



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14094/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16 March 2018

Decision & Reasons Promulgated
On 22 March 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENTRY CLEARANCE OFFICER

Appellant

and

DONNETH ALLISON ANN YOULANDA HARRISON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Ms G Brown, Counsel, instructed on a direct access basis

DECISION AND REASONS

1. The Entry Clearance Officer (the appellant) appeals against the decision of Judge of the First-tier Tribunal N J Bennett (the judge), promulgated on 13 November 2017, allowing the human rights appeal of Ms Donneth Harrison (hereinafter the claimant) against the appellant's refusal to grant her entry clearance as the partner of a British citizen under Appendix-FM of the immigration rules and under the general grounds of refusal of entry clearance.

Background

2. The claimant is a national of Jamaica, born on 3 December 1965. She entered the UK in 1992 and remained here initially with lawful leave as a student until 1995, and then without lawful leave until 2009 when she returned to Jamaica. She made an application for leave to remain as the wife of a British citizen called Mr Symns (“the Symns application”) in 1995, as a parent in 2001 (“the child application”) and for leave to remain on the basis of her long residence in 2005 (“the long residence application”).
3. The Symns application was refused on 23 November 1995 because the claimant failed to produce documents required to confirm her claim under the immigration rules. The appellant later became aware that the claimant’s marriage to Mr Symns was bigamous as he had acted as a sponsor in four other marriage applications. The child application was refused because it was found that the claimant did not have any children in the UK and documents submitted in support of the application were not genuine. The long residence application was refused on 1 December 2008 on the basis that it was undesirable to grant the claimant indefinite leave to remain due to doubts regarding her character and conduct. In reaching this conclusion the Secretary of State relied on the Symns application and considered, on the balance of probabilities, that the claimant would have been fully aware that the application had no real basis and was an attempt to obtain leave by deception. The Secretary of State additionally considered that the claimant would have been fully aware that the child application was not genuine. As the claimant had attempted to previously obtain leave by deception it was not appropriate, having regard to her character conduct, to grant her leave to remain.
4. On 3 February 2016 the claimant applied for entry clearance to join Mr Egerton Harrison, the claimant’s spouse and a British citizen. The appellant refused the application under paragraph 320 (11) of the immigration rules on the basis that she previously overstayed, used deception in previous applications, and had made frivolous applications. The appellant additionally refused the application under the Relationship requirements of Appendix FM having not been satisfied that the earlier bigamous marriage was indeed void as the claimant had not submitted any documentation to demonstrate that Mr Symns was not free to marry or any decree of nullity. The appellant was satisfied that the financial requirements and the English language requirements were met, and that the Suitability requirements were also met.

The First-tier Tribunal decision

5. The judge set out in detail the background to the appeal and the evidence adduced by both parties, including a Registrar General’s letter confirming that the Symns marriage was bigamous and that the marriage contracted on 19 May 1995 appeared void. The judge heard oral evidence from Mr Harrison and recorded the submissions from both representatives.

6. The judge set out the appropriate legislative provisions including the whole of paragraph 320 (11) and Section ECP2.7 of Appendix FM. The judge reminded himself that he was dealing with a human rights appeal. The judge then carefully considered each of the earlier applications made by the claimant. The judge considered the Registrar General's letter, which confirmed that Mr Symns had committed perjury and bigamy and that the claimant's marriage appeared to be void. While the Registrar General's normal advice would be to obtain a decree of nullity this was not an essential requirement. Having regard to the manner in which the Registrar General's letter was written the judge accepted that the Symns marriage was probably bigamous and therefore void at common law. In reaching this conclusion the judge made reference to *Rayden & Jackson on Divorce*. The judge consequently accepted that the claimant's marriage to Mr Harrison was probably valid. In reaching this conclusion the judge noted that the appellant had not challenged the subsistence of the relationship with Mr Harrison, only the validity of the marriage.
7. The judge then considered, within the context of his proportionality assessment, the allegation of deception in relation to the Symns application. At [30] the judge assessed the claimant's assertion that she had been unaware that her marriage to Mr Symns was bigamous. The judge considered the claimant's statement and, in particular, her claim that the bigamous nature of her marriage only came to light in June 2001 when she tried to obtain a duplicate marriage certificate. The judge accepted that this part of the evidence had the ring of truth about it and was further supported by evidence that the claimant became pregnant before and after the marriage to Mr Symns [31]. Having evaluated this evidence the judge was not satisfied that the claimant used deception in the Symns application.
8. The judge did however find that the claimant had acted dishonestly in respect of the child application and gave his reasons at [32] to [36]. Having found that claimant had been an overstayer and had used deception, the judge went on to consider whether there were "other aggravating circumstances" necessary to support a refusal under paragraph 320 (11). The judge properly noted that the list of aggravating circumstances in paragraph 320 (11) was illustrative and not exhaustive. The judge additionally noted that the only aggravating circumstance identified by the appellant was that the claimant had made frivolous applications.
9. At [38] the judge noted the reference to frivolous applications was plural and concluded that there must be more than one frivolous application. At [39] the judge stated that a frivolous application "... must be an application which is made without proper cause." In light of the judge's earlier conclusions concerning the Symns application he concluded that this application could not be said to have been made frivolously. Nor was the long residence application made frivolously because the appellant accepted that the claimant had lived in the UK for 14 years. The judge considered that there was, at most, one frivolous application, which was the child application. Having regard to the structure of paragraph 320 (11) the

judge could not accept, as a matter of construction, that it was intended that an application involving deception could also amount to a frivolous application when deciding whether there were aggravating circumstances. Having regard to the construction of the relevant immigration rule an aggravating circumstance had to be something different from overstaying, deception, or the other factors in paragraph 320 (11) (i) to (iv).

10. At [41] the judge found that, in any event, paragraph 320 (11) contained an element of discretion and, at [42], noted that there had to come a time when immigration offences were spent and that it was now over 16 years since the claimant used deception in the child application and over 8 ½ years since she returned to Jamaica. The judge noted that the claimant was married to Mr Harrison who, although born in Jamaica, had lived in the UK for about 50 years. There was no challenge to his claim concerning his family connections in the UK and that he had no tangible connections to Jamaica. Having considered this evidence holistically the judge was satisfied that the discretion should, exceptionally, be exercised in the claimant's favour. The judge consequently concluded that her exclusion was disproportionate and allowed the appeal.

The grounds of appeal and the parties' submissions

11. It was accepted by both Mr Bramble and Ms Brown at the 'error of law' hearing that both the grounds of appeal, and indeed the grant of permission, were difficult to follow. The grounds inaccurately claimed that the claimant had applications refused 3 times under paragraph 320 (11). This was self-evidently not the case. Paragraph 320 (11) had only ever been utilised in rejecting the claimant's 2016 entry clearance application. The Symns application had not been refused on the basis of deception. Indeed, the judge made a clear finding, supported by adequate reasons, that there had been no deception in respect of the Symns application. The grounds then assert that the claimant made 3 attempts to circumvent the immigration rules. Other than the child application, it is difficult to ascertain what the other attempts to circumvent the immigration rules were. The long residence application was made under the immigration rules, the claimant having resided in the UK for 14 years, and the Symns application was only refused because there was insufficient evidence to satisfy the Secretary of State in respect of the marriage. The grounds appear to assert that there was no evidence to back up the claimant's story in respect of her bigamous marriage, an assertion which is entirely unsustainable given the evidence clearly considered by the judge at [30] and [31]. The grounds go on to assert that the claimant made the child application fraudulently, a point accepted by the judge, and that the claimant, having been refused 3 times under paragraph 320 (11) (which is factually inaccurate), did not warrant the exercise of discretion in her favour.
12. The grant of permission is no less confusing. The First-tier Tribunal judge granting permission made the point that the child application involved 'true dishonesty', and, despite the fact that the grounds took no issue whatsoever with

the judge's findings on the validity of her marriage to Mr Harrison, stated that it was 'well arguable' that the judge's approach to the validity of the Harrison marriage was flawed. The grant of permission additionally stated that the judge's approach to the claimant's conduct was flawed and failed to "afford it is [sic] true and full significance." It is not altogether clear what this means. The grant of leave stated that the judge arguably erred in failing to find that the ECO had made out the legal burden of establishing that the claimant previously contrived in a significant way to frustrate the intentions of the immigration rules. The judge granting permission also found it arguable that the judge failed to approach the assessment of the balancing of proportionality in a legally sustainable manner and failed to appreciate the true weight of the public interest in the refusal of the application, and that even on his own findings the claimant failed the Suitability requirements of the immigration rules. This last point is manifestly incorrect. In her Refusal of Entry Clearance decision, the appellant was satisfied that all the Suitability requirements had been met.

Discussion

13. I am extremely grateful to Mr Bramble who, at the commencement of the 'error of law' hearing, sought to disentangle the mess established in the grounds and the grant of leave in order to advance the appellant's case on a coherent and logical basis. Mr Bramble very properly accepted that there was nothing wrong in the judge's assessment of the claimant's marriage to Mr Harrison. Mr Bramble accepted that no deception had been used by the claimant in respect of the Symns application, and that this application could not, on any rational view and in light of the judge's findings, be regarded as a frivolous application. Mr Bramble submitted that the grounds were essentially a challenge to the judge's application of paragraph 320 (11). He submitted that the long residence application was frivolous and that the judge's assessment at [39] was one not open to him. This was because the claimant ought to have appreciated that her application would fall to be refused under the character and conduct provisions of the long residence rule. It was additionally submitted that the use of deception in an application may render that application frivolous.

14. The only issue advanced by the appellant at the error of law hearing relates to the judge's assessment of paragraph 310 (11). This reads,

'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 re-documentation process.'

15. The immigration rules should be read sensibly, recognising that they are statements of the Secretary of State's administrative policy (see the observations of Lord Browne JSC in *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48, para. 10).
16. The judge found that the claimant had been both an overstayer and someone who had used deception in an application for leave to remain. The judge appreciated that the aggravating features identified in paragraph 320 (11) were not exhaustive but illustrative. It is readily apparent that the requirement of aggravating circumstances must be in addition to the basic elements identified in paragraph 320 (11) (i) to (iv). This, as the judge noted at [40], is clear as a matter of construction. The use of the conjunctive 'and' at the end of paragraph 320 (11) (iv) can only sensibly be interpreted as requiring, in addition to one or more of the factors in paragraph 320 (11) (i) to (iv), the existence of aggravating circumstances.
17. The appellant has only ever identified 'frivolous applications' as being the relevant aggravating circumstances. The judge found, at [39], that a frivolous application was one made "without proper cause." Having regard to the principles enunciated in *Mahad v ECO* [2010] 1 WLR 48 and having considered the natural language of the rule construed against the relevant background, I am satisfied that this is a fair assessment of the term. An application is frivolous if it is not one that, on its face, can seriously or sensibly be made. The judge concluded that the long residence application was not frivolously made as the Secretary of State accepted that the claimant had resided in the UK for a continuous period of 14 years. Mr Bramble submits that the claimant could not possibly have hoped to be granted indefinite leave to remain because of her use of deception in the child application. The assessment of a person's character and conduct is however discretionary and one that takes into account all relevant circumstances. While there may have been obstacles to a grant of indefinite leave to remain, it cannot be said that her application was one that could not sensibly have been made. The judge's conclusion in respect of the long residence application was therefore not outside the range of conclusions rationally open to him, and was a conclusion supported by adequate reasoning.
18. Mr Bramble further submits that the child application can be both frivolous and one involving deception, and that the judge should have considered that application as being the frivolous application. For the reasons I have given in paragraph 16 of this decision, I am not satisfied that an application that involved the use of deception can, on the proper construction of paragraph 320 (11), be the

same application that is also frivolous for the purpose of the aggravating circumstances. The aggravating circumstances are an additional requirement to the factors in paragraph 320 (11) (i) to (iv). But in any event, and for the detailed reasons given by the judge at [41] and [42], he considered, in the alternative, that the discretion should be exercised in favour of the claimant. In so concluding the judge took into account the claimant's personal circumstances, the full extent of her immigration history, the period of time that had elapsed since the previous deception and the impact on her relationship with Mr Harrison. The judge was consequently entitled to conclude that the decision refusing entry clearance was disproportionate in his assessment of article 8 both within and outside the immigration rules.

Notice of Decision

There is no material error of law. The Entry Clearance Officer's appeal is dismissed



Signed
Upper Tribunal Judge Blum

Date 20 March 2018