Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01432/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 9th May 2017	**On 23rd May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ADEEL FAROOQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohammad Latif (Counsel)
For the Respondent: Mr David Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Ghani, promulgated on 13th May 2016, following a hearing at Birmingham Sheldon Court on 7th April 2016. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Entry Clearance

Officer in Islamabad, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, who was born on 6th January 1990. He appealed against the decision of the Respondent dated 10th December 2014, refusing his application for entry clearance to join his British citizen wife as her spouse under Appendix FM of the Immigration Rules. The Appellant's wife's name is Shazia Begum.

The Respondent's Decision

3. The basis of the Respondent's decision is that the Appellant had previously applied for entry clearance as a family visitor in the name of Shabir Ud Din, with a date of birth being given as 11th October 1992. Fingerprints showed that the Appellant and this person were the same person. These facts were material to the application and the Appellant did not disclose these facts. Therefore, his application stood to be refused under paragraph EC-P.1.1(c) of Appendix FM of the Immigration Rules.

The Judge's Findings

4. The judge heard evidence from Mrs Shazia Begum, that the Appellant was her cousin, and she had known him all her life as Adeel Farooq, and that they were married on 31st October 2012 in Pakistan, following which she returned back to the UK, and has thereafter maintained contact with her husband through phone cards and other means. She also visited her husband in Pakistan on 22nd October 2013 to 26th November 2013. Furthermore, in order to confirm her husband's identity she had also produced a copy of the Punjab Police Character Certificate. The Appellant's Pakistani passport also makes reference to his ID number and confirms his identity. The signatures on these documents are identical to the Appellant (see paragraph 12).

5. The judge then gave specific consideration to the basis upon which the application had been refused, namely, that he had failed to disclose material facts, namely, that the Appellant had applied in the name of Shabir Ud Din with a date of birth of 11th October 1992 (see paragraph 15). However, the judge was satisfied that his identity has been substantiated by numerous documents which the Appellant had produced, such as the character certificate from Punjab Police, the family registration certificate, and a letter from the International Hospital there (paragraph 17).

6. Consideration was also given by the judge to paragraph EC-P.1.(c) which stipulated that the Applicant must fall for refusal under any of the grounds in Sections S-EC – suitability. In particular, the judge noted that under 2.2(b) there is reference to whether or not to the Applicant's knowledge there has been a failure to disclose material facts, such that an application

would normally be refused on suitability grounds here. However, given that the reference is to "normally be refused" what they suggest, according to the judge, was that "it is not a mandatory refusal as 1.1" (see paragraph 20).

7. The judge then recounted how the visit application, where the Appellant had given a false identity, occurred some seven or eight years ago, when the Appellant was approximately 16 or 17 years of age, and the issue now was whether the non-disclosure of that application is material to the current application of the Appellant. She reasoned that the judiciary meaning of the "material" signifies the likely influence on the determination of a case, or substantial input, of much consequence, or as pertinent or essential. She went on even to speculate that if the Appellant was to submit an application today and had disclosed his previous application as a visitor, it was likely that the Appellant would not have his visitor's application refused. Nevertheless, as the judge further explained, the issue was not whether the Appellant was now making a visitor's application, but what relevance a previous deception in relation to a visitor's application, and for a marriage application made some seven or eight years later. As she pointed out, "what constitutes material facts for the current application is the fact that they are married, they have the intention to live together, that the marriage is genuine and it is subsisting" (paragraph 21).

8. The judge allowed the appeal.

Grounds of Application

9. The grounds of application state that the judge erred in allowing the appeal against refusal of entry clearance as a partner under Appendix FM by giving insufficient weight or no weight whatsoever to the fact that the Appellant had previously applied for entry clearance as a visitor using false identity.

10. On 23rd January 2017, permission to appeal was granted.

11. Thereafter, a Rule 24 response was entered, of three pages, by the Appellant's representative.

Submissions

12. At the hearing before me, Mr Mills relied upon the Grounds of Appeal. He submitted that the Appellant could not get passed the threshold requirement of "suitability" because there had been a failure to disclose a material fact. Second, the ECO had taken the point that the Appellant had applied under two different identities, so that one could not be certain who the Appellant really was. In fact, it is not disputed at all that the Appellant had exercised deception some seven or eight years ago. Third, and no less importantly, the judge had erred at paragraph 21 when she had said that, "the issue is whether the non-disclosure of that application is

material …", because at paragraph 320(11), although not raised in the refusal decision itself, was relevant, because the Appellant had used deception in an application. The judge did not consider paragraph 320(11). Moreover, the judge did not exercise her discretion in concluding whether the Appellant could now succeed, given that a person in the Appellant's position could be refused "normally", but not on mandatory grounds. It said the judge had simply moved to conclude that because the marriage was genuine and subsisting the Appellant would succeed.

13. For his part, Mr Latif submitted that any reliance upon paragraph 320(11) was misconceived for the following reasons. First, the ECO had not raised it, the HOPO had not raised it at the hearing, the Grounds of Appeal did not raise it, and there had been no notice of raising it today, and certainly no application to amend the Grounds of Appeal today either. The effect of now bringing it forward was to "ambush" the Appellant's side, who had gone to the trouble of submitting a Rule 24 response, in which they had carefully attempted to deal with the Grounds of Refusal taken against the Appellant. Second, and in any event, paragraph 320(11) related to "the" application. The reference to "the" application here was the application for a marriage settlement visa. It was not a reference to any application made seven or eight years ago. Finally, the judge did give express consideration to Section S-EC – suitability. She expressed that she also considered S-EC.2.1, where it is stated that the applicant will "normally be refused" on grounds of suitability. Thereafter, she went on to consider the failure to disclose material facts (see paragraph 19).

14. In reply, Mr Mills submitted that there is a distinction between S-EC.2.2(a) and S-EC.2.2(b). The latter is an alternative to the former. The latter is not failing to disclose facts in the application. The Appellant had plainly applied under another name and this was material to the current application. For the judge simply to state that this was a genuine and subsisting marriage, and therefore the appeal should be allowed, was to fail to engage with the provisions of the law before her.

No Error of Law

15. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

16. First, it is not true that the judge does not consider how discretion should be exercised upon the application of the Rules, namely, the Rule here being S-EC.2.1, which states that the Applicant will "normally be refused". After recognising that this is not a mandatory refusal (at paragraph 20), the judge then goes on to consider what it means to say "material" in a particular situation. She goes so far as to say that if a similar visitor's application was made today, with full disclosure of the facts, the chances are that the Appellant would not be refused entry, and all of this simply demonstrates in no inadequate terms, that the judge was fully engaging

with the provisions and exercising her discretion. However, the judge then proceeds on to consider what the material facts will be in relation to the current application, where the parties are married and have an intention to live together, and the marriage is genuine and subsisting. She goes on to say that, "I find that in this case, the Respondent had a discretion which ought to have been exercised in the Appellant's favour" (paragraph 21) and she gives her reasons for so concluding.

17. Second, the issue of paragraph 320(11) was not raised in the refusal letter, not raised in the submissions of the HOPO at the hearing, and not raised in the Grounds of Appeal.

18. Third, applications made under Appendix FM under A320 state that "paragraphs 320 (except sub-paragraph (iii), (x) and (xi)) and 322 do not apply to any application for entry clearance, leave to enter or leave to remain as a family member under Appendix FM ...".

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 22nd May 2017