Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12884/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 June 2021	**On 29 June 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

ROYAN ALBERT BURRELL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Ijewere, Solicitor, BA Williams Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

2. The appellant is appealing against the decision of Judge of the First-tier Tribunal Louveaux ("the judge") promulgated on 1 October 2020 dismissing his appeal.

3. The appellant's immigration and relationship history is as follows:

   a. On 20 April 2002 the appellant entered the UK as a visitor with leave until 20 October 2002. Thereafter he remained in the UK without leave.

   b. On 29 March 2012 he is was arrested and served with notice that he was liable to removal. Reporting requirements were imposed on him.

   c. The appellant failed to attend reporting appointments in December 2014, January 2015 and February 2015; and on 16 February 2015 he was classed as an absconder. He did not report again and was an "absconder" for approximately two years.

   d. In 2015 he entered into a relationship and began living with a British citizen who he subsequently married.

   e. On 29 November 2017 the appellant left the UK (voluntarily, and at his own expense).

   f. On 27 March 2019 the appellant applied, from Jamaica, for entry clearance on the basis of his relationship with his wife.

4. In a decision dated 20 June 2019 the appellant's application for entry clearance was refused. It was accepted that the appellant met the relationship, financial and English language eligibility requirements under appendix FM. However, his application was refused under the Immigration Rules for the following reasons:

   a. It was said that he fell for refusal under paragraph 320(11) of the Immigration Rules and S-EC.1.5 of Appendix FM of the Rules because he had previously contrived to frustrate the intentions of the Immigration Rules by overstaying and absconding (which was an aggravating circumstance); and

   b. The respondent also stated that he fell for refusal under paragraph 320(3) of the Immigration Rules because he used a different identity when arrested in the UK to that which he used when making his application for leave to enter.

5. The respondent also stated that there were not exceptional circumstances which would render refusal of entry a breach of article 8 ECHR.

Decision of the First-tier Tribunal

6. The judge found that the appellant is married to a British citizen ("the sponsor"), and that they are in a genuine and subsisting relationship.

7. The judge rejected the respondent's contention that the appellant fell for refusal under paragraph 320(3) of the Immigration Rules, stating that this provision was not applicable.

8. However, the judge accepted the respondent's argument that paragraph 320(11) applied. The judge found paragraph 320(11) was applicable because there were aggravating circumstances (absconding and failing to report). The judge distinguished the case from *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC) on the basis that in that case there were no such aggravating circumstances.

9. The judge then proceeded to consider whether there would be unjustifiably harsh consequences if entry clearance was refused. The judge found that there would not, for the following reasons:

   a. The appellant and sponsor both have family in Jamaica (including the sponsor's mother)

   b. Although there would be difficulties in doing so, over time the sponsor would be able to obtain employment in Jamaica

   c. The appellant and sponsor would have the assistance of the sponsor's mother who has sufficient funds to travel annually between Jamaica and the UK

   d. The appellant and sponsor would have the assistance from appellant's brother, whose land and house the appellant looks after.

   e. There is no evidence to support a finding that the sponsor's medical condition could not be adequately treated in Jamaica.

10. In paragraph 41 the judge stated that:

> "Notwithstanding the credit (as per *PS*) that he gets for choosing to depart the UK voluntarily in 2017 and serving what is colloquially referred to as a 12 month re-entry ban, I find that the public interest in refusing the appellant leave remains strong".

11. In paragraph 45 the judge noted that the sponsor provides practical and financial support to her sick father and that social services may have a greater role in his care and support if she relocated to Jamaica. The judge stated that this is relevant to the public interest.

12. In paragraph 46 the judge stated that she gave due weight to the public interest in the maintenance of effective immigration controls and only little weight to the appellant's relationship with the sponsor given that it was established when he was in the UK unlawfully.

13. The judge concluded in paragraph 47 that the decision to refuse entry was proportionate.

Grounds of appeal and submissions

14. The grounds of appeal rely on *PS*, and cite paragraph 14 of that decision, where it is said:

> "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 Mr S's breach of UK immigration law was sufficiently aggravating so as to justify the refusal. It seems to us that the Entry Clearance Officer should have specifically recognised that Mr S had voluntarily left the United Kingdom more than 12 months ago with a view to regularising his immigration status. There was no question but that the marriage was a genuine one. If the aggravating circumstances are not truly aggravating there is in this context a serious risk that those in the position of Mr S will simply continue to remain in the United Kingdom unlawfully and will not seek to regularise their status as he has sought to do. The effect then is likely to be counter-productive to the general purposes of the relevant rules and to the maintenance of a coherent system of immigration. However, as explained, 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. Furthermore, Mr S had made a claim under Article 8 which, standing alone, may not have been very strong. Nonetheless the family circumstances needed to be evaluated carefully in the balancing exercise to which we have referred."

15. With reference to this paragraph of *PS*, the grounds argue that the judge (a) failed to address whether the appellant's breach was sufficiently aggravating so as to justify refusal of entry; (b) failed to take into consideration the public interest in overstayers leaving the UK to regularise their status; and (c) failed to attach sufficient weight to the length of time the appellant spent outside the UK.

16. In his submissions, Mr Ijewere argued that the judge failed to address the correct question, which was whether the conduct of the appellant was sufficiently aggravating in the light of the public interest in encouraging the stairs to leave the UK and make an application for entry. He also argued that the factual matrix in this case was similar to *PS*.

17. Mr Ijewere highlighted that the appellant would not have fallen for refusal under paragraph 320(7B), had this been applicable, because he has been out of the country for over 12 months.

18. Ms Everett submitted, in response, that the judge was entitled to find that a lengthy period of absconding (approximately two years) was an aggravating factor and that paragraph 320(11) applied. She argued that the grounds appear to be no more than a disagreement as the judge considered *PS* and explained why he reached a different conclusion.

Analysis

19. At the relevant time, paragraph 320(11) provided that entry clearance or leave to enter the United Kingdom should normally (but not always) be refused:

> 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.

20. There are two elements to 320(11). First, an applicant must fall into one of the categories (i) – (iv). Second, there must be an aggravating circumstance.

21. It is, in my view, plain that the appellant falls squarely within paragraph 320(11).

    a. Firstly, he was an overstayer and therefore sub-paragraph (i) applies to him.

    b. Secondly, he was an absconder, and therefore there was an aggravating circumstance (absconding is the first example given of an aggravating circumstance).

22. It is also important to note that the appellant's overstaying and absconding was serious: having entered the UK as a visitor, he overstayed for many years; and he absconded for approximately two years.

23. The appellant relies on *PS* but the circumstances of the appellant in *PS* were materially different. As is apparent from paragraph 13 of *PS*, the First-tier Tribunal in that case found that paragraph 320(11) applied because the appellant remained in the UK without leave (i.e. was an overstayer) without engaging with the question of whether, and if so to what extent, there were aggravating circumstances.

24. However, in contrast to PS, in this case it is clear that there was an aggravating circumstance, which is that the appellant absconded. Moreover, the absconding was a significant aggravating circumstance because (a) it persisted for a long time (approximately two years) and (b) the appellant has not (as acknowledged by Mr Ijewere) provided any reasons to justify or explain why he absconded.

25. There is, as recognised in *PS*, a tension between the application of paragraph 320(11) and the public interest in encouraging overstayers to leave the UK and make an application for entry (as, to some extent, reflected in paragraph 320(7B). It is for this reason that the panel in *PS* stated that great care should be exercised in assessing the aggravating circumstances under paragraph 320(11). However, in this case there was plainly a significant aggravating circumstance (absconding for two years).

26. In the light of the significant aggravating circumstances, it was (a) not inconsistent with *PS* to find that paragraph 320(11) applied; and (b) open to the judge in the article 8 proportionality assessment to find that the public interest in the maintenance of effective immigration controls weighed heavily against the appellant even though he had been outside of the UK for over a year and there is a public interest in incentivising overstayers to leave the UK and apply for entry clearance.

Notice of decision

27. The appeal is dismissed. The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 23 June 2021