



IAC-AH-DN-V1

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

Appeal Number: HU/03536/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 10 March 2020**

**Decision & Reasons Promulgated
On 27 April 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BILAL AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A. Everett, Senior Home Office Presenting Officer

For the Respondent: Mr M. Islam, Legal Representative

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal (“FtT”).
2. The appellant is a citizen of Bangladesh born in 1979. He appealed to the FtT against the respondent’s decision dated 6 February 2019 refusing entry clearance as the spouse of a partner present and settled in the UK. His application for entry clearance was made on 26 January 2018. The basis of the refusal of entry clearance was with reference to paragraph

320(11) of the Immigration Rules (“the Rules”) and the suitability requirements under Appendix FM.

3. His appeal was allowed by First-tier Tribunal Judge Lodge (“the Ftj”) after a hearing on 27 September 2019. To put my decision into context I summarise the Ftj's decision.

The Ftj's decision

4. The Ftj set out the appellant’s immigration history. He was granted entry clearance as a work permit holder on 29 June 2006 and arrived in the UK on 11 July 2006 with leave until 27 June 2007. He overstayed and was encountered on 22 March 2011 whilst working illegally at which point he gave false identity details.
5. He was then served with notification of his status as an overstayer. He gave “every impression” of intending to return to Bangladesh, purchasing a ticket on 29 March 2011. However, he did not board the plane. He made what the respondent described as a frivolous application for asylum. His application was refused on 10 May 2011 and his appeal was dismissed on 23 June 2011. He made a voluntary departure for Bangladesh in July 2011.
6. At [14] the Ftj said that the appellant spent some periods of time in detention after his being encountered and that “clearly concentrated his mind with regard to returning to Bangladesh”.
7. At [15] he said that the issue was whether, in terms of paragraph 320(11) of the Rules, the circumstances of the appellant’s breaches of immigration law are sufficiently aggravating to justify refusal of entry clearance.
8. The Ftj noted that the appellant’s behaviour involved his overstaying after his visa expired, working illegally and giving false details to an immigration officer when encountered. He said that the appellant had, on the face of it, delayed his departure and caused some inconvenience to the Secretary of State by failing to depart immediately.
9. In relation to his asylum claim, he said that although he had the right to claim asylum, looking at the determination of Judge Easterman, it would appear that he had no real grounds for that application. The Ftj said that he was satisfied that “it can be described as frivolous or spurious”.
10. At [17] he pointed out that in his view, in the appellant’s favour he did eventually depart voluntarily and the matters complained of by the respondent are now of some eight years ago. The Ftj noted that there is a public interest in those without leave returning voluntarily “which should not be discouraged by an overzealous application of Paragraph 320(11). He also said that he must take into account the fact that the appellant meets all the requirements of the Rules for a grant of entry clearance under Appendix FM (apart from paragraph 320(11)).
11. He concluded as follows:

- “18. I have given the matter anxious consideration. I am satisfied given the passage of time and the public interest in encouraging illegal immigrants to depart that the decision is disproportionate. I am not satisfied that the circumstances of the appellant’s immigration breaches can be described as truly aggravating.
19. The requirements of the immigration rules being met the refusal must having regard to Article 8 be a disproportionate interference with the appellant’s right to family life.”

The grounds and submissions

12. The respondent’s grounds of appeal argue that it was incumbent on the FtJ to assess whether, in addition to the serious breaches of immigration law that he identified, there are further aggravating features that would result in the refusal being justified. Thus, the FtJ agreed with the Entry Clearance Officer (“ECO”) and found that the appellant did give false details to an immigration officer and that he had submitted a frivolous asylum application as a means of delaying his departure. Accordingly, in finding that there were insufficient aggravating features to justify refusal is to ignore the terms of the Rule.
13. The grounds contend that there were other aggravating features, 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 redocumentation process.
14. It is clear that a proper reading of the Rule indicates that discretion is not to be exercised in an applicant’s favour when such additional factors are present. Given the FtJ’s finding that there were at least two additional factors present, the FtJ fell into clear error in allowing the appeal on Article 8 grounds. The FtJ had used Article 8 as a “general dispensing power”.
15. In submissions, Ms Everett argued that the FtJ had misconstrued the public interest at [18]. Although what the FtJ said in that paragraph is derived from a decision of the Upper Tribunal in terms of the need to encourage people to leave the UK when they are supposed to, this is only expecting individuals to do what they are supposed to do. It was submitted that there was a parallel with s.117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) in terms of the English language requirement and financial independence being regarded as neutral factors rather than factors in an individual’s favour.
16. Mr Islam referred me to that decision, namely *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 IAC in relation to what the FtJ said at [18].
17. It was suggested that the FtJ in fact had decisions in two other appeals before him in relation to this appellant, one from Judge Easterman in 2011 and one from Judge T. Jones in 2017. As to the relevance of the 2017 decision of Judge Jones, as far as I could understand Mr Islam’s submission

it was that that decision was relevant because it was concluded in that appeal that there was no breach of Article 8 but now there is. Although Mr Islam said that Judge Jones' decision was before the FtJ in the instant appeal, there is no reference to it in the FtJ's decision. It was conceded that Judge Jones did not actually make a finding in relation to paragraph 320(11). I was invited to take into account that paragraph 320(11) is a discretionary ground.

18. Although Mr Islam cited *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, he could not identify any aspects of that decision that he argued were relevant to this appeal.

Assessment and conclusions

19. The ECO refused the application for entry clearance not only in relation to paragraph 320(11) but also in terms of the suitability requirements of the Rules, in particular S-EC. 1.5. That provides that:

“The exclusion of the applicant from the UK is conducive to the public good or because, for example, the applicant’s conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.”

20. The FtJ made reference to that aspect of the decision at [12]. It seems to me that he correctly identified the fact that that part of the respondent’s decision was made in the context of the appellant’s immigration history, which in turn related to the paragraph 320(11) issue.

21. Paragraph 320(11) of the Rules provides as follows:

“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.”

22. Neither party referred me to any respondent’s guidance in relation to paragraph 320(11) in terms of how it is to be applied. Two things are, however, apparent from the Rule itself. The first is that it is discretionary:

“should normally be refused”. The second is that the list of “other aggravating circumstances” in the Rule is not intended to be exhaustive given that preceding the list of aggravating circumstances it uses the phrase “such as ...”.

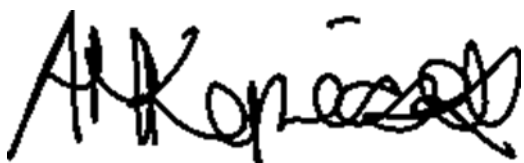
23. It is important to bear in mind that the Ftj could not have allowed the appeal because he thought that the discretion within paragraph 320(11) ought to have been exercised differently. That is not a permissible ground of appeal within the 2002 Act.
24. It is clear enough that the Ftj did find that there were aggravating circumstances, such as giving false details to an immigration officer and making a frivolous asylum claim. Working illegally is probably an aggravating circumstance in the sense that it is no doubt a breach of a condition of leave. The Ftj found that this was an aggravating circumstance.
25. In concluding that the appellant’s breaches of immigration law did not show “truly aggravating” circumstances the Ftj was using a phrase taken from [14] of *PS India* although, unfortunately, neither in that context nor in terms of the public interest issue that the Ftj referred to did he cite that case. Had he done so his decision would have been clearer.
26. The respondent’s grounds are misconceived in stating that “It is clear that a proper reading of the rule indicates that discretion is not to be exercised in an applicant’s favour when additional factors as described are present”. That, with respect, simply cannot be correct. Paragraph 320(11) applies where at least one of the factors (i)-(iv) are present *and* there are other aggravating circumstances. That is what the Rule consists of but the Rule as a whole is discretionary. It is not the case that where there are other aggravating circumstances then the Rule becomes mandatory.
27. Similarly, the contention in the grounds that the Ftj had used Article 8 as a general dispensing power, unintentionally misrepresents what the Ftj said at [17]-[19].
28. If one asks whether the Ftj sought to identify whether there were aggravating circumstances, the answer is in the affirmative. He made it clear what he considered those aggravating circumstances were.
29. The respondent’s challenge to the Ftj’s decision is, however, understandable in that the Ftj’s decision should have been much clearer in its structure, and in its application of Article 8. In that respect his decision is too concise and is unstructured.
30. Nevertheless, it is clear that he allowed the appeal in terms of Article 8. Under “Notice of Decision” he expressly stated that the appeal was allowed on human rights grounds. In the preceding paragraphs he found that the refusal of entry clearance was a disproportionate interference

with the appellant's right to family life (with his spouse). He was entitled to take into account in terms of Article 8 that all the other requirements of Appendix FM were met. He was similarly entitled to take into account the passage of time since the breaches of immigration law (with aggravating circumstances), as well as the fact that the appellant (eventually) returned voluntarily.

31. There is some inconsistency in the FtJ's decision in terms of whether or not paragraph 320(11) applied. He found that there were aggravating circumstances in the matters he identified that come within paragraph 320(11) yet went on to conclude that there were no 'truly' aggravating circumstances. However, that is not a matter that the respondent has raised as a ground of appeal.
32. As already indicated, the FtJ's decision could, and should, have been much clearer in its structure and reasoning in terms of Article 8. However, after close analysis and with some effort, one is able to discern the basis upon which the appeal was allowed in terms of Article 8. Whilst it may be that another judge may have come to a different conclusion, that is not a basis upon which it could be said that he erred in law in his decision.
33. Accordingly, I am not satisfied, notwithstanding the deficiencies in the FtJ's decision, that he erred in law in allowing the appeal under Article 8.

Decision

34. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision to allow the appeal therefore stands.



Upper Tribunal Judge Kopieczek
2020

Date 14 April

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the

Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email