



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

Appeal Number: HU/23948/2018

THE IMMIGRATION ACTS

**Heard at Birmingham Civil Justice
Centre, Priory Courts
On 5th February 2020**

Decision & Reasons Promulgated

On 4 March 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR MANJIT SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss H Masih (Counsel)

For the Respondent: Mr C Howells (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Bristow, promulgated on 23rd July 2019, following a hearing at Birmingham Civil Justice Centre on 15th July 2019. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, and was born on 28th April 1982. He appealed against the decision of the Respondent dated 10th October 2018, refusing his application for leave to enter the United Kingdom on the basis of his relationship with his wife, a British citizen, who is present and settled in the United Kingdom.

The Judge's Findings

3. The judge had regard to the fact that the appeal before him involved a person who had entered the UK clandestinely in around 2005 or 2007. He was then arrested on 3rd December 2009 and granted temporary admission. He was subject to a deporting condition. He failed to report. He was listed as an absconder. On 9th January 2013, he sought to regularise his stay when he applied for leave to remain on the basis of his relationship with his first wife. This was refused on 4th December 2013. He did not depart the UK. The following year on 3rd December 2014, the Appellant made a further application for leave to remain on the basis of his relationship with his former wife. This was refused. He appealed. The appeal was dismissed. On 28th April 2016, he applied for leave to remain on the basis of his relationship with his current wife. This was rejected. He was appeal rights exhausted on 5th January 2017. He then made a couple of applications which failed to get a proper consideration, in circumstances where he was not himself beyond reproach. He then voluntarily departed the UK on 15th November 2017 after having been in the UK for ten years without leave. He now sought to re-enter on the basis of his relationship with his current partner. He met the eligibility requirements for the English language. He met the financial eligibility requirements as well. He did not fall for refusal on the ground set out in S-EC.2.2.(a) of Section S-EC, given the suitability requirements set out for entry clearances there. The only issue, as the judge properly identified, was whether the Appellant's entry clearance refusal was properly made under paragraph 320(11) of the Immigration Rules.
4. The judge had regard to the fact that the decision in **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440**, made it clear that the refusal for entry clearance in a case such as this is not one that leads to an automatic prohibition on the grant of entry clearance, as is the case with paragraph 320(7)(b). The refusal in this case was a "discretionary" matter. In exercising such a discretion "great care in assessing the aggravating circumstances said to justify refusal" must be taken and that the decision maker "must have regard to the public interest in encouraging those lawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance" (see paragraph 23 of the judge's determination). The judge expressly stated that "this makes it clear that it is a discretionary grant" (paragraph 24).
5. In this case, however, the Appellant did not depart the UK in 2017, remained unlawfully for ten years, and "observed the Immigration Rules but very late in the day". His "immigration history" is a further factor. It is an immigration history which, I have found, means that he is properly

refused entry clearance on the basis of paragraph 320(11)” (see paragraph 44 of the determination).

6. The appeal is dismissed.

Grounds of Application

7. The grounds of application state that the judge had erred in law in a number of respects. First, whilst it was the case that the Appellant did not dispute the immigration history set out by the Respondent, the refusal of entry clearance certificate on the basis of paragraph 320(11) was unwarranted if it was stated that the Appellant had made frivolous applications and that he had absconded, because these matters had not been particularised in the allegation made by the Entry Clearance Officer. The judge erred in finding (at paragraph 25) that he was satisfied that the Appellant did abscond and at least one of the aggravating features was present. The initial burden of proof is upon the Respondent Secretary of State. She has to establish that there were aggravating circumstances (see paragraph 10 of **JC (Part 9 HC 395 - burden of proof) China [2007] UKAIT 00027**). The decision of Judge Bristow was silent on whether the Respondent had discharged the burden of proof. The issue had not been advanced by the Presenting Officer and it was not open to the judge to find that there was a presence of this aggravating feature which engaged paragraph 320(11). The decision of Judge Bristow was silent on whether the Respondent had discharged the burden of proof. The issue had not been advanced by the Presenting Officer and it was not open to the judge to find that there was a presence of this aggravating feature which engaged paragraph 320(11). The judge’s conclusion (at paragraph 25) that the applications were made by the Appellant in circumstances which were frivolous and tantamount to a further aggravating feature, without providing reasons for finding the same, was an error.
8. Secondly, the judge also misdirected himself in law by double counting against the Appellant. It was true that the Appellant had overstayed by ten years, but this cannot be categorised as “one further significant aggravating circumstance”, as the judge purports to do, because the overstaying is the entry point for the application of paragraph 320(11), and it is not specifically an aggravating factor that is so listed in the Rules.
9. Third, having made the errors above, the judge then failed to undertake a balancing exercise, to evaluate the Appellant’s family right interests against which the paragraph 320(11) discretion was to be exercised. The case of **PS** (cited above) made it clear that, given that refusal under this paragraph was only “discretionary”, that “great care” had to be exercised”, before it was decided that family life rights should be subjugated to the public interest in maintaining a refusal. The fact that the Appellant had departed the UK voluntarily was a specific factor that went in his favour, as was made clear in the case of **PS** itself. It could not be used against him, as the judge had done.

10. Fourth, insofar as the judge did consider the family life of the Appellant, he had done so “outside the Immigration Rules”, by applying Section 117B(4) of the 2002 Act. The judge had stated (at paragraph 29) that he “can attach little weight to that relationship as a result of the operation of Section 117 of the 2002 Act”, but this was an entirely separate and distinct (statutory) consideration and should not encroach on the evaluative exercise that was required under paragraph 320(11). The effect of the judge adopting this erroneous approach was to discount the weight to be given to the strength of the Appellant’s family life with his partner when assessing how the discretion under paragraph 320(11) was to be exercised. This was a material error of law. The Immigration Rules were met. If they were met then there was no public interest in exclusion or removal.
11. On 28th October 2019, permission to appeal was granted by the Tribunal on the basis that the judge’s findings in relation to “aggravating circumstances”, and in particular in the assertion that the Appellant had absconded, in circumstances where there was an absence of evidence to support this, could not be upheld (paragraph 25). There was also an inadequacy of reasoning on material matters in relation to the application of paragraph 320(11), given that this was a discretionary basis for refusal and the decision disclosed “tautological reasoning and failure to determine whether the Respondent had discharged the evidence or burden of law when relying upon 320(11)”. The judge had also wrongly given weight to immaterial matters. He had further failed to look at the Appellant’s human rights appeal in the proper context, relying upon the position outside the Immigration Rules under Section 117B(4) of the 2002 Act.

Submissions

12. At the hearing before me, Miss Masih relied upon the detailed grounds of application. She submitted that there had been no evidence put before the Tribunal that the Appellant had absconded. There was no evidence that he had made frivolous applications. In his witness statement he had made it quite clear that he was advised by his solicitor to make the applications, and that is what he had done. The making of applications per se did not amount to those applications being necessarily treated as being frivolous.
13. Secondly, and in any event, even if all these matters were true, the judge had to demonstrate that in exercising the discretion accorded to him under paragraph 320(11) that the family life matters, and the Appellant’s human rights, had been specifically considered in the context of paragraph 320(11). Instead, he had drawn attention to Section 117B(4) of the 2002 Act.
14. For his part, Mr Howells submitted that neither the issue of absconding nor of the Appellant having made frivolous applications was conceded by the Presenting Officer. First, as far as the making of “frivolous applications” was concerned, the judge had stated that the Appellant had made an

application on 28th April 2016, which was inevitably rejected because his appeal was still pending before the Upper Tribunal, and could not be considered. This in itself made it a frivolous application. Moreover, when he made his section application on 18th January 2017, he failed to pay the fee and provide his passport, so that this application too was inevitably rejected. This too was a frivolous application.

15. Second, insofar as the Appellant having absconded was concerned, the judge had pointed out that, “at least one of the aggravating circumstances in the list, that of absconding, is present” (paragraph 25). He had then gone on to say that the Appellant had also made “frivolous applications” and that this was a second aggravating factor (paragraph 25). However, Mr Howells also stated in the same breath that, “we accept that the judge erred in treating the length of overstaying as an aggravating circumstance because overstaying is the entry point for paragraph 320(11)”. Mr Howells also stated that, “we accept that at paragraph 29, the judge looks as the Appellant’s family life outside the Immigration Rules and not within the Immigration Rules”. However, Mr Howells then ended by stating that at paragraph 44 of the determination the judge was quite clear that the Appellant was unable to refer to the fact that his partner was severely ill, or was taking prescribed medication, in circumstances where she actually worked two jobs, and where the Sponsor herself could visit the Appellant in India should she wish to do so.
16. In reply, Miss Masih submitted that the matters referred to by Mr Howells did not show a proper exercise of discretion in any event. It was suggested that the judge had drawn attention to the fact that the Sponsor was not severely ill, or subject to prescribed medication, or that she could visit the Appellant in India, were not matters that went to the merits of family life, which is what the judge had to consider. Secondly, if one looks as the skeleton argument of Miss Masih, she sets out (at paragraph 12) the guidance that is provided by the Home Office to its staff, being dated 11th January 2018, which sets out the manner in which paragraph 320(11) is to be applied. The applicant has to do one or more of the following, and here it is made clear that he or she has to be “an illegal entrant”, to have “overstayed” and to have engaged in “employment”. If these factors are present then this is the entry point for the application of paragraph 320(11). However, insofar as “aggravating circumstances are concerned, the guidance makes it quite clear that this includes “absconding” and making “troublesome or frivolous applications”. There is no mention here whatsoever that overstaying is an aggravating factor or that taking employment is an aggravating factor. Yet, this is how the judge appears to have approached the matter.

Error of Law

17. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law, such that I should set aside the decision. My reasons are as follows. First, there is no doubt that the judge has employed tautological reasoning and has double counted the matters

that are to be taken against the Appellant. It is quite clear, as Mr Howells has properly accepted that the judge has used the length of overstaying, of ten years by the Appellant, as a matter that is “aggravating”. Yet, that is plainly not how the Rules are meant to be interpreted. What is aggravating is the Appellant had “absconded”. Yet, if one looks at the determination itself, whether or not it is the case that this matter was conceded or not by the Secretary of State, it is plain that there is no evidence put before the Tribunal. All that the judge can state is that, “at least one of the aggravating circumstances in the list, that of absconding, is present” (paragraph 25). Yet, no reference is made to any evidence put forward by the Respondent in this regard at all.

18. Secondly, insofar as the judge states that “the refusal letter only identifies making frivolous applications” (paragraph 25). However, this is again a matter which is not made good.
19. Finally, there is a stark absence of consideration by the judge of the Appellant’s family rights. This is a serious omission. It has to be recognised, in circumstances where paragraph 320(11) is a discretion of provision, that potentially, if this line of logic is pursued to its ultimate extent, it is possible to refuse entry to a person indefinitely, quite simply because they have overstayed and then decided to return back to their home country to make an application in a proper manner to join their partner. Yet, that cannot be in the public interest because as **PS** makes quite clear a decision maker “must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and to seek to regularise their status by an application for entry clearance”. Accordingly, that which ought to have been very firmly in the Appellant’s favour, had been taken to be against him, when the judge states that, “He observed the Immigration Rules but very late in the day” (paragraph 44).
20. In normal circumstances, having made a finding of an error of law of this extent by the decision maker below, I would have been happy to have remade the decision. However, given that the Appellant’s witness statement is very brief and only maintains that no frivolous applications were made, I do not have the evidence before me to remake the decision in a proper manner which this appeal warrants. Accordingly, the proper course of action is for this appeal to be remitted back to the First-tier Tribunal to be determined by a judge other than Judge Bristow.

Notice of Decision

21. The decision of the judge below amounted to an error of law. I set aside of the decision of the judge below. I remit the case back to the First-tier Tribunal pursuant to practice statement 7.2(a) of the Practice Direction for the reasons that I have given above.
22. This appeal is allowed.
23. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

15th February 2020