its wider context.

23. The grounds contain a recitation of the appellant's poor immigration history, including his use for many years of a false passport, being a South African passport in a different name. There is also reference to the nine months' sentence of imprisonment which was suspended for twelve months. Again, all those matters are plainly taken into account in the judge's determination.

24. It is said in the grounds that the appellant had deceived the immigration authorities and had shown a blatant disregard for UK laws. At [33] Judge Hopkins explored in detail the appellant's convictions, noting the most serious one for obtaining leave by deception. He plainly recognised its seriousness. He concluded that the Secretary of State was justified in deciding that the appellant's presence in the UK was not conducive to the public good, finding that paragraph S-LTR.1.6 of Appendix FM applied.

25. At [36] there is recognition of the appellant's likely deception in obtaining employment, although there was no evidence of continuing employment since his arrest in 2009.

26. As to the point made in the grounds about the appellant entering into a relationship in the full knowledge that he had deceived the authorities, and that his wife knew that to be the case, this is explicitly recognised by the judge at [43].

27. The point about the appellant having spent his formative years in India, again raised in the grounds, is also a matter that Judge Hopkins took into account at [34], finding that the appellant had not established that he has no ties with India, explaining what ties he has.

28. The narrow point advanced on behalf of the respondent before us was that the determination fails to recognise the significance of the public interest as against the appellant's immigration history and passport offence. Again, we do not agree. At [41] Judge Hopkins said this:

> "I must, however, give weight to the Secretary of State's view that the Appellant's presence in the UK is not conducive to the public good. However, in taking that aspect into consideration, it is appropriate to assess the extent to which the public good is in fact damaged by his continuing presence here. This is not a case in which the Secretary of State has chosen to make a deportation order on the ground that the Appellant's deportation is conducive to the public good. There is no evidence that the Appellant's conduct has given rise to any legitimate grounds for concern since the refusal of his application for naturalisation on 20th May 2009. His conviction for obtaining leave by deception was a serious matter, since the Crown Court ordered a custodial sentence, but, on the other hand, it was not regarded as so serious that an immediate sentence of imprisonment was necessary, since it felt it could suspend this. The Appellant has not committed a breach of the suspended sentence."

29. At [42] there is a reference to the decision in *Mumu (paragraph 320; Article 8; scope)* [2012] UKUT 00143 (IAC), noting that at [22] of that decision the Tribunal said that those who engage or who might be tempted to engage in dishonest attempts to deceive the United Kingdom authorities in relation to immigration control need to be aware that such actions will have disadvantageous consequences for those who are the intended beneficiaries of the dishonest conduct. He noted however, that that was an entry clearance case, rather than an application for leave to remain. Furthermore, unlike the matter that he was dealing with, the dishonesty related to the application with which the appeal was concerned.

30. At [43], after noting that the appellant's wife admitted that she knew right from the beginning that the name that the appellant was using was false and that he had immigration problems, he stated that he could not have very much sympathy for her and that he had even less sympathy for the appellant since it was his conduct that led to the refusal of the application under the suitability requirements. He then went on to state, correctly in

our view, that he was bound to recognise that the children are innocent in the situation.

31. At [44] he recognised that the grant of leave to remain on Article 8 grounds when an applicant does not meet the requirements of the Article 8 Rules is likely to require proof of exceptional circumstances, noting that 'exceptional' does not mean unusual or unique but rather circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family, such that refusal of the application would not be proportionate.

32. Then, at [45], he concluded that if he were permitted to look at the situation of the appellant and his wife in isolation he would not consider that the consequences for them could be said to be unjustifiably harsh. Again however, he repeated that he had to consider the children. He also noted that there may be circumstances in which the interests of the children affected by a decision are outweighed by other factors. That, in his judgement, was not the case here.

33. In the same paragraph he concluded that the appellant's conduct, "though serious enough to fall within paragraph S-LTR.1.6" was not such as to override the interests of the children, especially as the appellant had in more recent years acknowledged his past wrongdoing and has not continued to offend.

34. The reference to the children of course, is to the fact that the appellant and his wife have four children, born on 21 August 2003, 9 March 2006, 22 June 2008 and 6 October 2011, respectively.

35. As we have already indicated, the judge at [40] made an assessment of their situation, including that the eldest child is about to finish primary education and would soon be moving to a new school, that his education would be severely disrupted if he had to live in another country and to try and fit into a different educational system, language and culture. He also made the same observation, albeit that it applied with less force, to their 8 year old daughter.

36. Having concluded that the best interests of the children were that they remain in the UK with both their parents, the judge was entitled to conclude that the removal of the appellant would amount to a disproportionate interference with the family life of all concerned.

37. We do not consider that Judge Hopkins left out of account any material consideration, or took into account any immaterial consideration. He undertook a balanced assessment of the facts resulting in a conclusion which was open to him.

38. In these circumstances, we are not satisfied that he erred in law in any of the respects advanced on behalf of the respondent.

Decision

39. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision to allow the appeal therefore stands.