



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002738

First-tier Tribunal No: HU/54116/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 July 2023

UPPER TRIBUNAL JUDGE HANSON

Between

AISHA MOHAMMED OMAR ADBULLAH
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Howard of Fountain Solicitors.

For the Respondent: Mr Lawson, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 13 June 2023

DECISION AND REASONS

1. Following a hearing at Birmingham CJC on 29 November 2022 the Upper Tribunal found an error of law in the decision of the First-tier Tribunal Judge who allowed the appellant's appeal on Article 8 ECHR grounds against refusal of her application for entry clearance under the Immigration Rules ('the Rules') as the spouse of a refugee.
2. The appellant, a citizen of Sudan born on 1 July 1995, was found to have used deception in an earlier application leading to the current application being refused under paragraph 9.8.7 of the Rules as she had applied before 21 August 2030.
3. Error of law was found as it was not possible to establish in the decision how the First-tier Judge had factored in the fact that deception had been employed in a previous application, together with it being found that inadequate reasons had been provided for why it was unduly harsh for family life to continue, even if at arms length with occasional visits, on the facts of this case.
4. Preserved findings from the decision of the First-tier Tribunal relate to the use of deception in the earlier application and the finding that the appellant and her husband are in a genuine relationship.

Discussion and analysis

5. It is not disputed the current application was for the purposes of family reunion. The refusal by the Entry Clearance Officer (ECO) reads:

I have decided you do not meet the requirements of the Immigration Rules for the following reasons:

Your application for permission to entry clearance is refused under paragraph 9.8.1 Part 9 of the Immigration Rules because you have previously breached immigration laws and have applied during the time period specified in paragraph 9.8.7 of Part 9.

Home Office records show that you used deception in a previous application that you made for entry clearance on 16/01/2020, full details of this were outlined in the decision notice dated 21/08/2020 (DD). Therefore, any application made before 21/08/2030 which falls to be considered by reference to Part 9 of the Immigration Rules will be refused. The period starts from the date of the previous event in which the deception or submission of falsified documents or information was employed.

I acknowledge your sponsor's statement dated 11/02/2021 (J) referring to the money receipts submitted with your previous application which states:

"I used to send my wife money by Dahabshiil Money Transfer. The company had a branch in Birmingham. I used to send my wife money via Dahabshiil since January 2019. I usually send her around £50 to £100 every two months. My wife used to receive the money in Sudan."

"When my wife received the decision on her previous entry clearance application, I was shocked that the Entry Clearance Officer stated that the money transfer receipts were not genuine."

"I attempted to contact Dahabshiil to find out what had happened as I had genuinely attended Dahabshiil to send money to my wife and had been provided with the receipts. I was shocked to find out that their Birmingham Branch had closed when I attempted to visit them and that their local telephone number was no longer working. I do not know what has happened. All I know is that I sent my wife money via Dahabshiil. My wife had received the money and I had been provided with the receipts that I gave to my wife."

However, it is your responsibility to ensure any documents submitted with the application part genuine and in your case the documents submitted with your previous application as outlined above were verified as nongenuine. Therefore, little weight has been applied to the explanation submitted.

Furthermore, the declaration signed by yourself within your Visa Application Form that application confirms the following:

"I declare that the documents that I have supplied with this application are genuine and the statements I have made with this application are truthful. I understand that the Home Office (or a trusted third party) may make reasonable checks to confirm the accuracy and authenticity of evidence I have provided and documents I have submitted with this application."

I am also aware that my application will be automatically refused and I may be banned from going to the UK for 10 years if I use a false document, lie or withhold relevant information. I may also be banned if I have breached immigration laws in the UK. I am further aware that should I use a false document, lie or withhold relevant information my details may be passed to law enforcement agencies."

It is therefore mandated to refuse your application under paragraph 9.8.1 Part 9 of the Immigration Rules.

I have therefore refused your application.

I also considered whether there are any exceptional circumstances in your case, including whether refusal breached Article 8 of the European Convention on Human Rights (ECHR). I have also considered whether there are compassionate factors which may justify a grant of leave outside the rules.

You have not raised any exceptional circumstances nor have any been identified in your case.

It is noted that you and your sponsor both have a valid travel documents, if your sponsor chooses to do so they can travel to a safe third country where you can arrange to meet and therefore, there is no breach under Article 8.

6. In his witness statement dated 6 January 2023 the appellant's husband, Mr Abdullah, stated he and his wife are in a genuine subsisting relationship and that they intend to live permanently together as husband and wife. He says he and his wife cannot continue their relationship in Sudan as he has been recognised as a refugee from Sudan and he cannot return there as his life will be in danger. Mr Abdullah claims it is impossible for him and his wife to continue their relationship long-term at a distance and there will be unduly harsh consequences as a result. He states he and his wife speak daily on the telephone when they can secure a connection as the village where she lives has intermittent Internet connection. Mr Abdullah states that he sends his wife around £50 a month, more if she needs additional funds. He claims without the funds he sends she will have no money to survive. Mr Abdullah claims his wife lives alone as both her parents passed away although his brother is able to visit her from time to time, approximately once a month. He claims he and his wife could not live in a third country as they do not have status in another country. Mr Abdullah says his wife speaks some English, that he speaks a reasonable level of English himself, and that he has returned to working for a company in Telford four days a week earning about £450 per week. It is seasonal work. Mr Abdullah claims he will be able to support his wife in the UK without recourse to public funds and that he and his wife wish to continue their lives together as husband and wife.
7. In reply to answers put in cross examination Mr Abdullah stated he last saw his wife in 2013 and that they have lived apart for about 10 years since he left Sudan. When asked whether he accepted that false documents had been used in a previous application he stated he did not. He claimed that when he got leave to remain in the United Kingdom he decided to earn some money. Mr Abdullah was asked why he did not carry on working and visiting his wife, there being a reference to his having worked for the company he currently works for previously but only recommencing employment on 23 December 2022, to which he claims he applied for nearly a year and wanted to work but could not give a satisfactory answer. Mr Abdullah was asked why could not work abroad as he had in the past and why, even if he could not visit Sudan, he could not meet his wife in another country, to which he claimed he could not go back to Sudan which is why he left.
8. Mr Abdullah was asked by Mr Howard in re-examination what prevented him and his wife continuing family life in a country other than the UK to which he claimed that he wanted his wife here in the UK and did not know if other countries were secure. When he was asked as he had visited his wife elsewhere before he could not do so again, he claimed he could not go as he could not afford to go.
9. It is noted that the replies did not address key aspects of the questions.
10. The appellant's case is that she married her husband on 1 February 2012 in Debaiba, Sudan and that they lived together as husband and wife from their wedding day until her husband left Sudan on 1 March 2013. The appellant stated

she regained contact with her husband when he arrived in Libya in April 2014 and has maintained regular contact since. This has been both through social media and telephone calls.

11. The appellant and her husband travelled to Addis Ababa in Ethiopia in October 2020 to spend time together and evidence of that visit has been provided.
12. On behalf of the ECO Mr Lawson submitted that family life can continue elsewhere and that it was an important part of the balancing exercise to consider whether the claim had been overridden by the use of false documents. Despite there being a finding that false documents had been used previously the appellant's husband continues to deny that fact. It was submitted by Mr Lawson that the parties have been able to spend time together in Ethiopia, that the appellant's husband had worked abroad previously and could do so in a third country where they could meet to continue their family life, such as in one of the Arab states. It was submitted there is no requirement for family life to continue in the UK, the use of previous deception was relevant to the proportionality balancing exercise, and that it was not disproportionate to expect the parties to continue their family life elsewhere.
13. Mr Howard relied upon his skeleton argument, the further documents provided relating to country conditions, the fact this was an assessment outside the Rules, the husband's recognition as a refugee from Sudan, a claim the third country argument was not valid, that there are preserved findings, that the decision prevents the further development of family life, and that it was accepted the appellant's husband cannot return to Sudan.
14. In relation to the Immigration Rules, paragraph 352A read (prior to its deletion):
 - 352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee status are that:
 - (i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
 - (ii) the marriage or civil partnership did not take place after the person granted refugee status left the country of their former habitual residence in order to seek asylum or the parties have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
 - (iii) the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
 - (iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
 - (v) each of the parties intends to live permanently with the other as their spouse or civil partner and the marriage is subsisting; and
 - (vi) the applicant and their partner must not be within the prohibited degree of relationship; and
 - (vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.
15. It is not disputed that the appellant is the partner of a person who has refugee status granted in the United Kingdom. It is not disputed before me that their marriage took place before Mr Abdullah left Sudan in order to seek asylum. It is not disputed the relationship existed before Mr Abdullah left Sudan in order to seek asylum. It is not suggested the appellant is excluded from the protection of

the refugee Convention if she were to seek asylum in her own right or disputed that the appellant and her husband intend to live permanently with each other, and that the marriage is subsisting. It is not suggested that the relationship falls within a prohibited degree of relationship.

16. The relevant provisions are now to be found in the Immigration Rules Appendix Family Reunion (Protection).

17. FPR2.1 – 2.2 reads:

FRP 2.1. An application for family reunion must be refused on suitability grounds where the Secretary of State:

(a) has at any time decided that paragraph 339AA (exclusion from Refugee Convention), 339AC (danger to the UK), 339D (exclusion from a grant of humanitarian protection) or 339GB (revocation of humanitarian protection on grounds of exclusion) of these rules applies to the applicant; or

(b) has decided that paragraph 339AA, 339AC, 339D or 339GB of these rules would apply, but for the fact that the person has not made a protection claim in the UK, or that the person has made a protection claim which was finally determined without reference to any of the relevant matters described in paragraphs 339AA, 339AC, 339D or 339GB.

FRP 2.2. The applicant must not fall for refusal under Part 9: grounds for refusal.

18. Part 9 of the Immigration Rules sets out the grounds for refusal. Paragraph 9.8, a mandatory ground of refusal, reads:

9.8.1. An application for entry clearance or permission to enter must be refused if:

1. (a) the applicant has previously breached immigration laws; and
2. (b) the application is for entry clearance or permission to enter and it was made within the relevant time period in paragraph 9.8.7.

19. The 'relevant time period' is set out in paragraph 9.8.7 by reference to the published table. Section (f) states the relevant period will be 10 years if a person used deception in an application.

20. I find the refusal under the Immigration Rules to be lawful as the appellant has clearly been found to have used deception in a previous application, was therefore excluded from the United Kingdom for making an application within the proscribed 10 year period, which she breached by making the application that led to the decision under appeal. It is accepted by Mr Howard in his skeleton argument that the Immigration Rules cannot be met in light of Part 9.

21. I note the Judge of the First-tier Tribunal referred to the Secretary of State's guidance 'Family life (as a partner or parent) and exceptional circumstances, version 16'. This has now been replaced by version 19 dated 18 May 2023. The purpose of the guidance is to tell decision-makers how to decide applications or claims for leave to remain or enter on the basis of family life as a partner or parent or exceptional circumstances in compliance with Article 8 ECHR.

22. The Secretary of State's view is that the Immigration Rules set out the conditions that she believes should be satisfied to enable a non-British national to enter the UK on the basis of family or private life which reflect the qualified nature of Article 8, setting out only requirements which properly balance an individual's right to respect for their family or private life with the public interest in safeguarding the economic well-being of the UK by controlling immigration, in

protecting the public from foreign criminals, and protecting the rights and freedoms of others.

23. It cannot be disputed that the need for a valid, robust, and workable immigration policy is a justified legitimate interest.
24. In this case, the appellant satisfies the requirements of Appendix Family Reunion but cannot succeed on that basis as a result of the effect of Part 9. The appellant therefore relies on Article 8 ECHR outside the Rules.
25. It was not disputed before me that family life recognised by Article 8 exists between the appellant and her UK-based husband on the basis of their marriage. The issue to be considered is the proportionality of any interference with that protected right caused by the decision which has the effect of preventing them from developing their family life further in the UK at this time.
26. It is not disputed that in favour of the ECO's position is that the maintenance of effective immigration control is in the public interest and that this is a case in which the appellant is excluded from making a decision within a period of 10 years from the relevant date as a result of the operation of Part 9 of the Rules, based upon her use of deception.
27. In relation to the ability of the appellant to speak English, Mr Abdullah confirmed his wife can speak a little English with no real evidence before me of the standard at which she is able to communicate, in oral and written form, in English. Section 117B(4)(2) reads:

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English

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- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

28. Mr Abdullah asserts that the appellant will be financially independent if she comes to the UK as, provided he continues working, he will be able to financially support her without recourse to public funds. Evidence provided shows he earns above the minimum income threshold set out in Appendix FM. This is, however, a neutral factor.
29. Mr Howard asserts the points in favour of the appellant in the balancing exercise are:
 - a. The appellant and her husband are in a genuine subsisting relationship.
 - b. The appellant and her husband have been in a relationship since January 2012 and intend to live together permanently as husband and wife
 - c. That there are unduly harsh consequences which have been identified as:
 - i. The sponsor is recognised as a refugee from Sudan and is unable to return to that country without being subject to a real persecutory risk meaning they cannot continue their family life in Sudan.

- ii. The recent deterioration in the humanitarian situation/human rights situation in Sudan as a result of ongoing fighting there. It is said the Human Rights situation in Sudan has significantly deteriorated during 2023 meaning the appellant is no longer safe by herself in Sudan and faces a real risk to her safety there.
- iii. In light of Part 9 of the Immigration Rules the appellant will have to wait 10 years in order to make a successful application under the Rules, a period of time of particular significance given the sharp recent deterioration in the country conditions in Sudan.
- iv. If the Article 8 ECHR appeal is refused, there is no country in which both the appellant and her husband will be entitled to live and continue to maintain their family life together.

30. It was submitted by Mr Howard that the problems faced by the appellant and her husband cannot be overcome by occasional visits in a third country, especially as there was no guarantee both the appellant and her husband will be granted entry clearance to any third country in order to facilitate such visits, that in light of the humanitarian situation in Sudan it was unrealistic to anticipate the appellant will be able to leave Sudan in order to enter a third country, and that such potential visits would prevent the appellant and sponsor from being able to continue their family life unrestricted.
31. It is not suggested by the Secretary of State that Mr Abdullah can return to Sudan to live with his wife. It is not disputed there has been a deterioration in the situation on the ground in some parts of Sudan as a result of the outbreak of the Civil War, which is widely reported in the media as well as in the evidence provided by Mr Howard.
32. Mr Lawson indicated there was no evidence the appellant would not be able to leave Sudan and indeed there are regular flights from Khartoum such as, inter alia, to Dubai, Jeddah, and Riyadh. It was not therefore made out that flights are not available or that individuals such as the appellant will be prevented from leaving Sudan. Online visa applications can be made for Sudanese passport holders to visit Ethiopia, which includes both the appellant and her husband. There is no evidence they cannot use the process which they must have used to facilitate their earlier visit or that any such application will be refused. I find it has not been made out that the appellant and her husband cannot continue to visit each other as they have in the past in a country other than Sudan.
33. It is accepted that visits are not the same as living together as husband and wife but it is not made out the appellant and her husband will not be able to visit elsewhere, as they have in the past. There is no evidence they have made applications to be able to meet or settle in other countries that have been refused.
34. In relation to the period of exclusion, although initially for a period of 10 years, that expires on 21 August 2030 a further seven year period. That is, however, the effect of the operation of the law as a consequence of the appellant's own actions.
35. In relation to the appellant's personal circumstances in Sudan, it is said she lives in a village with the support of her brother-in-law, her husband's brother. There is insufficient evidence to show the situation for her personally has materially worsened as a result of the armed conflict, which is focused mainly upon Khartoum, that she faces a real risk or harm or destitution or is without the protection of a male family member.

36. The country evidence provided by Mr Howard includes an article by the Office of the United Nations High Commissioner for Human Rights entitled 'Concerns over the continued devastating impact of the fighting in Sudan on civilians, dated 9 June 2023. That article refers to civilian deaths as a result of airstrikes on a market in Khartoum, a child dying as a result of shelling in southern Khartoum, and other concerns arising as a result of the military action in that area. A second article by Radio Debanga entitled "Fierce fighting in Khartoum after unstable truce ends, 5 June 2023", refers to the resumption of armed conflict between the Sudanese army and the Rapid Support Forces, noting the site of battles and the evacuation of children who have been orphaned to areas outside Khartoum. There is reference to an ongoing humanitarian catastrophe with people being killed due to lack of drinking water, food, medical supplies, and loss of power in the areas of the conflict, but beyond these articles there is insufficient evidence to show that the appellant has been directly affected. It is not sufficient to speculate when there is insufficient direct evidence to support such a claim, even from the person concerned.
37. Mr Abdullah has worked other than in the UK, as suggested by Mr Lawson, and whilst he would prefer to stay in the UK Article 8 ECHR does not give a person the right to choose whether they wish to live. The grant of refugee status is a recognition that the Mr Abdullah cannot live in Sudan not that he cannot live in any other country. There is insufficient evidence to enable me to make a finding that in principle Mr Lawson's suggestion that Mr Abdullah can find work outside the UK and that he and the appellant can live together there is irrational, but whether it is realistic will depend upon whether such employment can be obtained and both Mr Abdullah and the appellant will be admitted as a couple to the county in question. There was insufficient evidence dealing with this issue from the appellant to enable me to make a clear finding in her favour on the point.
38. It is accepted there is a positive obligation upon a Member State to facilitate family life pursuant to Article 8, but case law establishes that the proportionality of any decision that prevents or restricts the same is to be assessed by reference to the established legal provisions.
39. The eventual goal for any decision maker considering an Article 8 appeal is to produce a decision compatible with both domestic and Strasbourg case law.
40. The European Court of Human Rights has affirmed that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 67; *Boujlifa v. France*, 1997, § 42). Moreover, the Convention does not guarantee the right of a foreign national to enter or to reside in a particular country.
41. In *AT and another* [2016] UKUT 227 it was found there is no obligation upon the Secretary of State to facilitate re-unification in the UK. It is recognised at [10] of that decision that the Secretary of State's policy in the realm of family reunification is expressed in the Immigration Rules which provide spouses and minor children of a sponsor, subject to satisfying governing conditions, the ability to secure entry to the UK by a grant of leave to enter. In the current appeal the relevant conditions in the Rules were not satisfied as a result of the impact of Part 9.
42. The UK therefore enjoys a margin of appreciation in relation to the control of entry into and stay in its territory. The manner in which the margin of appreciation has been exercised in this case is to refuse the application as a result of the effect of Part 9 of the Rules based upon the previous finding of the use of false documents and consequential bar in making a further application or the specified

period. It was not the will of parliament to make an exception from the application of the exclusion period in a case such as this.

43. The substantive elements, which are, in general, to be taken into consideration for determining whether a State is under a positive obligation under Article 8 of the Convention to grant family reunification, have been summarised in *M.A. v. Denmark* (application no. 6697/18) a decision of the Grand Chamber handed down on 9 July 2021, as follows:
- (i) status in and ties to the host country of the alien requesting family reunion and his family member concerned;
 - (ii) whether the aliens concerned had a settled or precarious immigration status in the host country when their family life was created;
 - (iii) whether there were insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting reunification;
 - (iv) whether children were involved;
 - (v) whether the person requesting reunion could demonstrate that he/she had sufficient independent and lasting income, not being welfare benefits, to provide for the basic cost of subsistence of his or her family members (§§ 131-135).
44. The answers to these questions in this case are:
- (i) Both the appellant and her husband are national of Sudan. The appellant lives in Sudan lawfully. Mr Abdullah is in the UK lawfully following his being recognised as a refugee.
 - (ii) Both the appellant and her husband resided in Sudan legally as nationals of that country when the relationship was formed and they were married.
 - (iii) There is an insurmountable obstacle to the appellant and her husband living as a family in Sudan as Mr Abdullah has been recognised as a refugee from that country.
 - (iv) There is no mention of children in the impugned decision or skeleton argument.
 - (v) It is accepted the appellant will not be a burden upon the public purse if she is permitted to join her husband in the UK.
45. What is missing from the questions above is consideration of any countervailing factors. It is accepted that if the above questions are answered as they will be in this case, without the Part 9 issue and exclusion provided for in the Rules, the appellant must succeed.
46. It is not made out the provisions relating to exclusion periods for future applications are not compatible with the principle of non-discrimination enshrined in Article 14 ECHR, as they apply to all.
47. The facts of *M.A. Denmark* involved consideration of a waiting period for those seeking family reunion where the person in the Member State had not been granted refugee status but rather subsidiary or temporary protection, who faced a blanket restriction on the time when an application for family reunion could be made by those who fell within this particular group, rather than being based upon any other subjective circumstances. It was found that while States enjoy a wide margin of appreciation under Article 8 of the Convention in deciding whether to impose a waiting period for family reunification requested by persons who had not been granted refugee status but who enjoyed subsidiary protection or temporary protection, beyond the duration of two years, the insurmountable obstacles to enjoying family life in the country of origin progressively assume

more importance in the fair balance assessment (M.A. v. Denmark [GC], §§ 161-162 and 193). At 161-192 the Court found:

161. Having regard to all the elements above, the Court considers that the member States should be afforded a wide margin of appreciation in deciding whether to impose a waiting period for family reunification requested by persons who have not been granted refugee status but who enjoy subsidiary protection or, like the applicant, temporary protection.
162. Nevertheless, the discretion enjoyed by the States in this field cannot be unlimited and falls to be examined in the light of the proportionality of the measure. While the Court sees no reason to question the rationale of a waiting period of two years as provided for in Article 8 of the Family Reunification Directive (three years being accepted only by way of derogation - see paragraphs 46, 156 and 157 above), it is of the view that beyond such duration the insurmountable obstacles to enjoying family life in the country of origin progressively assume greater importance in the fairbalance assessment. Although Article 8 of the Convention cannot be considered to impose on a State a general obligation to authorise family reunification on its territory (see paragraph 142 above), the object and purpose of the Convention call for an understanding and application of its provisions such as to render its requirements practical and effective, not theoretical and illusory, in their application to the particular case. This principle of effectiveness is a general principle of interpretation extending to all the provisions of the Convention and the Protocols thereto (see, for example, Muhammad and Muhammad v. Romania [GC], no. 80982/12, § 122, 15 October 2020).

48. At [193]:

193. Thus, for the applicant, the statutory framework and the three-year waiting period operated as a strict requirement for him to endure a prolonged separation from his wife, irrespective of considerations of family unity in the light of the likely duration of the obstacles. In these circumstances, it cannot be said that the applicant was afforded a real possibility, under the applicable law of the respondent State, of having an individualised assessment of whether a period shorter than three years was warranted by considerations of family unity. The union of the applicant and his wife had been established some twenty-five years before the applicant obtained protection status in Denmark and it was accepted that there were insurmountable obstacles in the way of the couple's enjoyment of family life in their country of origin. As the Court has held above (see paragraph 162), beyond two years the insurmountable obstacles to enjoying family life in the country of origin progressively assume greater importance in the fair-balance assessment. Whilst Article 8 of the Convention does not impose a general obligation on a State to authorise family reunification on its territory, the right to respect for family life as guaranteed by this provision must, like all other rights and freedoms guaranteed by the Convention and the Protocols thereto, be secured by the Contracting States in a manner that makes it practical and effective, not theoretical and illusory (see paragraphs 142 and 162 above).

49. The Court concluded at [194-195]:

194. Having regard to all the above considerations, the Court is not satisfied, notwithstanding their margin of appreciation, that the authorities of the respondent State, when subjecting the applicant to a three-year waiting period before he could apply for family reunification with his wife, struck a fair balance between, on the one hand, the applicant's interest in being reunited with his wife in Denmark and, on the other, the interest of the community as a whole to control immigration with a view to protecting the economic well-being of the country, to ensuring the effective integration of those granted protection and to preserving social cohesion (see paragraph 165 above).
195. It follows that there has been a violation of Article 8 of the Convention.

50. That decision, in addition to considering the legitimate interest of the community as a whole and the control of immigration did not have the additional factor of a period prohibiting entry by virtue of a separate provision of the Immigration Rules based upon the applicant’s use of deception. That is the material aspect of the Secretary of State’s case in relation to the proportionality balancing exercise.
51. I accept there is flexibility in the manner in which the prohibition period is applied. The table referred to above in paragraph 9.9.7 of the Rules reads:

Time from date the person left the UK (or date

of refusal of the application under row (f)

This applies where the applicant

And the applicant left the UK

And the applicant left the UK

(a) 12 months

left voluntarily

at their own expense

N/A

(b) 2 years

left voluntarily

at public expense

Within 6 months of being given notice of liability for removal or when they no longer had a pending appeal or administrative review, whichever is later.

(c) 5 years

left voluntarily

at public expense

more than 6 months after being given notice of liability for removal

Time from date the person left the UK (or date

of refusal of the application under row (f))

This applies where the applicant

And the applicant left the UK

And the applicant left the UK

or when they no longer had a pending appeal or administrative review, whichever is later.

(d) 5 years

left or was removed from the UK

as a condition of a caution issued in accordance with section 22 of the Criminal Justice Act 2003 (and providing that any condition prohibiting their return to the UK has itself expired)

(e) 10 years

was deported or removed from the UK at public expense -

Time from date the person left the UK (or date

of refusal of the application under row (f)

This applies where the applicant

And the applicant left the UK

And the applicant left the UK

(f) 10 years Used deception in an application (for visits this applies to applications for entry clearance only).

52. I was not referred to any provision that shows the exclusion periods are not applicable to an individual whose spouse has been recognised as a refugee as otherwise those seeking family reunion with a refugee, as such would mean there will be no incentive not to use deception in an application, which is contrary to the public interest in the maintenance of immigration control.
53. In *M.A. v. Denmark* the Court considered, in particular, that the applicant had not had a real possibility under domestic law to have an individualised assessment of whether a shorter waiting period was warranted by considerations of family unity, despite it having been accepted in the domestic proceedings that there were insurmountable obstacles in the way of the couples' enjoyment of family life in their country of origin (§§ 192-194). In the current appeal the opportunity and right to an effective remedy through judicial process exists and has been employed by the appellant.
54. It is not disputed the appellant cannot meet the requirements of the Rules. In *Razgar* [2004] UKHL 27 Lord Bingham said that decisions taken in pursuit of the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases identifiable only on a case by case basis.
55. In *Huang and Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11 the House of Lords said that in reaching a decision under Article 8(2) the decision maker will need to consider and weigh all that told in favour of the refusal of leave which was challenged. The decision maker should bear in mind several factors, including: the general administrative desirability of applying

known since rules if a system of immigration control was to be workable, predictable, consistent and fair as between one claimant and another; the damage to good administration and effective control if a system was perceived by claimants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non nationals admitted to the UK temporarily from believing that they could commit serious crimes and yet be allowed to remain; and the need to discourage fraud, deception and deliberate breaches of the law.

56. The modern approach to the weight to be given to immigration control was set out by Lord Reed in *Hesham Ali* [2016] UKSC 60 at [46] and following and also by him in *Agyarko* [2017] UKSC also [46] and following. The immigration rules are statements of the practice to be followed, approved by Parliament, and based on the Secretary of State's policy as to how individual rights should be balanced against the competing public interests. Considerable weight should be attached to the Secretary of State's policy at a general level by the tribunal.
57. Cases which have included an element of dishonesty of a party include *JK(India) v Secretary of State of the Home Department* [2013] EWCA Civ 1080 in which the Court of Appeal effectively confirmed that paragraph 322(1A) was deliberately couched in terms intended to prevent the making of dishonest applications with the result that applications were to be refused even though the dishonesty employed may not be that of the applicant himself or herself. Where an applicant claimed to be entirely innocent and relied on Article 8 there was nonetheless substantial weight to be given to the clear intention of Parliament that the making of dishonest applications be deterred.
58. In *Mumu* (paragraph 320; Article 8; scope) [2012] UKUT 00143(IAC) the Tribunal said, in the context of Article 8 and proportionality on an out of country spouse settlement appeal where 320(7A) was found to apply that "those who engage, or who might be tempted to engage, in dishonest attempts to deceive the United Kingdom authorities in relation to immigration control need to be aware that such actions will have disadvantageous consequences for those who are the intended beneficiaries of the dishonest conduct. In the present case, the appellant and the sponsor have chosen to marry against the backdrop that the appellant had no automatic entitlement to live in the United Kingdom. In all the circumstances, it is, we consider, not disproportionate for the respondent to refuse the application, on the basis of paragraph 320(7A)".
59. Other cases considered are *R (on the application of Onkarsingh Nagre)* [2013] EWHC 720 in which Sales J on a Judicial Review of the lawfulness of the Article 8 additions to the Immigration Rules of 13 June 2012 held that the Secretary of State is entitled to set out her view, reflected in the guidance to her officials in the new rules, of how Article 8 should operate.
60. In *A(Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 825 which the Sponsor was granted refugee status and 5 years leave to remain in September 2005. In early 2006 he married the claimant, also a citizen of Afghanistan, who was living in Pakistan. They later had children. Her application was refused under paragraph 352A because the marriage took place after the Sponsor left Afghanistan. She could not succeed under the immigration rules because the Sponsor was not settled in this country and only had limited leave. Permission to appeal was granted on the ground that it was arguable that the inability of a refugee to establish a matrimonial home in the country of refuge constituted an interference in family life for the purposes of Article 8, even though he had contracted a marriage abroad in the (imputed) knowledge that he would not be able to bring his spouse to the UK under the Immigration Rules until after he had achieved settlement. The Court of Appeal said that so far as Article 8 was concerned, the Tribunal had been unable to identify any public interest being

served by paragraph 352A in preventing refugees like the Sponsor being joined by genuine spouses.

61. In the current case there is a strong public interest in deterring the use of false documents as they undermine an efficient and effective immigration system, including possibly raising issues of national security if intended to conceal the true identity of an individual. Other elements of the substantial public interest in this case include, inter-alia, efficient administration of immigration provisions, preventing unlawful acts, protecting the public, preventing fraud, safeguarding the economic well-being of the UK.
62. In relation to the appellant's argument that the decision will result in unduly harsh consequences, one has to have regard to the leading authorities in relation to the definition of the term 'unduly harsh'. In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 and *KO (Nigeria)* the Supreme Court endorse the *MK* (section 55 - Tribunal options) [2015] UKUT 223 (IAC) formulation [at 46] that unduly harsh "does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher.". Undue harshness must not be conflated with the far higher test of "very compelling circumstances". The underlying concept is of an "enhanced degree of harshness sufficient to outweigh the public interest in the medium offender category" [44-56].
63. The current appeal is not a deportation appeal, the issue being as to whether the degree of harshness outweighs the public interest relied upon by the Secretary of State on the facts of this case. I set out above the arguments relied upon by the appellant in support of her contention that the decision is unduly harsh. It is necessary to balance those factors against the argument relied upon by the Secretary of State for why the decision is not.
64. I have also given consideration to whether there are very compelling circumstances sufficient to outweigh the public interest on the basis the use of the term *very* imports a high threshold and *compelling* circumstances which have a powerful, irresistible and convincing effect as found in the *Secretary of State v Garzon* [2018] EWCA Civ 1225.
65. In relation to both the unduly harsh argument and the question of whether very compelling circumstances exist sufficient to outweigh the public interest, Parliament has decreed that use of false documents will incur mandatory refusal of an application. Parliament has decided that a consequence of such is that a ban is imposed on making another application for the time specified in the table set out in the Rules, the length of the ban being dependant upon the circumstances of the case in question. It has not been found those provisions are unlawful or that the length of any ban is disproportionate per se, such as to warrant it being quashed. That is the starting point in the proportionality assessment on the side of the ECO.
66. The competing arguments are referred to above. I have found it is not made out the appellant cannot meet her husband in another country. It has not been made out that the further period of delay occasioned by the ban on applications will prevent an application being made at the end of that period or that further application could not be made in the interim if there is a material change in circumstances. I find it has not been shown that the family life enjoyed since 2014 by way of limited direct contact and substantial indirect contact will be interfered with by the decision. The issue has always been the proportionality of maintaining the status quo as against the ability of the appellant and her husband to be able to live together in the UK. On balance I find for the reasons

set out above that the Secretary of State it has been shown that the decision is proportionate. Whilst it may be harsh it has not been shown the decision will result in unduly harsh consequences in the interim until an application can be made or that there are exceptional circumstances which have been shown to outweigh the strong public interest in this case.

Decision

67. I dismiss the appeal.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 July 2023