Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/03709/2014**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 6th July 2015	**On: 4th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Bangkok

Appellant

and

NF
(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms Ahmed, Counsel

DETERMINATION AND REASONS

1. The Respondent is a national of Thailand date of birth 27 April 1981. On the 23 February 2015 the First-tier Tribunal (Judge Hussain) allowed her appeal against a decision to refuse to grant her entry clearance as the spouse of a person present and settled in the United Kingdom. Her Sponsor is British national F. The Entry Clearance Officer now has permission to appeal against that decision[1].

[1] Permission granted by First-tier Tribunal Judge Pirotta on the 24th April 2015

Background and Matters in Issue

2. The Respondent made her application for entry clearance on the 27 November 2013. She set out the relevant information about her relationship with F, his income etc. Asked about her immigration history she stated that she had entered the United Kingdom on the 1 January 2007 and had left on the 1 January 2011.

3. The Entry Clearance Officer found that the travel history given in the VAF did not tally with the records held in Bangkok: there was no record of the Respondent ever having been granted a visa.

4. The Entry Clearance Officer contacted the Respondent to ask her about the discrepancy. She said that she had made arrangements with an agent called Mr J to bring her to the UK so that she could work as a masseuse. These arrangements had entailed her changing her name to J so that she could pretend to be his daughter. She obtained an Irish visa in that name and in December 2007 travelled to EIRE with this agent. She subsequently entered the UK illegally. The Notice of Refusal sets out the Entry Clearance Officer's record of the rest of that telephone interview, and the enquiries which followed it:

> "you were asked why you wanted to travel to the UK and you said to work as a 'masseuse'. You stayed in a rented apartment with your friend 'B' where you posted pictures on the internet advertising your services. If customers were interested in you they contacted an 'agency' and you provided services in the apartment.
>
> Records held in this office show that you first came to the attention of the police on 19 May 2010 when you were arrested and then bailed in Crawley. You were then arrested on 23 June 2011 in Glasgow along with 2 other Thai nationals at an address being investigated as a suspected brothel used for prostitution. On the 25 June 2011 you were charged with entering the UK illegally and were removed back to Thailand on 8 July 2011."

5. Further enquiries revealed that the Respondent had been working illegally as a "masseuse" in Malaysia and Hong Kong.

6. The Entry Clearance Officer notes that the Appellant claims to have been living with F since 2008 but in light of her "character, conduct and associations" the ECO considered it undesirable to grant her entry clearance. Entry was therefore refused with reference to paragraph S-EC.1.5 of Appendix FM:

> S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S- EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.

7. Entry was further refused with reference to paragraph 320(11) which provides that entry should "normally" be refused:

> (11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
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> (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); 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.

8. The Respondent exercised her right of appeal.

The Decision of the First-tier Tribunal

9. The First-tier Tribunal heard live evidence from F. He understood the reasons why his wife had been refused but considered the Entry Clearance Officer to be prejudiced: he could support her now.

10. The determination deals first with the suitability criteria under Appendix FM. The First-tier Tribunal directed itself that paragraph S-EC.1.5 requires the decision maker to consider two matters. First, a finding of fact must be made about the nature of the applicant's conduct. Secondly, consideration must be given to whether the nature of that conduct is such that it would be undesirable for the applicant to be admitted to the UK. In addressing question one, it is noted that the ECO has not provided evidence that the Respondent was working in the UK as a prostitute; nor has she admitted as much. The refusal notice strongly suggests sex-work but falls short of making such an assertion. The conduct that the Respondent has admitted to consists of illegal entry, having been arrested (but not convicted) and removed from the country. Turning to question two the determination says this:

> "in my view, given that the appellant entered the United Kingdom illegally it is difficult to see what law she broke by working here. I am not aware that working as a masseuse is illegal in the United Kingdom and therefore this fact does not take the Entry Clearance Officer's case any further. In my view, simply entering the United Kingdom illegally is not a sufficient basis to exclude a spouse from the United Kingdom because that would mean anyone who has either entered the United Kingdom illegally or has overstayed here would automatically be refused admission….for an applicant to fall within paragraph S-EC.1.5 their conduct must reach a level of seriousness before they can be considered for exclusion. Simply entering the United Kingdom illegally does not reach that threshold." [at §21]

11. In respect of paragraph 320(11) it is noted that this is not a provision that requires automatic refusal. It is a discretionary power. The First-tier Tribunal notes that the ECO has made no assessment of whether there is a genuine family life here, and in those circumstances the discretion inherent in 320(11) – "should normally be refused" – has not been properly exercised. The determination concludes that such an assessment could only be properly exercised if the ECO had taken into account the strength of the Respondent's family life in the UK and the extent to which exclusion would interfere with, or show a lack of respect for, her relationship with F. The appeal was therefore allowed to the extent that it is 'remitted' to the ECO to make a decision in accordance with the law.

The Grounds of Appeal

12. The ECO submits that the First-tier Tribunal erred in the following material respects:

    i) *Irrationality*: the finding that the Respondent did not break the law by working illegally is not one that a reasonable Tribunal could have reached.

    ii) *Failure to consider material facts*: the reasoning does not take into account the extent of the Respondent's breaches of immigration control, viz the fact that she used a false identity, stayed for four years and only left when forcibly removed.

13. In his submissions Mr Clarke submitted that in changing her name and in assuming a false identity the Respondent committed fraud, which has been defined by parliament as a "serious crime"[2]. The matter of "character" did not depend on any convictions: the Respondent's admission that she had committed these crimes revealed an innate characteristic incompatible with entry being granted to the UK.

Rule 24 Response

14. For the Respondent Ms Ahmed submitted that the First-tier Tribunal was correct to identify that any exercise of discretion must involve a balancing exercise. The crimes, character or other countervailing factors had to be weighed against the Article 8(1) family life of the applicant, and in this case this had not been done by the ECO. The appeal had only been allowed to that extent and it was now for the ECO to consider the provisions in light of his own findings of fact about the extent and quality of the relationship. She referred to the UKVI guidance which indicates that the subject must have contrived in a significant way to frustrate the intention of the Rules and aggravating

[2] See Schedule 1, Section 7(2) Serious Crime Act 2007

circumstances had to be identified. She relies on PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440.

15. As to the question of illegal working she submitted that the Tribunal had not acted irrationally. The point being made was that an applicant can be an illegal entrant or someone who has had valid leave but has breached the conditions attached to it by working, not both.

Error of Law

16. Although the ECO only had one reason for refusing this application – the Respondent's past conduct – the decision invokes two separate paragraphs of the Rules: S-EC.1.5 and paragraph 320(11).

17. In respect of the latter the First-tier Tribunal cannot be faulted. The power to refuse under this paragraph is entirely discretionary and the First-tier Tribunal is supported by the decision in PS in finding that this involved a holistic balancing exercise, taking into account the nature and quality of the Respondent's family life. The decision-maker made no assessment of the relationship with F or whether the decision to exclude her was the right one in all the circumstances, even if 'aggravating' factors could be identified. As the decision in PS makes clear, the power to refuse under 320(11) is one that must be exercised with great care, taking all relevant circumstances into account. Accordingly I find no fault in the First-tier Tribunal's approach to this matter, which was entirely in accordance with PS. Had the application been refused only with reference to paragraph 320(11), it would have been entirely appropriate to 'remit' the matter to the ECO on the grounds that the decision had not been in accordance with the law, since the decision was made without any apparent reference to the Appellant's family life with F.

18. That was not however the only ground for refusal. Under Appendix FM that was S-EC.1.5.

19. The determination recognises that S-EC.1.5 was a different proposition. The application of 'suitability' criteria are not discretionary. S-EC.1.5 simply requires an answer to a composite question of fact; if answered in the affirmative the application must be refused under Appendix FM. The question falls into two parts, the nature of the conduct, character or associations, and whether it is sufficiently serious to justify refusal.

20. It is the factual assessment of this composite question that the First-tier Tribunal has erred. The closing sentence of paragraph 21 sums up those matters of conduct weighed against the Respondent (then Appellant): "simply entering the United Kingdom illegally does not reach that threshold". The ECO is justified in complaining that this sentence does not adequately reflect the evidence. The admitted facts are that the Respondent i) changed her name to

enable her to use a passport to which she was not entitled, ii) used this passport to deceive the Irish authorities when she obtained a visa for EIRE, iii) deceived the Irish authorities a second time when she entered Dublin, iv) deceived the UK authorities when she entered the country at Gatwick, v) worked in the UK for over four years without permission to do so, vi) did nothing to regularise her position or reveal her true identity despite being apprehended twice by the police. It is further alleged that she was eventually forcibly removed. It may be that in the final analysis the outcome of this appeal might have been the same, but the Tribunal was required to take all of these facts into account when assessing whether the exclusion threshold was reached. Had the Tribunal properly directed itself to the facts, it is possible that it would have reached a different outcome. For that reason I find that the decision of the First-tier Tribunal did contain an error of law and the decision must be set aside. I need make no finding on whether the Tribunal's approach to the illegal working was irrational; it may be that Ms Ahmed is right to suggest that this was simply poor wording.

The Re-Making

21. The Entry Clearance Officer alleges that by virtue of her conduct, character and associations the applicant's exclusion is conducive to the public good. It is for the Respondent to establish that this is the case, and the standard of proof is at the higher end of the spectrum of a balance of probabilities. There is no authority of which I am aware dealing specifically with paragraph S-EC.1.5 but see for instance JC (Part 9 HC395, burden of proof) China [2007] UKAIT 00027:

> "13. So far as the standard of proof is concerned, we consider that what the Immigration Appeal Tribunal said in Olufosoye [1992] Imm AR 141 still holds good: "insofar as the justification consists of deception or other criminal conduct the standard of proof will be at the higher end of the spectrum of balance of probability" (see also R v IAT ex parte Nadeem Tahir [1989] Imm AR 98 CA). This approach reflects that of the House of Lords in R v Secretary of State for the Home Department ex p.Khawaja [1984] AC 74 and is consistent with subsequent case law (see e.g. Bishop [2002] UKIAT 05532). In R (AN & Anor) v Secretary of State for the Home Department [2005] EWCA Civ 1605 Richards LJ stated at [62]: "Although there is a single *civil standard of proof* on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proven, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities".

22. In this case the facts as alleged by the Entry Clearance Officer, summarised at paragraph 20 above, are not in substance disputed. The question is whether the conduct of the Respondent is such that her exclusion would be conducive to the public good.

23. The term "conducive to the public good" has, in the pre-Appendix FM past, been interpreted to require fairly serious reasons for exclusion. For example, persons have been refused entry clearance where the Secretary of State has personally deemed their presence "socially harmful" by virtue of their toxic

political views[3], where serious criminality such as drug importation has been involved[4], in the interests of national security[5] or foreign policy[6], or where public policy demands it so[7]. It has consistently been held that the discretion of the Entry Clearance Officer to apply this ground for refusal is a wide one[8]. It is not however a provision which should be applied for trivial reasons. It has been held that a relevant consideration would be whether the conduct, character or associations concerned would justify deportation[9].

24. Where consideration is to be given to exclusion on conducive grounds UKVI decision makers are today referred to the guidance document entitled 'General grounds for refusal Section 1 of 5: *about this guidance, general grounds for refusal and checks*' in which (at page 100) says the following:

> This page explains what the Immigration Rules say about when exclusion is conducive to the public good, which is a general ground for refusal.
>
> **What the rules require**
>
> If it is conducive to the public good not to admit a person to the UK because of their character, conduct or associations you must consider refusing entry or leave to remain.
>
> Such a person may include:
>
> - a member of a proscribed group
> - a person suspected of war crimes or crimes against humanity
> - a person whose presence is undesirable because of their character, conduct or associations
> - a person whose presence might lead to an infringement of UK law or a breach of public order

25. It will be observed that this admittedly non-exhaustive list of examples does not include use of a false identity to facilitate illegal entry; the kind of conduct cited in this guidance as properly engaging the provision appears to be at the extreme end of the spectrum of misconduct. There is however a further guidance document: "General grounds for refusal Section 2 of 5: *Considering entry clearance*". This advises Entry Clearance Officers to check for evidence of:

> - adverse behaviour (using deception, false representation, fraud, forgery, non-disclosure of material facts or failure to cooperate)

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[3] R (ono Farrakhan) v SSHD [2002] EWCA Civ 606 (Nation of Islam leader)
[4] Villone v SSHD [1979-80] Imm AR 23 (drugs discovered in baggage on arrival)
[5] GI v SSHD [2011] EWHC 1875 (Admin) (SIAC case involving allegations of links of Islamic extremists)
[6] Lord Carlile & Ors v Secretary of State for the Home Department [2012] EWHC 617 (Admin) (exclusion of Iranian dissident on the grounds that Iran may take retribution if the ban was lifted)
[7] R v IAT (ex parte Ajaib Singh) [1978] Imm AR 59 (a man seeking entry to marry a 14 year old girl)
[8] See for instance Ivlev, R (on the application of) v Entry Clearance Officer, New York [2013] EWHC 1162 (Admin) at 59
[9] Olufosoye v SSHD [1992] Imm AR 141, R v ex parte Cheema [1982] Imm AR 124, CA.

> • non conduciveness, adverse character, conduct or associations (criminal history, deportation order, travel ban, exclusion, non-conducive to public good, a threat to national security)
>
> • adverse immigration history (overstaying, breaching conditions, illegal entrant, using deception in an application)
>
> • adverse health (medical reasons)

Here a distinction is drawn between "adverse behaviour", which covers matters such as false representation, and "non-conduciveness" which covers matters such as national security. The broader term "conduct character or associations" is not defined, although at page 21 of the 'Immigration Directorate Instruction Family Migration Appendix FM Section 1.0a: *Family Life (as a Partner or Parent): 5-Year Routes'* it is noted in this context that "the applicant can meet the suitability requirements even where there is some criminality".

26. Finally there is the internal policy instruction document entitled 'When can I refuse on character, conduct or associations?' published in November 2013. The titular question is answered as follows:

> Paragraphs 320(19) and S-EC.1.5. provide for a discretionary refusal of entry clearance on account of a person's conduct, character or associations. ECOs must be aware that there maybe more than one factor which would lead to the application being refused on character, conduct or associations grounds. While a person does not necessarily need to have been convicted of a criminal offence, the key to establishing refusal in this category will be the existence of reliable evidence necessary to support the decision that the person's behaviour calls into question their character and/or conduct and/or associations such that it makes it undesirable to grant them entry clearance.
>
> A non-exhaustive list could include:
>
> Low-level criminal activity. Association with known criminals. Involvement with gangs. Pending prosecutions. Extradition requests. Public order risks. Prescribed (*sic*) organisations. Unacceptable behaviours. Subject to a travel ban. War crimes. Article 1F of the refugee convention. Deliberate debiting. Proceeds of crime and finances of questionable origins. Corruption. Relations between the UK and elsewhere. Assisting in the invasion (*sic*) of the immigration control. Hiring illegal workers. Engaging in deceitful or dishonest dealings with Her Majesty's Government.

And further:

> Examples of the types of cases where refusal under 320(19) may be appropriate include:
>
> - where a person's admission could adversely affect the conduct of foreign policy;
>
> - where the person's admission would be contrary to internationally agreed

travel restrictions (for example, UN sanctions or EU measures) but the relevant resolution or common position has not been designated under the Immigration (designation of travel bans) order 2000. If it has been designated under the order, section 8B(1)(b) of the 1971 Act must be used to refuse LTE;

- the person is a threat to national security;

- there is reliable evidence the person has been involved in or otherwise associated with war crimes or crimes against humanity. It is not necessary for them to have been charged or convicted a person's admission might lead to an infringement of UK law or a breach of public order;

- a person's admission might lead to an offence being committed by someone else, for example, extreme views that if expressed may result in civil unrest resulting in an infringement of UK law.

When determining if a refusal under 320(19) is warranted the ECO must also take into account any human rights grounds and ensure that the refusal is both proportionate and reasonable.

27. This guidance leads me to draw the following conclusions. First the burden of proof lies on the Respondent, as it has always done in respect of such allegations, and the standard of proof is at the higher end of the spectrum of the balance of probabilities. Second the range of behaviour which might justify exclusion is a wide one. At the extreme end lie war crimes and terrorist activity; I would suggest that here a single incident, proven to the requisite standard, would likely be sufficient justification for exclusion. At the other end of the range lie matters such as a failure to disclose material facts or false representation. I would suggest, in line with the findings in PS and the ECO's own guidance that the conduct in question would need to be fairly serious, or "aggravated" in order to obstruct entry for the purpose of settlement with a spouse. I consider that the analogy with deportation is a helpful one: if the conduct, character or associations would justify deportation, then it would also justify exclusion under S-EC.1.5.

28. In this case the Respondent engaged in a deliberate and prolonged deception of the immigration authorities in Thailand, EIRE and the UK. There is no suggestion that in changing her name, using the passport to which she was not entitled, flying to Ireland and then to the UK, or in any of her contact with the police or immigration authorities whilst in the UK, she was acting under duress. It was a programme of deception which she actively participated in, and the offences she committed could have led to conviction for fraud. In those circumstances I am satisfied that there are "aggravating" circumstances such that S-EC.1.5 applies.

29. That is not however the end of the matter. If S-EC.1.5 applies the Respondent cannot gain entry under Appendix FM, but there remains a residual discretion to assess whether the decision would nevertheless interfere with her Article 8(1)

rights. There is no indication in the refusal notice that the ECO considered the strength of the Respondent's family life, or whether any interference with it would be proportionate. It is possible that the matters considered in the context of S-EC.1.5 could definitively answer the latter question, but in line with the reasoning in PS it is hard to see how the balancing exercise could be complete without any assessment of the former. The suitability criteria in Appendix FM leave no room to weigh the offending behaviour against the depth and quality of the family life: to this extent it does not appear to be a 'complete code'. For that reason I am driven to dispose of this appeal in the same manner as the First-tier Tribunal, by remitting it to the decision-maker. It is now for the ECO to consider whether to exercise discretion outside of the rules and conduct a holistic balancing exercise. It will be for the Respondent and F to provide the ECO with any relevant material to support their case that the decision would be a disproportionate interference with their family life. This would include, but not be limited to any evidence as to why the relationship cannot continue in Thailand.

Decisions

30. The decision of the First-tier Tribunal contains an error of law to the extent identified above and it is set aside.

31. I remake the decision in the appeal by allowing it on the ground that the decision of the ECO was not in accordance with the law. The ECO failed to exercise his discretion to consider Article 8 outside of the rules and the matter is therefore remitted to enable this decision to be made.

32. I make the following direction as to anonymity:

> "Unless and until a tribunal or court directs otherwise, the Respondent (FTT Appellant) is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings".

Deputy Upper Tribunal Judge Bruce
8th August 2015