IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12714/2019**
(V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2021	**On 01 April 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR ADRIATIK SOKOLI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Mr G Davison, Counsel, instructed by AR Law Chambers
For the Respondent: Mr A Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Albania. His date of birth is 6 April 1987. He appealed against a decision of the ECO on 2 July 2019 to refuse to grant him entry clearance as the spouse of British citizen. His appeal was dismissed by Judge of the First-tier Tribunal M Paul in a decision that was promulgated on 11 January 2021. The Appellant was granted permission by First-tier Tribunal Judge Landes on 4 February 2021.

2. The Appellant was unlawfully in the United Kingdom. He voluntarily departed the United Kingdom on 22 April 2019 to make an application under Appendix FM based on family life with his partner here, Maria

Marilyn Bandoles Tayo. The application was refused under paragraph 320(11) of the Immigration Rules. The ECO said that the Appellant having entered the UK illegally on 27 August 2011, was served with an IS75 and IS76 on 14 March 2015. He failed to report as required on 11 May 2015 and was, on 16 June 2015, recorded as being "an absconder". The ECO stated: -

> "I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules by overstaying. There were additional aggravating features in that you failed to follow reporting procedures and absconding".

3. The Appellant's case is that there were no aggravating features because he had not absconded. He had been declared an absconder as the result of an application which in fact had not been made. The relevant decision was not served on the Appellant. He was not aware of the requirement to report or inform the Secretary of State of a change of address.

The decision of the First-tier Tribunal

4. The Appellant's evidence is that he came to the UK in August 2011. He and his wife were married on 9 June 2018. He was living at an address in Enfield, which the Secretary of State was aware of because the Appellant had communicated with DVLA. However, he moved in February 2015. The Appellant stated that he did not receive any correspondence from the Home Office and did not know of the requirement to report. He did not intend to be an absconder.

5. The judge at paragraph 11 stated as follows: -

> "The essence of the respondent's case is that after he made his application for the DVLA and was served with the IS75 and 76 he/the appellant failed to report on 11 May 2015 and was recorded as an absconder. He subsequently made 2 human rights applications which were refused."

6. The judge under the heading "Conclusions & Reasons" stated as follows:

> "15. The appellant's evidence in relation to this is limited, and in my view unsatisfactory. In his witness statement he makes no reference at all to the application for a driving licence. But it is worth pausing to note that when he made the application, he would have had to provide an address. According to the witness statement, he was then living at 117 Pembroke Avenue but moved on in February 2015. He does not assert that he provided a follow up address. He simply went to ground and asserts that he never received any correspondence from the Home Office to report. However, it is self-evident that any notices must have been served at that address, and if in fact he had moved by the time those notices were issued, he should have notified the Home Office of his change of address. It is self-evident and common sense, and clearly the responsibility of the appellant

when dealing with the Government Department, to keep them notified of any change of address so that correspondence can continue to be sent to him. Alternatively, of course, he could have made arrangements for the correspondence sent to Pemberton Road to be forwarded to his new address. His statement is completely silent on that point.

16. In my view, the appellant's submissions that in some way because it was mistakenly considered at the time that he had made a human rights application which never led to a decision, does not mean that any of the removal notices that were served subsequent to the driving licence applications somehow fall away. In my decision, it is quite plain that the appellant must have been served with those notices once the Home Office realised that he was in the country unlawfully. The fact that he says that he never received them does not, in my view, justify him claiming that he was not an absconder.

17. In my view, that means that he is to be treated as an absconder in 2015, and that is also an aggravating feature as foreshadowed in the case of **PS** (see above). He clearly dropped beneath the radar until he was able then to make applications based on his marriage to a British citizen. In my view, it is clear that this was an aggravating feature of the exercise of discretion under paragraph 320(11) cannot be faulted."

7. The judge considered Article 8 at paragraphs 18 and 19 noting that there was no issue taken as to the genuineness of the marriage. He said that "the decision therefore has to be based on applying the principles of proportionality and section 117B". The judge said that "There is no doubt that the relationship of the marriage was entered into whilst the appellant was in the country unlawfully. There is a statutory requirement, therefore, to give little weight to the private/family life that results."

The grounds of appeal

8. The first ground is that the Appellant was declared as an absconder as a result of a human rights application that was made in 2015 which in fact he never submitted. The judge at [15] made assertions that were not grounded in the evidence. All the notices served as a result of a void application should be considered as null and void and therefore the Appellant should not be considered an absconder and penalised.

Error of law

9. Mr Tan on behalf of the Secretary of State conceded that the judge materially erred. The decision that the Appellant was an absconder is inadequately reasoned. In the light of the Secretary of State's concession, I conclude that the FTTJ materially erred for the reason identified by Mr Tan. I set aside the decision of the First-tier Tribunal to dismiss the Appellant's appeal.

10. I add that the grounds in so far as they challenge the validity of notices because the Appellant had not made a human rights claims are misconceived. The Appellant was in the United Kingdom illegally. The Respondent was entitled to serve notices on him. However, the judge did not adequately reason why the Appellant should be deemed an absconder (an aggravating feature) if he was not aware that he had to report or provide an address. If the Appellant is simply an illegal entrant it is material to the assessment of whether the appeal should be dismissed under Article 8 with reference to paragraph 320 (11) of the Rules.

11. I remit the appeal to the First-tier Tribunal for a fresh hearing. Applying paragraph 7 of the Practice Statement of the Senior President dated 24 September 2012, paragraph 7.2 (b), I agree with the parties that the matter should be remitted to the First-tier Tribunal for a fresh hearing.[1]

Notice of Decision

The decision of the First-tier Tribunal is set aside. The appeal is remitted to the First-tier Tribunal.

No anonymity direction is made.

Signed Joanna McWilliam Date 25 March 2021

Upper Tribunal Judge McWilliam

[1] 7 Disposal of appeals in Upper Tribunal
7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that: (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal. 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.