



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

Appeal Number: OA/12460/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 9<sup>th</sup> October 2015**

**Decision & Reasons Promulgated  
On 5<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**MR. AVTAR SINGH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - NEW DELHI**

Respondent

**Representation:**

For the Appellant: Mr. R Soleman of Counsel instructed by Adam Solicitors  
For the Respondent: Ms. J Isherwood: Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Malik promulgated on 27<sup>th</sup> May 2015 in which she dismissed the appeal against the decision made by the respondent on 4<sup>th</sup> September 2014 to refuse the appellant Entry Clearance as a partner under Appendix FM of the Immigration Rules and on human rights grounds.

Background

2. The appellant has a protracted immigration history that is set out in the respondent's decision of 4<sup>th</sup> September 2014 and repeated at paragraph [5] of the decision of the First-tier Tribunal. I do not repeat all of that immigration history in this decision. That immigration history is particularly relevant because the appellant's application for Entry Clearance was refused under paragraph 320(11) of the Immigration Rules.
3. Paragraph 320(11) of the Immigration Rules set out grounds on which entry clearance or leave to enter should normally be refused:  

'11. where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

  - (i) overstaying; or
  - (ii) breaching a condition attached to his leave; or
  - (iii) being an illegal entrant; or
  - (iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.'
4. Suffice it to say for present purposes that the Judge found, for the reasons that are set out at paragraphs [20] to [27] of her decision, that the respondent did not make any error in refusing to exercise discretion in the appellant's favour, in light of what the Judge found to be, a number of aggravating features. The appellant, in the grounds of appeal before me, does not challenge the findings of the Judge in that respect.
5. What is in issue before me is the Judge's assessment of the Article 8 claim of the appellant and in particular, her assessment of whether the exclusion of the appellant from the UK is proportionate in all the circumstances.

#### The decision of First-tier Tribunal Judge Malik

6. First-tier Tribunal Judge Malik heard evidence from the appellant's sponsor. The evidence is set out at paragraphs [8] to [19] of the decision and it serves no purpose to recite that evidence in full, in this decision.
7. Having found that the respondent had not erred in the decision not to exercise the discretion under paragraph 320(11) of the Immigration Rules in favour of the appellant, the Judge went on to address the Article 8 claim reminding herself, at paragraph [28] of the decision, of the five stage test referred to by Lord Bingham in **R -v- SSHD ex parte Razgar [2004] UKHL 27.**

8. The Judge found at paragraph [29] that on the evidence before her, the appellant and his sponsor are in a genuine and subsisting marriage, and that the appellant enjoys a family life with the sponsor and her two sons. She found that the interference with the right to family life would have consequences of such gravity as potentially to engage the operation of Article 8. She also found at paragraph [30] that the interference is in accordance with the law, and in pursuit of the legitimate aim of immigration control.

9. The Judge then turned her mind to the fifth and crucial question, of proportionality. She states:

“31. Thus I turn to consider whether the interference is proportionate in pursuit of the legitimate aim. In doing so, I am concerned not only with the family life of the appellant, but of the sponsor and her children. I have also had regard to Section 19 Immigration Act 2014 Part 5A: Article 8 of the ECHR: Public Interest Considerations of the Nationality, Immigration and Asylum Act 2002 (as amended), where the relevant parts of Section 117B are:

(1) The maintenance of effective immigration controls is in the public interest

(4) Little weight should be given to

(a) a private life, or

(b) a relationship formed with a qualifying partner

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.

32. The sponsor early in her relationship with the appellant became aware he was in the UK illegally. This was sometime in 2010. Neither she nor the appellant could have had any expectation that in marrying one another, the appellant would be able to re-join the sponsor in the UK. They only decided the appellant should return to India voluntarily in 2011 after he had been arrested in the August. Any family and private life the parties formed in the UK was at a time the appellant had no leave to be here and was here illegally.

33. Whilst I accept the sponsor cannot be required to join the appellant in India with her sons as they are all British citizens and both children are settled in the UK, the sponsor and her sons have visited the appellant on two occasions, they keep in contact over the phone, through letters and by email. There is nothing before me to suggest this cannot continue. I accept the sponsor’s children will have formed a bond with the appellant and his immigration history should not be held against them, but the time the sponsor’s children and the appellant have been together in the UK, is outweighed by the time they have been apart. I have considered the letter of the sponsor’s GP regarding her medical conditions and the GP’s view of the positive impact and support the appellant could provide to the sponsor and her son in the UK. Yet, the GP’s letter says the sponsor’s son has improved over the last two years and ‘has become a “Normal” child’. As the appellant has been absent from the UK since 2011, this improvement has

occurred whilst the appellant has been absent from the UK and when the sponsor has had sole care of her sons.

34. In the absence of any reasonable evidence before me to suggest the current situation is contrary to the children's best interests, I do not find the decision of the respondent is a disproportionate interference if the family lives of the parties, when considering the public interest considerations set out in Section 117B. It follows the appeal is dismissed under the rules and also under article 8 of the ECHR and I am satisfied the refusal under paragraph 320 (11) is in accordance with the rules and law.

### The Grounds of Appeal

10. The appellant complains that the Judge's assessment of proportionality at paragraphs [31] to [34] of the decision suffers from an error of law. The appellant contends that the Judge took into account section 117B of the 2002 Act, but the weight to be given to family life ought to be dictated by the factual nature of it, in all the circumstances. The appellant contends that the assessment of proportionality must be an open-ended consideration, not inhibited by definitions or limitations as defined by the rules and domestic law.
11. The appellant contends that in reaching her decision, having taken into account section 117B of the 2002 Act, the Judge failed to take into account other relevant factors of significant import, that weigh in favour of the appellant:
  - a. That the Appellant had returned to India voluntarily with a view to fully complying with Entry Clearance requirements.
  - b. That the Appellant and the Sponsor and her family have now been separated for in excess of 3 years due to efforts to comply.
  - c. The Appellant had made 3 applications for Entry Clearance, all of which had been refused, in line with paragraph 320 (11).
  - d. The genuine remorse shown by the Appellant.
  - e. The Appellant's impeccable conduct in an attempt to comply over the last several years, with Entry Clearance requirements.
  - f. Whilst holding the Appellant's 2011 conduct against him, the SSHD never pursued a deportation or criminal charges against him.
  - g. Unlike in cases of deportation or where individuals have breached immigration requirements and the ECO applies rule 320 (7), rule 320 (11) does not appear to have any time limits on its application or relevance. The ECO's adopted approach, is of indefinite application.
  - h. Ancillary to the above point must be the broader consideration that given the ECO's approach, the consequence is to deter individuals such as the Appellant from returning to their home countries to make Entry Clearance Applications and thereby defeat the public interest.
  - i. That the choice the family face is indefinite and potentially permanent separation (despite the IJ's reference to international methods of

communication) or the Sponsor and her British children relocating to India.

12. Permission to appeal was granted by First-tier Tribunal Judge Ford on 25<sup>th</sup> August 2015. The matter comes before me to consider whether or not the decision of the Tribunal involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

The hearing before me on 9<sup>th</sup> October 2015

13. On behalf of the appellant, Mr Soleman adopted the grounds of appeal. He submits that the judge, at paragraph [32] of the decision, gave undue weight to s117B(4) of the 2002 Act, and failed to have regard to factors that weigh in favour of the appellant including the fact that the appellant is able to speak English, and that the appellant and his sponsor are financially independent. These are relevant public interest considerations under sections 117B(2) and (3).

14. He also submits that in considering the best interests of the children, the Judge failed to have regard to section 117B(6) of the 2002 Act. He submits that the public interest does not require the appellant's exclusion. The Judge found at [29] that the appellant enjoys family life with the sponsor and her two sons, and Mr Soleman submits that it would not be reasonable to expect the children to leave the United Kingdom. Mr Soleman draws my attention to the decision of the Upper Tribunal in **LD (Article 8 - best interests of child) Zimbabwe [2010] UKUT 278 (IAC)**, and submits that the finding of the Judge that the sponsor and her two sons can continue to maintain contact by visits, over the phone and through letters and email, disregards of the observations made by the Upper Tribunal at paragraph [21] of its decision:

“... Families normally live together. Family life consists of the inter-dependent bonds between spouses or stable partners and between parents and children with particular strength being placed upon the interests and welfare of minor children. It is not normal for family life to be enjoyed by correspondence and occasional visits (even assuming that there were no obstacles to such visits following this immigration decision) ...”

15. Mr Soleman submits that paragraph 320 of the Immigration Rules provides for mandatory refusal in certain circumstances. Paragraph 320(7B) provides for refusal where a person has previously breached the UK's immigration laws by overstaying, breaching a condition attached to his leave, being an illegal entrant or using deception in an application for entry clearance, or leave to enter or remain unless he or she left the UK voluntarily, not at the expense of the Secretary of State more than 12 months ago. Mr Soleman submits that the appellant voluntarily left the UK at his own expense over three years ago, and that should inform the assessment of proportionality when considering the period over which the appellant's past conduct can properly be held against him. Mr Soleman referred me to the decision of the Upper Tribunal in **PS (Paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)** and

in particular the observation made by Mr Justice Parker at paragraph [11] that:

“... It might have been thought that the provisions of paragraph 320(7B) and (7C) were, among other things, intended to encourage a person in the position of Mr S voluntarily to leave the United Kingdom, to remain outside the United Kingdom for a significant period and then to seek to regularise his immigration status by applying properly for leave to enter the United Kingdom to join his wife. That would appear to be a desirable objective of the rules since it would encourage those who were unlawfully in the United Kingdom to leave and, as explained, to seek to regularise their immigration status.”

He submits that the Judge found that the appellant and his sponsor are in a genuine and subsisting marriage and that the appellant enjoys a family life with the sponsor and her two sons. He submits that the approach adopted by the respondent is counter-productive to the public interest in maintaining a coherent system of immigration control because of the risk that those in the position of the appellant, will not seek to regularise their immigration status in the way that the appellant seeks to do.

16. In reply, Ms Isherwood submits that the appellant seeks to do no more than to re-argue his case before the Upper Tribunal. She submits that to adopt the approach suggested by the appellant, is to ignore the immigration rules and the significant weight that is to be attached to the public interest as expressed in section 117B of the 2002 Act. Ms Isherwood refers to the decision of the Upper Tribunal in **AM (s117B) Malawi [2015] UKUT 260 (IAC)** in support of her submission that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3) of the 2001 Act, whatever the degree of his fluency in English, or the strength of his financial resources.
17. She reminds me that the appellant does not challenge the Judge’s finding that the respondent made no error in refusing to exercise discretion in the appellants favour, in light of what the judge found to be aggravating features, for the purposes of the refusal under paragraph 320(11) of the Immigration Rules. She submits that the Judge properly acknowledged that the sponsor’s two children are British citizens and in reaching her decision, the Judge properly considered the nationality of the sponsor and her two children. The Judge clearly considered all of the relevant evidence in coming to her decision that the exclusion of the appellant from the UK is not disproportionate in all of the circumstances. Ms Isherwood drew my attention to the decision of the Court of Appeal in **SS (Congo) -v- SSHD [2015] EWCA Civ 387** as to the proper approach to adopted in considering an Article 8 claim where the requirements of the immigration rules are not met.

#### Decision as to ‘Error of Law’

18. It is uncontroversial that the Judge was entitled to find as she did, that there are a number of aggravating features to the appellant’s background and immigration history such that the respondent was entitled to refuse to

exercise her discretion in favor of the appellant for the purposes of paragraph 320(11) of the Immigration Rules. That in my judgment must then form the backdrop against any decision as to whether the exclusion of the appellant from the UK would be in breach of the Article 8 rights of the appellant, his sponsor and her children.

19. In **SSHD -v- SS (Congo) & Others [2015] EWCA Civ 387**, the Court of Appeal in a judgment handed down by Lord Justice Richards, stated;

“... The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre , para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8.”; [44]

20. First-tier Tribunal Judge Malik found at paragraph [30] that the interference is in accordance with the law, and in pursuit of the legitimate aim of immigration control. The legitimate aim set out in Article 8(2) must now also be read in the light of **s117B Nationality, Immigration and Asylum Act 2002**, and particularly sub-paragraph (1) which holds that the maintenance of effective immigration controls is in the public interest.

21. It is the Judge’s assessment of whether the exclusion of the appellant amounts to a disproportionate interference to the family lives of the appellant, his sponsor and her children that is at the heart of the appeal before me. To that end, the Judge was required to carry out a balancing exercise taking into account all the facts and factors of the case, but also giving regard to s117B of the 2002 Act. Of potential relevance were sub-paragraphs (4) and (5) which required the Judge to give little weight to a relationship formed with the sponsor, established at a time when the appellant was in the UK unlawfully, and to a private life established by the appellant at a time when his immigration status was precarious. The Judge has correctly directed herself to these relevant considerations at paragraph [31] of her decision.

22. I reject the submission made by Mr. Soleman that the Judge, at paragraph [32] of the decision, gave undue weight to s117B(4) of the 2002 Act, and failed to have regard to other relevant public interest considerations under sections 117B(2) and (3). As the panel of the Upper

Tribunal held in **AM (s117B) Malawi [2015] UKUT 260 (IAC)**, an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.

23. I also reject the submission made on behalf of the appellant that in considering the best interests of the children, the judge failed to have regard to section 117B(6) of the 2002 Act. The Judge accepts that the sponsor and her children cannot be required to join the appellant in India, as they are all British Citizens and the children are settled in the UK. At paragraph [33] of her decision, the Judge refers to the relationship between the sponsor's children and the appellant, and in particular the evidence in the letter of the sponsor's GP regarding the positive impact and support the appellant could provide to the sponsor and her son in the UK. It was plainly open to the Judge to find on the evidence that the improvement in the presentation of the sponsor's son has occurred whilst the appellant has been absent from the UK. The appellant does not challenge that finding.
24. In **LD (Article 8- best interests of child) Zimbabwe [2010] UKUT 278 (IAC)** the appellant had been in the United Kingdom with leave as a dependant of his wife since 1999. She became eligible to apply for indefinite leave to remain after several years as a work permit holder and the appellant and their three children applied in line with that application. All were given indefinite leave bar the appellant. That was because he made a false representation in his application form, which attracted a mandatory refusal under paragraph 322(1A) of the Immigration Rules HC 395 (as amended). On appeal, the First-tier Tribunal Judge accepted that removal would interfere with the appellant's private and family life but found that such interference would be a proportionate response. The First-tier Tribunal Judge found that whilst the appellant's wife and children would remain in the United Kingdom, the appellant would be able to maintain contact with them "in the normal manner".
25. In looking at the First-tier Tribunal Judge's assessment of Article 8, Mr. Justice Blake could find no proper reasoning about proportionality. The Tribunal said:
- "The Immigration Judge has wholly failed to grapple with this. We find his reference to maintaining contact with his family 'in the normal manner' is extraordinary. Families normally live together. Family life consists of the inter-dependent bonds between spouses or stable partners and between parents and children with particular strength being placed upon the interests and welfare of minor children. It is not normal for family life to be enjoyed by correspondence and occasional visits (even assuming that there were no obstacles to such visits following this immigration decision)."
26. The panel carried out its own proportionality balancing exercise and concluded there was little weight to be attached to the public interest in maintaining immigration control, given the flawed mandatory refusal under part 9 of the Immigration Rules.



27. Here, unlike in **LD**, there is no flawed refusal under paragraph 320 of the Immigration Rules. Section 117A(3) of the 2002 Act imposes upon the Judge a requirement to carry out a balancing exercise where an appellant's circumstances engage Article 8(1) in deciding whether the proposed interference is proportionate in all the circumstances. The statutory regime under s117B now expressly requires a Tribunal, in considering the public interest question, to have regard to the considerations listed in s117B. Sections 117B(4) and (5) expressly require the Judge to give little weight to a relationship formed with the sponsor, established at a time when the appellant was in the UK unlawfully, and to a private life established by the appellant at a time when his immigration status is precarious.
28. There is no doubt, as the Judge found at paragraph [32] of her decision, that any family and private life established by the parties, was formed at a time when the appellant had no leave to be in the UK and was in the UK illegally. That was a finding that was properly open to the Judge. It was on the evidence, the only proper finding open to the Judge.
29. In my judgment, the appellant gains no support from the decision of the Upper Tribunal in **PS (Paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)**. Paragraph 320(7B) of the Immigration Rules requires that entry clearance or leave to enter the UK is to be refused where an applicant has previously breached the UK's immigration laws by (a) overstaying, (b) breaching a condition attached to his leave, (c) being an illegal entrant and (d) 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) unless the applicant *inter alia* left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State more than 12 months ago. Paragraph 320(7B) of the Immigration Rules sets out grounds for mandatory refusal. Paragraphs 320(8) to 320(22) of the Immigration Rules set out the grounds upon which entry clearance or leave to enter the UK should normally be refused. Paragraph 320(11) of the rules mirrors paragraph 320(7B) but offers the opportunity for refusal where there are other aggravating circumstances.
30. In my judgment it is unsurprising that the immigration rules seek to draw a distinction between those that fall within paragraph 320(7B) who stand to attract a mandatory refusal for a fixed period and those who have not only previously breached the UK's immigration laws by (a) overstaying, (b) breaching a condition attached to his leave, (c) being an illegal entrant and (d) using deception in an application for entry clearance, leave to enter or remain, or in order to obtain documents, but where there are additional aggravating factors. The rules framed in this way encourage people who have previously been in the UK unlawfully, even having used deception, to voluntarily leave the United Kingdom, to remain outside the United Kingdom for a period, and then to seek to regularise their immigration status by applying for leave to enter the United Kingdom in the proper way. Absent additional aggravating factors

such people would, having been excluded for a period, be in a position to make an application to return to the UK provided the requirements of the rules are met. It is only where, as here, additional aggravating factors are identified, that an applicant can expect that an application for entry clearance or leave to remain in the UK will normally be refused.

31. Encouraging those that are in the UK unlawfully to return voluntarily and seek to regularise their immigration status is an important factor. However in my judgment, where additional aggravating factors are identified as required by paragraph 320(11), another important facet of the rules is the need to deter those that are in the UK unlawfully from absconding, not meeting temporary admission/reporting restrictions or bail conditions, or using assumed or multiple identities, or switching nationalities, by leading them to understand that, whatever the other circumstances, their conduct may well lead to a refusal of entry clearance or leave to enter the UK in the future.
32. Having carefully taken into account all of the facts and circumstances, and having considered the best interests of the children, it was in my judgment, properly open to the Judge to conclude that the refusal of entry clearance is not a disproportionate interference with the family and private lives of the parties and to dismiss the appeal. There is no material error of law in the decision of the First-tier Tribunal and the decision of First-tier Tribunal Judge Malik shall stand.

## **DECISION**

33. The appeal is dismissed.
34. No anonymity direction is made. No application was made for anonymity before me and the First-tier Tribunal made no anonymity direction.

Signed \_\_\_\_\_ Date \_\_\_\_\_

Deputy Upper Tribunal Judge Mandalia

## **TO THE RESPONDENT** **FEE AWARD**

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

Signed \_\_\_\_\_ Date \_\_\_\_\_

Deputy Upper Tribunal Judge Mandalia