Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08078/2018

THE IMMIGRATION ACTS

Heard at Bradford Phoenix House	**Decision & Reasons Promulgated**
On 6th March 2019	**On 15th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SAMMAR [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R O'Ryan (Counsel), Prolegis Solicitors LLP
For the Respondent: Mrs R Petersen (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge A M Buchanan, promulgated on 23rd October 2018, following the hearing at North Shields on 20th August 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matters comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 19th December 1989. He appealed against the decision of the Respondent refusing his application for leave to remain in the UK on the basis of his family life with his wife, [RK], whom he had married in Pakistan on 20th September 2014. The decision appealed against is dated 15th March 2018.

The Appellant's Claim

3. The Appellant's claim is that, after marrying his wife on 20th September 2014 in Pakistan, he came to the UK on 11th June 2015. He and his wife have had difficulty conceiving a child. This has caused stress in their relationship. Initially the two of them lived with his wife's parents. They moved to their own home, however, in August 2016. The Appellant had an operation in March 2017 as part of fertility treatment, but a child has not been conceived.

4. One evening, the Appellant and his wife were invited to the home of her parents to discuss the situation. This was in May 2017. When they arrived the Appellant's wife's brother humiliated the Appellant. He told his sister (the Appellant's wife) that she should leave the Appellant and remarry. The Appellant's brother in law forced the Appellant onto a couch, and the brother-in-law's wife called the police. The Appellant was arrested. He was taken to the police station. He spent the night in a cell. He was asked by the police to accept a caution rather than face a criminal conviction, and a condition of the caution was that he should attend anger management courses at Carlisle Business Centre.

5. The Appellant was told that once he had completed the course, the caution would be complete, although it would remain on his record, but not affect his immigration case. The Appellant and his wife have lived together since the incident and it has brought them closer together. However, when the Appellant made his application for leave to remain, he was asked if he had any criminal convictions and he replied that he did not. Only when the application was refused, did he find out that the caution remained effective. He has no other convictions or cautions. The Appellant even then submitted a complaint to the West Yorkshire Police on 25th June 2018 about the circumstances of the caution. The complaint was rejected.

The Judge's Findings

6. At the hearing before Judge Buchanan, the Appellant's wife, [RK], gave evidence to say that the caution on 22nd May 2017 was allegedly for the Appellant having assaulted her brother. She did not understand that the caution remained on her husband's record. The incident, however, which led to the caution was caused by her brother. She did not consider that her husband assaulted anyone. She does not consider herself to be a victim of domestic violence in any way at all. The police were only called in the heat of the moment when emotions were high.

7. The judge noted that it was accepted that there was a failure by the Appellant to disclose the fact of a caution dated 22nd May 2017. The judge also accepted that when the application was completed the Appellant was not present before the immigration advisor. The answer to question 10.3, with respect to the caution, was answered by the Appellant's wife instead. She then took it home for the Appellant to sign the three or four pages of the application (numbering 79 pages). However, the judge did not accept that the Appellant only saw three or four pages of the 79 page document. It was an important document. He ought not to have been negligent or reckless in this regard.

8. On the other hand, the judge also accepted that [RK], had not been asked about details of questions 10.2 and 10.3 on the application form. She had only been asked questions about terrorism offences. The answer she gave to question 10.2 was correct. The answer she gave to question 10.3 was not correct. Proper care should have been taken, according to the judge. Nevertheless,

> "The Appellant laboured under a common misunderstanding that the conditional caution was completed when he had undertaken the anger management course but if he had read question 10.3 he would have seen that the question asked whether he had 'been subject to or received any other penalty in relation to a criminal offence: for example caution …'" (see paragraph 31).

9. The judge concluded that the Appellant did not take seriously the completion of the application form. In this sense, the HOPO was correct that the Secretary of State had received false information and that "the fault lies with the Appellant and ultimately no-one else" (paragraph 31). The judge went on to adopt a balance sheet approach.

10. Ultimately, the judge's conclusion was that "the subject matter of the caution is an incident at the minor end of the scale of domestic violence and that a conditional caution would not have been offered had that not been the case. The Appellant meets all the other requirements for leave to be granted and he is a man otherwise of good character. The interference with his family life and indeed his private life, whilst not amounting to very significant difficulties or causing very serious hardship, would nonetheless cause difficulties and hardship for the Appellant and RZ [RK] arising out of the failure to disclose information. I take account of the fact that the failure to disclose the caution was not intentional and indeed was always bound to be discovered given that the Respondent makes appropriate checks with the police as is stated plainly on the application form itself" (paragraph 33).

11. In undertaking the balancing exercise, the judge held that "this is one of those rare cases where there is justification to go outside the Rules under Article 8 of ECHR in the circumstances of this case", and allowed the appeal on the basis of freestanding Article 8 jurisprudence (paragraph 34).

12. The appeal was allowed.

Grounds of Application

13. The grounds of application state that the judge had found that the Appellant had failed to provide a reasonable excuse for not declaring his convictions and the caution entered on his record. Nevertheless, he had gone on to allow the appeal. There were three difficulties with this. First, there was a finding (at paragraph 33) which was in complete contradiction to the earlier findings, which meant that the decision to remove could not be disproportionate. Second, the judge had found that there were no insurmountable obstacles, but only "very significant difficulties or hardship to the Appellant" (see paragraphs 32 to 33). Third, the judge had made a contradictory finding that there would be "difficulties and hardship" for the Appellant if he were to be removed, but did not identify what these were (paragraph 33). Given that the judge had found that there were no insurmountable obstacles, the reference to "very significant difficulties or hardships" was the application of a wrong test in allowing the appeal.

14. On 14th November 2018, permission to appeal was granted.

Submissions

15. At the hearing before me on 6th March 2019, Mr Petersen, appearing on behalf of the Respondent Secretary of State, relied upon the grounds of application. She submitted that the judge had plainly confused the application of the "insurmountable obstacles" test with their being "very significant difficulties" and this being so, the appeal should not have been allowed.

16. For his part, Mr O'Ryan, appearing as Counsel on behalf of the Appellant, submitted that, even if it is the case that the Secretary of State did receive false information (see paragraph 31) this did not fall under S-LTR.1.7. This is because that provision states that:

> "The applicant has failed without reasonable excuse to comply with a requirement to-
>
> (a) attend an interview;
>
> (b) provide information;
>
> (c) provide physical data; or
>
> (d) undergo a medical examination or provide a medical report."

None of these four requirements were engaged here. Therefore, there could not be a mandatory Ground for Refusal in existence in this case. The failure to disclose material facts is not a matter that is considered in S-LTR.1.7, but is something which falls under S-LTR.2.2 (which is a discretionary Ground for Refusal), and which states that,

"Whether or not to the applicant's knowledge –

(a) false information, representations or documents have been submitted in relation to the application …; or

(b) there has been a failure to disclose material facts in relation to the application."

He submitted that there is a distinction between the mandatory Grounds of Refusal (S-LTRP.1.1) and the discretionary Grounds for Refusal (S-LTRP.2.1). If there were to be an ambiguity in the terms of the Rule to be applied, that ambiguity should be resolved in favour of an applicant so as not to prejudice an applicant. This was because the harsh consequences of a mandatory refusal should only be applied where there are clear grounds for doing so. The purpose of S-LTRP.1.7 was to impose a sanction against an applicant who is purposely obstructing the Secretary of State's consideration of an application. This would be the case where, without reasonable excuse, an applicant had not complied with the requirement to, attend an interview, provide information, or provide physical data. In this case, the Appellant is guilty of neither of these examples.

17. Second, if it is argued that a requirement to provide information necessarily implies that the information provided must be correct, such an argument is not made out here, if the provision of incorrect information alone was sufficient to warrant the invocation of S-LTRP.1.7, because then there would be no distinction capable of being drawn between S-LTR.1.7 and S-LTR.2.2, which relates to the provision of false information and failure to disclose material facts.

18. Third, what this meant was that the judge ought to have directed himself as to the terms of S-LTR.2.2, and not to S-LTR.1.7. The judge should have considered whether the requirements of S-LTR.2.2 were met. If there were, then he ought to have considered whether applying S-LTR.2.1, it could be said that this was a case where it was appropriate for the Appellant to have been refused on the grounds of suitability. Mr O'Ryan submitted that had the judge so directed himself, then the outcome would have been the same. The appeal would have been allowed. This is because it was plainly the case that the judge was of the view that the caution itself did not provide the Secretary of State with any proper grounds for refusing the application for leave to remain on the ground of the Appellant's character (see paragraph 28). If the Appellant had disclosed the caution on the application form, but the Respondent Secretary of State had then refused the application on grounds of character or conduct, then the appeal would have been allowed by the judge, on the basis that all the requirements of the Immigration Rules were met, and that there were no public policy considerations requiring the Appellant's removal. The difficulty in this case, submitted Mr O'Ryan, was that the judge felt bound by the constraints of S-LTR.1.7, which implied that in the absence of a reasonable excuse for failure to disclose the caution, the application must fail under the Immigration Rules. This did not follow. The provisions of S-LTR.1.7 did not apply to the present

application. The judge was not obliged to find that the Immigration Rules were not satisfied (see paragraph 31). The judge could have found that, taking all the circumstances into consideration (paragraph 33) the appeal fell to be allowed.

19. In reply, Mrs Petersen submitted that there were two points. First, even if what Mr O'Ryan suggested was correct, and this was not a case of her "mandatory" refusal but of a "discretionary" refusal, so that it fell under S-LTR.2.7, it could still be argued that this was an application which should "normally" be refused. This is because of the failure to disclose material facts, which the judge found had been for reasons of the Appellant's negligence and recklessness, which was not justifiable. Second, even when the judge proceeded to apply the balance sheet approach, and took into account the fact that on the one hand the Appellant had failed to disclose the existence of the caution, and on the other hand there were no "insurmountable obstacles to the family life of the Appellant and answered continuing if the Appellant had to leave the UK" (paragraph 32), then as a matter of proportionality the appeal still fell to be refused. That is the conclusion that the judge should properly have come to.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law, such that it falls to be set aside (see Section 12(1) of TCEA 2007). The reason for this is a failure to apply the correct provisions. I accept entirely what Mr O'Ryan submits, namely, that the appropriate Rule in this case was not S-LTR.1.7, requiring an applicant to attend for interview, provide information, or undergo medical examination, the failure of which to do, would lead, without reasonable explanation, to a mandatory refusal. The appropriate provision was S-LTR.2.2 which requires the consideration of "whether or not to the applicant's knowledge", there has been the disclosure of false information, representations or documents".

21. Although Mrs Petersen is equally correct, in her incisive and succinct submission, that whichever way one looks this, the fact remained that the judge's own findings were that the Appellant had no reasonable excuse in his failure to disclose material facts and that, adopting the balance sheet approach, the Appellant and his wife would not face insurmountable obstacles to life in Pakistan, the fact remains that a party before a Tribunal is entitled to have the correct legal provisions applied. There is a world of difference between a provision that leads to a mandatory refusal and the provision that leads to a discretionary refusal. If the argument is framed on an incorrect basis, as has been the case here, where the judge appears to have proceeded on the basis that the mandatory Grounds of Refusal applied, then it is a short step to a decision maker coming to the wrong conclusion.

22. For this reason, the judge erred in-law, and the appropriate course of action now is that this matter be remitted back to the First-tier Tribunal, to

be determined again, on the basis of the correct legal provisions by another judge. The findings made by Judge Buchanan, insofar as they are in the Appellant's favour, remain intact and should not be revisited.

Notice of Decision

23. The decision of the First-tier Tribunal involved the making or an error on a point of law. The decision is set aside. I remake the decision by remitting this appeal back to the First-tier Tribunal, to be determined by a judge other than Judge A M Buchanan, pursuant to Practice Statement 7.2.(a) of the Practice Directions.

24. No anonymity order is made.

25. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 15th April 2019