Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01159/2019

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre (remote)	**Decision & Reasons Promulgated**
On: 17th September 2020	**On: 22nd September 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department
(for the Entry Clearance Officer, Mumbai)

Appellant

And

Rutul Bharatkumar Patel
(no anonymity direction made)

Respondent

For the Appellant: Mrs Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr Counsel instructed by Aschfords Law

DECISION AND REASONS

1. The Respondent Mr Patel is a national of India born on the 3rd February 1994. On the 23rd September 2019 the First-tier Tribunal (Judge Buckwell) allowed his appeal against a refusal of entry clearance. The Entry Clearance Officer (ECO) now has permission[1] to appeal against that decision.

[1] Permission was refused by First-tier Tribunal Judge Grant-Hutchinson on the 10th January 2020. It was granted upon renewed application by Upper Tribunal Judge Kekić on the 12th February 2020.

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Background and Matters in Issue

2. The matter in issue between the parties is whether Mr Patel should be permitted to enter the United Kingdom in order to live here with his British wife. The ECO accepted that Mr Patel qualified for entry under the substantive requirements of Appendix FM, but refused him entry as follows:

> "Home Office records show that you entered the UK using a student visa which expired on 10/12/14. You then submitted an application for LTR after your previous visa had expired and this was refused on 29/04/15. You did not attempt to regularise your stay and subsequently became an overstayer in the UK. I am also satisfied that there are other aggravating circs as you failed to report as required to the Home Office after your application was refused in April 2015 and you were later listed as an absconder. You only made yourself know to the Home Office when you wished to voluntary depart the UK in June 2018. I am not satisfied that your willingness to voluntary depart outweighs the severity of your previous disregard to the Immigration Rules whilst you were in UK.
>
> I am satisfied that this conduct is consistent with that described in Entry Clearance Guidance chapter 26.18 as having contrived in a significant way to frustrate the intentions of the rules as you have absconded after making an application in order to attempt to remain in the UK. Therefore I consider it appropriate to refuse your application under paragraph 320(11)" (*sic*)

3. Paragraph 320(11) is one of the 'General Grounds for Refusal' found at part 9 of the Immigration Rules. It 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.

(emphasis added).

4. Before the First-tier Tribunal two questions therefore arose:

   i) Had Mr Patel behaved in such a way so as to engage the presumption of refusal under paragraph 320(11) of the Rules – ie had the Respondent demonstrated that there were aggravating circumstances in his case?

   ii) If so was refusal of leave nevertheless disproportionate, having regard to all relevant factors?

5. In respect of Q1 the Tribunal found that Mr Patel had overstayed in the past: he had admitted as much. The Tribunal accepted Mr Patel's explanation that he had done so because he had been unwell, and because he had encountered various problems with his Tier 4 sponsors etc. The Tribunal properly directed itself that in order to justify a refusal of entry clearance in these circumstances there would need to be some further, aggravating feature. The Entry Clearance Officer/Secretary of State for the Home Department had failed to produce evidence to establish that this was the case. In those circumstances the discretion to apply this 'general ground for refusal' had been wrongly exercised. That being the Tribunal's conclusion, it was not necessary for it to proceed to consider Q2 in any detail: absent paragraph 320(11) it was accepted that Mr Patel met the requirements of the rules, and that being the case, it would be disproportionate to refuse him entry (TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109 applied).

6. The ECO now appeals on the following grounds:

   i) It is submitted that Mr Patel "fell squarely within the category of applicants who should not be afforded discretion" because he had knowingly overstayed in the United Kingdom for a considerable period of time and because he had absconded.

   ii) There should be "equal weight attached to the Public Interest in the SSHD operating a robust deterrent";

   iii) It is arguable that had he not met his wife he would have remained in the United Kingdom illegally;

   iv) Little weight should be attached to the relationship because it was forged when Mr Patel knew he was here illegally. The public interest in maintaining a fair and just system of immigration control should have prevailed;

v) The Judge has failed to consider why the Sponsor could not move to India to live with her husband.

Discussion and Findings

7. The somewhat discursive grounds were not easy to understand. I have done my best to summarise them above. Here I work backwards because, as Mrs Aboni accepted before me, the only ground of any remotely arguable merit is ground (i).

8. Ground (ii) as I have framed it above, that there should be "equal weight attached to the Public Interest in the SSHD operating a robust deterrent" frankly makes no sense. The rule is the rule, and it is there to reflect the public interest. There is no requirement for decision makers to go beyond the terms of that general ground for refusal and consider some wider public interest matter, here unspecified.

9. Ground (iii) is equally unfathomable. What the point would be of speculating as to what Mr Patel might have done had he not met and fallen in love with his wife is difficult to discern.

10. Ground (iv) might be relevant had Mr Patel continued to overstay and then made an in-country application to remain. He didn't do that. He did, eventually, the right thing, going back to India to properly make his application. Having done so he has established that he meets all of the "fair and just" substantive requirements of Appendix FM.

11. Similarly ground (v) was entirely irrelevant to the enquiry under 320(11). Once that enquiry was completed in Mr Patel's favour, the fact that he met all of the requirements under Appendix FM was a complete answer to the question of whether this decision was proportionate.

12. That leaves ground (i). The Secretary of State here submits that the decision on 320(11) was flawed for a failure to take two material matters into account. The first is the length of the overstaying. As Mrs Aboni accepted before me, this point is not a good one since overstaying will not in itself justify refusal under this provision. It is difficult to see that anything is added by the fact that Mr Patel knew that he was overstaying, since the vast majority of individuals who overstay can be assumed to know that this is the case. As for the submission that Mr Patel overstayed for a "considerable amount of time" I am not satisfied that this is capable of establishing any error of law on the part of the First-tier Tribunal. First of all it was actually a period of about three years, not a particularly lengthy period at all. Secondly it is not apparent from the rule itself that the length of the overstay is relevant to whether there are aggravating circumstances

such that the rule should be invoked: had that been the intention of the drafters one would expect to see this in the list of admittedly non-exhaustive factors there identified. Third it is perfectly clear that the Tribunal was aware of the chronology and how long the period was, so it is not arguable that it overlooked that matter.

13. The second point made under the heading of ground (i) is at the heart of this appeal. It is that the Judge failed to accept that Mr Patel had absconded and 'fallen off the radar', such behaviour constituting an aggravating circumstance warranting refusal under 320(11). This was the assertion in the refusal letter. At the outset of the hearing the Judge specifically asked the Presenting Officer if there was any evidence she would like to produce in support of that allegation. She had none. None appears in the bundle produced by the ECO. The allegation was denied by Mr Patel and his wife, whose evidence the Judge apparently accepted in its entirety. This led to the conclusion at the First-tier Tribunal's paragraph 86 that the ECO had failed to bring evidence forward to confirm the allegation. The burden of proof lying on the ECO, the appeal fell to be allowed on the basis that the burden had not been discharged.

14. The appeal is therefore dismissed.

Decisions

15. The decision of the First-tier Tribunal contains no error of law and it is upheld. The Entry Clearance Officer/ Secretary of State's appeal is dismissed.

16. There is no order for anonymity.

Upper Tribunal Judge Bruce
17th September 2020