



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14239/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6 June 2018

Decision and Reasons Promulgated
On 20 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SANDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER NEW DELHI

Respondent

Representation:

For the Appellant: Mr S Vokes (counsel for Jasvir Jutla and Co)
For the Respondent: Mr S Kotas (Home Office Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Sandeep Singh, a citizen of India born 1 November 1986, against the decision of the First-tier tribunal of 12 March 2018 to dismiss his appeal, itself brought against the refusal of asylum of entry clearance of 18 May 2016.
2. The immigration history supplied in the refusal letter sets out that the Appellant had previously resided in the UK having entered the country on 14 April 2011 as a student, that leave being curtailed due to the sponsoring institution's loss of licence; he was granted further leave on 22 October 2013, again curtailed to end 14 April 2014, this time because the Secretary of State had reason to believe he had acted dishonestly in relying on a false education certificate in gaining his extension of

leave. He did not leave the country, and was treated as an absconder until he applied for leave on family and private life grounds in December 2015. That application was rejected and he voluntarily departed the UK on 21 February 2016.

3. The application was for the Appellant to join his wife and child in the UK. His Sponsor held indefinite leave to remain here. He claimed to have been naive in relation to the 2013 application having used the services of an agent who provided a false education certificate without his knowledge.
4. The application was refused because it was considered that the Appellant had contrived in a significant way to frustrate the intentions of the Rules by using deception in an application of 22 October 2013 to extend his leave. It was not accepted that he had shown "any particular remorse" for his failure to comply with immigration control previously. Although it was acknowledged that a refusal under Rule 320(11) should not be punitive, it was considered that here there were aggravating circumstances sufficient to invoke the Rule. Any interference with family life with his partner was considered proportionate to immigration control as there were no insurmountable obstacles to their life together abroad.
5. The Sponsor gave evidence, setting out that she had met the Appellant in July 2014 having divorced her first husband. Their relationship developed from January 2015, marrying in October 2015 from which time they lived at the Appellant's sister's home. She had stayed with him in April 2016 and made several subsequent trips, including one in September 2016 when she conceived a child by him, their British citizen son being born on 1 July 2017. She did not accept he had been responsible for providing a false education certificate on the extension application: she believed her husband had only given his passport to the agent, and had not provided any other documents.
6. In cross-examination she acknowledged that she had been aware of the Appellant's immigration status before marrying him; nevertheless she loved him and they wanted to live together. She did not believe he had been asked to leave the country at that time. She accepted she had chosen to start a family fully aware of the likely difficulties ahead. Her own parents were in India. The Appellant's sister gave evidence, confirming that the family had approved of the match and that she had provided the Sponsor with accommodation and a job at her beauty salon. She had helped her throughout the Sponsor's pregnancy but could see that she found things difficult and strenuous, and was aware that she suffered post-natal depression.
7. The First-tier tribunal considered it was appropriate to initially assess whether Rule 320(11) should have been employed against the Appellant, given that whilst the appeal was on human rights grounds alone, the exercise of the discretion to employ that Rule was relevant to the public interest assessment.
8. The Judge did not accept that the Appellant had been an innocent victim of circumstances, as he must be taken to have some familiarity with the relevant procedures having previously successfully obtained entry clearance. The

explanation given by the Sponsor as to her understanding that attempts had at once been made to contact the agent following the curtailment of leave was implausible given her relationship with the Appellant had not begun until 2015, over six months thereafter; and there was no corroborative evidence to confirm such attempts were truly made. She had also stated she was unaware of any request for the Appellant to leave the country at the time of their marriage. Overall the stance taken by the Respondent vis-à-vis Rule 322(11) was well founded

9. That left the question of the proportionality of the interference with Article 8 rights, given that family life was clearly extant. The child's British citizenship had to be taken into account as it was of particular importance, though given the boy was aged less than one year old he would not be significantly affected by the circumstances in which family life was enjoyed. The Sponsor had made visits of significant duration allowing the child to bond with its father. There was no suggestion in the evidence that the Sponsor had employment or family ties that would inhibit moving to India. The qualifying child provisions of section 117B(6) of NIA 2002 did not apply to an entry clearance case, and the support of the Appellant's sister continued to be available to the Sponsor. Overall, the decision was a proportionate one.
10. Grounds of appeal of 28 March 2018 contended that the decision was erroneous in law because the First-tier tribunal
 - (a) At one point clearly stated that only circumstances appertaining at the date of decision were amenable to consideration on appeal;
 - (b) Failed to apply the five-stage *Razgar* test;
 - (c) Failed to give the Appellant credit for his voluntary departure when considering the applicability of Rule 320(11);
 - (d) Failed to consider the fact that the substantive spouse rules were satisfied, Rule 320(11) apart, and that this was material to assessing proportionality;
 - (e) Failed to make findings as to the best interests of the child.
11. Permission to appeal was granted by the First-tier tribunal on 24 April 2018 on the basis that all the grounds were arguable, albeit that it seemed that there was no material failure to take account of post-decision evidence, given that the existence of the child itself fell into that category.
12. Mr Vokes submitted that the First-tier tribunal had erred by failing to take an appropriately structured approach. When assessing the claim outside the Rules, it should have first had regard to the fact that the Appellant was accepted as satisfying every dimension of the Appendix FM partner route, before balancing that against the failure to satisfy a single aspect of the General Refusal reasons. There had been no detailed assessment of the best interests of the British citizen child. The Tribunal had expressly applied an "exceptional circumstances" test rather than a balancing exercise.

13. Mr Kotas replied that there was sufficient immigration offending by way of dishonesty compounded by absconding to justify refusal under Rule 320(11). *PS* involved only a bare breach of immigration control by way of clandestine entry. There was no clear concession by the Presenting Officer as to the Appellant having simply been naïve rather than dishonest. The best interests of the child had been sufficiently considered and the decision on the appeal was perfectly consistent with the conclusions of the Supreme Court in *Agyarko*.

Findings and reasons

14. Before me the advocates agreed that section 117B(6) of Nationality Immigration and Asylum Act 2002 did not apply to entry clearance appeals (because of the phrase therein ("the public interest does not require the person's *removal*"), and that the reference to there being no jurisdiction to consider post-decision events was, whilst erroneous, not material.
15. The criteria of the Appendix FM Partner route are all accepted as satisfied. Essentially they require that the Appellant is in a genuine and subsisting relationship, has a certain level of English language proficiency, and that adequate funds are available to support the family unit, excluding British citizen children: so the relevant measure is having available funds of £18,600. However, whilst not all of General Refusal reasons are applicable in these appeals, Rule 320(11) does apply:

"Grounds on which entry clearance or leave to enter the United Kingdom 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."

16. The headnote to *PS India* [2010] UKUT 440 (IAC) states that

"In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and 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.”

17. It seems to me that Mr Vokes’s reliance on the recorded submission of the Secretary of State’s advocate below does not take the case very far. Had the Respondent intended to accept that the Appellant had been naïve in the sense of being innocent of any intentional immigration misdemeanour whatsoever, that would have amounted to a concession of the sole issue on the appeal. However, that was clearly not the Presenting Officer’s stance, given that his submissions plainly aimed to uphold the general refusal reason. The First-tier Tribunal gave clear reasons for finding that the evidence before it of attempts to contact the agent said to have been responsible for the misrepresentation was not adequate. There is nothing perverse or irrational in its findings, which seem to me to have taken account of all relevant evidence.
18. I consider that the First-tier Tribunal was entitled to find that Rule 320(11) was satisfied here: there was a dual dimension to the Appellant’s immigration misdemeanours which meant that this was not simply a bare case of overstaying or illegal entry, but was one which (given the Judge’s credibility findings) involved both overt dishonesty and a period of absconding.
19. However, once the disposition of the appeal outside the Rules is examined, there are clear errors of law. In particular, I alight on the issue of the child’s best interests having regard to its nationality, and the failure to conduct a staged enquiry, which led to errors of principle such as that identified below. In *Rhuppiah* [2016] EWCA Civ 803 §45, Sales LJ noted that “the starting point for consideration of the proper construction of Part 5A of the 2002 Act is that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with, and not in violation of, Article 8.” The essential requirement that Tribunal decision making takes account of the public interest factors within the context of section 117B, notwithstanding that 117B(6) may not apply in terms, is therefore beyond doubt.
20. Firstly, the Appellant’s child’s nationality is of particular importance because it brings into play considerations going beyond those present, for example, in the case of a foreign national child who has established seven years of residence in the UK. As was noted by Baroness Hale in *ZH* [2011] UKSC 4 relevant considerations in removing a British citizen child include the potential deprivation of the practical benefits of that citizenship, “and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle.” However, these distinct benefits of British citizenship were simply not considered at all. Nor indeed was there any distinct ass of the child’s best interests.
21. Secondly, the fact that the Appellant satisfied every aspect of the immigration route in question (the general refusal reason apart), regarding the genuineness of his relationship, English language proficiency, and ability to meet the financial

requirements set by Parliament, receives no express credit. As stated in *MM (Lebanon)* [2017] UKSC 10, “although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy.” Lord Carnwath in the Supreme Court makes the same point in *Patel* [2013] UKSC 72, stating at [55] that “the balance drawn by the rules may be relevant to the consideration of proportionality”. Accordingly the failure to expressly assess satisfaction of the route under which he applied as being a matter in the Appellant's favour is an error of law.

22. Thirdly, the First-tier Tribunal effectively found that might be proportionate for the Appellant to depart for a limited period to seek entry clearance from abroad: however to my mind any such enquiry would be futile given that the Secretary of State has effectively refused the very same application in the instant proceedings. This is explained by Hickinbottom LJ in *Tikka* [2018] EWCA Civ 642 §25-26:

“The Secretary of State has already considered her discretion in that regard, and determined that the Appellant should not remain in the United Kingdom. There is no reason to suppose that, on the same material and applying the same criteria, an Entry Clearance Officer on her behalf will come to a different view; indeed, there is every reason to consider that he will come to the same view. That refusal will be the subject of an appeal that will raise exactly the same issues as the appeal to the tribunal in this case, i.e. whether the interference with the article 8 rights of the Appellant and his wife that a permanent separation would entail is justified ... That ... only underscores the futility of removing the Appellant without determining, once and for all, the underlying article 8 issue ...”

23. It seems to me that this consideration applies *a fortiori* in a case where the Secretary of State has already expressed her view on an entry clearance application made post-departure with a view to regularising one's immigration status, not simply in the context of seeking to resist return abroad to seek a visa to return.
24. I accordingly find that the decision below was flawed by material errors of law. I go on to re-determine the appeal substantively, as I was invited to do by the advocates.
25. The starting point is that it is accepted that family life is established between the Appellant and his partner settled in the UK. The departure of a British citizen child from their country of nationality must constitute interference with at least that child's private life, which as shown by *ZH* includes the full benefits of their nationality. In this case, given the Sponsor is settled in the UK, the requirement for her to depart the country where she has resided lawfully for a significant period also represents a very significant interference with her own private life.
26. That leaves the question of proportionality, to be approached via the statutory factors below.

“PART 5A**Article 8 of the ECHR: public interest considerations ...****117B Article 8: public interest considerations applicable in all cases**

- (1) The maintenance of effective immigration controls is in the public interest.
- (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 –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) 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 financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.”

- 27. The Appellant has studied in the UK in English and must be taken therefore as having significant proficiency in the language. He and the Sponsor have funds available to them sufficient to pass the benchmark set by the Rules: the Secretary of State does not dispute that. So the principal obstacle on the public interest side of the balance is the establishment of the relationship at a point where his immigration status was precarious. This counts against the interference with the couple’s family life now being disproportionate. On the other hand, the Appellant left the United Kingdom voluntarily, which is in his favour, as identified in *PS India*.
- 28. It seems to me that the best interests of the child would be to live in the country of its nationality, enjoying the significant benefits that British citizenship brings to which Lady Hale alluded in *ZH*. Here the child has the advantage of its mother having the emotional support of her sister available to her, and for her to continue working at the beauty salon if required and to live in accommodation provided by her sister to which mother and child are accustomed. It has not been suggested in submissions before me that the child has Indian nationality. So its departure would be to reside in a country where it could not assert nationality rights without some further steps being taken (though it would of course have the advantage of its parents being Indian nationals).
- 29. Given that the only consideration counting against the child’s best interests is the father’s immigration history, it seems to me that it would be wrong to find that that trumps my conclusion that those best interests point in favour of his continued

residence in his country of nationality. As Lord Hope stated in *ZH (Tanzania)* [2011] UKSC 4 at [44]:

“The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.”

30. I accordingly find the immigration decision to be disproportionate to the public interest it seeks to enforce.

Decision:

The decision of the First-tier Tribunal contains a material error of law and is set aside. Upon reconsideration, the appeal is allowed.

Signed:

Date: 8 June 2018

A handwritten signature in black ink, appearing to read 'M. A. Symes', with a long, sweeping horizontal line extending from the bottom of the signature.

Deputy Upper Tribunal Judge Symes