Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18416/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2014	**On 8 January 2015**
Prepared 19 December 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

between

MUNISH KUMAR PARMAR

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Ms K Tiku, Counsel instructed by H & M Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of India, born on 31 August 1989, appeals, with permission, against a decision of Judge of the First-tier Tribunal N M K Lawrence who in a determination promulgated on 9 September 2014 dismissed the appellant's appeal against a decision of the Entry Clearance Officer, New Delhi, to refuse him entry clearance as a spouse under the provisions of Appendix FM and paragraph 320(11) of HC 395.

2. The Entry Clearance Officer noted that the appellant had arrived in Britain as an illegal entrant in November 2007 and had been arrested when he was seen getting out of a lorry. He had given his name as Mikah Singh born in August 1991. The following year an emergency travel document application had been submitted to the Indian authorities who had refused to issue the same. The appellant had absconded. In November 2008 he had been encountered by chance while travelling in a vehicle which had been stopped by the police. He had given his identity as Munish Kumar, born in August 1989. An application for emergency travel documentation had been made in October 2011 but as the appellant had not given the correct details the Indian authorities rejected that application. The appellant had made an application for leave to remain as an unmarried partner under the name of Munish Kumar in 2011 but that application was refused, reasons being given in a letter dated 23 December 2011. The appellant did not leave the country but remained in Britain. He married his sponsor, Ms Afsha Ladha in March 2013 and the following month he and the sponsor left for India where they married. On 26 April 2013 the appellant made the application to return to Britain.

3. The respondent considered that the appellant could not succeed under the provisions of Appendix FM: paragraph EC-P.1.1(c) – Section S-EC 1.5: suitability – entry clearance requirements of because of his immigration history and, because of that history, considered that it was not appropriate to exercise discretion in his favour. It was stated that during the interview he had stated that if his application for settlement failed his sponsor could come to India to live with him. The Entry Clearance Officer stated that he noted that there was no bar to the sponsor returning to India either permanently or temporarily in the future and said that family life could continue without interference.

4. In his determination the judge set out his findings in paragraphs 9 onwards of the determination. He took into account the appellant's immigration history and the various attempts he had made to deceive the British authorities when apprehended as well as the fact that he had not left Britain when his application for leave to remain as an unmarried partner was refused. The Judge concluded that the appellant was caught by the provisions of paragraph 320(11) of HC 395. He considered that the decision not to exercise discretion in the appellant's favour was well-founded, indicating that this case was distinguishable from that of the appellant in **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440**. He went on to state that the finding of the Entry Clearance Officer that the marriage was not genuine or subsisting was based on a reason – that the appellant and the sponsor had married just a month before the appellant left for India – which was insufficient to show that the marriage was not genuine. He noted that, when interviewed, the appellant had said that the sponsor would be able to come and live with him in India. He did not accept as credible the sponsor's assertion at the

interview that the appellant had not said that or that what he had said had been recorded incorrectly.

5. In paragraph 26 the Judge went on to say:-

> "In my view, even if there is a genuine and subsisting relationship between the appellant and the sponsor they can enjoy 'family life' in India. I note that the sponsor is a British national; she works for a firm of solicitors in the UK; she has her mother and her stepfather in the UK; she has her social and family ties in the UK. I note that when she started her relationship with the appellant she knew that he was an illegal entrant; she knew the appellant used identities; he absconded. As against that is the public interest in maintaining proper immigration control. On the evidence before me I find that there is nothing to indicate that the sponsor cannot join the appellant in India and enjoy "family life" with him there. She may not prefer to but it was her choice to commence and continue with a relationship with the appellant whom she knew to be an illegal entrant, an absconder who frustrated, in a significant way, the enforcement of the Immigration Rules in the UK."

6. The judge then went on to set out case law relating to the rights of the appellant under Article 8 of the ECHR and then in paragraph 29 stated:-

> "In analysing the jurisprudence in this field I find the 'suitability requirement' replicates/duplicates the 'proportionality' assessment under **Razgar v Secretary of State for the Home Department [2004] UKHL 27**. I find that Appendix FM is a complete *[sic]* in so far as this appeal is concerned. The 'suitability requirement' asks whether the appellant is a suitable person to be granted leave to remain in the UK. The 'proportionality' asks whether removal of the appellant is proportionate to the legitimate aims of the state, namely proper immigration control and prevention of crime. It is the flipside of the 'suitability requirement'. In this regard the determination by the Upper Tribunal in **Shahzad**, *Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* namely, "It follows from this that any other rule which has a similar provision will also constitute a complete code;" Consequently I find the appellant has not demonstrated that I should go on to consider this appeal under Article 8 of the Human Rights Convention."

7. The grounds of appeal firstly asserted that the judge had been wrong to state that there was not a genuine subsisting relationship. They referred to relevant case law and then went on to assert that the judge had erred in his conclusions regarding the issue of the Article 8 rights of the appellant. The referred to the judgement in **MF (Nigeria) [2013] EWCA Civ 1192** and the determination in **Shazad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)** arguing that the rules should not be considered to be a complete code. They referred to the terms of Appendix FM which had stated that leave could be granted "outside the Rules on Article 8 grounds".

8. The grounds went on to refer to paragraph 320(11) of the Rules, arguing that extra care should be taken on the application of paragraph 320(11)

given that the public interest was involved as those in the United Kingdom unlawfully should be encouraged to return to their country of origin in order to apply for lawful entry under the Immigration Rules.

9. Judge Cox granted permission on the basis that the second ground of appeal had arguable merit on the basis that the judge had arguably erred in failing to consider and apply **MM (Lebanon)** and therefore disqualified himself from a full Article 8 proportionality assessment. He added that he was "less sanguine" about the other grounds but would not rule them out.

10. At the hearing of the appeal before me Ms Tiku stated that she would concentrate on the issue of the proportionality of the decision and argued that the Entry Clearance Officer and indeed the judge had not properly taken into account the fact that the appellant's wife was British. She then asserted that if the appellant's wife had to go to India she would have to give up her British nationality. Moreover, his wife had not only a career here, but she was also in the process of buying a property here and had a settled life here with her family and siblings. Ms Tiku stated that the judge had not taken into account all relevant factors in the balancing exercise.

11. Ms Isherwood asked me to find there was no material error of law in the determination. The issue which had been raised in the grounds of appeal that the appellant had not stated that his wife could go to India did not match with the interview record and she pointed out that the judge had found that the sponsor was not credible on that point. She stated that the difficulties which the sponsor would face were not material. The issue was whether or not there were insurmountable obstacles which could stop family life being enjoyed in India. She argued that the actions of both parties should not be disregarded. She stated that the judge had applied relevant case law to the proportionality exercise and reached conclusions which were open to him.

Discussion

12. I considered first whether or not the judge was correct to decide that the appellant's exclusion was justified by the provisions of paragraph 320(11). I consider that the Entry Clearance Officer was entitled to refuse the application on that basis. This is not merely the case of an appellant who had entered Britain illegally but one who clearly had made various attempts to subvert immigration control.

13. The lack of a finding by the judge as to the subsistence of the marriage was criticised in the grounds of appeal. I consider that, reading the determination as a whole, the judge, who made it clear that he did not consider the fact that the appellant had made the marriage application shortly after returning to India indicated that the marriage was not genuine and subsisting was not a good enough reason for that conclusion, found after consideration of various factors including that the sponsor had attended the hearing that this was a genuine and subsisting marriage. On

all the evidence before the judge I consider that that is a finding which was made or, if not clearly made, was the appropriate finding in this case.

14. However the appellant has to deal with the issue of the suitability requirement of the Rules and clearly these reflect the same matters as were raised in the consideration of the refusal under paragraph 320(11). The question remains as to whether or not the appellant's rights to private and family life are infringed by the decision and if they are infringed whether or not the infringement is disproportionate. In considering this I turn to the Rules at Section EX: exception of Appendix FM that these refer to a situation at "B" where:-

> "The applicant has a genuine and subsisting with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection and there are insurmountable obstacles to family life with that partner continuing outside the UK."

15. It is of note that neither the Entry Clearance Officer nor the judge appear to have taken on board the fact that the appellant's sponsor is a British citizen who indeed was born here. The judge did in paragraph 26 of the determination set out relevant factors relating to the private and family life of the sponsor. They are indeed persuasive given that not only was she born here and is a British citizen but that she works here, is in the process of buying property here and her parents and siblings are her. She has never lived in India. However I consider that the judge was correct to consider the necessity of the public interest in maintaining proper immigration control. The appellant's own behaviour militates very strongly against any finding that the decision is disproportionate but the reality is that, in any event, there was no evidence that there were insurmountable obstacles to the appellant's wife living with him in India. Where husbands and wives come from different countries and have different nationalities there is nothing to indicate that the country of residence of one should take precedence over the country of residence of the other. I consider that the lack of evidence that there are insurmountable obstacles to the sponsor living in India can only lead to the conclusion that the decision is not disproportionate, taking into account all relevant factors in this case.

16. I therefore consider that there is no material error of law in the determination of the Immigration Judge and that his decision dismissing this appeal on both immigration and human rights grounds shall stand.

Signed Date

Upper Tribunal Judge McGeachy