



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18307/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Wednesday 15 July 2020

Decision & Reasons Promulgated
On Wednesday 12 July 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ISABELLE [E]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian, Counsel instructed by DJ Webb & Co Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. By a decision dated 21 February 2020, I found an error of law in the decision of First-tier Tribunal Judge Rowlands promulgated on 29 August 2019. I therefore set that decision aside and gave directions for the re-making of the decision. My error of law decision is annexed hereto for ease of reference.

2. On 3 April 2020, Upper Tribunal Judge Pickup reviewed the file in light of the Covid-19 pandemic and directed that the hearing to re-make the decision should be listed to be held remotely via Skype for Business. The hearing was held by that medium. Other than one or two minor interruptions of connection, there were no problems with the hearing and both representatives confirmed that they were able to follow it throughout.
3. In addition to the representatives, the Appellant's partner and sponsor, Mr [O], also joined the hearing remotely. He confirmed the truth of his statements dated 30 June 2019 and 15 July 2020 but was not asked any questions by way of cross-examination. I come to the detail of his and the other evidence below.
4. At [14] to [25] of my error of law decision, I set out my conclusions as to the applicability of paragraph 320(11) of the Immigration Rules ("Paragraph 320(11)") to this case. I do not repeat what I there said. That provision lies at the heart of the Respondent's reasons for refusing the Appellant entry and is therefore the central issue. Although Mr Youseffian suggested that I should revisit my earlier conclusions on the law I decline to do so. I have set out at [25] of my error of law decision what I consider to be the crucial issue to be determined.

THE RESPONDENT'S CASE

5. The Respondent's decision reads as follows:

"GCFR 320(11)

I understand from your application and Home Office Records held in the UK the following:

- You were born in the UK and have a UK birth certificate.
- You last entered the UK in 2005 on a visit visa valid until 15/04/07.
- You subsequently overstayed and did not seek to regularise your stay until you made an application for Further Leave to Remain on 30/03/12. This was refused on 06/09/12 and you departed the UK on 16/06/15.
- Whilst in the UK you successfully obtained a student loan, National Insurance number, provisional driving licence and a place at Middlesex University and Aberdeen University as evidenced by your degree certificates. It is unclear what documents you provided to gain entry to University and obtain a National Insurance number considering you have not held valid leave to do so.
- You were cautioned on 2 criminal offences in 2004 and I note the police report states you presented yourself as a UK national.

In light of all of the above I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules be (i) overstaying and (ii) breaching the conditions attached to your leave. There were additional aggravating factors in that when arrested in 2004 the police have recorded your nationality as UK, demonstrating switching nationality. I therefore consider it appropriate to refuse your application under paragraph 320(11) of the Immigration Rules. This application was referred to an Entry

Clearance Manager prior to being refused and application of paragraph 320(11) was agreed.”

6. It is accepted in the Respondent’s decision and now that, other than the suitability requirements of the Immigration Rules, which are not met due to the application of Paragraph 320(11), the Appellant otherwise meets the Rules for entry as a partner. The Respondent’s decision was confirmed by the Entry Clearance Manager.
7. Ms Everett accepted that the issue to be resolved is whether there are “aggravating circumstances” within the meaning in Paragraph 320(11). It is not disputed that the Appellant was an overstayer when she left the UK. It is also accepted that the Appellant did not have the necessary visa to attend university in the UK as a student. As Ms Everett submitted, the success or otherwise of the Appellant’s appeal depends whether I accept the Appellant’s explanation in relation to her stay in the UK, her attendance at university and her obtaining of a student loan and whether I conclude that her conduct is such that there are circumstances which aggravate her overstaying.
8. The Appellant says that she obtained advice from a solicitor about her nationality in 2005 but cannot remember the details of the advice she was given. That is key, says Ms Everett. The Appellant has not attended remotely to be cross-examined. There would be no point in cross-examining Mr [O] in relation to what occurred as he can only testify as to what he was told by the Appellant. There is, says Ms Everett, “no real depth” to the Appellant’s assertions. The Appellant does not say why she sought out the advice of the solicitor. The advice is curious.
9. Ms Everett accepted that the Appellant was unlikely to know anything about nationality law but pointed out that in order to find in favour of the Appellant, I have to accept her say-so about what occurred without any supporting evidence. The advice given to her is said to be that she should wait five years and would then be eligible to apply for a passport. If I accept that this is so unlikely to be true that I cannot believe it, then that is enough for there to be aggravating circumstances because her actions would amount to deliberate conduct to evade immigration control.
10. Ms Everett also submitted that the Appellant’s entry on a visit visa is also critical. It is difficult to see how she could assume that she was entitled to stay in the UK given her knowledge that she had needed a visa to enter.
11. Ms Everett accepted that the burden is on the Respondent to demonstrate that there were aggravating circumstances. She accepted that the Respondent cannot make out the reason given in the decision, namely the circumstances at the time of the police caution. There is no evidence of what was there said. However, she submitted that I could nonetheless find that other circumstances were aggravating, whether or not relied upon by the Respondent at the time of the decision. It was implicit from what was said in my error of law decision that I

accepted that the attendance at university and obtaining of a student loan and national insurance number could amount to aggravating circumstances whether or not those matters were relied upon expressly.

12. Ms Everett also pointed out that those matters could amount to “switching nationality” as originally asserted but based on different evidence.
13. In conclusion, Ms Everett submitted that it was difficult to see how the obtaining of benefits to which the Appellant was not entitled could be other than deliberate. She submitted that, in order to find for the Appellant, I would have to accept that her actions were innocent. I do not accept that the issue is quite as clear cut as that. Even if deliberate, if the Appellant’s actions were not such as to aggravate her overstaying, then Paragraph 320(11) does not apply.

THE APPELLANT’S CASE

14. Mr Youssefian submitted a skeleton argument. He again relied on the case of PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) the headnote to which reads as follows:

“In exercising discretion under paragraph 320(11) of HC395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance.”

15. I do not consider that this case assists me. As is clear from the body of the decision, the Tribunal was there dealing with a case where there was no indication that aggravating circumstances had even been considered by the decision-maker, in the context of an error of law decision and where the appeal was allowed on the basis that the Respondent’s decision was “not in accordance with the law” and therefore remitting the case back to the Respondent for a lawful decision. That ground of appeal is no longer open to the Appellant and nor can I decide to remit the case back to the decision-maker. The Appellant either succeeds on human rights grounds or fails and whether she succeeds or fails depends whether I accept that there were or were not aggravating circumstances in this case.
16. I do not understand it now to be disputed by the Appellant that she was not entitled to attend university in the UK without the requisite visa to do so nor that she was not entitled to a student loan. She also obtained a national insurance number. Since, as a visitor, it has long been the case that she would not be entitled to work, she could not have been entitled to that either. The real issue in relation to her evidence is whether she thought she was so entitled and whether

her conduct was deliberately designed to enable her to remain in the UK without permission. I therefore turn to her evidence in this regard.

17. The Appellant's evidence is set out in two witness statements from the Appellant dated 2 July 2019 and 13 March 2020. There is also some limited evidence in the more recent statement of Mr [O] dated 15 July 2020 although what he says necessarily depends on what he has been told by the Appellant.

18. The relevant parts of the Appellant's first statement read as follows:

"Immigration History

1. By way of background, I was born in the UK on 17 December 1985 at Guy's and St Thomas' Hospital, London. I recall living in the UK until December 1989, when my mother took me and my two siblings to Nigeria so that we could join my father who was already residing in that country. Therefore, I spent the first four years of my life in the UK. For the reasons I will explain later on, this is important for why I 'overstayed' in the UK.
2. I returned to the UK in September 2003 with a multi-entry visit visa valid for two years from 28 May 2003. I was still under 18 at the time, my mother had made the visa application on my behalf, I returned in 2004 to see my relatives in the UK.
3. Regrettably, my father passed way in Nigeria on 22 February 2005. I was struggling to cope with his passing. I was very close to my paternal uncle who resided in the UK, he was my shoulder to lean on when times were tough, and so I came back to this country to visit him in 2005. Whilst in the UK, I attended a consultation with a solicitor who had advised me that I was eligible to apply for a British citizen passport because I was born in the UK. However, he advised me that I would need to wait for at least five years in order to make such an application. I am afraid I do not recall the details of the solicitor but in any case, it was a one-off meeting.
4. Therefore, in 2011, I filled in an application form for a British passport as much as I could and later went to the Citizens Advice Bureau in Aberdeen Scotland to ask for their assistance. I was informed by them that my application would be unsuccessful because I had overstayed. I was shocked to hear this because of the advice I had received, indeed the previous solicitors had made no mention of overstaying disqualifying me from obtaining a passport and I had no reason to dispute what the lawyer had told me. The staff at Citizens Advice Bureau later advised that I see assistance from another lawyer as the case was beyond their scope. I attended another consultation with a different lawyer who advised me to make an application for leave to remain under Article 8 of the European Convention on Human Rights. In accordance with that advice I instructed that lawyer to prepare and lodge with the UKVI an application for discretionary leave which was submitted on 30 March 2012 which was refused on 6 September 2012. I was unsure of what to do at that time and if the truth be told, I think I just buried my head in the sand. It was after meeting Utchay and seeing that I could not continue in this limbo that I decided that something would need to be done and that is why I voluntarily returned to Nigeria on 16 June 2015.

...

Refusal letter

19. Turning to the reasons provided for refusing my appeal, I should explain how I was able to obtain a national insurance number, a provisional driving licence, a student loan and places at Middlesex and Aberdeen University.

20. From an early age I considered myself British until I gradually understood that this was not the case. Having a UK birth certificate, National Insurance number, a UK Driving licence and access to student loans gave me the impression I was legally in the UK. A previous solicitor explained that all I needed was to gather my proof of long stay in the UK and make an application for naturalisation after having been in the UK for five years. I was also advised to apply to register as a British Citizen but I had not been in the UK for 10 years continuously from birth.

21. In order to apply for national insurance number, I made an appointment to meet with a member of staff at the Job Centreplus located in Aldgate, London in 2006. As far as I can remember, I went in for the appointment with my original birth certificate, provisional driving licence and proof of address. I was subsequently provided with a national insurance number. I had not been advised at all during that process that I was not eligible for a National Insurance number, if indeed, that is the case.

22. I obtained a student loan by going on the student loan website, entering in the required details. I had to provide proof of ID, UCAS admission confirmation and proof of my national insurance number. That is all I provided. Furthermore, in order to obtain places at the aforementioned universities, I applied through UCAS and was offered a place.

23. I cannot recall precisely which documents I provided in order to obtain a provisional licence as it was so long ago, but to my recollection all I had provided was my birth certificate, passport photograph and proof of address. Again, I was not informed that I was not eligible for a provisional driving licence, if indeed, that was the case.

24. Insofar as it is suggested that I had somehow obtained these items and services by deception (which I refute entirely), neither myself or my legal representatives have been provided with evidence to demonstrate that I had provided false documents or information, or anything which confirms that I was not entitled to a National Insurance number, a provisional driving licence etc.

25. It is correct that I received two cautions for shoplifting in 2004. Me and a couple of my friends went shopping and they pressured me into taking a cardigan in GAP and a bracelet in the BHS store. This occurred within the same hour on the same day (The shops were connected in the same shopping centre). I was young at the time. I make no excuses for my behaviour but to remind the court of my youth and that it was 15 years ago. I have never been in trouble with the police since and have certainly learnt my lesson.

26. I do not feel that I have, to use the words of the Entry Clearance Officer 'contrived in a significant way to frustrate the intentions of the Immigration Rules'. When I made my application to stay in the UK, I did so on advice from legal representatives. Similarly, when I applied for my National Insurance number, Driving Licence etc, I followed fully the guidance and information that was provided to me. If, and it is not clearly stated in the refusal, I did anything wrong, I do so inadvertently and if that is so, I sincerely apologise. However, I do not feel that it is proportionate to punish me and my partner by refusing my application and effectively forcing us to live separately for what could be an indefinite period. I therefore respectfully ask the Judge of the First-tier Tribunal

to not let these two cautions which were over 15 years ago prevent me from joining my fiancée in the UK.”

19. In her second statement, the Appellant says this (so far as relevant):

“...2. My appeal was dismissed on the basis that the Immigration Judge considered that I had previously contrived in a significant way to frustrate the intentions of the Immigration Rules by overstaying and using and obtaining services or benefits to which I was not entitled. FTTJ Rowlands considered that I had deliberately presented a false impression of my immigration status in order to gain employment, and obtain a national insurance number, reduced university fees and a student loan. I should state, at this stage, that I adopt my earlier statement of 2 July 2019 which was lodged in support of my appeal before the First-tier Tribunal. In that statement I explained how I was able to obtain a national insurance number, a student loan and a driving license, and that I did not provide false documents or information in order to obtain these things.

...

4. I understand from my legal representatives that UTJ Smith set aside the earlier FTT decision because the Immigration Judge failed to consider my own evidence as to how and why I had obtained the aforementioned documents and services without deception; and that she had failed to make a finding on the reasons provided by the ECO for considering that I had deliberately presented a false impression of myself to obtain the above items. To that end, I have provided DJ Webb & Co with correspondence from the Student Loans Company, covering the period from 21 November 2006 to 16 October 2019, to confirm that they required either my birth certificate or passport to process my claim for a student loan, and that I have already made arrangements to repay the loan. As stated in my earlier witness statement, I provided the Student Loans Company with proof of my identity, which was my UK birth certificate. My legal representatives have also emailed the Student Loans Company to request information on the eligibility criteria, and application and documents I would have had to provide in order to obtain a student loan in 2006. Regrettably, this request is yet unanswered.

5. I reiterate that in order to obtain a driving license all I had to provide was my UK birth certificate, my passport photograph and a proof of address, and in order to obtain a national insurance number I was only required to provide my UK birth certificate, provisional driving license and proof of address. I refute the suggestion that I deliberately misled officials on behalf of the DVLA, the Department of Work and Pensions or the Student Loans Company.

6. Turning to the topic of my voluntary departure, I understand that FTTJ Rowlands considered that I should receive no credit for electing to leave this country in order to return to join Utchay on the correct visa. I also understand that UTJ Smith upheld the earlier decision on this point. However, I still maintain that it should be recognised that I did the right thing, albeit belatedly. Furthermore, if this approach were to be applied in similar cases, ie those where a person was in this country unlawfully but leaves voluntarily only to be refused a visa to return, I would expect that this would have the effect of discouraging such persons from leaving the UK and trying to re-enter by lawful means. I would add that if I am granted entry clearance the question of any future breach of any immigration laws would not arise since I would have no need to breach any immigration laws – I

would be in the UK lawfully – so that I present no risk of breaching immigration laws in the future.”

20. The evidence to which the Appellant refers in her statement is contained within the supplementary bundle filed on 13 March 2020. In particular at page [6] of that bundle, there is a letter dated 21 November 2006 from the LB Barking and Dagenham branch of Student Finance Direct (the trading name of Student Loans Company Ltd) which reads as follows (so far as relevant):

“...When you applied, we asked you to send us the following documents in support of your application:

Date Of Birth: Original birth certificate, or Passport

Place Of Birth: Original birth certificate, or Passport

Identity: Adoption Certificate, or Original birth certificate, or Passport

...”

There then follows a chasing letter dated 7 December 2006 again seeking those documents and finally a letter dated 14 December 2006 confirming entitlement. That required the Appellant to sign an online declaration form. The letter also included reference to a booklet providing guidance about financial support for students in higher education which could be obtained online.

21. The attached notification confirmed that the Appellant was awarded £1200 for payment of her fees and £4630 by way of maintenance. Other notifications in the bundle indicate that the Appellant was awarded £3000 for fees and £4630 towards maintenance on 23 February 2007, £3070 for fees and £4735 towards maintenance on 17 July 2007, £3145 for fees and £4944 towards maintenance, as well as a maintenance grant of £2835 on 10 October 2008, £3070 for fees and £5185 towards maintenance as well as a maintenance grant of £2765 on 21 October 2008. It is not entirely clear to me whether those were all amounts paid or whether some notifications are revised assessments. Either way, there is also evidence that the Appellant is repaying the loan by way of an “Overseas Repayment Schedule” at the current rate of £246 per month.

22. At page [010] of the supplementary bundle, appears the declaration form which the Appellant was asked to sign. That refers to the booklet about terms and conditions of the loan. Unfortunately, I do not have a copy of that booklet and there has been no response to e mails from the Appellant’s solicitors requesting other information about entitlement to loans at the relevant time. I do note the following provisions within the form which may have some relevance:

“..h. I agree that my request for a loan, the loan and the contract between me and the lender shall be governed by the law of the place of my home address as supplied during the online application process (or, if my address is outside the United Kingdom, English).

i. I irrevocably agree that the courts of the part of the United Kingdom in which my home address supplied during the online application process is situated (or the English, Welsh, Scottish and Northern Irish courts where my address is

outside the United Kingdom) shall have non-exclusive jurisdiction to hear any action or proceedings arising out of or in connection with the loan and the contract between me and my lender and I irrevocably submit to the jurisdiction of those courts and waive any objection to the jurisdiction of those courts, provided that this shall not limit the lender's rights to take proceedings against me in any other court of competent jurisdiction.

- j. I agree that from the date I submit this form until the date when my loan(s), together with all and any interest, penalties and charges which apply, is fully repaid, I will notify the lender of any changes in the personal details (including National Insurance number) and contact details I have provided as required in accordance with the Regulations referred to in paragraph c.
- k. In the event that I leave the United Kingdom to reside outside the United Kingdom or that for any other reason I am outside the UK tax system, I undertake to inform the lender in accordance with the regulations referred to in paragraph c and I undertake to provide the lender with my new and any subsequent contact details until my loan, together with all and any interest, penalties and charges which apply, is fully repaid.
- l. ...
- n. I understand the lender will check my National Insurance number and personal details, specifically, name, date of birth and address with the Department for Work and Pensions (DWP). If I do not know my National Insurance Number, or if the number I provide cannot be authenticated, DWP will trace and give my number to the lender."

23. Finally, at page [018] of the supplementary bundle, there is a letter from the Student Loans Company Ltd dated 30 October 2007 indicating that they had checked information with the Department of Work and Pensions who had been unable to verify the Appellant's national insurance number. That the Appellant received awards thereafter confirms that the Appellant must have answered the enquiry in that letter to the satisfaction of the company.

24. Finally, I come to Mr [O]'s statement of 15 July 2020 which reads as follows so far as relevant:

"..2. I have been asked to clarify with my fiancée whether she deliberately lied to police officers about her immigration status when she was arrested many years ago for shoplifting.

3. She reminded me that the events occurred many years ago and so she does not have a precise recollection of the incident. However, she does remember being asked by police officers to provide her full name, date of birth and full residential address. She informed me that at no point was she asked to clarify her immigration status. The police officers ran their own checks and thereafter arrested her.

4. I asked my fiancée if after her arrest she was ever asked by police officers to clarify her immigration status. She told me that she was never questioned by the police about her immigration status."

25. Turning then to Mr Youssefian's submissions, he asserted, and I accept (as did Ms Everett) that there is no evidence that the Appellant told the police in 2004 that she was British. Had she done so, the police would have made enquiries and it is

likely that the Appellant's presence in the UK would have been drawn to the Home Office's attention. In any event, what happened in 2004 is largely irrelevant as it is the Appellant's case as I understand it that she returned to Nigeria when her father died in February 2005 and re-entered. Moreover, it is also her evidence (which I do not understand to be disputed) that she had a multi-visit visa valid for two years from May 2003 and therefore whilst not British, the Appellant would not have been in the UK unlawfully at the time of the shoplifting cautions. Thus, she could have demonstrated to the police that she was here lawfully at the time and would not have needed to lie about her nationality.

26. Mr Youssefian sought to draw a distinction between the assertions made in the Respondent's decision about switching nationality and the matters now relied on (the obtaining of the loan, study in the UK, national insurance number and driving licence). He said that the latter were breaches of conditions and not aggravating circumstances and that to rely on those was double counting. He relied in that regard on what is said at [28] of a decision of Upper Tribunal Judge Conway promulgated on 2 April 2019 in Gurbhej Singh v Entry Clearance Officer - New Delhi (HU/07439/2017) as follows:

"Thus, there must have been breaches which frustrated the Rules in a significant way plus aggravating circumstances. There should be no overlap between a 'significant way' and 'aggravating circumstances' otherwise there would be double counting. Decisions makers and Tribunals must 'exercise great care' (per PS headnote) in deciding to apply paragraph 320(11) to a family member and must ensure that the aggravating circumstances relied on are 'truly aggravating' (PS [14]) otherwise there is a risk of discouraging migrants from making applications to regularise their stay, which would be contrary to the public interest."

27. This is an unreported decision. Mr Youssefian told me that he had the permission of the Judge to rely on it although I cannot find any confirmation of that from UTJ Conway. In any event, it is at most only persuasive. I do not disagree with what is there said but I consider that case can be distinguished from the circumstances of this. In this case, if the Respondent was saying, for example, that the Appellant had overstayed but that I should consider as aggravating circumstances, the fact that she had done so for a significant period without seeking to regularise her stay, I would have no difficulty in rejecting that submission. That would amount to double counting. In this case, though, leaving aside whether the circumstances relied upon can amount to "switching nationality", the overstaying is capable of being aggravated by the breach of conditions or, more accurately, the obtaining of benefits to which the Appellant was not entitled. The question is therefore rather one of whether the Appellant knew that she was not entitled and has "contrived" to avoid immigration control by overstaying and has obtained the benefits to that end.
28. In relation to whether the obtaining of the benefits to which she was not entitled was deliberate, Mr Youssefian accepted that factually the Appellant was unlikely

to have been entitled to those benefits. It is certainly the case that she was not entitled to study as there have been separate categories of visa for foreign students for very many years. However, the position is not, as now, that colleges are required to make checks of their students in the same way. I doubt therefore that the Appellant was required to prove that she was entitled to study in the UK when she applied to her college.

29. The position may be less clear in relation to the other benefits. However, since, as a visitor, the Appellant was not entitled to work, she would not have been entitled to a national insurance number. There is limited evidence as to the terms and conditions for student loans at the relevant time (now over fifteen years ago). However, based on the letters in the supplementary bundle and the terms of the declaration which I have set out, the position appears to be that those resident outside the UK were entitled to apply for a loan, and that no evidence was sought of nationality.
30. However, the focus of the entitlement to the loan appears to be the existence of a national insurance number. The Appellant of course had one, and in that way, coupled with her birth certificate showing her place of birth in the UK, was able to obtain a student loan. I accept, as does the Respondent as I understand it, that the Appellant did not use false documents. However, I find it likely that, if she had not had a national insurance number when she applied for the student loan, she would not have obtained one.
31. I do not understand the Respondent to rely on the obtaining of a driving licence. Certain categories of foreign nationals are no longer entitled to driving licences. However, as Mr Youssefian submitted and I accept, what is now termed “the hostile environment” was not as prevalent as it is now nor as well monitored and regulated.
32. I did suggest to Mr Youssefian that it might be open to me to draw adverse inferences from the fact that the Appellant supplied her birth certificate rather than passport when she was asked to verify her date and place of birth and identity in order to obtain the loan. However, I accept his answer to that question. Individuals are often far more reluctant to relinquish the original of their passport than their birth certificate as it is a more important identity document and therefore its loss is of greater consequence.
33. In relation to the evidence about the solicitor’s advice, as a lay person, Mr Youssefian submitted I should conclude that the Appellant might have understood that she would become entitled to citizenship even if not currently able to apply. Although the Appellant studied law at university, I accept that it does not follow that she is to be considered other than as a lay person in relation to nationality law. He pointed out that this was one-off advice obtained some fifteen years ago and it was not implausible that the Appellant could not remember the detail. She had not sought to embellish her evidence in this regard.

Moreover, what she says she was advised is consistent with her seeking further advice some five years or so later in 2011. By then, she had already completed her studies.

34. Mr Youssefian said that I should not be swayed by the submission that the Appellant's entry as a visitor is key. It is after all the case that some countries confer nationality merely on the basis of being born in that country. It is not implausible that the Appellant would believe that she needed to complete a period of residence before making an application to obtain her citizenship.
35. In relation to the student loan, Mr Youssefian also pointed out that the Appellant had tried to obtain information about student loan entitlement in 2005 via a Freedom of Information request but had not received a reply. She has actively sought out evidence.
36. Mr Youssefian pointed out that, following PS, I should exercise great caution when considering the "aggravating circumstances" issue, because otherwise those who have behaved negatively in the past would be dissuaded from returning to their home country to obtain entry clearance. Although he accepted that PS was decided on the "not in accordance with the law" ground, he submitted that it was nonetheless still of application as discretion is part of the public interest assessment under Article 8 ECHR. He also accepted that Paragraph 320(11) does not contain any specific period of time during which a breach will be held against an individual (unlike paragraph 320(7B)) but asserted that there had, in this case, been a sufficient passage of time since the conduct alleged which attenuates the public interest in relation to exclusion.
37. In conclusion, Mr Youssefian asked me to consider the nature of the aggravating circumstances (if they were to be so termed). This is not a case where the Appellant has used an assumed identity to evade immigration control. She had not sought to go under the radar - quite the opposite. She had eventually made a voluntary departure and even if she was at the end of the road by that stage, she could have sought to stay to argue her case here.

DISCUSSION AND FINDINGS

38. I begin by saying that I do not place any less weight on the Appellant's evidence because it could not be tested. She is still in Nigeria and, even remotely, would have had some difficulty in participating in person. I therefore take her evidence on its face.
39. There are, though, some unusual features of her evidence even taken that way. First, she does not explain why it was that she sought the advice of a solicitor in 2005. At that point in time, she had returned from Nigeria following the death of her father in order to see her uncle. She was aged nineteen at the time and could not have been unaware of her need for a visa to enter. Even though her mother

may well have made the application for her in 2003, as she would then have been a minor, she could not have failed to know that she needed permission to enter the UK and was not British. She would have known that because she passed through the airport using a Nigerian passport bearing that permission. It is therefore I find likely that the reason she sought advice at that stage is because her permission to remain in the UK was about to or had just run out (it must have expired after she re-entered as otherwise she would have been stopped at the airport).

40. Second, therefore, the Appellant was aware following that advice that she was, firstly, not British and, secondly, that she had no permission to be in the UK. She might have thought that she would be eligible to apply for citizenship after five years but, on any view, she knew from that point in time that she could not do so in 2005.
41. Third, I accept that the Appellant seeking further advice in 2011 is consistent with her case that she thought she would be able to apply for citizenship after five years. However, the words at [4] of her first statement are, I find, carefully chosen. She does not say that she was shocked to find that she had overstayed but rather that she was shocked to learn that her overstaying would disqualify her from obtaining a passport.
42. Based on the above, I find that the Appellant was well aware that she was an overstayer from 2005 and that she stayed in the UK knowing that to be the position. However, I accept that she did so thinking that, after a period, she would be entitled to apply to be a UK citizen because she had been born here.
43. The central question which arises thereafter is whether the Appellant used her time when she knew she was unlawfully here to obtain benefits to which she was not entitled in order to permit her to stay. In other words, was the obtaining of those benefits deliberate and designed for the purpose of enabling her to remain in the UK without leave?
44. It is not entirely clear to me why the Appellant applied for a national insurance number. It is not suggested by the Respondent and I do not understand the Appellant's evidence to be that she ever worked in the UK. It was therefore perhaps an unusual step to take.
45. However, I accept the Appellant's evidence about the way in which she obtained the national insurance document. It is perhaps surprising that she is able to give detail about the circumstances of applying for that document when she is unable to remember other events at that time, but her evidence in that regard has not been disputed. In any event, as I have already noted, the so-called "hostile environment" was not in being in the same way as it is today and it is, I find, quite likely that the Department of Work and Pensions would have given the Appellant a national insurance number even though she was very clearly, in my

view, not entitled to it as her conditions of leave (which had in any event by then expired) did not permit her to work.

46. It may well be the case that the Appellant sought and obtained the national insurance number in order to permit her to study. I accept that she must have known that she was not entitled to a national insurance number as, by that stage, she knew that she was not lawfully in the UK. That does not however mean that she necessarily knew that she was not entitled to study and, more importantly, that she was not entitled to apply for an obtain a student loan.
47. I have already pointed to some of the provisions of the declaration which the Appellant was asked to sign which might appear to the untutored eye to suggest that just because she came from outside the UK did not preclude her from seeking a loan. The loan company asked only for proof of her date and place of birth and confirmation of her identity. I do not draw any adverse inferences from the fact that she used her birth certificate as that proof rather than her passport for the reasons I have already given. It is not suggested that she assumed any different identity or details of identity which were not her own. It is not suggested that she used any false documents to obtain these benefits.
48. For those reasons, I find that the Appellant was not aware that she was not entitled to the student loan which she obtained. It is perhaps to her credit that she is taking steps to repay the loan.
49. The position in relation to entitlement to study is not quite the same. As I have already pointed out, there has been a category of visa for study for very many years and one certainly existed in 2005/2006 when the Appellant started her studies. I have not been provided with a copy of the Appellant's passport but it is not suggested that this would not have included the usual conditions for a visitor on the visa namely that she was not allowed to work or study without specific permission. It is notable that the Appellant talks about the obtaining of the other benefits such as the loan and even the driving licence but says very little about her application to study when her conditions of stay (when she had leave) prevented her from doing so.
50. I find that the Appellant was well aware that she was not entitled to study. In fact, she could not help but be aware of that since, as I have already found, she knew that she had no right to be here at all. That does not however affect my view that she was not aware that she had no right to the student loan. Although I have accepted that she must also have known that she had no right to the national insurance number, the issue I have to consider is whether the obtaining of these benefits amounts to aggravating circumstances which add to the contriving "in a significant way to frustrate the intentions of the Rules".
51. In this regard, I do not agree with Judge Landes that "[t]he obtaining of goods or services are not circumstances bearing directly on the respondent's ability to

control immigration". The Respondent's guidance refers to the receipt of benefits, goods or services without an entitlement as an example of aggravated circumstances. The fact that this is not an example in Paragraph 320(11) itself is nothing to the point. As I pointed out at [19] of my error of law decision, the examples given in the rule itself are a non-exhaustive list and, as I note above, and Mr Youssefian accepted (as recorded at [20] of my error of law decision), the published policy supports the obtaining of benefits as being a potential aggravating circumstance.

52. One can well conceive of scenarios where the obtaining of benefits to which an individual is not entitled are an aggravating circumstance. The obtaining of a national insurance number, enabling an individual to work and therefore to earn money to finance a continued unlawful stay is quite sufficient to aggravate the overstaying and breach of conditions.
53. However, in this case, the obtaining of the benefits to which the Appellant was not entitled are of a different nature. She may well have obtained a national insurance number to which she was not entitled in order to study. She studied when she knew she had no right to do so. However, that did not have any causative effect on her overstaying.
54. In the current climate, the Appellant's unauthorised stay may well have been detected much sooner or even stopped at its inception when she tried to obtain these benefits and make her applications to study. As Mr Youssefian pointed out, though, this is not a case where the Appellant has obtained these benefits in order to remain under the radar to avoid detection. She willingly engaged with the authorities to obtain these benefits.
55. The benefits should not of course have been given to the Appellant and I have already found that she must have known that at least the national insurance number was not something to which she was entitled and that she should not have been studying. There is though insufficient evidence to show that she did all this with the intention to "contrive in a significant way to frustrate the intentions of the Rules"; in other words, to enable her to continue to stay in the UK unlawfully. She did not use any false documents and there is no evidence that she lied to the authorities about her nationality. It appears that she simply was not asked and therefore did not say that she was not British.
56. For those reasons, I accept that, although the Appellant did obtain benefits and services to which she was undoubtedly not entitled, that does not amount to aggravating circumstances for the purposes of Paragraph 320(11).
57. I should add that the Appellant in this case has done herself few favours in the way in which her evidence has been presented. It is not to her credit that she has continued to insist that she did little wrong other than to stay for a short while longer than she was entitled to do. She knew that she had no entitlement to stay

since 2005 and stayed regardless. If it had become relevant to consider whether it was to her credit that she left voluntarily, I would have had no hesitation in finding that it was not. She stayed for a significant period after she knew that her leave had expired and whatever she thought about her entitlement to citizenship, she knew by the latest in 2011 that she was not so entitled and did not leave the UK until 2015 and then only after she had met Mr [O] and therefore doubtless saw another way of being allowed to gain entry lawfully to this country.

58. However, since I have concluded that the obtaining of benefits and services to which the Appellant was not entitled does not amount to an aggravating circumstance for the purposes of Paragraph 320(11), it follows that this paragraph does not apply. Since that was the only reason for refusing the Appellant on suitability grounds and since suitability grounds were the only reason for refusing the Appellant's application to join her partner in the UK, it follows that this appeal must be allowed on the basis that the Appellant meets the Immigration Rules (under Appendix FM). There is therefore no public interest in requiring her continued exclusion from the UK. Although she has overstayed in the UK previously (and knew that she was here without permission), she has finally done the right thing and returned home to apply for re-entry. For those reasons, the Appellant succeeds on human rights grounds and her appeal is allowed.

DECISION

The Appellant's appeal is allowed on human rights (Article 8 ECHR) grounds



Signed:
Upper Tribunal Judge Smith

Dated: 6 August 2020

ANNEX: ERROR OF LAW DECISION



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

Appeal Number: HU/18307/2018

THE IMMIGRATION ACTS

**Heard at Field House, London
On Monday 10 February 2020**

Determination Promulgated
.....

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ISABELLE [E]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian, Counsel instructed by DJ Webb & Co Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Rowlands promulgated on 29 August 2019 (“the Decision”) dismissing the Appellant’s appeal on human rights grounds (Article 8 ECHR). The Appellant is a national of

Nigeria. Her human rights claim is based on her relationship with her fiancé, Utchay [O], who is a citizen of Nigeria but also a British citizen by birth.

2. The Appellant's human rights claim was refused by the Respondent by the decision under appeal, dated 7 August 2018 made in the context of the refusal of an application for entry clearance to join her fiancé in the UK. Although the Appellant has in the past overstayed in the UK, she made a voluntary departure to Nigeria thereafter where she remains.
3. The Respondent's reason for refusing the claim was based on the general grounds of refusal under the Immigration Rules ("the Rules"), specifically paragraph 320(11) based on the Appellant's overstaying which was said to be aggravated by two police cautions when the Appellant claimed to be British. The Respondent otherwise accepted that the Appellant met the Rules to join her fiancé. The Judge found paragraph 320(11) to be satisfied although the matters which he relied upon as the aggravating circumstances were not the same as those initially put forward by the Respondent. He relied on the Appellant having obtained a student loan and university place to which she was not, as a foreign student, entitled. He therefore found that the Appellant could not succeed under the Rules and that there were no circumstances on which she could succeed outside the Rules. For those reasons, he dismissed the appeal.
4. The Appellant appeals on three grounds. First, she asserts that the Judge failed to direct himself to the guidance given by this Tribunal in PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) ("PS (India)"). Second, she says that there were no "aggravating circumstances" in this case which could properly fall within paragraph 320(11). Third, it is suggested that the Judge acted improperly by having regard to his own researches as to the criteria which apply in order to be eligible for a student loan.
5. Permission to appeal was granted by First-tier Tribunal Judge Landes on 20 December 2019 in the following terms so far as relevant:

"..2. It is arguable as set out at paragraph 7 grounds that the appellant's conduct does not fall within paragraph 320(11) in that the aggravating circumstances listed in paragraph 320(11) are circumstances which bear directly on the respondent's ability to control immigration and it is arguable therefore that other aggravating circumstances need to be of the same type to fall within paragraph 320(11) ('such as'). The obtaining of goods or services are not circumstances bearing directly on the respondent's ability to control immigration.

3. It is also arguable that there was a procedural irregularity in that there appears to have been no evidence before the judge what the criteria for obtaining a student loan were at the time the appellant applied. The judge did not put to the sponsor or the appellant's representative that those were the criteria for obtaining a student loan. Whilst, despite what is said in the grounds, the appellant was evidently not entitled to study at university or to a student loan (judicial notice can be taken of the fact that those who overstay are not entitled to study at university and for that reason if for no other reason not entitled to a student loan) the

criteria/the clarity of the criteria are relevant to the appellant's knowledge that she was not so entitled and hence to how serious (or otherwise) her conduct was.

4. Whilst I do not restrict the grounds which may be argued, I do not consider that the judge erred by failing to apply PS. PS makes clear that care has to be taken to ensure that what are said to be the aggravating circumstances are truly aggravating as if they are not the provision will encourage people to remain in the UK unlawfully rather than regularising their status. The judge explained why he considered the circumstances were aggravating at [11]. If the circumstances did indeed come within 320(11) and if he was right as to the appellant's deliberately obtaining benefits to which she was not entitled by giving a false impression of her status, it is difficult to see how the judge could have reached any other conclusion than that the circumstances were truly aggravating."

6. The matter comes before me to determine whether the Decision contains a material error of law and, if it does, to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

7. It is appropriate to take the Appellant's grounds in reverse order not least because of the comments made in the grant of permission.

GROUND THREE

8. The Judge made the findings of which complaint is made at [10] of the Decision as follows:

"Knowing that she was not a UK citizen she stayed in the UK without leave six months after she first entered in 2005. Not only that she applied for a university place and a student loan knowing that she was not entitled to either as a foreign student. The eligibility rules for a student loan are crystal clear. You can apply if you are:-

A UK national or have settled status;

You normally live in England;

You have been living in the United Kingdom, the Channel Islands or the Isle of Man for three years before starting your course."

9. I begin by observing that the Appellant does not say that the Judge was wrong about the relevant criteria. Mr Youssefian said he simply did not know what those were. He had not checked. His point is rather that the Judge should have alerted the parties if he intended to rely on his own researches. For the reasons which follow, I do not accept that submission.
10. First, the Appellant was on notice from the Respondent's decision that the Respondent's case was, at the very least, that she had not been entitled to study at a UK university as a foreign student without the necessary permission. Although I accept that this is a point which was not directly relied upon as the aggravating

circumstance under paragraph 320(11), it was nonetheless asserted that she was not entitled to study in the UK without the relevant leave.

11. Second, the Judge did not solely rely on the obtaining of the student loan but also the obtaining of a university place. That was the position of the Respondent in her decision.
12. Third, as Judge Landes pointed out, the Judge was entitled to take judicial notice as to that fact. Although I accept that the criteria set out at [10] of the Decision are quite specific as to the obtaining of a student loan, nothing is said about the allegation that the Appellant had obtained a student place without permission to study as a foreign student. It is not entirely clear that what is said by the Judge at [10] about student loans is based on internet research but, even if those criteria are taken out of the equation, the allegation still stands that the Appellant studied at a UK university when she was not entitled to do so. She never had leave to remain as a student. She was only ever here with leave as a visitor.
13. Fourth, and most importantly, it is not the Appellant's case that she was entitled to a NI number, a student loan or the places at University. Her case as set out in her statement is that she obtained those benefits because she believed that she was entitled to them because she had a British birth certificate. She does not take issue with the allegation that she was not entitled to these things, but she says that the obtaining of them did not amount to deception because she simply did not realise that she was not so entitled. I will return to that point below because, if there is an error in this regard, it is, as Judge Landes said, the importance of what the Appellant believed about her entitlement and not her actual entitlement.

GROUND TWO

14. Paragraph 320(11) of the Rules reads as follows:

“(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. My attention was also drawn to Home Office guidance entitled “General grounds for refusal: Section 2 of 5: Considering entry clearance” published on 11 January 2018 the relevant section of which reads as follows:

“When an applicant has previously breached the Immigration Rules and/or received services or support to which they were not entitled you must consider refusing the application. When these circumstances are also aggravated by other actions with the intention to deliberately frustrate the rules, you must refuse entry clearance under paragraph 320(11)

This means when an applicant has done one or more of the following:

- Been an illegal entrant
- Overstayed
- Breached a condition attached to their leave
- Used deception in a previous application
- Obtaining:
 - Asylum benefits
 - State benefits
 - Housing benefits
 - Tax credits
 - Employment
 - Goods or services
 - National Health Service (NHS) care using an assumed identity or multiple identities or to which not entitled

And there are aggravating circumstances, such as:

- ...
- Receiving benefits, goods or services when not entitled
- ...
- Switching nationality

This is not a complete list of offences. You must consider all cases on their merits and take into account family life in the UK and, if the applicant is a child, the level of responsibility for any breach....”

16. The Judge dealt with the paragraph 320(11) issue at [12] of the Decision as follows:

“I have applied these findings of fact to this case and reach the conclusion that her appeal must fail. Her application has been refused under paragraph 320(11) which states that it is a ground where entry clearance should normally be refused at the discretion of the Respondent where an applicant has previously contrived in a significant way to frustrate the intention of the Rules by overstaying or breaching a condition attached to her leave and there are other aggravating circumstances such as absconding and other examples. It is argued that she has not absconded and not broken any temporary admission or reporting restrictions and not used any assumed identities all of which is true, but it ignores completely the fact that she overstayed for many years. The general grounds of refusal provide that there are other matters which should be taken into consideration, including overstaying, breaching a condition attached to their leave and using or obtaining goods or services or benefits to which they are not entitled. I have already made my decision absolutely clear, this young lady was not entitled to enter university for either of the two degrees that she did at the rate applicable for UK students and she knew it.

Neither was she entitled to obtain a student loan and she knew that. She was not entitled to work either. Whatever she may have presented in order to get a national insurance number she was not entitled to it she was here only as a visitor. The conditions of visit visas are perfectly clear and employment is not allowed and would have been stated as such on her visit visa. The Respondent suggests that she switched nationality at some point or other I am not sure that be the case because the reality is that she has breached a number of the conditions attached to visit visas knowingly. She has obtained the benefit of lesser university fees which is a significant amount of money running into many thousands of pounds and a loan which she seemingly still owes for her time here as student. These are significant breaches. I note that the family life in the United Kingdom should be taken into account but quite clearly this was always on the basis of the Appellant and her fiancé knowing for quite some time that she had no status here. Why else would somebody who was as eminently qualified as her not be working. The Respondent was perfectly right to exercise their discretion not to allow her application.”

I pause to observe that although, as Mr Youssefian submitted, those findings are expressed in strident terms, they do not overstep the mark in terms of indicating any bias against the Appellant and nor does any such assertion appear in the Appellant’s grounds.

17. That passage follows the findings made by the Judge on the evidence concerning the so-called aggravating circumstances. I have already cited [10] of the Decision in the context of ground three. Paragraph [11] of the Decision is also relevant. That reads as follows:

“None of those three [that is to say the criteria for student loans set out at [10] of the Decision] applied to her and yet she applied for a student loan and university place which again is restricted to people in similar categories on the back of her birth certificate and national insurance number which she knew was presenting a false impression to people of her actual status. By 2011 she had a law degree and a Masters in International Commercial Law and claims to have made another application in 2011 or 2012 which was refused, even then she remained for another three years before leaving. She says that she should have been given some kind of credit for the fact that she voluntarily left on 16th June 2015. Quite frankly she deserves no credit at all for having remained unlawfully after a supposed refusal in 2012 during which time she and her fiancé continued with their relationship knowing full well that she was here illegally and that her status was precarious to say the least. I am satisfied that she obtained a national insurance number knowing that she was not entitled to it and had reduced university fees and student loan all at the cost to the British tax-payer. Her suggestion that she didn’t know and thought she was British is nonsense. She knew all along that she didn’t have the right and deliberately continued with the façade.”

18. I begin by noting that the Respondent herself did not find there to be aggravating circumstances due to the obtaining of the student loan and place at university but rather that the Appellant had said she was British when cautioned by the police which the Respondent said amounted to “switching nationality”. I did not understand Mr Youssefian to dispute that this could come within the aggravating

circumstances or, put another way, that what occurred, could be described as such. It is said on behalf of the Appellant that the Judge did not accept this. I do not think that her case can be put so strongly. As appears at [12] of the Decision cited above all the Judge says is that he is “not sure that be the case”. Of course, the relevant standard of proof is not certainty. Whilst I accept that the Judge did not make any proper finding one way or the other, I do not accept that the Judge rejected the Respondent’s case on this point.

19. In relation to the reasons on which the Judge did rely, Mr Youssefian rightly accepted that the aggravating circumstances which are set out at paragraph 320(11) are a non-exhaustive list. His point is that such circumstances have to fall within the same category which he described as being actions or omissions which prevent the Respondent from exercising and maintaining immigration control which, as appears from what precedes the description of aggravating circumstances is, he said, linked to immigration status.
20. Mr Youssefian accepted that the Respondent’s published policy supports the Judge’s reasoning. However, he submitted that the Rules cannot be interpreted by a policy if that policy confines the rule. The Respondent can be more generous by her policy than a rule provides. However, as he pointed out, based on what is said in R (oao Alvi) v Secretary of State for the Home Department [2012] UKSC 33, in order to achieve the necessary certainty, matters which go to the question of whether and when leave to enter or remain should be granted or refused should be specified in the Rules and not left to guidance.
21. I begin by noting that if and insofar as the Respondent’s policy suggests that the first part of paragraph 320(11) includes the frustration of the Rules by the obtaining of benefits to which a person is not entitled, it is inconsistent with the rule itself. That does not fall within sub-paragraphs (i) to (iv) at all. However, neither do I accept Mr Youssefian’s submission that such behaviour is not consistent with the other circumstances set out in paragraph 320(11). It is legitimate to point out that such things as absconding or not meeting bail conditions are clearly linked to the status of overstaying or illegal entry. I pause to observe that it is not here said that those circumstances apply.
22. However, Mr Youssefian’s submission ignores sub-paragraphs (ii) and (iv) of paragraph 320(11) which concern the breach of conditions or the use of deception. Certain of the factors set out in the second part of paragraph 320(11) are obviously intended to relate to those sub-paragraphs, for example, the use of an assumed identity is relevant to the use of deception. The reference to “switching nationality” may be similarly relevant in that regard (and was relied upon by the Respondent here as a reason why the overstaying was aggravated). However, there are clearly other circumstances not there mentioned which relate to those sub-paragraphs. For example, it cannot sensibly be said that someone who is working in breach of conditions by obtaining a document to which he or she is not entitled has not aggravated the breach of conditions requirement. Yet, there

is no actual mention in the aggravating circumstances section of paragraph 320(11) that the obtaining of a false document is such a circumstance, but it must be so.

23. Mr Youssefian's categorisation of the nature of the harm which paragraph 320(11) is designed to prevent against is also, if I understood that submission correctly and with respect to him, slightly simplistic. There is no doubt that some of the aggravating features go to the ability to remove a person but that is not the only facet of immigration control. If a person is not entitled to remain in the UK, that he or she manages to do so by obtaining a means of support to which they are not entitled and therefore manages to stay below the radar in order to avoid removal is also relevant to the maintenance of immigration control.
24. For those reasons, I do not accept that the obtaining of benefits to which a person is not entitled is not a circumstance which can aggravate the behaviours set out in paragraphs (i) to (iv) of paragraph 320(11). It is a circumstance of a similar nature. Mr Youssefian accepted that the list is not exhaustive. I accept that it may be preferable if this were spelt out, particularly given the wording of the policy but I do not accept, given the way in which the rule is phrased, that the Respondent has to particularise each and every circumstance which can aggravate the behaviours in sub-paragraphs (i) to (iv).
25. That the circumstances here are capable of being an aggravated circumstance is not however the end of the matter. The issue is whether the circumstance has aggravated the behaviour. In other words, that the Appellant overstayed and moreover on the Judge's analysis breached conditions of her leave, is relevant but the issue is whether the behaviour of the Appellant has been aggravated by those circumstances. That involves the taking into account of whether she was aware that what she was doing was wrong. The circumstances said to aggravate the overstaying etc are all ones which involve some deliberate conduct on the part of an applicant. The Judge therefore needed to consider the Appellant's own evidence as to how and why she obtained the documents and services which she did and needed to make findings about that evidence. That is the point made at [3] of Judge Landes' grant of permission. There is also a failure by Judge Rowlands to make a finding on the reason relied upon by the Respondent.
26. For those reasons, I find an error of law on ground two.

GROUND ONE

27. Having reached my conclusion on ground two, it is not strictly necessary for me to deal with ground one, but I do for completeness. I can do so shortly. I reject that ground for the following reasons.

28. First, the Appellant was legally represented. Although there is reference to PS (India) in the skeleton argument for the hearing before Judge Rowlands, that reference does no more than repeat the guidance.
29. Second, and for that reason, I do not accept that the Judge was bound to have regard to it. The Judge had determined that there were aggravating circumstances. The only point which then remained is the credit to be given to a voluntary departure. As the Judge pointed out at [11] of the Decision, however and as Mr Tufan reiterated, this was a voluntary departure in name only as the Appellant had come to the end of the line in terms of immigration applications and would have been removed if she had not left voluntarily. She knew by that time that she had no right to remain and should have left long before she did.
30. Third, as Mr Tufan pointed out, the factual circumstances of the appellant in PS (India) are very far removed from the present case. The appellant there was married to his wife and had returned when his asylum claim, and an application to remain had been rejected in order to obtain entry clearance. More importantly, paragraph 320(11) was in very different terms to the current version and the decision was based in part on the interaction of paragraph 320(7C) and 320(11) of the Rules.
31. The case of PS (India) had no obvious bearing on the present case given the Judge's findings, and there was no reason for the Judge to refer to it, having determined that there were aggravating circumstances. This ground adds nothing, as Judge Landes pointed out when granting permission.

CONCLUSION

32. I find an error of law on ground two. The Judge found there to be aggravating circumstances without taking account of the Appellant's evidence as to the manner in which and reasons why she had obtained the documents and services which she had. The Judge also failed to make any finding on the reason given by the Respondent for applying paragraph 320(11).
33. For the foregoing reasons, I am satisfied that the Decision contains a material error of law. I set aside the Decision. I have made directions below for a resumed hearing.
34. Mr Youssefian invited me to remit the appeal if I found an error. He accepted however that the appeal could remain in this Tribunal provided there was a resumed hearing. I consider it appropriate for the decision to be re-made in this Tribunal. Although there may be a degree of fact finding needed when re-making the Decision, that is likely to be limited and the facts of the case are not complex. Although I appreciate that it is unlikely that the Appellant will give evidence and therefore that her written evidence will be tested orally, I consider it

appropriate for there to be a resumed hearing and I have given directions below for that hearing.

DECISION

I am satisfied that the decision of First-tier Tribunal Judge Rowlands promulgated on 29 August 2019 discloses an error of law. I set aside that decision. I make the following directions for a resumed hearing:

- 1. Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which she wishes to rely.**
- 2. The resumed hearing is to be relisted before me on the first available date after six weeks from the date when this decision is sent with a time estimate of ½ day.**



Signed:
Upper Tribunal Judge Smith

Dated: 21 February 2020