



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03574/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 April 2018

Decision & Reasons Promulgated  
On 8 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

DIANA AMADA NESTEL  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - MANILA

Respondent

**Representation:**

For the Appellant: Mr L Magsino of Queen's Park Solicitors  
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Walters promulgated on 29 June 2017 dismissing the Appellant's appeal against a decision to refuse entry clearance on human rights grounds.
2. The Appellant is a citizen of the Philippines born on 22 January 1977. She first entered the United Kingdom pursuant to entry clearance as a visitor on 16 September 2001. The Appellant's entry clearance appears to have been sought by her then employer; she was employed by a doctor in the capacity of a domestic worker. Whilst it appears to have been clear from the documentation surrounding that application that it was intended that she should accompany her employer to the UK and thereby work as his

employee in the UK, entry clearance was issued in the capacity of a visitor rather than in the then category of domestic worker. Be that as it may, the Appellant was issued with an entry clearance endorsement in her passport valid from 27 July 2001 until 27 October 2001, and it appears that upon her entry she was conferred with six months' leave to enter.

3. Having thus entered, on the following day the Appellant left her employer. She remained in the United Kingdom thereafter, notwithstanding the expiry of her visit visa. It is a feature of her case that she sought alternative employment in the capacity of a domestic worker, at least up until 2011 when she met the man who was to become her husband.
4. The Appellant did make an application for further leave to remain on 11 April 2002, which would have been shortly after the expiry of her leave as a visitor. She sought leave to remain as an overseas domestic worker, but her application was refused on 12 March 2003 with no right of appeal. The refusal drew to the Appellant's attention that her limited leave had expired on 16 March 2002 and she should now leave the United Kingdom without delay. However, she did not leave. The Respondent's version of the chronology has it that the Appellant made a further application for leave to remain on 27 March 2006; closer scrutiny reveals that this was not an application but an attempt to lodge a notice of appeal out-of-time against the earlier refusal of leave to remain. In due course the Tribunal issued a decision confirming that the Appellant had no right of appeal.
5. For reasons that are unclear, the Entry Clearance Officer in the current decision refers to this history and describes the Appellant as having become 'appeal rights exhausted' on 29 March 2011. However, 29 March 2011 is the date on which the Appellant made an application for leave to remain relying on Article 8 - an application which was refused on 17 May 2011. Again, there was no right of appeal in respect of this decision. The Appellant's then representatives wrote requesting reconsideration. It is common ground that the application for reconsideration was still outstanding when the Appellant made a voluntary departure from the UK on 4 November 2015.
6. It is clear that that departure from the UK was made for the purpose of making an entry clearance application rather than awaiting reconsideration of the earlier adverse decision. This is clear because the application for entry clearance that is the subject of these proceedings was made on 7 November 2015.
7. As adverted to above, it was during the time that the Appellant was in the UK that she met the man who was to become her husband. The Appellant first met Mr Darran Nestel in 2011 and the couple began living together in 2012. They were married in the

United Kingdom on 25 October 2015. The Appellant's application of 7 November 2015 was for entry clearance as a spouse.

8. The Entry Clearance Officer was satisfied that the Appellant met the requirements of Appendix FM of the Immigration Rules in all respects. However, the application was refused with reference to paragraph 320(11) of the Immigration Rules. The Notice of Immigration Decision rehearses something of the Appellant's immigration history and concludes that the Appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules and that her conduct constitutes aggravating circumstances. It was identified that there was a discretion inherent in paragraph 320(11) of the Rules, but this was not exercised in the Appellant's favour in light of her immigration history and the circumstances of her residency in the UK, in particular the fact that she entered the UK as a visitor and worked illegally for at least eight years receiving employment income in cash which was not declared. The Respondent, for much the same reason, considered that the decision would not constitute a disproportionate breach of the Appellant's Article 8 rights.
9. The Appellant appealed to the IAC on human rights grounds.
10. The appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Walters.
11. The Appellant sought permission to appeal which, in the first instance, was refused by First-tier Tribunal Judge Shimmin, but subsequently granted by Upper Tribunal Judge Kebede on 2 March 2018.
13. Although this was an appeal based on human rights grounds, it is relevant to note that it is not disputed that there was a genuine marital relationship and that the requirements of Appendix FM were satisfied. Indeed, the First-tier Tribunal Judge concluded that the first two **Razgar** questions should be answered in the Appellant's favour (see paragraphs 47 and 48).
14. Accordingly, it may be seen that the Respondent's position on proportionality essentially was congruent with the basis for the invocation of paragraph 320(11). Accordingly, the proportionality issues in this case were in substance those identified under the Immigration Rules by the Entry Clearance Officer with reference to paragraph 320(11).
15. Paragraph 320(11) is in the following terms:-

***“Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused***

...

(11) *where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:*

- (i) *overstaying; or*
- (ii) *breaching a condition attached to his leave; or*
- (iii) *being an illegal entrant; or*
- (iv) *using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);*  
*and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process”.*

16. It may be seen that there are in effect three elements to this provision. Firstly, it must be established that an applicant has previously contrived in a significant way to frustrate the intentions of the Rules. Secondly, there must be other aggravating circumstances. Thirdly, if there is both a history of previous contrivance and aggravating circumstances, it is necessary to consider whether the discretion inherent in paragraph 320(11) should be exercised in favour or against an applicant.

17. In my judgement it is not discernible in the decision of the First-tier Tribunal Judge what was considered to constitute ‘aggravating circumstances’ on the particular facts of this case. Nor is it discernible how the First-tier Tribunal Judge approached the issue of discretion inherent in paragraph 320(11).

18. The Judge made adverse findings in respect of the Appellant’s immigration history which are set out at paragraph 49 in the following terms:-

*“The more important issue was that the Appellant deliberately continued to work for a long period after being expressly informed that that was not permitted. The other matter was, of course, the fact that she simply ignored the Respondent’s Directions for her to leave the U.K. and continued to stay here.”*

19. On the face of it those matters accord with the matters relevant to ‘contrivance’, that is to say overstaying or breaching a condition. Those matters do not obviously correlate with the matters that are described as aggravating circumstances by way of illustration in the Rule. There is no suggestion, for example, that the Appellant absconded. Indeed, she maintained contact with the Respondent through a series of applications,

and indeed the outcome of representations was pending when she voluntarily departed the United Kingdom. There is no suggestion that the Appellant assumed a different identity or switched nationality, and it has not been said that any of her applications were frivolous or that she did not comply with any documentation process.

20. There is further guidance in respect of what might constitute aggravating circumstances contained in internal instructions to Immigration Officers: 'Frustrating the intentions of the Immigration Rules: RFL07, paragraph 320(11)' (published in November 2013). A copy of the internal instructions was before the First-tier Tribunal Judge, and was the subject of submissions: it was argued on behalf of the Appellant that the Entry Clearance Officer's decision was not in accordance with the law because internal guidance had not been followed.
21. The non-exhaustive list of potential aggravating circumstances set out in the guidance reflect to a significant extent the matters set out in the Rule itself. I note that amongst the potential factors listed is failure to comply with removal directions. In the context of the instant case, although the Appellant was given to understand by the Respondent that she had no basis to remain in the United Kingdom, it is not suggested that the Secretary of State at any point issued removal directions with which the Appellant failed to comply. Nor is anything, for example, suggested in respect of "*previous recourse to NHS treatment when not entitled*", or "*previous receipt of benefits... when not entitled*".
22. The provisions of both the Rule and the guidance were clearly before the First-tier Tribunal Judge. He addresses the guidance at paragraphs 51-54 of the Decision at page 8. (I refer to the page number because the paragraph numbering is mistakenly repeated; page 9 also has paragraphs numbered 51-54.)
23. The Judge considered the internal guidance in the context of a submission as to the decision being not in accordance with the law, but concluded that the Entry Clearance Officer had had adequate recourse to the guidance in reaching the decision. This is not the same as the Judge making an independent evaluation of the issue of aggravating circumstances, and indeed the Judge concludes this part of the decision by simply stating "*There are only two issues in the case: overstaying despite being directed to leave, and unlawfully taking employment despite being told to desist*". The Judge does not express a view and does not express a finding as to whether those matters amounted to aggravating circumstances as opposed to simply being aspects of contrivance to frustrate the intention of immigration control.

24. In the circumstances it seems to me that the Judge's ultimate conclusion under Article 8, which is set out in its entirety at paragraph 56 (page 10), is inadequately reasoned. The Judge says this:-

*"Having considered all the evidence, I find that the Appellant's actions in refusing to leave the U.K. when directed to do so and her unlawful working were matters which lasted for such a lengthy period that the ECO was justified in finding that they frustrated the intentions of the Immigration Rules and, in addition, makes the exclusion of the Appellant proportionate."*

25. In that paragraph the Judge again refers to the element of 'contrivance' - "*frustrated the intention of the Immigration Rules*" - but does not refer to the element of 'aggravating circumstances'. Far less does the Judge refer to, or consider, the residual discretion. In my judgement the final phrase of the final sentence of paragraph 56 - "*in addition, makes the exclusion of the Appellant proportionate*" - is inadequate by way of reasoning.
26. I find therefore that the Decision is vitiated for error of law and must be set aside.
27. The representatives before me today were content that I should remake the decision in the appeal without hearing further evidence. I should say that the Sponsor was present and prepared to give evidence if that were necessary. However, Mr McVeety on behalf of the Respondent was extremely hesitant to advance any submission to the effect that, indeed, there were aggravating features in the Appellant's immigration history. In any event, in the alternative, he did not seek to resist the notion that the residual discretion under paragraph 320(11) - which it was accepted informed the proportionality exercise - should not be exercised against the Appellant. Of particular significance in this regard were the facts that the Appellant and the sponsor were in a longstanding relationship dating back to 2011 with cohabitation from 2012 up until the Appellant's departure for the Philippines, that that was a genuine marital relationship, that the requirements of Appendix FM were otherwise not in dispute, that the Appellant had maintained contact with the immigration authorities whilst in the United Kingdom, and indeed had left the United Kingdom voluntarily while she still had representations outstanding.
28. The voluntary departure is also a significant matter to which positive weight should be given in accordance with the observations in the decision of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)**.
29. In all such circumstances I am content to accept the effective concession on the part of the Respondent that the decision to deny the Appellant entry clearance was a disproportionate interference with the mutual Article 8 rights of the Appellant and the sponsor. The appeal is allowed on that basis accordingly.

**Notice of Decision**

30. The decision of the First-tier Tribunal contained a material error of law and is set aside.

31. I remake the decision in the appeal. The appeal is allowed on human rights grounds.

32. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: **7 June 2018**

**Deputy Upper Tribunal Judge I A Lewis**

**TO THE RESPONDENT**

**FEE AWARD**

I have allowed the appeal and in all of the circumstances make a full fee award.

Signed:

Date: **7 June 2018**

**Deputy Upper Tribunal Judge I A Lewis**  
(*qua* a Judge of the First-tier Tribunal)