Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12949/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 7th March 2019	**On 22nd March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS ASHRAFSADAT RAZAVI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Holmes (Counsel)
For the Respondent: Mr Tan (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Durance, promulgated on 7th September 2018, following a hearing on 20th August 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant 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 citizen of Iran, was born on 13th February 1982, and is a female. She appealed against the decision of the Respondent refusing her application, dated 4th July 2017 to join her husband in the UK, [AA], the refusal decision being dated 21st September 2017.

The Basis of Refusal

3. The basis of refusal by the Respondent is that in her application, the Appellant stated that she had never travelled to the United Kingdom, which was untrue, and she had been encountered at UK Border Control on 13th September 2013, where she presented with a passport and a false name. On 3rd October 2013, she was encountered at Dunkirk, trying to enter the UK illegally. Therefore, under paragraph 320(11) the application was rejected.

The Application of Devaseelan Principles

4. A feature of this appeal is that there had been a previous decision by Judge Heynes, where the Sponsor had argued that the Appellant had acted foolishly upon the advice of an unscrupulous lawyer. Judge Heynes was not impressed with this. The conclusion by the judge was that the Appellant had not told the truth and it was more probable than not that the Appellant had left Iran equipped with false documentation that she attempted to use to enter the UK illegally (see paragraph 6). It had been argued before Judge Heynes that paragraph 320(11) was improperly imposed as the Appellant had acted in a moment of madness. The judge had concluded that the level of deception exercised by the Appellant cast a considerable doubt over the nature of their relationship (paragraph 7).

The Judge's Findings

5. At the hearing before Judge Durance, there was a statement from the sponsoring husband, to the effect that his wife had made some mistakes in the past without having had any bad intentions. She was a lay person. She wanted to be reunited with the sponsoring husband in the UK. However, "My wife travelled to France to visit her friend. While there, my wife was encouraged by her friend to enter UK in order to be reunited with me" (see paragraph 10). The judge was not impressed with this attempt to excuse the behaviour of the Appellant. Judge Durance observed that the Appellant had on two occasions used a false identity attempting to enter the UK illegally and on a third occasion the Appellant was dishonest about her activity outside of Iran (paragraph 13).

6. Applying the principles in **Devaseelan**, the judge stated, before giving his reasons for the decision himself, that the summary of the previous Tribunal's conclusions were that the sole issue here involved the application of paragraph 320(11) of the Rules, because all the other requirements of the Immigration Rules had been satisfied. The previous

judge had held that the discretionary power by the Secretary of State had been properly exercised. The previous judge had also held that "Article 8 is not engaged" (paragraph 26). In then proceeding to give the "reasons" for his own decisions (see paragraphs 27 to 37), the judge went on to refer to the fact that IJ Heynes, had found the Sponsor to be an unsatisfactory witness who did not accept responsibility for fraudulent activity of his wife and that he himself would also agree with that conclusion.

7. The appeal was dismissed.

Grounds of Application

8. The grounds of application state that the judge made arguable errors of law in failing to consider relevant facts in issue when carrying out the balancing exercise in the consideration of Article 8. The judge also failed to note that paragraph 320(11) is discretionary and not mandatory. He failed to give adequate reasons for refusing to accept the explanation given by the Sponsor (at paragraph 35).

9. On 4th December 2018, permission to appeal was granted. It was observed that the Appellant's actions in 2013 had to be considered in the light of subsequent application where nothing was hidden from the ECO. Second, the judge's conclusions in relation to Article 8 (at paragraph 36) did not contain the balancing exercise required, which involved the balance of the public interest against the Appellant's right to family life.

Submissions

10. At the hearing before me on 7th March 2019, Mr Holmes, appearing on behalf of the Appellant, submitted that there were two points before this Tribunal. First, that the judge's analysis of the appeal under Article 8 outside the Immigration Rules was flawed, because the judge did not take material circumstances into account, by way of undertaking a proportionality exercise, and these included the fact that the Appellant and the Sponsor were in a genuine and subsisting marriage relationship, where the Sponsor had visited the Appellant in Iran on a number of occasions, such that it could not be concluded that Article 8 was not even engaged.

11. Second, that insofar as the judge gives reasons (at paragraphs 34 and 35) these reasons are inadequate to uphold the decision arrived at. In making good his first ground, Mr Holmes submitted that this was a human rights appeal and so it is important to look at the position outside the Immigration Rules, as against what was a general ground for refusal, which could not be determinative. The judge had at the outset (at paragraph 56) simply referred to the findings of the previous judge which were that "Article 8 is not engaged" but this could simply not be true because the marriage was genuine and subsisting and there had been visits between the Sponsor and the Appellant. In any event, no reasons are given by the judge in this Tribunal either.

12. Insofar as paragraph 36 is concerned, where the judge does expressly refer to Article 8, the fact remains that the conclusion here is necessarily coloured by what the judge had stated earlier at paragraph 26, namely, that Article 8 is not engaged. All that the judge does at paragraph 36 is to say that there is plainly a public interest in preventing the individual entering the UK who has a track record of fraudulently interception and that it would be "entirely inappropriate to overlook that factor" (paragraph 36). There is no balancing exercise undertaken here at all.

13. This was despite the fact that the judge recognises in the same paragraph that "The Sponsor has been able to visit the Appellant in Iran on a number of occasions since 2012". It is no answer, however, to then also add that "There is no bar to the Sponsor moving to Iran and enjoying family life with the Appellant there" (paragraph 36). This is because the application was to join the Sponsor in the UK. It was incumbent upon the judge to carry out a balancing exercise. That was not being undertaken by the judge in this case. Essentially, what the judge was doing was giving an open-ended exclusion decision to the Appellant entering the UK.

14. As far as the reasons given at paragraphs 34 to 35 were concerned, Mr Holmes submitted that the judge fastened upon the fact that the Sponsor had made family arrangements very shortly before his wife attempted to gain illegal entry to the UK, and that his bank accounts showed him purchasing seven flights for which he paid, together with payment for a hotel in Euros, and that whilst he did not then go to France, "It is unclear to my why one would purchase flights and reserve accommodation if a visa had not been arranged" (paragraph 34), the implication here had been, submitted Mr Holmes, that the Sponsor knew that his wife, the Appellant, was coming to France, where he could meet her there. However, submitted Mr Holmes this failed to take into account the Sponsor's own explanation for this.

15. For his part, Mr Tan submitted that the judge had properly identified (at paragraph 13) that the sole issue in this appeal was to deal with the application of paragraph 320(11) because this was a case where "The Appellant has used deception in an application for entry clearance" and that "The Appellant has on two occasions used a false identity attempting to enter the UK illegally and on that third occasion the Appellant was dishonest about an activity outside of Iran" (paragraph 13). The judge had then gone on to consider Article 8, after having found that the Appellant could not succeed under paragraph 320(11) and the Article 8 assessment in this regard was bound to have been impacted upon by the judge's findings at paragraph 320(11). It was not in dispute that this was a genuine marriage and it was not in dispute that the Sponsor had visited his wife on several occasions. Nevertheless, the judge had rejected the credibility of the Appellant and the Sponsor, when considering the application of paragraph 320(11) and this was bound to influence the way in which the wider Article 8 assessment was to be carried out. In short, the public interest in favour of immigration control was bound to be given controlling rate. This is what the judge held.

16. In reply, Mr Holmes submitted that if one looks at the Appellant's bundle (from pages 48 onwards), there are four copies of disclosure documents, which the judge does not show any evidence of having taken into account. Their importance lies in the fact that insofar as paragraph 320(11) was a "discretionary" provision, then, faced with the full disclosure made by the Sponsor in the latest application, the discretion ought to have been exercised in favour of the Appellant, because otherwise one was looking at a situation where there would be an indefinite exclusion of the Appellant to join her husband. The failure by the judge to have regard to these documents of full disclosure and to factor them in to his assessment under the Immigration Rules, insofar as paragraph 320(11) was concerned, was an error of law. Second, and in any event, even if that was not the case as far as paragraph 320(11) was concerned, it was clearly the case insofar as Article 8 was concerned, because here regard could be had to the fact that the Appellant had made a full disclosure of documents so that it did not necessarily follow that the public interest in favour of immigration control meant that the Appellant stood to be excluded from joining her husband, even in a situation where the marriage was a genuine and subsisting one, and where visits had been made by her sponsoring husband to be with her in Iran.

Error of Law

17. I am satisfied that the making of the decision by the judge involved 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. My reasons are as follows. First, whereas I am not impressed with the argument that the judge is vulnerable to a discrete reasons challenge with respect to what he said at paragraphs 34 to 35, I do think that the decision with respect to Article 8 is flawed. The reason why I am not impressed by the argument in relation to paragraphs 34 and 35 is that it ignores what is said at paragraph 33, where the judge refers to the earlier decision of IJ Heynes, who found the Sponsor to be an "Unsatisfactory witness who does not accept responsibility for the fraudulent activity of his wife", and the judge clearly gave a reason himself in terms that, "I reached the conclusion that the Sponsor knew far more than his wife's deception than that which he has disclosed" (paragraph 33). Accordingly, there is nothing in this point.

18. However, the Article 8 argument is a more substantial one. The judge, having set out the summary of the findings of IJ Heynes in 2017 (at paragraph 26), to the effect that, "Article 8 is not engaged", proceeded to approach the matter on the same footing at paragraph 36, observing that, "There is plainly a public interest in preventing an individual entering the UK where the individual has a track record of forgery and deception", and that it is, "Entirely inappropriate to overlook that factor" (paragraph 36). But this does not show a balancing exercise having been carried out in an even-handed manner. It also fails to take into account the documentation in the Appellant's bundle from pages 48 onwards, where there has been a full disclosure of the matters to date.

19. What is significant in this relationship is that it is accepted by the Respondent that the Appellant and the Sponsor are in a genuine and subsisting relationship, and that the Sponsor has visited the Appellant, and that the Appellant has in turn been keen to join the Sponsor in the UK and to live with him here. That requires a full and proper assessment of their Article 8 rights to family life, which have to be balanced against the public interest in favour of immigration control. The reliance on the fact that "Article 8 is not engaged" is plainly wrong because the engagement of Article 8 involves a low threshold, and in a case such as this, where the marriage was genuine and subsisting, there is no doubt that such a threshold had been reached.

Notice of Decision

20. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Durance pursuant to Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding, which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

21. No anonymity direction is made.

22. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 20th March 2019