Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09718/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th August 2019	**On 6th September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE KING TD

Between

M S

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Reza Halim of Counsel, instructed by way of Direct Access
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 8th January 1973. He entered the United Kingdom in September 2004 on a visit visa in the name of FI. In November 2005 he was found working using the alias of MRU and was detained.

2. He claimed asylum on 14th November 2005. That was refused and the subsequent appeal dismissed. He absconded and was not re-encountered by the authorities until 15th August 2012.

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3. Thereafter he sought leave to remain in the United Kingdom on the basis of his private life with his claimed partner SB and with his daughter SMI born on 14th June 2007. That application was refused on 3rd September 2012. He appealed against that refusal and his appeal was heard on 19th October 2012. The appeal was dismissed on 26th October 2012 and he was removed from the United Kingdom on 12th February 2013.

4. On 3rd January 2018 the appellant made an application for entry clearance to the United Kingdom on the basis of his family life with his partner SB and his two children.

5. That application was refused for a number of reasons and paragraph 320(11) of the Immigration Rules applied. The appellant had been untruthful in relation to his immigration history; and breached the Immigration Rules by overstaying, absconding, working illegally, making frivolous applications and using multiple identities.

6. It was not accepted that the appellant met the eligibility requirements of Appendix FM nor was it accepted that the relationship between SB and SMI was as claimed. Indeed it was not accepted either that he was married to SB or that he was the father of SMI. In terms of the circumstances of SB it was not accepted that her earnings had met the Rules, nor that family and private life was established under Article 8 of the ECHR.

7. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Turnock on 12th February 2018. The appeal was dismissed. Leave to challenge that appeal before the Upper Tribunal was granted, particularly focused upon argument that the deception used in the 2004 and 2005 claims fell outside the scope of paragraph 320(11). Also that the Judge incorrectly placed the burden on the appellant to prove that he is not a bigamist.

8. In terms of paragraph 320(11) Mr Halim drew my attention to the Immigration Rules, in particular to the interpretation of 320(7A) which excluded from consideration in an application for entry clearance or leave to enter or remain, any deceptive documents or statements used more than ten years ago.

9. He submits that the area of deception exercised by the appellant was in relation to the claimed asylum in 2005 and his working in 2005, which was said to be outside the ten year period.

10. Mr Kandola submits that that is to ignore the reality that the appellant has exercised continuing deception towards the authorities well within the ten year period. In particular he was detained in August 2012 and sought leave to remain on the basis of his relationship with SB and SMI. The hearing of that matter came before the First-tier Tribunal on 16th October 2012. The appellant was still using his fictitious name of Mr F I. Indeed it was a matter noted indeed by the First-tier Tribunal Judge, in the decision now under challenge, that it undermined the credibility of SB because she supported the application and gave evidence knowing full well that that

was not his true identity. Significantly the Judge in 2012, Judge Lingard, highlighted the lack of evidence concerning the appellant's parentage of his claimed daughter. The birth certificate was signed by SB's former husband and no DNA tests had been undertaken. The Judge noted that, for much of the time when the appellant was living in Leeds SB was living in Middlesbrough. At the time of the determination they had never lived together and lived in different parts of the country. It was not accepted by the Judge in 2012 that the relationship was as claimed to found any basis to grant leave to remain.

11. The First-tier Tribunal Judge, in the decision currently under challenge, did not find SB to be credible for the reasons as set out at paragraph 69 and noted indeed that the claim was the couple met whilst at work at a time when the appellant was working under the name of MRU. The Judge did not accept in paragraph 70 of the determination the reason why a DNA test had not been instituted in relation to the claimed daughter.

12. It was noted also that the appellant's current online application did not disclose his full immigration history. The appellant claims that that was as a result of the errors on the part of his representatives rather than himself, an explanation which was not accepted by the Judge. The reasons are set out in paragraph 65 to 68 of the determination.

13. The aggravating circumstances including absconding, previous working in breach of visitor's conditions and using an assumed identity or multiple identities for deceptive reasons.

14. Were such matters made out to have occurred beyond the ten year period there would be some force of merit in submissions that have been made to me concerning the application of Rule 320(11). However it is clear, both from the factual analysis and from the findings, that deception has continued and that the aggravating features identified by the Judge certainly occurred in part at and a stage within the ten year period. Consequently I find no error of law in that approach.

15. The other matter is perhaps of more significance and that concerns the contention made on behalf of the respondent in the refusal letter, that the appellant was previously married and that accordingly it could not be said that SB was a partner within the application of the Rules. That matter had arisen because of the insistence by the appellant at an early stage in matters that he had operated a business in South Korea and indeed that in 2003 he had married a South Korean national. They had returned to Pakistan in 2004. It was noted by the First-tier Tribunal Judge in the earlier determinations in relation to asylum, Judge Gordon, that on his Visa Application Form in 2004 he had listed his wife by name and had produced an email from South Korea from an individual claiming to be his wife and business documents relating to South Korea. Such led the First-tier Tribunal Judge to accept that he had married a South Korean wife but beyond that his account was not accepted.

16. In terms of the determination regard was had to the hearing of 16th October 2012, in which it was noted that the appellant continued to assert that he operated a business in South Korea having married in 2003. The marriage failed. He and his wife went to Pakistan, she returning to Korea in May 2004. It was during 2005 that he met and formed a relationship with SB.

17. It is not a surprise therefore that the respondent sought to act upon that statement. The appellant in his current application seeks to indicate that he has never married and that the marriage to SB was a proper one in all the circumstances such that she should be considered to be his wife.

18. The challenge that is made is essentially to the expression set out at paragraph 74 of the determination as follows:

> "Accordingly, there is a burden upon the appellant to produce evidence to show that the factual finding previously made should not stand. He now asserts he was never married but I do not consider that bare assertion is sufficient to justify departure from the previous finding, particular in light of my findings as to his credibility. It is not addressed, in his latest witness statement, why he should have claimed to be married to a named South Korean woman if that were not the case. It is a somewhat unusual claim to have made if not true."

19. Mr Halim addressed me at length on this particular matter contending that it was entirely wrong in matters of deception for the burden to fall upon the appellant. The allegation that he had been married and therefore that his marriage to SB was not validly conducted, he submits is a crucial element of the evidence, such that the burden of establishing that fact falls upon the respondent and not upon the appellant. That he was married previously is something that has permeated the case and adversely influenced the approach taken to the Rules and to Article 8.

20. Mr Halim submits that as the appellant seeks to deny that marriage and to retract that which he previously said, it ought to be for the First-tier Tribunal Judge to actively engage with that denial to see whether or not the appellant is now telling the truth about his circumstances when he was not before.

21. It is said that the appellant cannot prove a negative, namely that he was not married, and the burden should be upon the respondent to show that he was. There is some merit in the contention that the burden has been misstated. Clearly the respondent bears the overall burden of proving deception or a material fact. Once the respondent established a prima facie case then clearly the evidential burden shifts to the appellant. It seems to me that there is clear prima facie evidence of a previous marriage that that was presented on two occasions at two hearings before the First-tier Tribunal as well as documents to show that event.

22. The appellant now seeks to resile from what he said before but, as has been specifically noted by the Judge in paragraph 74, he has not properly addressed why he should have claimed to be married to a South Korean woman if that were not the case. Thus the Judge has specifically addressed the issue as to whether or not what the appellant now says is likely to be true.

23. Even if the burden of proof were reversed, as it properly should be, it is difficult in practical terms to understand that there would be any different outcome to the approach to be taken. If the Judge did not believe that the appellant was telling the truth about his non-relationship with the Korean wife then the Judge is entitled to act accordingly. This is particularly so given the other elements of deception as identified by the Judge.

24. Approaching the matter on the basis that the direction was inaccurately expressed, the question is whether that could have made any material difference to the outcome of the determination.

25. Leaving aside the issue of marriage, it is abundantly clear that the Tribunal Judge did not find the appellant to be a credible witness for many other reasons. This current application did not disclose his full immigration history. It was not accepted that there was an innocent explanation for the lack of disclosure. The Judge considered a letter from Beachwoods Solicitors, contending that the appellant had now been honest by pointing out his name was different when he came to the United Kingdom. Such however was found to be a false portrayal of the appellant as one who changed his name and sought to minimise the fact that he used a completely false name when applying for entry clearance, asylum and leave to remain. For the reasons as set out in paragraphs 67 and 68 of the determination, the Judge gives little weight to the explanations that are sought to be offered for the significant omissions in the current applications. Moreover the Judge, for the reasons as set out, did not find SB to be credible nor accepted the nature of her circumstances as claimed.

26. Even were the appellant not to be lawfully married to SB the Judge did recognise that it was also necessary to consider the relationship between SB and claimed daughter under Article 8 of the ECHR. The Judge noted the living arrangements as between the appellant and SB in the United Kingdom and the gap in her visiting him. The health of the daughter was considered but again it was not accepted by the Judge that she was the natural daughter of the appellant nor that her difficulties which she describes were attributable to the absence of the appellant from her life. The Judge looked at the medical evidence that was presented in relation to mother and daughter and concluded overall that it was not a relationship that engages Article 8 of the ECHR. There was a detailed consideration of the chemistry as between wife, daughter and appellant. It was also acknowledged of course that his wife now has a child conceived during her visit to the appellant in Pakistan. Whilst the genuineness of the current relationship with SB would not seem to have been challenged, the nature of that relationship and whether it gives rise to a claim under Article 8 was

very much the focus of consideration. The reason why no DNA evidence had been provided was also considered by the Judge and found to lack credibility. Obviously this was not a new matter but one raised indeed by Judge Lingard in 2012 and little has been done to resolve that matter.

27. I find that even had it been the case that the Judge accepted that the appellant was not previously married it would have made very little difference to the analysis that was conducted overall, as to his conduct and that of his SB in the United Kingdom. I find therefore that the error attributed to burden of proof was in the circumstances not a material error. Although it was clearly one factor that weighed the balance of credibility there were many others which were drawn upon by the Judge in a very detailed determination.

28. In all the circumstances therefore I do not find there be a material error of law in the determination. The determination therefore shall stand.

29. In the circumstances the appellant's appeal before the Upper Tribunal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

Signed Date: 29 August 2019

Upper Tribunal Judge King TD