



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23401/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12th March 2018

Decision & Reasons Promulgated
On 12th April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MISS RAJVIR (ALIAS RAJ KUMARI)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M Nadeem, Legal Representative, City Law Immigration Ltd.

For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Thew promulgated on 27 September 2017 dismissing her appeal for entry clearance as the partner of a British citizen on human rights grounds, under Article 8 ECHR. Permission to appeal was granted by First-tier Tribunal Judge McGinty. The grant of permission may be summarised in the following terms:

“It is arguable that the learned First-tier Tribunal Judge has erred in failing to apply the statutory public interest considerations as required under Part 5A of

the Nationality, Immigration and Asylum Act 2002, as argued in the first ground of appeal. The issue in that regard is materiality.

The second and fourth grounds appear to have less merit, as the Judge has given seemingly adequate and sufficient reasons in respect of paragraph 320(11) and her findings in respect of the answers on application forms.

It is arguable that the Judge has not adequately set out the positive features in carrying out the proportionality balancing exercise, as argued in the third ground.

However, I do not limit permission, but grant permission to argue all grounds.”

2. I was not provided with a Rule 24 reply from the Entry Clearance Officer but the Respondent indicated that she resisted the appeal.

Error of law

3. At the close of submissions I indicated that I did not find that there was an error in law such that the decision should be set aside, but that my reasons for that finding would follow. My reasons for so finding are as follows.
4. In respect of Ground 1 which Mr Nadeem pursued concerning Section 117B of the Nationality, Immigration and Asylum Act 2002 and the public interest considerations he submitted that these were factors that would fall to be assessed in the applicant's favour and the evidence indicated that the Appellant could speak English and was financially independent and would therefore not be a burden on the taxpayer and be able to integrate. He submitted that in light of *AM (Malawi)* that these factors had to be considered to the required extent. However, Mr Nadeem was unable to address me on the materiality of this point and in particular, given the decision of *Forman (ss 117A-C considerations)* [2015] UKUT 00412 (IAC) which confirms that the public interest considerations which may indicate that the applicant is able to not be a burden on a taxpayer and integrate, do not provide any positive weight in the Article 8 balancing exercise but simply failed to contribute any negative weight in the opposing scale in the Respondent's favour. Consequently, on this ground alone, I would not find a material error, notwithstanding that Section 117B was not considered by the First-tier Judge as complained.
5. Turning to Ground 2, this ground did give me considerable pause and caused me to reflect upon the consideration of paragraph 320(11) and the nature and purpose of the Rule and the judge's assessment of that Rule. Ultimately, however, notwithstanding the valiant and persuasive submissions of Mr Nadeem, I do not find there is a material error revealed by this ground. Mr Nadeem argued that the factors which gave rise to paragraph 320(11) were such that the judge should have considered the length of time since the Rules were frustrated (as the Rule alleges) and that that would be a material consideration in the conduct of the proportionality exercise, particularly where the Respondent had not disputed the genuine and subsisting nature of the relationship between the Appellant and the sponsoring fiancé, and in light of the Sponsor's ability to maintain and accommodate the Appellant also. As persuasive as this submission seemed at first instance, whilst

paragraph 320(11) factors, such as the length of time since the Immigration Rules was frustrated, would be a material factor in an Article 8 exercise, my reason for rejecting this ground is due to the parties' agreed position and interpretation of paragraph 320(11) which they addressed me on at the conclusion of the hearing and which I turn to further in this decision at §10 below.

6. Turning to Ground 3, Mr Nadeem in essence complained that the judge had failed to consider material evidence before her in the form of the previous refusal letter which failed to raise any complaint under paragraph 320(11) whereas the current refusal letter did. As the two application forms were in essence identically completed, it was said to be untoward of the Entry Clearance Officer to criticise the Appellant on the second occasion, and not on the first, which led her to believe that her answers on the first Visa Application Form she submitted were given correctly. It is true indeed that this particular submission does not find explicit consideration in the judge's decision, however this argument on its own would not be sufficient to indicate a material error of law. However it is an argument which the Entry Clearance Officer could consider in a future application in the Appellant's favour, if the Appellant were to make one.
7. Turning to Ground 4 and the judge's failure to consider the evidence in the application form, Mr Nadeem in essence argued that the questions at 31, 27 and 34 of the application form had not been considered by the judge in terms of the burden of proof alongside the fact that the Appellant was merely granted temporary admission and would have been confused as to how to complete these parts of the form and in any event she had confirmed that she was refused entry into the United Kingdom. I have some sympathy for the Appellant in respect of this ground because of the manner in which the previous legal representatives had completed the application form on her behalf. The Appellant's bundle showed the previous application form of 3 November 2015 at pages 42 to 48 and the Entry Clearance Officer's bundle had within it, the current application form submitted on 20 July 2016 which had given rise to the instant refusal. I am told that the second and current representatives, namely City Law Immigration, relied upon the answers given by the previous legal representatives in completing the previous visa application form, and were fortified in that reliance because nothing was complained of in terms of general grounds for refusal in the previous application and so the current representatives addressed their minds to other matters and merely recited the previous answers. In terms of the previous application form I note that it was completed by a person named "Belinda Mason" and purports to be signed by the Appellant. Mr Nadeem was unable to confirm who Belinda Mason was, but it certainly was not the name of the authorised representative within the previous representatives, Immigration Law Practice, the authorised advisor being a Mr Ayo Olufunwa.
8. I note that in the current letter from Immigration Law Practice at pages 39 to 41, the previous representatives have noted that the Appellant was in the United Kingdom as a student and returned to India, however I note an error in the application form which has not been noted by the Entry Clearance Officer in the first application or the current one or by the First-tier Tribunal Judge either. That error is that at question 30 of the previous form and question 32 of the current form, the question is

asked 'have you been refused a visa for any country including the UK in the last 10 years?' to which the answer was 'no' on both occasions. Leaving aside the previous form, the current form could not have been completed with the answer 'no' without there either being a misunderstanding of the form or incompetence in completing it by whoever did complete it. This is because in respect of the current application it would have been apparent to whoever completed the form that the Appellant had been refused entry clearance within a year of making the second application. This should have been apparent to the legal representative who completed the form and putting it neutrally, this evidence does indicate to me that it is arguable that something has gone 'awry' in terms of the completion of at least the most recent application form. However, this matter was not raised or argued before the First-tier Judge and therefore it is not a matter by which her decision can be criticised. However, it is of course a matter which the Entry Clearance Officer should consider if a fresh application for entry clearance is made by the Appellant.

9. Returning to Ground 4, in terms of the criticism made by Mr Nadeem of the questions he alleges the judge has not considered, I do not find there is any merit in this submission because the judge has considered the Appellant's immigration history at paragraphs 20 and 24 of the decision. I also note that the judge has considered the application on the basis that family life did exist given that the Entry Clearance Officer did not explicitly seek to criticise the Appellant on this basis, which was the correct approach for the First-tier Judge to take. However, the complaint that that there should have been clear findings regarding family life do not follow given that the judge did consider the appeal on the basis that family life exists.
10. Having considered the grounds as they are framed, I do make some final observations before concluding this decision. My observation is in relation to the complaint by Mr Nadeem that paragraph 320(11) may operate as a bar to entry clearance for the Appellant - indefinitely - if the Entry Clearance Officer maintains his or her view of the discretionary application of paragraph 320(11). This issue does overlap with Ground 2 but is addressed here in isolation given its complexity. Having heard an agreed position of both the Entry Clearance Officer's representative and the Appellant's representative on this issue at the close of the hearing I record their agreed view, and my independent affirmation of that view, that there is nothing in that argument in hindsight. This is because paragraph 320(11) itself operates based upon two sets of factors. The first set of factors is a list of factors that will instigate or activate paragraph 320(11). Whilst the second set of factors is a list of aggravating factors which would need to be met, over and above, and entirely separate from the first list of instigating factors.
11. In the instant appeal there are two instigating factors: first, the manner in which the form was completed by the Appellant and secondly, the failure to disclose the number and whereabouts of all previous spouses. Looking at those instigating factors in light of the FTT's decision, Mr Nadeem is wrong in arguing that paragraph 320(11) could apply time and again, this is because if the Appellant reapplies and completes the form correctly and discloses the previous refusals and other matters as complained of by the Entry Clearance Officer in the instant appeal, there will be no

instigating factor from the initial list of factors under paragraph 320(11) which will trigger paragraph 320(11) being considered against the Appellant. This is because, the second list of aggravating factors will cannot be reached unless there is an instigating factor from the initial list under paragraph 320(11).

12. Turning to the failure to disclose the number and whereabouts of all previous spouses, this, as far as I can see, was not a ground raised by Mr Nadeem in his Grounds of Appeal, however it did arise in the course of legal submissions and therefore I feel I should say something about the point. It is a belated but fair submission that Mr Nadeem makes in criticising the application form in giving no question on the form that would prompt or elicit information regarding the Appellant's previous spouses, other than a question which queries a person's relationship status and asks for evidence in support of what the current status might be i.e. divorced or unmarried etc. On that basis, and given that there is no requirement under the specified evidence rules to provide the number and whereabouts of all previous spouses, it is a concerning criticism that is made of the Appellant for not disclosing these facts in her application. Rather, if the Entry Clearance Officer desired to know about these issues, it would have been more appropriate for the Entry Clearance Officer to either request evidence from the Appellant in this regard before refusing the application, or invite her to attend an interview where she could discuss these relationships (particularly if the Entry Clearance Officer harboured doubts as to the nature of the present relationship, although these doubts if they existed did not solidify into a refusal on that specific basis as the FTT seemed to feel also).
13. Therefore, given my observations on the above instigating factors which arose under paragraph 320(11) in the instant refusal, these are matters which the Appellant can resolve and correct in any future application for entry clearance if she so wishes to make one, and I do not see why paragraph 320(11) would apply on a future application if the Appellant is more careful on a future application as discussed above.
14. As such whilst there are minor errors in the decision, those errors are not of such materiality or perversity that the decision should be set aside in accordance with the requisite standard identified in *R, (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982.

Notice of Decision

15. The appeal to the Upper Tribunal is dismissed.
16. The decision of the First-tier Tribunal shall stand.
17. No anonymity direction is made.

Signed

Date: 12 April 2018

Deputy Upper Tribunal Judge Saini