



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13634/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3rd of January 2018

Decision & Reasons Promulgated
On 05th January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR LI WU
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:

For the Appellant: Mr E Wilford of Counsel

For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of China born on 5th of March 1987. He appealed against a decision of the Respondent dated 13th of April 2016 which was to refuse his application for leave to enter the United Kingdom as the fiancé of [SW], a British citizen ("the Sponsor"). His appeal was allowed by Judge of the First-tier Tribunal Rayner sitting at Taylor House on 28th of July 2017. The Respondent appeals against that decision and the matter therefore came before me in the first place as an appeal

by the Respondent. For the reasons which I have set out in some detail below I have found a material error of law in the decision of the First-tier Tribunal and have set it aside. I have proceeded to remake the decision in this case and therefore for the sake of convenience I shall refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom on 15th of November 2010 with leave to enter as a Tier 4 student. This was extended until 19th of April 2016. In attempting to re-enter the United Kingdom on 29th of July 2014 the Appellant's leave was curtailed because the immigration officer considered that a false English language test certificate had been submitted with an application made by the Appellant in 2013 for leave to remain as a student. The Appellant appealed against that decision but withdrew his appeal. On 4th of March 2015 the Appellant was issued with removal directions to China to take effect on 12th of March 2015.
3. Three days before those removal directions were to take place the Appellant made an application on 9th of March 2015 for leave to remain on the basis of his Article 8 rights and his relationship with the Sponsor. The Respondent refused the Appellant's claim on 24th of March 2015 and certified it as clearly unfounded. Seven days later the Appellant using a ticket he had bought himself returned to China on 31st of March 2015. On 23rd of May 2015 the Respondent wrote to inform the Appellant that his application would be rejected if biometric information was not provided even though the Respondent had in fact already refused the Appellant's application. On 17th of June 2015 the Respondent wrote to the Appellants representative that as the Appellant had left the United Kingdom his application had been voided. On 15th of March 2016 the Appellant made his application for leave to enter as the partner of his Sponsor the refusal of which on 13th of April 2016 has given rise to these proceedings.

The Explanation for Refusal

4. The Respondent refused the Appellant's application for leave to enter primarily on the basis that the Appellant had fraudulently obtained the English-language certificate submitted with the application in 2013. His application was refused on discretionary grounds pursuant to paragraph 320 (11) of the Immigration Rules. This subsection provides that leave to enter the United Kingdom should normally be refused where the applicant has previously contrived in a significant way to frustrate the intentions of the Immigration Rules. A number of possible ways that this might have occurred are then set out but for the purposes of this appeal the relevant subparagraph is (iv). This provides that not only should there be deception in an application for leave to remain but there should also be aggravating circumstances such as making frivolous applications. A number of other possibilities are mentioned but they are not relevant to this case. The burden of proof of establishing that the Appellant has frustrated the intentions of the Immigration Rules rests upon the Respondent and the standard of proof is the civil standard of balance of probabilities although the more serious the allegation the more cogent the evidence must be to establish it.

5. In addition to the allegation that the Appellant had fraudulently obtained his English-language certificate the Respondent considered that the Appellant had submitted a vexatious application in a significant way to frustrate the intention of the rules. This related to the application made by the Appellant on 9th of March 2015 which was refused by the Respondent and certified as clearly unfounded.

The Decision at First Instance

6. At [18] onwards the Judge set out his findings and reasons. It was accepted that the relationship between the Appellant and the Sponsor was genuine and subsisting and that the Sponsor who is employed by a firm of solicitors could meet the financial requirements of Appendix FM. The Appellant had subsequently shown that he could meet the English language test requirement. The issues to be decided were: (i) whether the Appellant had fraudulently obtained an English language test certificate for the purposes of the 2013 application; (ii) whether he had made his application on 9th of March 2015 frivolously and thus brought himself within paragraph 320 (11) and (iii) whether in any event the appeal should be allowed outside the Immigration Rules under Article 8.
7. The Judge decided at [26] that the Respondent had demonstrated to the required standard that the Appellant had provided a false test result with his 2013 application. The Judge had carefully considered the matter before arriving at this decision, see [19] to [26] and that part of the decision has not been challenged by the Appellant. At [31] the Judge held that the application made on 9th of March 2015 was unlikely to succeed but did that did not make it frivolous within the meaning of the paragraph. As the relationship between the Appellant and Sponsor was genuine it was open to the Appellant to make an in-country application to have that relationship recognised. It was unlikely to succeed as the Appellant did not qualify under the rules. Further the Respondent's decision that the Appellant should leave United Kingdom and make a proper application for entry clearance from outside was correct. The Respondent's decision to refuse the application and certify it was the Judge considered plainly correct but that did not make the application frivolous.
8. As a result, the Appellant's application did not fall to be refused under paragraph 320 (11). The fraud in relation to the English language test examination was not aggravated for the purposes of the paragraph. The Judge cited the Upper Tribunal authority of **PS [2010] UKUT 440**. The decision-maker must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance. This in the Judge's view the Appellant had done by acting responsibly and leaving the United Kingdom to make an out of country application at the appropriate time. The basis of the appeal was that the Appellant's human rights had been infringed by the refusal of leave to enter and the Judge proceeded to consider human rights at [34] and [35]. Since the Appellant could in the Judge's view meet the rules and there

were no countermanding features the decision to refuse the application was a disproportionate interference with the Article 8 rights of both the Appellant and the Sponsor. He allowed the appeal.

The Onward Appeal

9. The Respondent appealed against this decision arguing with the Judge's decision that the application made on 9th of March 2015 was not frivolous despite the fact that it was unlikely to succeed because the Appellant was unable to qualify. The Judge it was said had gone on to use Article 8 as a general dispensing power. The Appellant and Sponsor had seen each other only once since 2015 and the decision did not amount to an interference with family life. The Judge had not considered whether family life could continue in China. That the Appellant and Sponsor might prefer to conduct their family life in the United Kingdom was not without more sufficient and the Judge had failed to identify anything amounting to compelling circumstances.

10. The application for permission to appeal came on the papers before First-tier Tribunal Judge Holmes on 20th of October 2017. In granting permission to appeal on both the issue of the Immigration Rules and the human rights application outside the Rules he wrote: "although the Appellant had left the United Kingdom at his own expense on 31st of March 2015 the Appellant had made an application for leave to remain on 9th of March 2015 which the Judge concluded was unlikely to succeed. Arguably the Judge erred and was bound to find that this was a frivolous application that could not succeed under the Immigration Rules. Thus, arguably, he ought to have concluded that paragraph 320 (11) did apply to the Appellant notwithstanding his departure from the United Kingdom at his own expense.... This was only ever a "private life" appeal, based upon a relationship with an individual who could at any time have visited the Appellant in China in safety but has chosen not to do so. He could move to China to live with the Appellant there. The couple are not married and had taken no steps to form an engagement prior to the Appellant's departure from the United Kingdom. None of this appears to be rehearsed in the decision and thus arguably the Judge fails to consider adequately the public interest in the refusal of entry clearance within the true factual context (in particular the frivolous application; **PS**)."

11. The Appellant responded to the grant of permission under rule 24 arguing that the Judge had given proper consideration to the applicability of paragraph 320 (11) and had adopted the correct approach to determining whether the Appellant fell for refusal under that paragraph. The Judge had given proper reasons for the conclusion that the 9th of March 2015 application was not frivolous. There had been no 2nd application made on 23rd of March 2015 the Appellant had only made one application bearing in mind that the paragraph of the Immigration Rules refers to frivolous applications in the plural. The Judge had correctly had regard to relevant case law. Further the Judge had dealt with the human rights appeal appropriately. To refuse entry clearance to an Appellant who met the rules was a disproportionate

interference with the Appellant's family life. This was not a private life appeal as Judge Holmes asserted in the grant of permission, it was a family life appeal based on the Appellant's relationship with the Sponsor.

The Hearing Before Me

12. For the Respondent, the Presenting Officer indicated there was little further to add to the Respondent's grounds of appeal, the core issue in the case was the interpretation of paragraph 320 (11). There were no compelling circumstances in this case for the appeal to be allowed outside the Immigration Rules under Article 8 and the Respondent relied upon the Supreme Court decision in **Agyarko [2017] UKSC 11**.
13. For the Appellant, counsel accepted that the essence of the case lay within paragraph 320 (11). The Judge's conclusion was that the application made on 9th of March 2015 was not a frivolous one. Frivolous was not the same as an application unlikely to succeed. The Respondent initially asserted that there had been two applications made by the Appellant one on 9th of March and the other on 23rd of March but the Judge concluded that there was only one the 9th of March application. The paragraph referred to frivolous applications in the plural although that was not a point taken by the Judge at first instance. Even if there was an element of frivolity in the application it was not sufficiently aggravating such as to engage the sub-paragraph and result in the refusal of the application. The circumstances in this case were similar to those of **PS India**. This was a case in which the Appellant had left the United Kingdom in order to make an application from outside the country in compliance with the Respondent's Immigration Rules.
14. In conclusion, the Presenting Officer reiterated the Respondent's view that the Judge had used Article 8 as a dispensing power. The error of law was at [31] of the determination where the Judge had incorrectly considered what was frivolous distinguishing that wrongly from unlikely to succeed.

Findings

15. The issue in this case is a relatively narrow one. Did the Appellant make a frivolous application on 9th of March 2015 or was it merely an application which was unlikely to succeed even though as the Judge at first instance found the Respondent was quite entitled to certify as being without merit. The Judge's reasoning is set out at [31] of the determination. He found that just because an application was unlikely to succeed that did not make it frivolous. There does appear to have been something of a muddle on the part of the Respondent as pointed out by the Judge at [2] of the determination. Although the Respondent certified the application made on 9th of March as early as 24th of March, the Respondent still wrote to the Appellant two months later asking for biometric information and a month after that wrote to the Appellant's representatives that the application had been voided because the Appellant had left the United Kingdom not because it had already been refused and

certified. Some of this confusion on the Respondent's part might have been caused by the view the Respondent took that there were in fact two applications as asserted by the Entry Clearance Officer's letter. However, no evidence was ever provided to substantiate the 2nd application and the Judge dismissed the prospect that there had been one.

16. The questions remain whether the application made on 9th of March was indeed frivolous and whether a single application can be sufficient to engage the paragraph. The Judge's rejection of the idea that the 9th of March application was frivolous is somewhat undermined by the Judge's finding at [31] that it was never a strong application and the Respondent's decision to refuse and certify it was "plainly correct". The certification was that the application was clearly unfounded. To apply a certificate to an application which is clearly unfounded is stronger than saying that an application is unlikely to succeed. Unlikely to succeed means that there might still be a chance that it could succeed whereas to say an application is clearly unfounded means that there is no possibility that it could succeed.
17. An application made in the circumstances of the 9th of March application namely three days before the Appellant was about to be removed to China has a very strong suggestion that it was made in order to frustrate removal. Similarly, the Appellant's decision to voluntarily return to China could also be interpreted as meaning that he had done so in order to avoid fresh removal directions being issued, a course which was quite likely given that the Respondent had since certified the application that caused the Respondent to withdraw the removal directions in the first place. The Appellant's application was not going to succeed because the Appellant had no leave to make such an application.
18. It is correct that the Appellant was in a genuine and subsisting relationship with the Sponsor who could meet the financial requirements of the Immigration Rules. That was a factor which influenced the Judge at [31] who found that it was open to the Appellant to make an in-country application to have his relationship with the Sponsor recognised. That is tantamount to saying that the Appellant had a right to make a frivolous application even though it could not succeed because he was in a relationship. That was clearly insufficient.
19. Although there is no specific authority, certainly none quoted to me, on what is the meaning of frivolous, the word has to be given its ordinary English meaning. Frivolous means something which has no serious purpose or value. The purpose of the application of 9th of March 2015 appears to have been to delay removal since it came three days before the removal directions were due to be carried out. That would be an abuse of the immigration system and could not properly be regarded as either a serious application or one of value. The application of 9th of March 2015 clearly met the definition of being frivolous. The Judge was wrong in law to find that it was not and wrong in law to find that the Appellant could meet the requirements of the Immigration Rules.

20. The application by the Appellant did contain aggravating features because he had both sought to deceive the Respondent by using a false English language test certificate and had aggravated that by making a frivolous application three days before he was due to be removed. The Judge's view was that it was open to the Appellant to make an in-country application to have his relationship recognised but it is difficult to see on what basis the Judge could make that statement since there was no way that the Appellant could make a valid in-country application to have his relationship recognised.
21. Although the case of **PS** was relied upon by both parties in this appeal, I do not consider that it is of direct relevance. The facts of that case were that the Appellant was in the United Kingdom without leave had married and had then returned to India to make an application for leave to enter. The difficulty was that the decision maker and the Judge's decision (that was overturned by the Upper Tribunal) had not correctly considered whether there were aggravating features to engage paragraph 320 (11). That is not the case here since the Respondent was well aware when refusing the Appellant's application that for the paragraph in the Immigration Rules to be engaged aggravating circumstances had to be shown. The argument was whether the application of 9th of March 2015 was frivolous and thus an aggravating feature.
22. **PS** reminds decision makers that they must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance. That is balanced by the fact that if an action by the Appellant has an aggravating feature it may outweigh the public interest in encouraging persons without leave to return to apply.
23. A further argument made in the rule 24 response to the grant of permission was that the paragraph appeared to acknowledge that more than one frivolous application would have to be made before the paragraph could be engaged. It is correct that the paragraph refers to making frivolous applications in the plural but it cannot have been the intention of the drafter of the rules that every applicant should be entitled to make one frivolous application without adverse consequences. That would plainly be an absurd result. To give efficacy to the rules it must be intended that the paragraph should be read as making "one or more" frivolous applications.
24. As a consequence of the finding that the Judge was wrong in law to say this was not a frivolous application the Judge also erred in law in his assessment of Article 8 outside the Immigration Rules. The Judge's assessment of Article 8 was predicated on the assumption that the Appellant could otherwise meet the rules. If the Appellant fell for refusal under the discretionary ground in the paragraph then he could not meet the Rules and there was consequently significant weight on the Respondent's side of the scales in the proportionality exercise. In granting permission to appeal Judge Holmes alluded to this with his comments regarding the possibility that the Sponsor could travel to China to be with the Appellant and that the couple did not have the right to choose where to enjoy their relationship. I

accept the point that this was not a private life application but a family life one but the points made by Judge Holmes are relevant to the consideration of an Article 8 family life claim.

25. For the Appellant to succeed outside the Immigration Rules under Article 8 very compelling circumstances would need to be shown why the refusal of entry clearance breached this country's obligations to promote family life. It is difficult to see where those very compelling circumstances are in this case for the reasons given by Judge Holmes. It is fair to say at this stage that the argument before me concentrated on whether the application in March 2015 was or was not frivolous. To a large extent the facts of the case are not otherwise in dispute and nor is the application of Article 8 depending on the interpretation of paragraph 320 (11). The Judge found that meeting the Immigration Rules was a very compelling reason for finding that Article 8 had been breached in this case. Since I am of the view that the Appellant could not meet the Immigration Rules for the reasons I have set out at some length above, that point made by the Judge falls away. There are no very compelling circumstances in this case outside the Immigration Rules which are such that the Appellant should be granted entry clearance. The Appellant cannot therefore succeed under Article 8 and I find that the Judge materially erred in law to say that he could.
26. I therefore set aside the decision at first instance and remake the decision in this case by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant leave to enter. I find that paragraph 320 (11) applies because the Appellant had committed deception by producing a false English language test certificate and there were aggravating circumstances because he had made a frivolous application in March 2015. He could not succeed outside the rules because there were no very compelling circumstances as to why he should. I therefore dismiss the appeal. I make no anonymity order as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision in this case by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant leave to enter.

Appellant's appeal dismissed

Signed this 3rd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

The judge made a fee award in this case on the basis that the respondent had not demonstrated the appellant had made any frivolous applications. Since I find that the appellant has done that, I revoke the fee award made in this case such that no fee is payable.

Signed this 3rd of January 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge