



IAC-AH-SC-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/05257/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham**

**Determination & Reasons  
Promulgated**

**On 9<sup>th</sup> October 2015**

**On 23<sup>rd</sup> October 2015**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MS YINGJUN GAO  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills

For the Respondent: Mr S Vokes

**DETERMINATION AND REASONS**

1. The Appellant in this appeal is the Secretary of State for the Home Department (hereinafter the Secretary of State). The Respondent in this appeal is Ms Yingjun Gao, a national of China, who was born on 13<sup>th</sup> February 1968, (hereinafter the Claimant). This is the Secretary of State's appeal to the Upper Tribunal in respect of a decision of the First-tier Tribunal (Judge Moan and Judge Cheales) promulgated on 2<sup>nd</sup> April 2015. That decision was to allow the Appellant's appeal against a decision of an

Entry Clearance Officer, of 6<sup>th</sup> March 2014, refusing to grant her entry clearance to come to the UK with a view to settlement, as a spouse.

2. The Claimant has a somewhat unedifying immigration history. She came to the UK on 27<sup>th</sup> May 2007 in possession of a business visa. That visa expired on 17<sup>th</sup> November 2007 but she did not leave the United Kingdom, instead remaining as an overstayer. The Home Office wrote to her on 4<sup>th</sup> May 2010 advising her that it intended to remove her from the UK and she responded by absconding. At some point in 2010 she met one Mr Alan Allsop, a British national, via an internet dating site. The two struck up a relationship. Indeed, on 21<sup>st</sup> January 2012, while she was still in the UK unlawfully, they married. On 25<sup>th</sup> January 2014, though, the Claimant voluntarily left the UK and went to China where she has remained ever since. Mr Allsop went with her and spent some considerable time with her in China before returning to the UK. He has sponsored the application for entry clearance which has led to this appeal.
3. As noted, the Appellant's application for entry clearance was refused. This was on a number of grounds, one of those was a failure to provide the necessary documentation in order to satisfy financial requirements contained within the Immigration Rules. Another was that, it was decided, she fell foul of paragraph 320(11) of the Immigration Rules because she had contrived in a significant way to frustrate the intention of the Rules. Those are the only bases of refusal which matter for the purposes of this appeal to the Upper Tribunal.
4. The Claimant's appeal to the First-tier Tribunal was heard on 1<sup>st</sup> April 2015. The First-tier Tribunal was not, of course, able to hear oral evidence from the Claimant because she was at that time, and remains, in China. It did, though, have a witness statement from her. It had evidence, including some oral evidence, from a friend and some family members of the Sponsor and it heard oral evidence from the Sponsor himself. It clearly accepted the genuineness of the relationship.
5. At paragraph 62 of its determination (this is important because of the content of the one of the Grounds of Appeal) it noted that, at the hearing before it, the representative for the Secretary of State had "accepted that the Appellant met the financial and language requirements". It went on to explain, in some detail, why it found the relationship between the Claimant and the Sponsor to be a genuine one. It then moved on to consider the matter of paragraph 320(11) which it noted, correctly, contained a discretionary rather than a mandatory refusal ground. It said this;
  - "90. There was no doubt that the answer given by the Appellant to question 23 on the application form was false. She was asked a question about how long she had lived at the China address and she replied four years.
  91. There was some margin for the Appellant to misunderstand question 32 on that form. She was served with a Section 10 removal direction notice in May 2010. She was not actually removed and no further action was taken by the authorities to ensure her departure. The fact that she was clear at question 28 of the form that her visa had expired

in 2007 but did not leave until 2014, was indicative that she was not trying to deceive the authorities about being an overstayer. She admitted that very fact at question 28 of the form.

92. Therefore whilst there were inaccuracies on the form, there was a clear attempt to be honest about the Appellant overstaying her visa in 2007.
93. Under Appendix FM the failure to disclose information or disclosing false information is a reason that would normally lead to the refusal of entry clearance. There is no need for the authorities to be satisfied of any intentional deceit.
94. The Entry Clearance Officer was not bound to refuse entry clearance, the Rules merely state that he should normally do so.
95. The Notice of Refusal restates the provisions under paragraph S-EC 2.2(b) but does not go on to consider what factors have been considered in the exercise of that discretion, what weight applied to those factors and how that decision was determined.
96. Paragraph 320(11) provides for a similar discretionary power to allow entry. There was no doubt that the Appellant falls within paragraph 320(11) but in the same way she also should benefit from a consideration of the facts and circumstances of her case in accordance with the guidance issued to Entry Clearance Officers.
97. We have been referred to the case of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)**. In that case the Upper Tribunal commented at paragraph 14:
 

‘The Entry Clearance Officer, in making the decision of refusal, refers nowhere to the guidance under paragraph 320(11). It is therefore wholly unclear whether the Entry Clearance Officer has addressed his mind to the relevant question, namely whether in the circumstances of this case ....’
98. As was the Appellant’s case, in the **PS** case the Entry Clearance Officer had failed to recognise that the Appellant had voluntarily left the UK in order to make an application to legitimise his entry into the UK.
99. The Upper Tribunal in **PS** further commented at paragraph 14 -
 

“The Entry Clearance Officer in this case did not address the correct question and did not carry out an adequate balancing exercise under the guidelines and then concluded that this decision was therefore not in accordance with the law.”
100. The decision notice refusing entry clearance states the reasons why the Entry Clearance Officer has considered that paragraph 320(11) applied.
101. There was no reflection of what other considerations the Entry Clearance Officer has considered in the exercise of his discretion. There were clear family life considerations that had not been addressed by the Entry Clearance Officer in his refusal notice.
102. The Entry Clearance Officer should have considered that the Appellant voluntarily left the UK, he should have considered that the Appellant was honest about her status as an overstayer on the application form when weighing up the failure to disclose and he should have considered whether there were any aggravating factors.

103. The Officer should then have conducted a balancing exercise before reaching his decision about entry clearance.

104. We consider that the Entry Clearance Officer's decision was therefore not in accordance with the law."

6. The First-tier Tribunal then went on to indicate that it was allowing the appeal outright.
7. The Secretary of State, in seeking permission to appeal to the Upper Tribunal, contended that the First-tier Tribunal had erred in failing to address the Entry Clearance Officer's concerns regarding shortcomings in the documentary evidence pertaining to the financial requirements of the Immigration Rules and in failing to adequately consider the issues under paragraph 320(11). The Secretary of State noted in her grounds that the First-tier Tribunal had made no finding "on whether discretion should have been exercised differently".
8. On 5<sup>th</sup> June 2015, permission to appeal was granted by a judge of the First-tier Tribunal. The salient part of that grant reads as follows;

"It is arguable that the lack of determination of the issue regarding the production of specified evidence and therefore compliance with the Immigration Rules amounts to a material error of law. All the grounds may be argued although that may be the strongest ground."
9. In fact, it turned out not to be the strongest ground because Mr Mills chose not to pursue it. He acknowledged, before Mr Vokes could even make the point, and indeed in my judgment, entirely correctly, that it could not be pursued because of the concession which had been made before and accepted by the First-tier Tribunal that the financial requirements were met. This meant that the only live issue of dispute between the parties was that relating to the First-tier Tribunal's treatment of paragraph 320(11). Here, Mr Mills contended that it had materially erred. This was because it had not decided, for itself, what the decision regarding paragraph 320(11) should be. Having decided that the Entry Clearance Officer had not properly exercised the discretion afforded to him by the Rule (discretion because it says entry clearance should normally be refused under certain circumstances) it should then have either concluded that the decision was unlawful and effectively remitted to the Entry Clearance Officer for a lawful decision to be made or gone on to exercise the discretion, for itself, based upon its findings.
10. Mr Vokes, I think it is fair to say, accepted the inevitability of my conclusion that the First-tier Tribunal had erred in law in the way Mr Mills contended it had. Having only decided that the Entry Clearance Officer had not exercised his discretion correctly, such that the decision was not in accordance with the law, and not having gone beyond that, it was not open to it to simply allow the appeal outright.
11. I indicated to the parties that I would, in the circumstances, set aside the First-tier Tribunal's decision only on the basis it had erred to that extent. I

indicated that everything else in the determination, including the findings of fact, would be preserved. There was no disagreement by either party as to that approach. I also indicated, again with the agreement of the parties, that I would now move on to consider how the decision should be remade. Mr Vokes accepted that it would not be necessary for him to call any oral evidence with respect to that discrete issue so that the matters could be dealt with by way of submissions.

12. Mr Mills addressed me, on the point, first of all. He acknowledged that there was no dispute about the fact that the Claimant and Sponsor have a subsisting relationship. He acknowledged that she had made a voluntary departure and that these were factors in her favour. Against that, however, was her immigration history. She had been an overstayer and an absconder. Those were aggravating factors.
13. Mr Vokes said he accepted that the overstaying was an aggravating factor but, essentially, it was the only one. It had not been worsened by her seeking to use false identifies or the like. She had simply gone to ground. I should bear in mind what was said in the case of **PS**, cited above, to the effect that substantial credit must be given to a person who overstays but then makes a voluntarily departure. The relationship between the Claimant and the Sponsor was a genuine one. The Sponsor had even gone to China when she returned there and, had not health difficulties and the need for treatment in the UK arisen, he would have remained there, at least, for a longer period. If the Claimant were to be successful in her appeal she would only receive a grant of leave limited to some two and a half years, as opposed to a grant of indefinite leave, so if there was any further breach of the Rules the Home Office would be able to act against her.
14. I have carefully considered those helpful competing submissions. I have reminded myself of the full content of paragraph 320(11) of the Immigration Rules. Essentially, the Rule states that entry clearance should normally be refused;
  - “(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by;
    - (i) overstaying; or
    - (ii) breaching a condition attached to his leave; or
    - (iii) being an illegal entrant; or
    - (iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.”

15. Here, there is no dispute that the Claimant's conduct, in overstaying, brings her within the scope of Rule 320(11). There was also a suggestion that she had used deception when seeking entry clearance in that she had answered a question on the relevant entry clearance application form in a way which seemed to indicate she had been living at her current address in China for a period of four years, as at the date of application, when, in fact, she had spent a good deal of that time unlawfully in the UK. However, the First-tier Tribunal found that there was no deliberate attempt to deceive, because she had made it clear elsewhere that she had overstayed and had not left the UK until 2014, such that there was no intention to mislead. As indicated, the findings of the First-tier Tribunal have been preserved.
16. Of course, the fact that the Rule indicates leave to enter will "normally" be refused means that my starting point, given that the Claimant's conduct falls within the scope of the Rule, is that such should be refused. I look, therefore, to the Claimant to persuade me otherwise. I take into account, against her, the above points made by Mr Mills and bear in mind that her period of overstaying was a lengthy one. The mere fact of overstaying was aggravated, in my view, by her failing to respond to the Home Office when they apparently located her in 2010. Although Mr Vokes contends that she only "went to ground" as distinct from committing some of the other actions specified in paragraph 320(11)(iv) that, of itself, is serious. There are, though, the various points in her favour to which Mr Vokes referred. I accept, following **PS**, that weight is to be attached to her making a voluntary departure from the UK in order to seek entry clearance. There is no dispute about the fact that that is what she did. I also take into account the findings of the First-tier Tribunal, unchallenged, to the effect that she and her husband are in a genuine relationship. He is, of course, a British national who, understandably, wishes to enjoy his family life, with her in the UK. She had, it was found in preserved findings, acted honestly when making her application for entry clearance rather than seeking to hide her previous adverse immigration history. Whilst there are certainly arguments both ways, I have concluded that, on the facts, this is a case where the Claimant has been able to demonstrate that, in all the circumstances, the normal situation should not apply and that entry clearance should be granted.

### **Conclusions**

The First-tier Tribunal materially erred in law but in remaking the decision, I allow the Claimant's appeal.

I make no anonymity direction.

Signed

Date

Upper Tribunal Judge Hemingway

**TO THE RESPONDENT**  
**FEE AWARD**

I make no fee award.

Signed

Date

Upper Tribunal Judge Hemingway