IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00411/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 19 June 2015	**On 15 July 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

MOHSIN YAKUB HAJI MOHMED PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – MUMBAI

Respondent

Representation:
For the Appellant: Mrs N Bull, instructed by Bhavsar Patel, Solicitors
For the Respondent: Mr D Mills, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mohsin Yakub Haji Mohmed Patel, was born on 8 January 1985 and is a male citizen of India. He appealed to the First-tier Tribunal (Judge T R P Hollingworth) against the decision of the respondent dated 20 November 2013 to refuse to grant him entry clearance as a spouse under Appendix FM of HC 395 (as amended) with regard to paragraph EC-P1.1. The First-tier Tribunal dismissed his appeal in a decision dated 20 November 2014. The appellant now appeals, with permission, to the Upper Tribunal.

2. Mrs Bull of Counsel, who appeared for the appellant at the Upper Tribunal hearing, told me that her client did not rely upon paragraph 2(i) of the grounds. The appellant continued to rely upon the ground in respect of paragraph 320(11) of HC 395. He contends that the First-tier Tribunal Judge erred in law by stating that the burden of proof as regards the refusal under paragraph 320(11) lay with the appellant, and not the respondent.

3. In the refusal of 20 November 2013, the ECO set out the appellant's immigration history. The appellant had entered the United Kingdom as a working holidaymaker on a visa granted to him on 6 December 2009. A recipient of such a working holidaymaker's visa was only entitled to work for a maximum of twelve months out of the two year period of the visa and the respondent considered "that you were employed for more than this, you breached a condition attached to the leave that you had been granted." The appellant had overstayed his visa for over three years until April 2013. He had been encountered by Immigration Officers on 6 February 2011 but released on the basis that he would obtain emergency travel documentation. The appellant had failed to report to Immigration Officers after that date. He had married whilst in the UK and had only returned to India in April 2013 "on the advice of your solicitor who recommended you to apply in your home country for settlement as a spouse." The ECO had concluded,

> "I have taken into account your previous immigration history where you have repeatedly contrived to frustrate the Immigration Rules. I am satisfied you have previously contrived in a significant way to frustrate the intentions of these Rules (paragraph 320(11) HC 395 as amended)."

4. The judge stated [3] that "the burden of proof is on the appellant and the standard of proof is the balance of probabilities." He made no further reference to the burden of proof and Mr Mills, for the respondent, accepted that the judge had erred in law by failing to state that the burden of proof in the paragraph 320(11) allegation rested on the respondent, and not the appellant (*JC (Part 9 HC 395; burden of proof) China* [2007] UKAIT 00027). However, Mr Mills submitted that the error was immaterial. He pointed out that the immigration history of the appellant (which I have set out above) had been agreed by both parties before the First-tier Tribunal. Therefore, whilst it was for the respondent to establish the facts pertaining to the refusal under paragraph 320(11) she had done so because those facts had been agreed; the question of upon whom the burden of proof fell was nugatory as a result.

5. At [22] the judge recorded that

> "It is apparent from the interview referred to in the first paragraph of the respondent's reasons letter that the appellant worked for longer than the WHM [working holidaymaker] regime allowed. At least the appellant does not challenge this."

At [26] the judge noted that, "when the appellant was interviewed he apparently accepted that he had paid £500 to a dishonest agent to extend his stay in the United Kingdom [seeking leave to remain for private medical treatment]." The judge found that, "on the available evidence … it is clear that [the appellant] knew perfectly well that what was submitted amounted to falsehood. He blames the legal advisor." At

[30], the judge noted, "the appellant agreed in the interview that he had worked unlawfully. The appellant said he worked in a fabric factory."

6. I acknowledge that the decision of Judge Hollingworth is, in parts, quite difficult to comprehend. It is, however, quite apparent that, as Mr Mills submitted, that the judge has reached his decision on the paragraph 320(11) refusal on the basis of previous breaches of the conditions of his leave by the appellant which both parties agree occurred as detailed in the refusal notice. I agree with Mr Mills that, in consequence, there was no need for the respondent to prove the facts upon which the decision was based. The judge's failure to state correctly that the burden of proof fell on the respondent did not, therefore, have any material affect upon the outcome of the appeal; because the facts were agreed, there was, in short, no burden of proof to be discharged. As a result, I find that the appellant's appeal should be dismissed, notwithstanding the judge's error of law.

7. As regards Article 8 ECHR, it is not entirely clear whether Judge Williams (who granted permission on 11 February 2015) has given permission on that ground. At [5], he wrote

> "However there is nothing in the judge's analysis of Article 8 of the European Convention on Human Rights that could be said to contain errors of law based on the judge's findings of fact contained in the decision."

8. Even assuming that the appellant has been granted permission on Article 8 grounds, I do not find that the judge has erred in law in dismissing the appeal. On the basis that the judge's finding in respect of paragraph 320(11) is sustainable, there is nothing in the circumstances of the appellant or his wife (the respondent does not dispute that the relationship is genuine) which would outweigh the considerable public interest concerned with the exclusion of an individual who agrees that he has in the past breached United Kingdom immigration laws in a significant manner. The judge was aware that the couple have a child who was born in October 2013 and who is a British citizen. However, the appellant's wife was born in India and that the immediate family of both the appellant and his wife reside there. The refusal notice recorded that the appellant had said, "if [my wife] is ready to come here I will stay here." I also note that Mrs Bull did not make any submissions before me as regards Article 8 ECHR and the First-tier Tribunal Judge's analysis. I can identify no basis to justify interfering with the judge's conclusions.

Notice of Decision

9. This appeal is dismissed.

10. No anonymity direction is made.

Signed Date 10 July 2015

Upper Tribunal Judge Clive Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 10 July 2015

Upper Tribunal Judge Clive Lane