



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24263/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House, via (MS Teams)
On Wednesday 6 October 2021

Decision & Reasons Promulgated
On Wednesday 17 November 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SHAMSER SINGH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji, Counsel instructed by West London Solicitors Ltd

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION

FACTUAL AND PROCEDURAL BACKGROUND

1. By a decision promulgated on 20 April 2021, Upper Tribunal Judge Owens found an error of law in the decision of the First-tier Tribunal (Judges Lloyd-Lawrie and Osborne) itself sent on 7 October 2020 dismissing the Appellant's appeal. As a result, Judge Owens set aside the First-tier Tribunal's decision although preserving

some of the findings. A copy of Judge Owens' decision is annexed hereto for ease of reference.

2. The Appellant is a national of India. He entered the UK clandestinely in 2005 and worked here illegally as a builder. When he was encountered by the authorities in 2007, he gave a false identity and subsequently absconded. Whilst in the UK, he formed a relationship with [SB] (hereafter "the Sponsor") who is a British citizen. They married in India on 22 December 2015, the Appellant having made a voluntary departure on 18 November 2015. Although this was a voluntary departure, it was prompted by the Appellant's father-in-law refusing to bless the union unless the Appellant did the right thing and regularised his status.
3. On 24 May 2018, the Appellant applied for entry clearance under Appendix FM to the Immigration Rules ("Appendix FM" to "the Rules") to join the Sponsor. That was refused on 20 November 2018 within the Rules and by reference to Article 8 ECHR. The refusal under the Rules was based on lack of suitability (paragraph S-EC.1.5 of Appendix FM - "Paragraph S-EC.1.5"). That was on the basis that his previous character and conduct made his presence in the UK non-conducive to the public good. He was otherwise found to meet the eligibility requirements of Appendix FM. The entry clearance officer also considered the case under paragraphs GEN.3.1 and GEN.3.2 of Appendix FM but concluded that there were no exceptional circumstances justifying the grant of entry clearance. The Appellant was given a right of appeal.
4. On 20 August 2019, First-tier Tribunal Judge Lebaschi allowed the Appellant's appeal. She found against the Appellant in relation to Paragraph S-EC.1.5. She allowed the appeal outside the Rules under Article 8 ECHR based on the Sponsor's circumstances and the contrition which she found the Appellant to have shown for his past mistakes.
5. The First-tier Tribunal refused the Respondent permission to appeal Judge Lebaschi's decision but permission to appeal was granted by Upper Tribunal Judge Canavan on 21 January 2020. Upper Tribunal Judge Kamara thereafter found an error of law in Judge Lebaschi's decision and remitted the appeal to the First-tier Tribunal. That then led to the dismissed appeal to which I have already referred and to Judge Owens' decision. Judge Owens declined to remit the appeal for a second time and retained the appeal for re-making of the decision.
6. I also need to mention an earlier decision of First-tier Tribunal Judge Lewis promulgated on 31 July 2017 in an appeal against an earlier refusal of entry clearance ([AB/112-122]). In that decision, Judge Lewis was concerned with paragraph 320(11) of the Rules ("Paragraph 320(11)"). Judge Lewis found that Paragraph 320(11) was satisfied and that the Respondent had been entitled to rely on that provision. The Judge went on to consider the exercise of discretion based on the circumstances of the Appellant and the Sponsor and concluded that the Respondent's decision was proportionate. The Judge also concluded that the

interference with the family and private lives of the Appellant and Sponsor was outweighed by the public interest. Permission to appeal that decision was refused. Permission to appeal that decision was refused by the First-tier Tribunal on 4 September 2017 ([AB/123]).

7. The appeal comes before me to re-make the decision. The appeal proceeded via Microsoft Teams. There were no technical issues affecting the conduct of the hearing.

In addition to the parties' representatives, the Sponsor and the Appellant attended remotely. Unfortunately, in spite of the direction given by Judge Owens that, if the Appellant was to give evidence and needed an interpreter, the Appellant's representatives were to request an interpreter to be booked, no such request was received, and no interpreter was therefore booked. I indicated that there were two courses open to me given the state of my list. Either the hearing could proceed without the Appellant's evidence, or it could be adjourned to a later date when an interpreter could be provided. I indicated that I would be prepared to take the Appellant's evidence as read in the event that the hearing was to proceed without an interpreter. Mr Clarke did not object to that course. Having taken instructions, Mr Dhanji indicated that the Appellant and Sponsor wished to proceed. Although the Appellant remained present remotely throughout the hearing, he did not participate in it. As I will come to, I heard evidence only from the Sponsor. I have taken into account all of her oral (and written) evidence, but I refer only to those parts which are relevant to the issues which I have to decide.

8. I had before me several bundles of documents. First, I had the Appellant's bundle before the First-tier Tribunal to which I refer hereafter as [AB/xx]. Next, I have a small supplementary bundle which was before the First-tier Tribunal running to twenty pages to which I refer as [AB2/xx]. Finally, the Appellant submitted further documents under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and that bundle has now become the second supplementary bundle (running to 59 pages) to which I refer as [AB3/xx]. In addition to those documents, I had a core bundle of documents relating to the appeal including the Respondent's decision and the application which led to that decision. I have read all the documents but refer hereafter only to those documents relevant to the issues I have to decide.

THE ISSUES AND LEGAL FRAMEWORK

9. The first issue to be determined is whether the Appellant falls for refusal on suitability grounds under Paragraph S-EC.1.5. That is based on his character and conduct. The relevant part of Appendix FM reads as follows:

“Section S-EC: Suitability-entry clearance

S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply.

...

S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good 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.

10. In her decision, Judge Owens found an error of law in the decision of the First-tier Tribunal on this occasion because the panel had failed to have regard to Paragraph 320(11) of the Rules. The parties disagreed whether that paragraph remained relevant following the introduction of Appendix FM. At [16] of her decision, Judge Owens concluded that Paragraph 320(11) remained relevant based on the exception at B320 of the Rules in force at the date of the application. It may be the case that this should read A320. That states as follows:

"A320. Paragraphs 320 (except subparagraph (3), (10) and (11)) and 322 do not apply to an application for entry clearance, leave to enter or leave to remain as a Family Member under Appendix FM, and Part 9 (except for paragraph 322(1)) does not apply to an application for leave to remain on the grounds of private life under paragraphs 276ADE-276DH."

[my emphasis]

11. Paragraph 320(11) is a discretionary general ground of refusal. That paragraph (at the date of the Appellant's application and the decision under appeal) read 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 redocumentation process."

12. Paragraph 320(11) is now replaced by paragraph 9.8 of the Rules which reads as follows:

"9.8.2. An application for entry clearance or permission to enter may be refused where:

(a) the applicant has previously breached immigration laws; and

...

(c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding.”

There is no material difference between the provisions read as a whole.

13. In relation to Paragraph 320(11), the decision of First-tier Tribunal Judge Lewis is the starting point following the guidance given in Devaseelan [2002] UKIAT 000702. Although Judge Lewis’ decision is the starting point, the Devaseelan guidance provides that “[f]acts happening since the first Judge’s decision can always be considered”. That is however qualified by (iv) of the headnote that “[w]here the Appellant relies on facts personal to him or her which were not brought to the attention of the first judge but which could have been and were relevant ‘should be treated by the second Adjudicator with the greatest circumspection’ and generally should not lead to a different conclusion.”
14. At [30] of her decision, Judge Owens preserved the finding of the First-tier Tribunal that the Appellant met the provisions of Paragraph 320(11) by previously entering the UK illegally and that there exist aggravating circumstances by the Appellant’s use of a false identity, working illegally over a long period and absconding. I am not therefore required to consider that issue. I would in any event have reached the same conclusion on the facts.
15. The only issue which remains therefore under Paragraph 320(11) is the exercise of discretion. That is, however, said to be one of the main issues in this appeal. Relevant to that issue is the decision of PS (paragraph 320(11) discretion: care needed) India UKUT 440 (“PS (India)”). The guidance for which the case is reported is as follows:

“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.”
16. Neither party directed my attention to any relevant guidance concerning the application of either Paragraph S-EC.1.5 or Paragraph 320(11). However, the Appellant’s skeleton argument before the First-tier Tribunal draws attention to guidance in force at the date of the decision under appeal in January 2018 entitled “General Grounds for Refusal: Considering Entry Clearance”. That deals with Paragraph 320(11). The Appellant’s skeleton argument refers selectively to only one sentence. The section read as a whole is as follows (so far as relevant):

“This page contains guidance for entry clearance officers on what to consider when an applicant for entry clearance has previously breached the Immigration Rules and there are aggravating circumstances.

This relates to general grounds for refusal under paragraph 320(11) of the rules when the person has previously contrived in a significant way to frustrate the intentions of the rules. For visitors this relates to paragraph V 3.8 of Appendix V.

...

When an applicant has previously breached the Immigration Rules and/or received services or support to which they were not entitled you must consider refusing the application. When these circumstances are also aggravated by other actions with the intention to deliberately frustrate the rules, you must refuse entry clearance under paragraph 320(11).

This means when an applicant has done one or more of the following:

- been an illegal entrant

...

- obtaining:

...

- o employment

...

using an assumed identity or multiple identities or to which not entitled and there are aggravating circumstances, such as:

- absconding
- not meeting temporary admission/reporting restrictions or bail conditions

...

- using an assumed identity or multiple identities

...

- attempting to prevent removal from the UK, arrest or detention by Home Office or police

...

This is not a complete list of offences. You must consider all cases on their merits and take into account family life in the UK”

The Appellant relies on the final sentence of that passage.

17. The only ground available to the Appellant in this appeal is whether the refusal of entry clearance breaches section 6 of the Human Rights Act 1998. The relevant question in this appeal is only whether the refusal interferes disproportionately with the family and private lives of the Appellant and the Sponsor. Nonetheless, whether or not the Appellant meets the Rules is a relevant consideration. Since the only reason for the Respondent’s refusal is the Appellant’s suitability (which includes here both Paragraph S-EC.1.5 and Paragraph 320(11)), if I am satisfied that the Respondent’s decision in that regard is not justified, it would follow that there is no public interest reason to refuse the Appellant entry clearance.
18. Even if I am against the Appellant in relation to suitability, I still have to go on to assess the impact of the continued absence from the UK of the Appellant on him and the Sponsor and to balance that impact against the public interest. In that regard, although paragraph EX.1 of Appendix FM (“Paragraph EX.1”) does not directly apply (as this is an entry clearance case), I take into account what is said by

the Supreme Court in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko"). Notwithstanding the inapplicability of Paragraph EX.1, one of the central issues in this appeal is whether the Sponsor can be expected to go to live in India in order to continue family life with the Appellant. Outside the Rules, I have to consider whether the impact of the refusal of entry clearance is disproportionate on the basis that the consequences of refusal for the Appellant and Sponsor are "unjustifiably harsh".

19. When balancing the interference with the Appellant's and Sponsor's family and private life against the public interest, I adopt the balance sheet approach advocated by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 ([83] and [84] in the speech of Lord Thomas). When considering the public interest in refusal of entry clearance, I am also required to have regard to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") insofar as relevant.
20. I have the above legal principles and guidance firmly in mind when considering the evidence hereafter.

THE EVIDENCE AND FINDINGS

The Appellant's Evidence

21. The Appellant has provided three written witness statements which appear at [AB/1-2] (dated 29 May 2019), [AB2/5-6] (dated 19 June 2020) and [AB3/5] (dated 15 September 2021). The third of those statements does not contain any statement of truth. Nonetheless, I take it into account as read as I indicated I would do. It is extremely short in any event and largely repeats what is said in the previous statements.
22. In his first statement, the Appellant "take[s] full responsibility and acknowledge[s] the wrong doings of [his] past". He accepts that he entered the UK illegally in 2005, used a false identity to avoid being returned to India, worked illegally and evaded immigration control for almost ten years. He says that "the only genuine thing about [his] stay in the UK was [his] relationship" with the Sponsor. In relation to his time back in India over the past nearly six years, he says that he has been volunteering in his local community. The Appellant acknowledges that he should not have sought to justify his use of a false identity in the appeal decided by Judge Lewis. He accepts that he used a false identity to hide his real identity from the authorities and he accepts that his conduct was unlawful. He also admits that the reason he left the UK was at the behest of the Sponsor who "wanted to start [their] life the right way". In spite of the foregoing, he says he "never harmed anyone in the Public" and did not seek recourse to public funds. He believes that "the punishment supersedes [sic] the crime" and that he should be allowed to return to the UK so that he can live with his wife in the UK and become a law-abiding citizen.

23. In his second statement, the Appellant says that he is “wholeheartedly sorry for [his] past immigration history”. He acknowledges that he has made “huge mistakes” for which he says he has been paying ever since. He believes that “[his] punishment must come to an end for the sake of [the Sponsor’s] mental health and for our lives”. He says that the Sponsor would not be able to adjust to his life in India. He lives in a small, rural village. He says that it does not have adequate facilities to cater for the Sponsor’s mental health needs. He considers it “unfair” to require her to settle in India “due to her circumstances and nature”. He says that she does not like change. He would work hard if permitted to come to the UK. He reiterates his service to the local community in India. He does not say anything about engagement in paid employment there.
24. The Appellant’s third statement largely reiterates what he has said previously. He again apologises and repeats his acceptance of his past mistakes. He reiterates the impact on the Sponsor and notes again that she has suffered miscarriages. He says that they have “lost 6 years of [their] married life” which has been “difficult” for them.
25. Although Mr Clarke asked me to reject the Appellant’s evidence in relation to his contrition as not credible, I reminded him that I had agreed to take the evidence as read. Whilst the Appellant had not been prepared to apologise for his mistakes in his first appeal, I am prepared to accept as credible that he has come to acknowledge that he has acted unlawfully in the past and has ceased to make excuses for his conduct. Nonetheless, his contrition such as it is has to be read in context. I very much doubt that he would have expressed that contrition without the realisation of the impact which his actions have had on the Sponsor and their future. It is notable that even after he had met the Sponsor and had been encountered by the authorities, he departed the UK voluntarily only because the Sponsor wanted him to (and because her father would not bless the marriage unless he did). In reality, it is the impact for which the Appellant is now apologising rather than the conduct itself. He still shows no recognition of the impact of his past conduct. He says for example that he did not harm anyone without recognising the more general harm which conduct of this sort causes.

The Sponsor’s Evidence

26. The Sponsor has provided three written statements which appear at [AB/3-5] (dated 31 May 2019), [AB2/1-4] (dated 19 June 2020) and [AB3/3-4] (dated 28 September 2021). As with the Appellant’s third statement, the Sponsor’s third statement does not contain any statement of truth. However, as I have previously indicated, the Sponsor gave evidence orally and adopted her statements in the course of that evidence, confirming the truth of what she there says.
27. The Sponsor confirms that she and the Appellant married in India on 22 December 2015. They could not marry in the UK because of the Appellant’s status. She

accepted that she had known of his status when she met him. However, she did not realise that it would be so hard for him to get entry clearance. They had been advised by a solicitor that the Appellant should return to India to get entry clearance.

28. The Sponsor travelled to India seven times between her marriage and May 2019. She could only do so for short periods due to her job as a teacher. She also had a pet dog to look after. She also has a sister with special care needs. Her mother was unable to attend the wedding in India as she had to look after her sister.
29. The Sponsor is committed to her job as a teacher. She has been teaching now for over ten years. She said that her work had kept her going during her separation from the Appellant. The Sponsor is clearly a well-respected teacher. The school has written a letter dated 1 June 2020 which appears at [AB2/9] (also replicated in the same terms but re-dated 15 September 2021 at [AB3/15]) and gives a positive reference. The head teacher says that there is a skills shortage in the education sector and that it is “therefore important for our children’s continued learning, social and emotional development that [SB] remains employed at our school”. The Sponsor has a particular responsibility for the management of phonics throughout the school. However, the Sponsor accepted in response to questions from Mr Clarke that this is not an unusual role, that she is not irreplaceable and that her job could be filled by another teacher if she were to go to live in India.
30. A central theme of the Sponsor’s evidence is the impact which separation from the Appellant has had on her mental health.
31. The Sponsor has received counselling via the school where she teaches. That is confirmed by the short letter from Helen Thorp, Ealing Schools Counselling Partnership dated 27 May 2020 at [AB2/10] which confirms that the Sponsor has been attending counselling with her since January 2019 and continues as follows:

“The focus of the sessions have vastly been on the impact of the separation from her husband as well as her three pregnancy losses. [SB] has spoken about feeling low in mood and severe anxiety around the process of the ongoing struggle of getting her husband here.”

Essentially the same letter but re-dated 15 September 2021 appears at [AB3/13].

32. The Sponsor also says in her second statement that she has contacted the IAPT in Ealing to get support. She has had an assessment.
33. At [AB/9-10], there is a letter from Khudija Ismail, a Psychological Wellbeing Practitioner dated 9 November 2018. The Sponsor reports problems as being separation from her husband exacerbated by an ectopic pregnancy. Test scores are given as PHQ-9 score 26 and GAD-7 score 21. Those scores indicate the most severe depression and anxiety. However, the tests are not explained and nor is there any diagnosis or assessment reported. There is no detail given about the qualifications

or experience of the practitioner. The Sponsor was given two options to either consider a specialist counselling approach or support via Ealing-IAPT. She opted for the latter in the form of guided self-help based on cognitive behavioural therapy. She was added to a waiting list for treatment.

34. A letter from Ms Mason, a trainee high intensity therapist dated 18 March 2020 is at [AB2/13-14]. That refers to an initial triage appointment on 12 March 2020. The Sponsor reported "a significant amount of stress", feeling "low and anxious" and "struggling to manage". The PHQ-9 score is given as 21/27 which suggests severe depression. The GAD-7 score is given as 17/21 which suggests severe anxiety. There is no explanation of how those scores were reached nor is any detail given about the therapist's qualification and experience (save that she is a trainee) or what she observed from the assessment. It is said that the Sponsor mentioned suicidal thoughts but had no active plans and mentioned self-harming eighteen months previously (which would, if correct, be around the time that the Appellant's appeal was allowed). The Sponsor has no active plans to self-harm in the future. As a result of this assessment, the Sponsor was given guidance for self-help and put on a waiting list for treatment.
35. The Sponsor says that she began therapy sessions in June 2020. However, the letter from Ealing IAPT at [AB3/18] suggests that this service referred her to "a more suitable and supportive counselling" with the Asian Family Counselling Service. A letter from a counsellor with that service dated 17 September 2021 ([AB3/14]) indicates that the Sponsor has attended eleven weekly sessions since December 2020. The Sponsor reported that her depression and anxiety is caused by the stress arising from the uncertainty of the future around her marital status and separation from her husband. It is said that if the situation continues, this could lead to "a mental breakdown". The counsellor does not deal with his or her assessment of the Sponsor's mental state nor its causation. Again, there is no detail given about the counsellor's qualifications or experience.
36. The Sponsor tested positive for Covid-19 in November 2020. In her third statement, she says that she has been "mentally exhausted" and physically ill since. She puts this down to the separation from her husband and ongoing appeal process. She says she had "long Covid". Documents at [AB3/33-36] show that she was signed off sick from November 2020 to April 2021 for that reason.
37. There is a detailed letter from the Sponsor's GP (Dr Karunalingam) dated 29 May 2020 at [AB2/11-12] (replicated at [AB3/16-17]) concerning her mental and physical problems. It confirms the Sponsor's own evidence that she was unwell when she visited India in March 2016 (to the point where she had to be hospitalised). She also told the doctor that she had suffered chest and abdominal pain and headaches due to "extreme stress". Her physical symptoms may however be caused or contributed to by her mental health condition because the GP goes on to say that, following a visit to India in December 2017 when the Sponsor again complained on return of severe stomach and abdominal pains and underwent an endoscopy, "the

results showed symptoms are most likely to do with the stress due to her personal circumstance and separation from her husband” (see also report at [AB/13]). That does not of course mean that the physical symptoms are any less real but there may be some doubt about their cause.

38. The GP’s letter speaks of the Sponsor suffering from “depression, anxiety and stress” caused in part by the ongoing appeal and separation from her husband and in part due to her failed pregnancies. The letter goes on to assert that the Sponsor suffered from post-traumatic stress disorder (PTSD) following her ectopic pregnancy. The Sponsor confirmed in answer to Mr Clarke’s questions that she has not seen a psychiatrist and was unaware when this diagnosis had been made if it had. She thought that this might have been the conclusion of Ms Thorp (the counsellor to whom I refer at [31] above). However, there is nothing in Ms Thorp’s letter to suggest that this is the case and nor does she appear to have qualifications to make such a diagnosis.
39. I accept that the Sponsor is suffering emotionally as a result of her separation from the Appellant (amongst other causes). She was tearful throughout most of her oral evidence. I have already referred to the counselling which the Sponsor has received. She said in her evidence that she is prescribed sertraline. There is some limited evidence confirming prescription of medication. However, the evidence shows that it is her separation from the Appellant which is largely the root cause of her problems exacerbated by her ectopic pregnancy and miscarriages. There is limited supporting evidence that the Sponsor has mental health problems which require medication or treatment. There is no evidence that such treatment or medication as she currently receives is unavailable in India. Insofar as the Sponsor’s mental health problems are caused by her separation from the Appellant, she would of course have his support if she moved to India as she would if he came to the UK.
40. The other central plank of the Sponsor’s evidence is the impact of separation from her sister, [M] if the Sponsor were to leave the UK. The Sponsor currently lives with her mother, father and ([M]). As I have already indicated, [M] has special care needs. The documents show that [M] is cared for by her mother. However, the Sponsor said that her parents are getting older and will not be able to look after [M] in the longer term. She accepted that, for the time being, her mother is the main carer. Her mother is now aged sixty-two years.
41. The Sponsor’s GP has also provided documentary evidence dealing with the medical condition of the Sponsor’s sister. She has “Global development delay, right arm hemiparesis, poor visual acuity on her right eye”. There are some medical documents relating to the Sponsor’s sister at [AB3/29-30] which suggest her visual problems are managed by wearing glasses and that there are “no concerns” on review. However, I accept that the Sponsor’s sister is sufficiently ill to require constant care. The GP says that the Sponsor’s sister is receiving “the care component at the highest rate” because she is unable to work and needs continuous

supervision. That is confirmed by a DWP letter dated 22 January 2021 addressed to the Sponsor's father at [AB3/6-9], a First-tier Tribunal (Social Security) decision at [AB3/37] and a completed questionnaire in relation to care needs at [AB3/38-56]. [M] needs assistance with personal care. The GP speaks of the Sponsor's "strong bond" with her sister. The Sponsor is said to accompany her sister to GP appointments to "offer emotional and moral support". Although it is there acknowledged that the Sponsor's mother is her sister's main carer, the GP says that the Sponsor "also takes a significant role" in that care.

42. However, the care questionnaire at [AB3/38-56] is particularly instructive as to the needs of the Sponsor's sister. [M]'s difficulties appear to arise mainly from her delayed cognitive development. She is unable to go out alone as she lacks any sense of direction. She lacks social and communication skills which makes interaction with others very difficult. She is also said to be "very difficult to handle" and demonstrates "challenging behaviour towards her carer when she refuses to listen to an instruction". That is consistent with the Sponsor's oral evidence. The evidence however suggests that it is the Sponsor's mother who looks after her sister "at all times". The Sponsor's sister is said to be "fully dependent on her mother". Her mother is said to "do everything for [her sister]". That is notwithstanding that this questionnaire was completed by the Sponsor herself.
43. The Sponsor says in her second statement that [M] becomes very distressed during the Sponsor's absence. She says that [M] has angry outbursts which her mother finds difficult to manage. The Sponsor said in her oral evidence that when [M] throws a tantrum, she is able to help. However, the questionnaire paints a somewhat different picture which causes me to question that evidence. It is said that the Sponsor's sister "may hit or kick [the Sponsor] if she feels like it". Whilst the Sponsor says in the questionnaire that she understands and accepts this, that does not give the impression that the Sponsor is able to act as a calming influence if her mother finds it difficult to cope.
44. The Sponsor's mother has provided a letter of support dated 29 May 2020 which appears at [AB2/7]. The letter states that it was written by the Sponsor on her mother's behalf as her mother is unable to speak or write in English. The Sponsor's mother says that the Sponsor assists her with care for [M] by helping with [M]'s personal care. She also says that [M] misses the Sponsor "greatly" when the Sponsor is not there. She says that it impacts [M]'s "emotional well-being". The Sponsor's mother states that the Sponsor and Appellant would live with her if he were allowed to come to the UK. She says that they would contribute to the country. The Sponsor's mother is from Punjab and says that it would be difficult for the Sponsor to adjust to the cultural differences. The Sponsor's mother would "feel very sad" if the Sponsor were to go to India. Notably, though, she does not say that she could not cope without the Sponsor nor that she considers that the Sponsor would be unable to adapt to life in India in time even if she might find it difficult. The Sponsor's mother did not attend to give oral evidence.

45. That brings me on to what the living situation would be if the Appellant were to come to the UK to live with the Sponsor. The Sponsor was asked questions about her and the Appellant's intentions if he were to come to the UK. She said that they would live at first with her parents. However, she accepted that since she and the Appellant wish to start a family, they would probably move to their own house. When it was put to her that if that were to happen, she could not provide the support for [M] that she claimed was required, she changed her evidence and said that in all likelihood, her parents would sell the existing family house to buy a bigger house where they could all live together. There is no evidence, including in the letter from the Sponsor's mother, that the Sponsor's parents have any such intention and I accept Mr Clarke's submission that I should reject this part of the Sponsor's evidence. I think it more likely that the Sponsor and the Appellant would want to form their own family unit and would live independently of the Sponsor's family if they could afford to do so. It may be that they would live close by but that would of course depend on the Appellant's employment prospects in the UK and affordability of a property in that local area (as to which there is no evidence).
46. It may be that in due time, [M] would go to live with the Appellant and Sponsor if they could afford a sufficiently large property but that is also speculative and, for the time being at least, [M]'s needs are shown as satisfied by the care which her parents provide. As Mr Clarke also pointed out, the Sponsor works full-time as a teacher and the burden of care for [M] must therefore be borne by her parents.
47. I accept that the Sponsor and [M] have emotional ties as do most siblings. I also accept that those may well be strengthened because of [M]'s condition. There is however insufficient evidence to show that [M] would suffer if the Sponsor were not living with her or that the Sponsor's parents would be unable to cope with [M].
48. The Sponsor also accepts in her second statement that she did not mention her care for [M] in the first appeal as she "didn't see the relevance to [her] case as [her] relationship and care for [her] sister is a matter of everyday life". Looking at all the evidence relating to [M], I think it more likely that the Sponsor is now exaggerating this factor as reason why she cannot go to live in India.
49. The Sponsor's father has been unwell recently as is confirmed by the documents at [AB3/19-28]. Those show that he was admitted to hospital on 20 June 2021 having suffered a stroke. He was discharged two days later. The "clinical narrative" at [AB3/20] suggests that the Sponsor's father suffers from diabetes and may not have been complying with his medication. He was told that he could not drive for 28 days (he is a driver for Royal Mail). He was given a follow up appointment in three months.
50. The report dated 2 August 2021 written by Dr Jessica Barton at [AB3/24-27] indicates that the Sponsor's father underwent tests in relation to his cognitive skills following the stroke. The Sponsor attended with her father for that appointment.

The tests identified strengths with his understanding arising from things he had seen but he had difficulties with language and memory which he said “represent some of the challenges [he faces] day-to-day” (perhaps suggesting these are problems of longer standing). It is recorded that the Sponsor’s father was working with a speech and language therapist to assist him with his difficulties with communication.

51. The evidence shows that the Sponsor’s father is being monitored intermittently (about every three months). There is no evidence of more lasting physical problems which require greater care on the part of the Sponsor. As she said in her oral evidence, it would of course be difficult for her to help if her father were to relapse if she were living in India. However, that is a problem faced by many young people with ageing parents who are geographically separated due to employment or family circumstances. There is no reason why she could not travel back to the UK if the need arose.
52. I turn then to the reasons given by the Sponsor why she could not go to live in India. She is British. She is “westernised”. She says in her first statement that she would find it “tremendously distressing adapting to the Indian Punjab culture”. She points out that the Appellant’s family is “traditional” and she is aware of the differences with her own behaviour. She says that, as a woman, she would not be allowed to go out without a male accompanying her. She gives as an example of the culture shock, an incident when she complained to a local woman about the way in which she was treating her dog. She said in her oral evidence that her communication in Punjabi was probably not perfect and that she may have come across as rude. For that reason, the woman was offended and complained to the Appellant’s mother. The Sponsor says also that she would not be able to deal with the animal cruelty which she witnessed on that occasion as she is an animal lover.
53. The Sponsor develops this theme in her second statement. She says that living in the Appellant’s village is like living on a farm. Notably she says that the Appellant’s village is one where “the young generation have educated themselves and have migrated”. She says that the role of women in that village is very traditional. She is expected to wear traditional clothes. She would not be allowed to drive and that to do so is very dangerous anyway. She says that she would therefore lose her independence.
54. The Sponsor also said that she fell ill when she was in India in March 2016. As a result, she now has to use almond milk as she “is very sensitive to the dairy products and wheat in India”. There is no medical evidence in this regard and nor is there evidence that alternatives to dairy products do not exist in India at least in larger cities. The Sponsor says that gluten free options are hard to come by “where we live in Punjab” and says that she takes her own food with her when she visits. I have already noted the evidence from the Sponsor’s GP concerning the possible mental health causation of the physical symptoms. It is worthy of note that the endoscopy report to which the GP refers (at [AB/13]) states that “[s]ymptoms are

most likely to do with stress due to her personal circumstances as symptoms settles [sic] whilst in India then reoccurred once back". The Sponsor also says that she is unable to deal with the temperature in India and with the dust storms.

55. Mr Clarke asked the Sponsor questions about how she might acclimatise to India in due course. He pointed out that she and the Appellant could go to live in a large city rather than remain in the Appellant's village. That would be a less traditional environment. The weather also varies significantly between various areas in India. Mr Clarke suggested that the problems which the Sponsor identified could be alleviated if she were prepared to consider alternative areas.
56. The Sponsor says in her second statement that she could not move to another part of India as she "[does] not have the finances and job security that [she does]" here. She says that in the UK she can support herself and the Appellant with accommodation provided by her parents but would not be in the same position in India. I did not understand why the Appellant who came to an entirely unfamiliar country where he did not speak the language and found work would be unable to move to another part of India and similarly find work, particularly given the tendency which the Sponsor points to in her statement for the youth in his village to migrate away to other areas. The Appellant is aged in his late thirties. He does not say anything in his evidence about being unable to relocate within India. There is no evidence about the Appellant's educational background, but the Sponsor is herself educated.
57. Mr Clarke asked the Sponsor about her own ability to work in India. In her second statement, the Sponsor accepts that she speaks Punjabi but says that she does not speak Hindi which is the main language spoken in the schools in the Appellant's local area. She says that this inability to speak Hindi "would jeopardize [her] teaching career". She also says that teaching in India is more rigid and strict than in the UK. She gives as an example that her sister-in-law's child "was expected to write pages of the letter 'g' as she did not write on the line". The Sponsor considered this harsh. She also says that "physical chastisement" is still used in schools in India. She says that the cultural differences in teaching practices "is huge and not suitable for [her]". She does not say how she knows about education in India beyond her experience derived from the Appellant's family in his local area. In response to Mr Clarke's questions about the possibility of teaching in an urban area or an English-speaking school, she admitted that there were "one or two around" in the area where the Appellant is located. In relation to the option of moving to a city, she simply asserted that this was "not possible". She provided no satisfactory explanation for why that was so.

DISCUSSION AND CONCLUSIONS

Suitability: Paragraph S-EC.1.5 and Paragraph 320(11)

58. As Mr Clarke rightly submitted, my starting point is the decision of First-tier Tribunal Judge Lewis promulgated on 31 July 2017 ([AB/112-122]). At that time, the Appellant sought to offer excuses for his past actions. He accepted that he had entered and remained in the UK as an illegal entrant. However, he said that his use of an alias was simply another name that he was known by amongst family and friends, he had not claimed any financial support, had visited the GP only once and was honest with the Sponsor about his status. He accepts that he was encountered by immigration officials in 2007 and says that he was released without bail. He accepts that he was arrested in 2012 for a driving offence. Having pleaded guilty to that offence, he was disqualified from driving for six months and fined. The Appellant said that he was sorry for his conduct and accepted responsibility for his wrongdoing. He claimed to have learned from his past behaviour ([14] of the decision).
59. At [18] of the decision, Judge Lewis found that the Appellant's explanation for his use of another identity was not to be believed. He concluded that the Appellant had exercised deception "because he sought to avoid greater trouble than he might otherwise be in". Judge Lewis did not accept that the Appellant's failure to report was due to a breakdown in communication arising from interpretation problems. He found that "it would have been patently obvious to the Appellant that he was required to maintain contact with the Immigration service and or otherwise to seek to regularise his position in the UK or leave" ([20]). The Judge concluded that the Appellant was "indeed an absconder". The attendance at court following the summons for a driving offence did not assist his case since he did so in the false identity.
60. Judge Lewis made the following findings as to the seriousness of the Appellant's conduct:

"21. Further to the above I consider it significantly to the Appellant's detriment that he has not openly and frankly acknowledged the nature of his deception and wrongdoing, but has instead sought to hide behind petty disputes as to the accuracy of the Respondent's Notice of Immigration Decision - in particular the largely immaterial distinction between whether he entered on a false passport or clandestine [means] - and, in my judgement, manifestly false assertions as to the essential innocence of his conduct in making use of an identity that was not his formal identity, and remaining in the UK in ignorance of the notion that he was anything other than an absconder. In my judgement the Appellant's protestations as to comparative innocence give the lie to the sincerity of the apology offered in his witness statements, and his assertion that he has 'grown up' and is now more responsible.

22. The sponsor told me that the Appellant came from a poor family background and '*so he felt he had to come to Europe to get work*'. In the circumstances it is manifestly the case that the Appellant was an economic migrant who knowingly and deliberately entered the UK illegally with the intention of remaining and working unlawfully. His conduct strikes at the very heart of immigration control, and was contrary to the public interests that immigration control is designed to protect - including access to the labour market and protection of the

workforce which is inevitably undermined by the presence of illegal workers with a concomitant adverse impact on workers' rights and tax revenues.

23. The Appellant's unlawful conduct was sustained and deliberate; he was present in the UK unlawfully for 10 years. Moreover, I do not accept that he decided to alter his ways out of a sense of remorse, but rather because his hand was in effect forced by the sponsor and her father – the latter of whom indicated that he would not give his blessing to the couple's relationship unless the Appellant regularised his immigration status – see further below. Whilst this circumstance underscores the genuine nature of the marital relationship, it in no way suggests to me that the Appellant is genuinely contrite or has demonstrated any sort of reformation of character.

24. In summary: the Appellant admits that he entered the UK illegally; he admits that he worked illegally in the UK in the building trade; he accepts that he was encountered by Immigration Officers in April 2007 and that thereafter he took no steps to regularise his immigration status or otherwise to have any formal contact with the immigration service; I reject his claim that he did not give them a false name at this time; I reject his claim that he was unaware that he had an obligation to maintain contact with the immigration service; in my judgement he knowingly gave the false identity of Sandeep Singh Sidhu to the police and in turn the West London Magistrate court in respect of driving offences; I find that the Appellant was at all material times fully cognisant of the fact that he was living and working in the UK wholly illegally."

61. It is self-evident that there cannot be any change of circumstance since Judge Lewis' decision in relation to the Appellant's past conduct. As such, the findings as to the Appellant's past immigration history, his conduct during his illegal stay and the public interest impacted by that conduct all remain the same. I observe that Judge Lewis did not have to determine whether Paragraph S-EC.1.5. was met. The only issue was the applicability of Paragraph 320(11). However, the existence of past breaches of immigration law and aggravating circumstances indicates the character and conduct of the Appellant at that time. It is for that reason also relevant in this regard that Judge Owens, in her error of law decision, preserved the First-tier Tribunal finding in this appeal that Paragraph 320(11) is met in relation to the Appellant's past breaches of immigration control and the aggravating circumstances arising from his conduct.
62. The issue for me to consider under Paragraph S-EC.1.5. is whether there has been any change in the Appellant's position since 2017 which would lead to any different weight being given to that conduct and whether the Appellant's character and conduct is of such a nature that his presence in the UK would be non-conducive to the public interest. Paragraph S-EC.1.5. is a mandatory ground of refusal and therefore, at this stage, there is no question of balancing the suitability of the Appellant against the other factors in this appeal.
63. Dealing with the latter question first, Mr Dhanji accepted that, in principle, the Appellant's past conduct is sufficient to engage Paragraph S-EC.1.5. He submitted however that the Appellant's conduct since is relevant.

64. Mr Dhanji suggested that I should give weight to the fact of the Appellant's voluntary departure in spite of Judge Lewis' observations. I see no reason to do so. There is no evidence that the Appellant's reason for leaving the UK was prompted by any crisis of conscience. He left either because his father-in-law would not bless the marriage unless he did, because the Sponsor wanted him to do the right thing ([9] of the statement at [AB/2]) or because he and the Appellant were given legal advice that this was their best chance of him being readmitted (the Sponsor's oral evidence). None of those matters indicates any contrition for past mistakes.
65. Indeed, the Appellant's commitment to remaining in the UK come what may during the ten years he spent here illegally leads me to suspect that he would be here still were it not for those events. I indicated that I would take the Appellant's evidence as read which includes his statements as to contrition. However, all that this evidence indicates is that he is sorry for making those mistakes, but that he has "been paying for 6 years" and believes "[his] punishment must come to an end for the sake of [the Sponsor's] mental health and for our lives" ([AB3/5]). Those statements indicate only that he is sorry because of the impacts his past mistakes have had on his and the Sponsor's current and future lives. There is no recognition of the damage which his actions may have caused in the past. That is underlined by the assertions at [10] and [11] of the statement at [AB/2] that "[he] never harmed anyone in the public and [he] never took any public funds from the Respondent" and that "the punishment supersedes the crime".
66. As Judge Lewis set out in his decision, the Appellant's use of a false identity to work illegally in the UK potentially deprived others of gainful employment and undermined the labour market. There is no evidence to suggest that the Appellant paid tax in the time he worked here illegally, thereby depriving the exchequer of the tax revenues which a lawful employee would have to pay. I do not know what was the nature of the motoring offence but I am prepared to accept that the Appellant did not cause any physical harm to any individual member of the public. Nonetheless, his sustained and deliberate breach of immigration control and use of deception is, I find, sufficient to show that his presence is not conducive to the public interest. His lack of recognition of the damage caused by his past actions leads me to the conclusion that his presence remains non-conducive. I accept of course that the Appellant may well work lawfully in the UK if permitted to come here. He would probably be obliged to do so as he would not be entitled to public funds. There is however no evidence of any skills or qualifications which he has which might indicate that his presence here would have any positive benefit to the public interest in the UK which might outweigh his past conduct.
67. For those reasons, I am satisfied that Paragraph S-EC.1.5 is met. The Appellant is unable to meet the Rules on suitability grounds.
68. Strictly, I should then go on to determine whether Paragraph 320(11) is met. However, there is a preserved finding that the breach of immigration laws and

aggravating circumstances exist (as I have also found to be the case in line with Judge Lewis' findings).

69. The difference between Paragraph S-EC.1.5 and Paragraph 320(11) is that the latter is a discretionary ground of refusal. I accept that the guidance in PS (India) is of relevance to the exercise of that discretion. However, I have already taken into account the impact of the Appellant's voluntary departure when considering Paragraph S-EC.1.5 and have concluded that this does not affect the suitability position. I accept that there is a public interest in encouraging those in the Appellant's position to return home in order to regularise their status. However, I have found that this was not the Appellant's reason for returning. If he had not done so, his father-in-law would not have given permission for him to marry the Sponsor and the Sponsor was unwilling to start their married life on an unlawful footing. The ulterior reasons for the voluntary departure mean that I can place no weight on that as a reason displacing the application of Paragraph 320(11).
70. The other factors relevant to the exercise of discretion emerge from the Respondent's own guidance. Those are however personal factors relating to the Appellant and the Sponsor. The impact of refusal of entry clearance on the Appellant and Sponsor is one of the central issues which must be considered under Article 8 ECHR. There is no need for me to balance the application of Paragraph 320(11) against the personal factors within the Rules since I have already found that Paragraph S-EC.1.5 applies. The Appellant cannot therefore succeed within the Rules.

Article 8 ECHR

71. I begin my assessment outside the Rules with consideration of the factors in the Appellant's favour.
72. In relation to the Appellant himself, I have very limited information about the impact on him of the refusal of entry clearance apart from the obvious issue of separation from his wife. It is not suggested that he is living in dire circumstances in India. He lives in the family home. He works on a voluntary basis. There is no evidence of paid employment, but it is not said that he does not have a reasonable living standard. As I understand it, the Appellant lives in a traditional village where the villagers make their living from growing their own food.
73. It is accepted that the Appellant and the Sponsor are in a genuine relationship. She has visited him about seven or eight times in the six years that he has been away from the UK.
74. The next question which arises however is whether the couple can reasonably be expected to continue their family life in India. Put another way, would it be unjustifiably harsh to expect the Sponsor to go to live there? Are there insurmountable obstacles (in the sense of very significant difficulties or very serious

hardship) in the way of the couple continuing their family life there? I have recognised that Paragraph EX.1 does not strictly apply. Nonetheless, the principles set out in Agyarko remain of some general application.

75. There are two aspects to the difficulties faced by the Sponsor. First, the difficulties arising from the disruption of her current life in the UK. Second, the difficulties which she would face in becoming accustomed to life in India.
76. The interference with the Sponsor's life in the UK is to my mind the more significant. She has a steady job in the UK. She provides a valuable service to the UK as a teacher. She is good at her job and valued in her employment. She was born in the UK and has spent all her life here save for the visits to India.
77. The Sponsor lives with her mother, father and sister, [M]. [M] has a cognitive disability and requires constant care. I am prepared to accept that the Sponsor has a close bond with her sister although I have indicated that I find to be overstated the evidence about the role which the Sponsor plays in her sister's life. [M] would I accept miss the Sponsor if she went to live in India but there is limited evidence that this would have any significant impact on [M] herself. [M] is looked after by her mother who is her main carer. If at some future date, the Sponsor's mother finds herself unable to care for [M] without assistance, she would be able to ask for that assistance from outside agencies.
78. The Sponsor's father has also suffered ill health recently. However, the evidence suggests that he has largely recovered and is now subject only to intermittent monitoring. There is no evidence that the Sponsor needs to be in the UK to provide care for him.
79. Probably the most significant factor when considering the impact on the Sponsor of going to live in India is her own mental health. Although there are no formal reports diagnosing the Sponsor's mental health problems, I accept that she has been receiving counselling and medication to deal with those problems. I accept that she has genuine problems with depression and anxiety. There is acceptance among those who have treated the Sponsor that her problems are caused by separation from her husband and the problems she has had with conception (including an ectopic pregnancy and miscarriages). However, as Mr Clarke pointed out, if the Sponsor were to go to live in India with the Appellant, she would at least have his support and would not have to suffer the continued separation from him which appears on the evidence to lie at the heart of her problems.
80. Turning then to the problems the Sponsor might face in India, I accept that she may find it difficult to become accustomed to a different way of life. I accept that this may be the more difficult due to her current mental health problems. However, as I say, she would have the benefit of her husband's support in order to adjust. There is no evidence that medication for mental health or counselling facilities are not available in India.

81. The Sponsor's mother says in her letter that it would be hard for the Sponsor to adjust but does not consider it would not be possible. The Sponsor lives with her mother and father both of whom are of Indian heritage. Her mother apparently speaks little English, and it must follow that the Sponsor speaks her mother's language. The Sponsor is also likely to be accustomed to Indian culture via her parents.
82. The Sponsor was born in the UK and is westernised. Again, that is likely to make it more difficult to adjust but, given her cultural background, not to the extent of it being a very serious hardship for her. As was pointed out by the Court of Appeal in Secretary of State for the Home Department v Olarewaju [2018] EWCA Civ 557 even "'very real culture shock' is not the same as 'very significant obstacles'" [to integration]. It was clear from the Sponsor's evidence that she has not considered as an option moving to India and for that reason has given no thought to whether she might find it easier to adjust to life in one of the many cities in India. As I have already found, there is no reason given why the Appellant could not move away from his home area (as many of the other young people are said to have done) to a place which the Sponsor might find less traditional.
83. For that reason, I did not accept the Sponsor's evidence that a move to India would lead to her losing her independence and being unable to work. It was her evidence that, even in the Appellant's home area, there are one or two English schools (if language is a problem for her) and it is likely that there would be more schools of this nature in larger cities.
84. The Sponsor also gave evidence that she has been physically unwell during her visits. I accept that this is so, at least on one occasion when she was apparently hospitalised as a result. I imagine that this is not necessarily an unusual occurrence for those visiting India who are unaccustomed to the food and water in that country. In any event, though, investigations after this occurrence suggest that there were no lasting ill effects and that the impact which the Sponsor believed the illness to have on her was largely associated with her mental health problems. Notwithstanding this problem, the Sponsor has continued to visit India and there is limited evidence about the physical illness in any event.
85. The Sponsor and Appellant have had difficulties with conception. There is however no evidence that facilities to assist with conception do not exist in India.
86. I fully accept that the Sponsor does not wish to go to live in India. I also fully accept that she will find it difficult and possibly very difficult to adjust to life there in the short term. It may be easier for her if she and the Appellant were to live in a more urbanised part of India but moving to India will still be a wrench. She would also be leaving behind her family with whom she has a close bond. I accept in summary that relocation to India would for the Sponsor amount to a serious

interference with her family and private life. I accept that the consequences would be harsh.

87. However, against that interference I have to balance the public interest. I must also have regard to the factors in Section 117B so far as relevant. The issue is whether the consequences for the Appellant (or probably more accurately the Sponsor) are unjustifiably harsh when the interference is balanced against the public interest. In other words, is the refusal of entry clearance a disproportionate interference?
88. The fact that the Appellant is unable to meet the Rules is not determinative of where the balance is to be struck between interference and public interest. It is however necessary to have regard in this case to the reason why the Appellant is unable to meet the Rules and that is based on suitability factors. I have found that his presence in the UK is not conducive to the public good given his egregious breaches of immigration laws in the past. I take into account that the Appellant did the right thing by going back to India to obtain entry clearance in the proper fashion. I also take into account that the Appellant meets the other requirements of the Rules absent the suitability finding. Nevertheless, when considering the public interest in the maintenance of effective immigration control, I give significant weight to the Appellant's past history and his failure to meet the suitability requirements of the Rules based on that history.
89. Although the Appellant's English ability was not sufficient to allow him to give evidence without an interpreter, I do not give any weight to this factor as the Respondent was satisfied that the Appellant meets the English language requirement. Similarly, the financial requirements of the Rules are met. However, these are both neutral factors.
90. It is suggested by the Appellant that the public interest weighs in his favour due to the Sponsor's profession as a teacher. The submission is that her position benefits the community. If she were to go to live with the Appellant in India, the children she teaches and the school where she works would be deprived of a valued asset. It is said that the public interest in refusing the Appellant entry is diminished in consequence. Mr Clarke drew my attention to the guidance given by the Tribunal President in Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 00336 (IAC) ("Thakrar") as follows:

"..(2) Before concluding that submissions regarding the positive contribution made by an individual fall to be taken into account, for the purposes of Article 8(2) of the ECHR, as diminishing the importance to be given to immigration controls, a judge must be satisfied that the contribution is very significant. In practice, this is likely to arise only where the matter is one over which there can be no real disagreement. One touchstone for determining this is to ask whether the removal of the person concerned would lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it."

91. I have considered the letter from the Sponsor's school concerning the value she brings to that establishment and the impact of her leaving on the children she teaches. Ultimately, however, the Sponsor herself accepted that she could be replaced by another teacher. I am unable to find that the contribution she makes is so significant that it impacts on the public interest. There is no "irreplaceable loss" to the UK as explained in Thakrar.
92. Balancing the factors of interference against the public interest, I accept that refusal of entry clearance has consequences in particular for the Sponsor which are harsh. If Paragraph EX.1. had been in play, though, I would not have found the reasons why the Sponsor says she cannot go to live in India amount to a very serious hardship such that there would be insurmountable obstacles to such a move. Nonetheless, I have accepted that this would amount to a serious interference with the Sponsor's Article 8 rights. Against that, however, there is a significant public interest in refusing the Appellant entry given his past immigration history. The Appellant and Sponsor complain in their evidence that the "punishment" of continued separation is not commensurate with the Appellant's past conduct. I disagree. It is for that reason that I have upheld the Respondent's view that the Appellant's presence is not conducive to the public good and that he cannot meet the suitability requirements of the Rules.
93. I am not concerned with the impact of refusal on the Appellant who deserves to be refused given his past conduct. I recognise however that the Sponsor has done nothing wrong, and the interference will be the greater for her. However, when that interference is balanced against the public interest, and taking into account my finding that there would not be insurmountable obstacles to the Sponsor going to India to continue her family life there, I am satisfied that the consequences of refusal of entry clearance are not unjustifiably harsh for either the Appellant or the Sponsor. It is a matter for the Sponsor whether she decides to try to move to India to continue her family life there or whether the couple decide to continue their relationship as it is currently.

CONCLUSION

94. The decision to refuse entry clearance is not a disproportionate interference with the rights of those impacted by the decision. There is no breach of section 6 Human Rights Act 1998. I therefore dismiss the appeal.

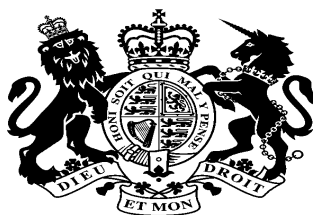
DECISION

The refusal of the Appellant's human rights claim does not breach section 6 Human Rights Act 1998. I therefore dismiss the appeal.

Signed: *L K Smith*
Upper Tribunal Judge Smith

Dated: 5 November 2021

APPENDIX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24263/2018

THE IMMIGRATION ACTS

Heard remotely at Field House
By UK Court Skype
On 15 March 2021

Decision & Reasons Promulgated
...20 April 2021.....

Before

UPPER TRIBUNAL JUDGE OWENS

Between

SHAMSHER SINGH
(ANONYMITY ORDER NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Petterson, Senior Presenting Officer

For the Respondent: Mr Dhanji, Counsel instructed by West London Solicitors

DECISION AND REASONS

1. The appellant appeals with permission against the decision of a panel of the First-tier Tribunal consisting of First-tier Tribunal Judge Lloyd-Lawrie and First-tier Tribunal Judge Osborne ("the panel") sent on 7 October 2020. Permission to appeal was granted on 23 October 2020 by First-tier Tribunal Parkes.

Background

2. The appellant is a national of India. He previously entered the UK clandestinely in 2005 and worked in the UK illegally as a builder. He was encountered during an enforcement visit on 22 July 2007. He provided the immigration authorities with a false name and subsequently failed to report. He was listed as an absconder. Whilst in the UK, he met a British national and formed a relationship with her. On 18 November 2015 he voluntarily returned to India to regularise his status by properly applying for entry clearance to enter the UK as a spouse. He first applied for entry clearance in 2017. His application was refused and an appeal against that decision was dismissed on suitability grounds only. An appeal against that decision was dismissed on 8 June 2017. First-tier Tribunal Judge Lewis found that the paragraph 320 (11) of the immigration rules applied to the appellant and that discretion should not be exercised in his favour because there were aggravating factors.
3. The appellant made a second application on 24 May 2018. The application was refused on 20 November 2018 on the grounds of suitability. An appeal against that decision was initially allowed by First-tier Tribunal Judge Lebaschi pursuant to Article 8 ECHR but was set aside because of an error of law in relation to a failure to follow the test in Agyarko [2017] UKSC 11 when considering whether there were insurmountable obstacles to the appellant and his spouse living in India and because the judge failed to demonstrate that she took the earlier judge's decision as a starting point in the Article 8 ECHR assessment. Upper Tribunal Judge Kamara recommended that the appellant seek representation in order to adequately challenge the suitability issue on his behalf.

The decision of the respondent

4. It is accepted that the appellant meets the relationship, maintenance and English language requirements of the rules. It is said that the appellant previously contrived in a significant way to frustrate the intentions of the immigration rules because the appellant entered the UK illegally and there were aggravating factors in that the appellant used an assumed identity, worked illegally and absconded. The respondent considers that S-EC 1.5 applies to the appellant because the exclusion of the appellant from the UK is conducive to the public good. Further there are no exceptional circumstances which would lead to unjustifiably harsh consequences for the appellant or his sponsor in the UK such that there it would be a breach of Article 8 ECHR to deny the appellant entry. The respondent took into account that the appellant and the sponsor entered into their relationship at a time when the appellant did not have valid leave and that the appellant and sponsor have maintained contact with each other.

The hearing before the First-tier Tribunal

5. The appellant was represented by Mr Dhanji. The appellant gave oral evidence by video link. The sponsor, the appellant's wife also gave evidence. Both representatives made submissions. It was agreed at the hearing that because the

decision was taken on 20 November 2018 and because of the wording of the decision, that the panel needed to consider paragraph 320(11) of the immigration rules as well as S-EC 1.5. Both parties agreed that the findings of First-tier Tribunal Judge Lewis formed the starting point for the consideration of the suitability criteria and any Article 8 ECHR assessment.

The decision of the First-tier Tribunal

6. The panel took the findings of First-tier Tribunal Lewis as their starting point for the consideration of the suitability criteria in accordance with Devaseelan [2002] UKAIT 000702. They considered whether paragraph 320(11) of the immigration rules applied to the appellant. They found that the appellant's application was "identical" to the previous application, the only difference being that the appellant now admits his deception. They referred to the previous judge's findings that the appellant had acted dishonestly and that there were other aggravating factors. On this basis they concluded that paragraph 320(11) applied and that the appellant did not meet the requirements of the immigration rules. The panel then turned to the Article 8 ECHR proportionality assessment. They found that the situation remained very much as it did at the last hearing. The sponsor had similar health problems then. They did not accept that the sponsor assisted her mother to care for her severely disabled sister. They found that there was nothing new that would cause them to depart from the findings of First-tier Tribunal Judge Lewis in respect of Article 8 ECHR.

Grounds of appeal to the Upper Tribunal

Ground 1

Misapplication of the law in relation to paragraph 320(11) of the immigration rules.

7. Although the findings of the previous judge formed the starting point, the panel erred in failing to determine for themselves, on the basis of information before them at the date of the hearing whether in the circumstances of the appellant's case, his breach of UK immigration law was sufficiently aggravating so as to justify his refusal under the general grounds of refusal in paragraph 320(11). The panel failed to have regard to PS (paragraph 320 (11) discretion; care needed India [2010] UKUT 440 in this respect and should have weighed the mitigating circumstances against the aggravating circumstances.
8. The panel erred in finding that the appellant's current application was identical to the previous one. The appellant pleaded a number of mitigating circumstances before the panel which were not before First-tier Tribunal Judge Lewis.

Ground 2 - Failure to take into account material evidence in respect of the sponsor's health difficulties.

9. The sponsor's health had deteriorated since the previous hearing before First-tier Tribunal Judge Lewis. The evidence related to matters that post-dated the hearing

including the sponsor's miscarriages. The Tribunal erred in finding that the sponsor's suffering was similar.

10. The panel failed to take into account the sponsor's health when assessing the proportionality of the respondent's decision in accordance with her own policy guidance.

Ground 3 – Failure to take into account a material consideration when determining public interest considerations

11. The panel failed to take into account that the sponsor is a teacher who is performing a key role during the Covid 19 pandemic. This should have reduced the public interest in excluding the appellant from the UK. The panel failed to take into account this factor and include it in the balance sheet.

Grant of permission

12. Permission was granted by First-tier Tribunal Parkes on the basis that;

“there comes a point when the previous breach of immigration control has been sufficiently noted by an entry clearance refusal and after that continued exclusion is not justified on that basis. The panel do not appear to have considered the lapse of time since the previous decision in 2016 and that is a relevant factor considered against the actual features of the appellant's previous breach and his voluntary return. It is arguable that the panel erred in simply treated the appeal as identical without consideration of the time that had passed and putting that in the context of the appellant's previous behaviour. In that context the other circumstances would also be relevant”.

Analysis and Discussion

13. At the outset of the hearing, I sought clarification by the parties on the applicability of paragraph 320(11) of the immigration rules. In the rule 24 response the respondent asserts that the application was refused under S-EC1.1 with reference to S-EC 1.5 and that paragraph 320(11) is not applicable at all. S-EC 1.5 is a mandatory ground of refusal and the applicant accepted that this ground applied to him. The respondent submits that the Tribunal was not required to make findings on paragraph 320 (11) because it was a settled matter and not a live issue in the appeal. The respondent does not address the Tribunal's failure to mention S-EC 1.5.
14. Mr Dhanji drew my attention to the fact that the refusal of entry clearance referred to the wording of paragraph 320(11) because it referred to the appellant having previously contrived in a significant way to frustrate the immigration rules. He referred me to the passages in First tier Tribunal Judge Lewis' decision where the judge had found that paragraph 320(11) applied. He also submitted that at the outset of the appeal both parties and the panel had agreed that paragraph 320(11) was at issue. He had addressed both paragraph 320(11) and S-EC1.5 in the skeleton argument.

15. The grounds of appeal are that the panel has erroneously approached this issue because the panel failed to take into consideration up to date circumstances to make an analysis of whether discretion should be exercised in the appellant's favour taking into account aggravating and mitigating factors in line with PS.
16. Having considered the version of the immigration rules in force at the date of the application, I am satisfied that paragraph 320(11) in the general grounds of refusal applied to this decision. After the introduction of Appendix FM the assessment of suitability in the general grounds of refusal was largely incorporated into the suitability section of Appendix FM. However there remained an exception at B320 in relation to 320 (11) in respect of applications for entry clearance. On that basis, I am satisfied that the task of the panel was to consider both paragraph 320(11) of the immigration rules and S-EC1.5.
17. I turn to whether the approach taken to paragraph 320 (11) of the immigration rules is a lawful one. The provision states that entry clearance should normally 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”.

18. This is dealt with by the panel at [25] and [26], where it is said;

“We find that this application is identical to the last made by the appellant. The only difference on this occasion is that the appellant admits his deceptions whereas he attempted to justify some upon the last occasion. Paragraph 320 (11) states that entry clearance should normally be refused if the appellant has previously undertaken such activities as dishonesty. The issue of the dishonesty was previously considered by Tribunal Judge Lewis who clearly found that the appellant had acted dishonestly and that there were other aggravating factors, namely the sustained period of illegality”.

“As there are no grounds for us to depart from this decision, it follows that we too find that paragraph 320 (11) of the immigration rules is met in this case and that therefore the appellant does not meet the immigration rules”.

19. Mr Dhanji argues that having found that the type of conduct listed in paragraph 320(11) (i) to (iv) applied to the applicant, the panel then needed to determine for themselves on the information before them at the date of the hearing whether the

breach of immigration law was sufficiently aggravating so as to justify his refusal under the general ground of refusal at paragraph 320(11). He also submits that the application is not identical.

20. Ms Pettersen's submission was that the panel took into account that the appellant has now admitted his deception at [25] and that the sponsor's health and medical circumstances are not relevant to the exercise of discretion and that there is no error in the approach by the panel.
21. I am satisfied that there is a clear error of the approach of the panel. First there were numerous factors which were not before First-tier Tribunal Judge Lewis which post-dated the earlier decision and could therefore in accordance with Devaseelan be taken into consideration. This, importantly, included the passage of time. By the date of the decision the applicant had been out of the UK for a period of 3 years and by the date of the hearing a period of 5 years. The applicant had submitted material in relation to his remorse and character which was clearly a departure from the evidence before First-tier Tribunal Judge Lewis. In light of these circumstances, it was manifestly an error to categorise the application as identical.
22. Mr Dhanji referred me to the relevant passage of PS at [14] which states;

"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".
23. The question then arises as to whether the panel has lawfully found that the respondent has struck a proper balance between the public interest as outlined in PS in encouraging those unlawfully in the UK to leave and seek to regularise their status by applying for entry clearance and that of keeping out those who try to seriously frustrate the operations and intentions of the immigration rules; and if, more generally, the normal course of applying the provision should follow on a full consideration of the facts of this case.
24. I am satisfied that beyond finding that the previous judge had found that there existed aggravating factors, the panel did not generally consider whether there were reasons why the normal course should not be followed. There was no consideration at all of the public interest point raised in PS. The underlying principle as set out in PS can be summarised as being that the discretion to use

paragraph 320(11) of the immigration rules should not be exercised to keep genuine couples able to meet the immigration rules out of the UK unless aggravating circumstances are sufficiently serious. The rule was not designed to prevent such an individual from ever returning to the UK. I am satisfied that the central question for this panel to determine ought to have been; was the appellant's use of an assumed identity in 2007 as well as his absconding at that time and illegal working, a sufficiently serious aggravating circumstances to mean that the respondent should have been found to have shown that the requirements of paragraph 320(11) were met, given that the appellant had now done the right thing and returned to make an entry clearance application. I am satisfied that there is a failure to focus on the relevant question and the public interest factors in light of the circumstances at the date of the application. These factors should have included the fact that the appellant voluntarily left the UK, the length of time the appellant had been out of the UK, his conduct since then, the public interest aim of encouraging illegal immigrants to voluntarily leave the UK to make proper applications to regularise their status and the appellant's remorse.

25. Even if it were found that the aggravating circumstances of the assumed identity and absconding were sufficiently serious so that the requirements of aggravating factors in paragraph 320(11) were met, I am satisfied that the other factors of the case ought to have been considered to see if the normal course of refusal under the provision should follow. I am satisfied that there was a further error of law on the part of the panel in failing to consider other relevant matters such as the fact that the appellant otherwise meets the substantive requirements of the rules, his wife's mental health difficulties following her miscarriages and ectopic pregnancy and fact that the appellant's wife is working as a teacher with a specialism in phonics for whom there was reliable evidence that her absence would be a loss to children in the UK, if she relocated to India. I do not agree with Ms Pettersen that these factors are not relevant.
26. The panel manifestly erred in failing to carry out this exercise. Had they done so, they may have reached a different conclusion. This is an error which is material to the outcome of the appeal as in an appeal pursuant to Article 8 ECHR it is of central importance whether the appellant could meet the immigration rules.
27. The panel should then have gone on to consider whether S-EC 1.5 applied. This would entail the panel looking at the conduct complained of and then deciding whether the appellant's exclusion still remained desirable in the light of all of the circumstances surrounding his immigration history, public interest considerations and his family life as set out above. The panel manifestly did not carry out this exercise which is a second material error for the same reason as above.

Ground 2

28. I am also satisfied that the panel erred in finding at [27] that the sponsor was suffering in much the way as she was at the last hearing (in 2017). The panel ignored medical evidence which post-dated the previous hearing including the fact

that she had an ectopic pregnancy in August 2018 for which she required surgery to remove her left fallopian tube and two further miscarriages in 2019 and 2020, all of which have impacted negatively on her mental health. There was evidence before the Tribunal that the sponsor's mental health had deteriorated particularly in light of the strain of being separated from her husband for such a long time. I am satisfied that this evidence went significantly beyond that presented to First-tier Tribunal Judge Lewis. On this basis, I am satisfied that the Tribunal has failed to provide adequate reasons for why they decided that the "sponsor is continuing to suffer in a way that is similar to the suffering which was evidenced at the last hearing" and also failed to have regard to relevant evidence. The panel misapplied the guidance in Devaseelan in this respect in that evidence of facts which postdate previous decisions can be taken into account. This error fed into the assessment of Article 8 ECHR proportionality in which the panel simply referred to the previous assessment undertaken by First-tier Tribunal Judge Lewis and asserted that nothing had changed. I do not accept Ms Pettersen's argument that since the sponsor's health condition does not meet the Article 3 ECHR threshold that it is not relevant to the issue of proportionality. An Article 8 ECHR proportionality assessment involves the weighing up of all relevant factors on either side of the balance.

Ground 3

29. In the skeleton argument before the panel, Mr Dhanji submitted that the fact that the sponsor's work as a UK trained teacher (which is a shortage occupation) should be taken into account in the proportionality balancing exercise. He pointed to evidence in the bundle about the sponsor's level of skill and importance to her school. I am satisfied that the panel erred in failing to take this factor as well as other up to date evidence into account when carrying out the proportionality assessment. I am satisfied that the panel's approach to Devaseelan in respect of the Article 8 ECHR balancing exercise was also flawed given the passage of time and new evidence before the panel. This was also material to the outcome of this appeal. The proportionality assessment carried out by the Tribunal is manifestly flawed.

Disposal

30. I am satisfied that this decision needs to be re-made in the Upper Tribunal because two decisions of the First-tier Tribunal have now been set aside and the original decision was taken in November 2018. Although the Upper Tribunal will need to conduct a fresh fact-finding exercise it is not in the interests of justice to remit this appeal to the First-tier Tribunal for a second time, since the decision can be dealt with more expeditiously in the Upper Tribunal and there is a complex public interest question to determine. I preserve the finding of the panel that the appellant meets those provisions of paragraph 320 (11) of the immigration rules in that he previously entered the UK illegally and that there are aggravating circumstances because he used a false identity, worked illegally for a long period and absconded. All the other findings are set aside. What needs to be re-made is the issue of whether discretion is properly applied to refuse on this basis or not; this in turn relates to the issue of the public interest identified in PS and a wider

consideration of the facts of this case. The Article 8 ECHR appeal will then need to be remade in the context of whether the appellant can show that he meets the requirements to enter the UK as a spouse under Appendix FM of the immigration rules or not.

Notice of Decision

31. The decision of the First-tier Tribunal involved the making of an error on a point of law.
32. I set aside the decision of the panel dismissing the appeal, but with some findings preserved as set out above.
33. I adjourn the appeal for re-making in the Upper Tribunal.

Signed

Date: 13 April 2021

R J Owens

Upper Tribunal Judge Owens

Note and Directions

1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules, I have reached the provisional view that the forthcoming re-making hearing can and should be held remotely, by skype for Business on the first available date.
2. I therefore make the following DIRECTIONS;
3. No later than 7 days after these directions are sent by the Upper Tribunal:
 - (i) the parties shall file and serve by email any objections to the re-making hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and
 - (ii) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:
 - (a) contact/join-in details, where the hearing is to take place remotely by the means currently proposed; and
 - (b) dates to avoid in the period specified

4. Both parties are to file with the Upper Tribunal and serve on each other skeleton arguments/ position statements with electronic caselists with links to the cases cited no later than 14 days prior to the date of the hearing.
5. If the appellant wishes to rely on any further evidence not before the First-tier Tribunal, the appropriate notices under rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 must be filed with the Tribunal and served on the other party within 28 days of the date of this notice.
6. The appellant must also notify the Tribunal within 14 days of the date of this notice if he intends to give evidence from India and provide join in details as well as indicate the best time of day i.e. 10 am or 2pm and whether he requires an interpreter.
7. The skeleton argument/position statements are to address in particular paragraph 320 (11) of the immigration rules, S-EC1.5 and the public interest considerations.
8. The appellant shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. The bundle should be compiled and served in accordance with the Presidential Guidance Note [23- 26] at least 7 days before the hearing.
9. Additional documents and submissions must be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.
10. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed

Date: 13 April 2021

R J Owens

Upper Tribunal Judge Owens