



IAC-AH-SC-V1

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

Appeal Number: HU/20132/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 28 February 2020
Judgment given orally at hearing**

**Decision & Reasons Promulgated
On 22 April 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**HUSNAIN MUSHTAQ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Akinbolu of Counsel, HRS Solicitors LLP

For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 22 April 1990. He was in the UK between 2007 and 2015 with leave to remain, initially at least, as the child dependent of his father. He made an application for further leave to remain on 24 May 2012 which was refused, his father by that time having left the UK to return to Pakistan. The application was made on the basis of the appellant's ties to the UK, having arrived in 2007 when he was aged 17, having studied here and having a brother in the UK. His appeal against the refusal of that application was dismissed in 2014.

2. The appellant then made another application, for indefinite leave to remain on the basis of family life. On 24 July 2014 that application was also refused, on 4 December 2014. He then made yet another application for leave to remain on 5 March 2015, which was refused on 12 May 2015.
3. On 26 June 2015, following the execution of a search warrant at the appellant's home address, he was arrested and detained and thereafter left the UK on 4 July 2015. The appellant was an overstayer from 16 July 2014 which is when his appeal rights were exhausted.
4. The appellant, having left the UK voluntarily, and this is not disputed, at his own expense, then made an application on 8 June 2018 for entry clearance as a spouse. That application was refused in a decision dated 4 September 2018 and that refusal is the subject of this appeal. The application was refused with reference to paragraph 320(11) of the Immigration Rules ("the Rules"). That paragraph applies in circumstances where an individual has previously contrived in a significant way to frustrate the intentions of the Rules, in this case by overstaying and there are said by the respondent to be aggravating circumstances such as to justify the application of paragraph 320(11). Where that paragraph of the Rules applies, an application should "normally" be refused. Thus, a refusal based on paragraph 320(11) is discretionary rather than mandatory.
5. The appellant's appeal against the decision came before First-tier Tribunal Judge Kinch on 5 August 2019. Judge Kinch dismissed the appeal because she decided that the Entry Clearance Officer ("ECO") was correct in applying paragraph 320(11). Considering Article 8, she also concluded that the decision did not amount to a disproportionate breach of the appellant's right to family and private life.
6. The grounds of appeal in relation to Judge Kinch's decision argue the following. It is asserted that she erred in distinguishing the decision in *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 IAC. It is contended that there are, in fact, no "truly aggravating" features identified in this case, the phrase 'truly aggravating' being taken from [14] of *PS India*. It is argued that there was no evidence that the applications made by the appellant for leave were frivolous. Before removal directions were set the appellant left the UK, and thus there is no suggestion that he failed to comply with removal directions. The respondent, it is contended, would need to identify factors which are aggravating, sufficient to come within paragraph 320(11).
7. Ms Akinbolu relied on the grounds in her oral submissions. She took me to the decision in *PS India*, in particular at [11]- [14]. She emphasised that if the purpose is to encourage people to leave the UK, they should not be penalised unduly where there are no truly aggravating circumstances. That, it was submitted, is the import of *PS India*.
8. Ms Akinbolu highlighted various undisputed factual matters such as, for example, that the appellant entered the UK as a child and when his leave expired he sought further leave to remain on three occasions. Those

applications were unsuccessful because he did not meet the requirements of the Rules in different respects.

9. I was referred to what was said in the appellant's witness statement about the circumstances in which he made those applications and the legal advice that he was given. In those circumstances, it was submitted, Judge Kinch was wrong to distinguish *PS India*.
10. In her submissions, Ms Cunha readily accepted that Judge Kinch erred in law in misapplying Section 117B(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), that is to say the little weight provisions concerning a relationship formed with a qualifying partner at a time when the person is in the UK unlawfully.
11. She questioned, however, whether that error of law was material. Ms Cunha submitted that there was no misapplication of the decision in *PS India* in the sense advanced on behalf of the appellant. She pointed out the history in terms of the unsuccessful applications for leave to remain and the fact that the appellant only left after he was arrested. Ultimately however, it was accepted on behalf of the respondent that there were errors in the judge's reasoning in terms of identifying the aggravating features necessary for paragraph 320(11) to apply. But as I understood Ms Cunha's submissions, it was not accepted that those errors of law necessarily required the decision to be set aside. Even if they did, there were sufficient factors such as to mean that the ECO was correct to apply paragraph 320(11).

Assessment

12. I indicated to the parties that I was satisfied that Judge Kinch did err in law in her consideration of paragraph 320(11) and additionally in relation to Article 8 in terms of Section 117B(4) of the 2002 Act.
13. There is, it seems to me, an inadequacy of reasoning in the judge's decision in terms of the identification of aggravating circumstances within the meaning of the respondent's guidance, to which I shall turn in a moment. It is not necessary for me to decide the point in relation to whether she was right in saying that *PS India* could be distinguished because it may be that Judge Kinch was saying nothing other than that the facts of the appellant's case were different from those in *PS India*.
14. Nevertheless, I am satisfied that in coming to the conclusion that paragraph 320(11) applied, Judge Kinch failed to appreciate the import of *PS India*. The reported guidance in that case is as follows:

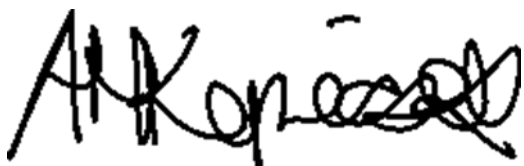
'In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C) the decision maker must exercise great care in assessing 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. Contrary to *PS (India)*, although one can see that Judge Kinch did seek to identify the aggravating circumstances, she fell into error in that respect as explained above.
16. So far as Article 8 is concerned, Judge Kinch decided that little weight was to be attached to the appellant's relationship with his wife, whom he married in December 2017 in Pakistan, applying s.117B(4)(b) of the 2002 Act. That provides that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. Although Judge Kinch acknowledged that the appellant was not in the UK unlawfully when he married the sponsor, she said that that was only because he had previously left the UK having been arrested and detained as an overstayer.
17. However, the evidence before the respondent was that they met in November 2017 in Pakistan. The appellant was not in the UK at that time. Whether Judge Kinch was under the impression that the relationship was formed in the UK before the appellant left is not clear. On any view, however, s.117B(4)(b) has no application to the circumstances of their relationship. In finding otherwise, Judge Kinch erred in law.
18. The errors of law are such as to require the decision to be set aside and for the decision to be re-made.
19. In re-making the decision I take into account what was said in *PS India* about the great care necessary in assessing the aggravating circumstances. It is also necessary to see if there is any assistance to be derived from the respondent's own guidance.
20. The current guidance appears to be that published on 14 November 2013 entitled 'Frustrating the intentions of the Immigration Rules: RFL07, paragraph 320(11)'. It contains a section entitled 'What are aggravating circumstances?'. There then follows a list, which is said not to be exhaustive. The fact that the list is not exhaustive necessarily means that there may be other factors not contained within the list that can be taken into account.
21. According to that guidance, the aggravating circumstances can include actions such as, and I summarise:
 - absconding
 - failure to comply with removal directions after illegal entry
 - previous recourse to NHS treatment when not entitled
 - receipt of benefits when not entitled
 - using an assumed identity or multiple identities
 - previous use of a different identity or multiple identities for deceptive reasons
 - vexatious attempts to prevent removal, for example, by feigning illness
 - attempts to frustrate arrest or detention

- a sham marriage, marriage of convenience or polygamous marriage in the UK
 - harbouring an immigration offender
 - facilitating people smuggling
 - switching nationality
 - vexatious or frivolous applications.
22. It is clear that the context of the examples above indicate that where aggravating circumstances are required, as they are in paragraph 320(11), those aggravating circumstances have to be something significant, or to use the phrase from *PS India*, “truly aggravating”. The word “truly” does not qualify the word aggravating, but it means that the circumstances must be, in truth, aggravating circumstances.
23. In this case, whilst the appellant made three applications for leave to remain after his leave expired, it is not said in the respondent’s decision and was not advanced on behalf of the respondent before me, that those applications were vexatious or frivolous, although the decision does refer to them. Apart from the respondent’s stance, it seems to me that there is no evidence to support a conclusion that any of those applications were frivolous or vexatious. Frivolous applications are not necessarily, or not even, the same thing as applications that do not succeed. No details of the applications were put before me on behalf of the respondent to demonstrate that any of them was frivolous. It appears to be the case simply that the applications were unsuccessful because they either did not meet the requirements of the Rules or, in the case of an outside Rules application, were just rejected on the merits.
24. The fact that the appellant left only after being arrested seems to me to add very little to the mere fact of his having been an overstayer. Being an overstayer, plainly, is not enough for the application of paragraph 320(11) because the individual has to be overstayer with attendant aggravating circumstances.
25. Looking at all the circumstances, I am not satisfied that it has been established by the respondent that there are aggravating circumstances in this case sufficient for paragraph 320(11) to apply.
26. Accordingly, the appeal must be allowed.

Decision

27. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and I re-make the decision by allowing the appeal under the Immigration Rules with reference to Appendix FM.



Upper Tribunal Judge Kopieczek
2020

Date: 03rd April

TO THE RESPONDENT
FEE AWARD

If a fee was paid, and assuming I have power to do so, I make the relevant order in favour of the appellant in terms of a fee award.