Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12064/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 23 August 2018	**On 23 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR LATWINDER SINGH
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Appearances:
For the Appellant: Mr A Mackenzie, Counsel instructed by TRP Solicitors
For the Respondent: Ms H Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India, date of birth 15 August 1979, appealed against the ECO's decision, dated 29 October 2015, to refuse entry clearance by reference to paragraph 320(11) of the Immigration Rules but also with reference to Appendix FM of the Immigration Rules. The appeal first came before First-tier Tribunal Judge Parker who on 9 May 2017 dismissed the appeal on the basis that the Appellant had

failed to show that he had not used deception as part of his application and the judge was not satisfied that the Appellant was in a genuine relationship with his wife. Following permission to appeal on 25 May 2018, my decision was promulgated in which I found that the original Tribunal's decision could not stand in relation to the considerations of paragraph 320(11) of the Rules and its consequential effects upon the assessment of the claim.

2. I concluded that the matter should be remade at a further hearing in the Upper Tribunal.

3. The Appellant applied for entry clearance as the husband of a British national settled in the UK, Mandeep Kaur Kalar (MKK) born on 2 March 1985. The basis of the decision under paragraph 320(11) of the Rules was because the Appellant had come into the United Kingdom unlawfully, remained here for some nine years unlawfully before leaving to seek entry clearance. The ECO considered that those actions called into question the Appellant's intentions and was not satisfied that the relationship with MKK was genuine or subsisting or that the couple intended to live together permanently in the UK. There was no dispute that the Appellant met the financial requirements and the English language requirements of the Rules.

4. The history of this matter is substantially set out in a wealth of documents and the significant of bundles but I summarise the facts as follows. The Appellant lived unlawfully in the UK between 2006 and 2015. Whatever his reasons for coming to the United Kingdom, he must have entered unlawfully or on a basis that left him unrecorded. He met MKK in 2011 and shortly thereafter disclosed to her that he had uncertain and unsettled immigration status. They began a close relationship and decided to get married in 2012 and received the blessings of MKK's family which is evidenced within the bundle. In September 2014 his own family met MKK, after MKK and her parents visited his family in India. The couple entered into a civil marriage on 9 January 2015 and a Sikh wedding on 9 April 2015. Those marriage certificates are contained within the Appellant's bundle before the Immigration Judge.

5. They began to live together after the religious ceremony. There was, after the civil marriage, some indication that further enquiries would be made by the immigration authorities but nothing was done. The Appellant sought to regularise his immigration status in 2013 on the basis of a lack of ties with India but the application was refused. The basis on which the Appellant was advised to apply appears to have been misconceived because the Appellant was invited not to mention his relationship with MKK as a couple nor that they were then cohabiting.

6. The information provided was incorrect in some respects but not by the Appellant and after receiving advice and further legal proceedings the Appellant was advised to leave the UK and make an out of country application which he did. He then applied to return as the spouse of the Sponsor, MKK.

7. Evidence was adduced, which was not challenged, as to the frequency of the visits that MKK had made to India after the occasion when she returned with her husband in 2015. There have effectively been two trips, for no longer than the periods of time she could get leave from work, each year to India. In addition MKK and the Appellant are in regular contact on a daily basis by telephone and using social media and the Appellant has maintained contact not only with MKK but others of her family members.

8. The Appellant has been unable to find work in India and has been supported by regular money payments by MKK, some of which have been of significant size. Again the evidence is fully set out in the bundles prepared for the Upper Tribunal hearing and I do not need to recite them because ultimately there was no challenge to that factual basis advanced in the statements provided and by the witnesses who attended the hearing.

9. MKK gave evidence and was completely consistent and clear about the nature of their relationship, her knowledge of his circumstances and how they had decided he must return to India to make an out of country application. There was no challenge to MKK's evidence, to that of her father and to her six sisters and others including brothers-in-law. Those are to be found in the Upper Tribunal bundle at pages 11-75.

10. In addition there were of course, as I took into account, the Appellant's statements contained in the First-tier Tribunal bundle, the Upper Tribunal bundles and MKK's statements similarly in both bundles. The statements of MKK's father and mother are contained within both bundles as well.

11. In the circumstances I proceed on the basis of the essentially uncontested evidence of the relationship, its durability and their wish to be united together, particularly as they have now been apart for about three years. In that time it has plainly been stressful for MKK and she has carried on working, doing two jobs and identifying what she can do to assist her husband. The Upper Tribunal bundle, as indeed the First-tier Tribunal bundle, contains a wealth of evidence to show the journeys that MKK has made, the money transfers, the call logs and the evidence of continuing contact between the two of them.

12. I now turn to the basis of refusal. It is clear under paragraph 320(11) of the Immigration Rules that entry clearance should normally be refused, which of course demonstrates a measure of discretion

> "where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
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> (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 ...
>
> 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."

13. The case law, which is limited but deals with paragraph 320(11), is PS India [2010] UKUT 440. PS India indicates that, in addition to specifically the Rules' requirements, there is entry clearance guidance which lists in relation to the issue

what are considered although not exhaustively to be aggravating circumstances. It is clear that its objectives include not so much the mere failure to follow the Rules but a use of deliberate, schemed or planned undermining of immigration controls or contrived to achieve that end and that a decision to refuse under paragraph 320(11) must lead to a proportionate outcome under Article 8. Any other outcome would frustrate the intentions of Appendix FM to set out categories of cases where the Secretary of State accepts the public interest in exclusion is outweighed under Article 8 by countervailing factors. Further mere overstaying and breaching conditions is not sufficient to meet the threshold. A combination of illegal entry and overstaying really does not seem to me to be materially different in terms of the criticism so that illegal entry is one and overstaying another form of immigration misconduct.

14. Rather it seems to me that they are different sides of the same coin. It is also clear that the guidance recites a number of issues in relation to failing to comply with directions or restrictions or abusing the benefit system, use of multiple identities, sham marriages and so forth, switching nationality and vexatious, frivolous applications and so on give rise to concerns and may constitute aggravating circumstances.

15. None of the examples in paragraph 320(11) guidance seem particularly pertinent nor are they asserted by the Respondent to be aggravating circumstances. Remaining in the UK unlawfully does not, it seems to me in this case, amount to an aggravating circumstance. In any event the Appellant's conduct in terms of his immigration history was not spoiled by making false claims for asylum or protection or seeking to abuse the appellate system in order to avoid removal.

16. It is in his favour that he left the UK voluntarily. The failure to mention his wife in his 2013 application was not evidently done to try and frustrate the intentions of the Rules. At that stage the couple were not yet married, were not cohabiting but had known each other for some two years. It is unlikely it seems to me that were that relationship to have been relied upon it would not have been regarded as sufficiently significant or durable. There is no need to criticise the advice he received in not

mentioning MKK at that stage and it is quite understandable why immigration practitioners might not have done so.

17. It did not seem to me that the failure to mention MKK is of the kind which is deliberately intent on securing an advantage in immigration terms but rather it really hindered the Appellant in rendering him susceptible at a later date to not having mentioned it. I therefore conclude that as a matter of fact and degree there were no demonstrated aggravating circumstances raised by the Secretary of State nor did Ms Aboni seek to argue that there were.

18. So far as the genuineness of the marriage is concerned, the evidence is truly overwhelming and Ms Aboni, through a sensible decision not to cross-examine, clearly recognised the weight and force of the evidence and how difficult it would be, if not preposterous, to suggest that there was not that relationship. The facts of the civil ceremony and the wedding, the involvement of the families and the issues arising under that again it is clear and sufficient that there was no suggestion that the Appellant was not genuine entering into this relationship with MKK.

19. There is it seems to me nothing that supports a consideration that this was at the outset a sham marriage or that it is a marriage of convenience but rather it is a marriage where unhappily the couple have been kept apart now from enjoying the fullness of married life for some three years.

20. In these circumstances on the findings of fact which I have made I conclude, having regard and applying Sections 117A and 117B, that there is nothing to indicate that the public interest should not be given significant weight in the assessment. The Appellant plainly has an ability to work but he would not on coming to the UK at the outset be a burden upon the taxpayer and his ability to speak English would plainly with presence here return to the level it was at when he originally was in the United Kingdom for the number of years he was. I take into account and give it little weight that the relationship was entered into in the full knowledge that his status in the UK was precarious. Similarly I take into account that his Sponsor and MKK are in a

position to support him in the UK until he gets settled and finds employment and there is nothing to indicate he would not do so.

21. In these circumstances the public interest in maintaining immigration controls and proper border controls is an entirely legitimate objective. I conclude that the Respondent's decision is an interference in establishing family life and establishing it in the UK where MKK has all her family, her roots, her employment and financial wherewithal. She is a British national and taxpayer, she does not wish to make a life in India. It seemed to me that the public interest in maintaining border controls, whilst very important is not in this case of such importance as to justify the Respondent's decision and the continued interference in their relationship. I find therefore particularly in the light of the fact that the immigration history ultimately led to him properly leaving the UK of his own volition and making an out of country application did stand to his credit and diminished the extent to which the public interest might be concerned over the abuse of immigration controls.

22. In the circumstances I find the continued separation of the Appellant and MKK is disproportionate.

DECISION

The appeal is allowed under Article 8 ECHR.

ANONYMITY ORDER

No anonymity order was sought nor is one required.

FEE AWARD

A fee of £140 was I understand paid and in the circumstances a fee award in that sum is appropriate.

Signed Date 10 September 2018

Deputy Upper Tribunal Judge Davey