Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01749/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 11th December 2018	**On 08th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ALTAF HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr A Salam of Salam & Co Solicitors Limited
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Resident Judge of the First-tier Tribunal Zucker (the judge) promulgated on 27th November 2017.

2. The Appellant is a citizen of Bangladesh born 1st February 1980. On 22nd November 2016 he applied for entry clearance to enable him to settle in the UK with his spouse Nasima Begum who is a British citizen and to whom I shall refer as the Sponsor.

The Refusal

3. The application was refused on 4 January 2017. The reasons are briefly summarised below.

4. The Respondent refused the application with reference to paragraph 320(11) of the Immigration Rules. The Respondent contended that this applied because the Appellant had overstayed in the UK, worked illegally, and had made frivolous applications. The Respondent was satisfied that he had contrived in a significant way to frustrate the intentions of the Immigration Rules.

5. The application was also refused with reference to S-EC.2.2.(a) of Appendix FM which provides than an application will normally be refused on grounds of suitability if, whether or not to the applicant's knowledge, false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application). The Respondent's view was that the Appellant had made false representations as when he had been arrested on 11th November 2014 he had stated that he was not in a relationship. However, in his application form he stated that his relationship with the Sponsor started in November 2014. He had not adequately explained this discrepancy.

6. The application was also refused with reference to E-ECP.2.6 and 2.10 which require that the relationship between the applicant and partner must be genuine and subsisting, and the couple must intend to live together permanently in the UK. The Respondent did not accept that the relationship was genuine and subsisting or that the couple intended to live permanently together because of the discrepancy as to when the relationship started.

7. The Respondent considered Article 8 of the 1950 European Convention on Human Rights. It was not considered that the application raised any exceptional circumstances which would warrant granting leave to enter the UK outside the Immigration Rules.

The First-tier Tribunal Hearing

8. The judge heard oral evidence from the Sponsor. The judge found that the discrepancy as to when the relationship commenced was resolved in the Appellant's favour. The judge found that the relationship developed and matured after the period of initial detention in the UK in 2014. The Sponsor visited the Appellant while he was detained in the UK and thereafter their relationship matured. The couple returned to Bangladesh voluntarily. The judge accepted that there was a genuine marriage in Bangladesh on 15th June 2015.

9. The judge found that the relationship had been entered into when the Appellant's immigration status was precarious which affected the weight

that could be given to the relationship. The judge found at paragraph 12 that the Appellant had overstayed, and worked when he was not entitled to do so, and when initially detained had made an application for asylum, albeit on advice, although it was accepted that this was subsequently withdrawn. The judge commented;

> "That conduct is the sort of conduct which can undermine the immigration system (paragraph 320(11), though discretionary in effect applies and is to be put into the mix.)"

10. The judge found that considerable weight must be given to the public interest in this case and that a couple do not have a right to choose where they enjoy their family life. It was found that family life could continue in Bangladesh, and in coming to that view the judge took into account the fact that the Sponsor is a British citizen, in employment, and with family connections in the UK including her son who is at university. The judge concluded that there was no sufficient basis to find that the private interests of the Appellant and Sponsor outweigh the public interest and therefore the appeal was dismissed.

The Application for Permission to Appeal

11. In brief summary it was submitted that the judge had erred in finding that paragraph 320(11) of the Immigration Rules applied. It was pointed out that the Appellant had voluntarily departed from the UK. His claim for asylum was withdrawn three days after it was made. It was therefore submitted there were no aggravating circumstances so that paragraph 320(11) should have had no application to the Appellant's case.

Permission to Appeal

12. Permission to appeal was initially refused by Judge Frankish but subsequently granted by Upper Tribunal Finch in the following terms;

> "The Appellant made a voluntary return to Bangladesh and waited for more than a year before applying for entry clearance. The evidence did not suggest that the Appellant had made a frivolous application for asylum, as he withdrew that application when he had received legal advice that he should do so. There was also no evidence that the Appellant had absconded, failed to meet conditions of leave or bail, assumed false identities, switched nationalities or failed to comply with re-documentation processes.
>
> Therefore, it is arguable that the First-tier Tribunal Judge's reliance on paragraph 320(11) of the Immigration Rules undermined his application of the principle of proportionality for the purposes of Article 8(2) of the ECHR.
>
> Therefore, the Grounds of Appeal do identify arguable errors of law and it is appropriate to grant permission to appeal."

The Upper Tribunal Hearing

13. Mr Tan conceded that the decision of the First-tier Tribunal contained a material error of law in that there were no aggravating circumstances to justify applying paragraph 320(11), and this materially affected the consideration of proportionality and the public interest.

14. I took the view that the concession was rightly made and did not need to hear from Mr Salem on this point. I set aside the decision of the First-tier Tribunal.

15. I was invited by both representatives to proceed and remake the decision based upon the evidence that was before the First-tier Tribunal. In the circumstances I found this to be appropriate. Mr Tan did not make any oral submissions indicating that he was content for the Tribunal to make a decision based upon the evidence that had been presented.

16. Mr Salem submitted that the appeal should be allowed. I was asked to preserve the finding made in the First-tier Tribunal that the relationship between the parties was genuine. That finding had not been the subject of any challenge. Mr Salem submitted that it was clear that paragraph 320(11) should not be applied as there were no aggravating circumstances.

17. I was asked to find that the requirements of Appendix FM were satisfied, and there was no public interest in refusing entry clearance to the Appellant.

18. At the conclusion of oral submissions I reserved my decision and indicated that I would produce a written decision.

My Conclusions and Reasons

19. The decision of the First-tier Tribunal was set aside as it was an error of law to find that paragraph 320(11) applied. No aggravating circumstances were identified which would bring paragraph 320(11) into effect.

20. I preserve the finding in paragraph 7 of the First-tier Tribunal decision to the effect that the Appellant and Sponsor married in Bangladesh on 15th June 2015 and the marriage is genuine. The discrepancy as to the commencement of the relationship was resolved by the judge in the Appellant's favour. It follows that the Appellant did not make false representations in his application.

21. The factual matrix is that the Appellant arrived in the UK on 21st February 2007 with entry clearance as a working holidaymaker. He had leave until 5th February 2009. Prior to that leave expiring he was granted further leave until 31st March 2010.

22. Prior to that leave expiring the Appellant made a further application for leave to remain which was refused. When detained he explained that that application was refused on 15th September 2010 and I accept that to be the case. Thereafter the Appellant remained in the UK without leave. He

was detained on 11th November 2014. He initially made an asylum claim but withdrew this approximately three days later.

23. The Appellant and Sponsor began a relationship only after he was detained. He therefore did not make any false representations when spoken to by the authorities when initially detained, when he explained that he was not in a relationship. I accept that the relationship commenced later in November 2014.

24. It is common ground that the Appellant and Sponsor left the UK on 12th June 2015 and the Appellant did so voluntarily. The couple married in Bangladesh on 15th June 2015. The Sponsor subsequently returned to the UK leaving the Appellant in Bangladesh but has returned on at least two occasions to visit him.

25. The Appellant waited until 22nd November 2016 before submitting an entry clearance application as the spouse of a British citizen.

26. I am asked to consider this appeal with reference to Article 8 of the 1950 Convention. In considering Article 8 I adopt the balance sheet approach recommended at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing have regard to the guidance given at paragraphs 39 to 53.

27. The burden of proof lies on the Appellant to establish his personal circumstances, and why the decision to refuse his human rights claim interferes disproportionately in his family life rights. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.

28. I find that Article 8 is engaged on the basis of family life between the Appellant and Sponsor. Although this is a human rights appeal, the appropriate starting point is to consider whether the requirements of the Immigration Rules are satisfied.

29. I set out below paragraph 320(11);

> "(11) 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
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> (ii) breaching a condition attached to his leave; or
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> (iii) being an illegal entrant; or
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> (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
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> 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."

30. It is clear that the Appellant overstayed and did so substantially between 2010 and November 2014. He admitted working illegally but that is not listed as an aggravating circumstance in paragraph 320(11). It is not suggested the Appellant absconded or failed to meet temporary admission or reporting restrictions, nor is it suggested that he used an assumed identity or multiple identities or switched nationality or did not comply with the re-documentation process. It is common ground that he left the UK voluntarily.

31. It was not suggested before me, on behalf of the Respondent, that the Appellant had made frivolous applications. It is the case that he initially made an asylum claim but withdrew that within approximately three days. I do not find that that amounts to making frivolous applications. I therefore conclude that paragraph 320(11) should have no application to the Appellant in this appeal. In considering paragraph 320(11) I have taken into account the guidance issued in PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) to the effect that great care must be exercised in assessing the aggravating circumstances said to justify refusal and regard must be had to the public interest in encouraging those unlawfully in the UK to leave and seek to regularise their status by an application for entry clearance.

32. As with paragraph 320(11) the burden of proof is on the Respondent with reference to S-EC.2.2.(a) and the burden has not been discharged. I do not find that the Appellant made false representations as to when his relationship the Sponsor commenced. I am satisfied on the evidence before me, that the relationship started after the Appellant had been detained and while he remained in detention. He was therefore not making a false representation when initially detained when he stated that he was not in a relationship.

33. I find that E-ECP.2.6 and 2.10 are satisfied. The finding made by the First-tier Tribunal that there is a genuine relationship and genuine marriage is preserved. That finding was not challenged. I am satisfied that the parties are in a genuine and subsisting relationship and intend to live together permanently in the UK.

34. I have regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration control is in the public interest. It is in the public interest that a person seeking to enter the UK can speak English and is financially independent. The Respondent accepts that the Appellant passed the appropriate English language test, and that adequate financial maintenance is available. Those were not reasons given for refusing entry clearance. Section 117B(4) provides that little weight should be given to a relationship formed with a qualifying partner established by a person at a time when the person is in the UK unlawfully.

35. I take into account that the relationship between the Appellant and Sponsor started when the Appellant was in the UK unlawfully, and was in

detention. However, I must take into account that the Appellant left the UK voluntarily, and that the Sponsor travelled with him, and that they married in Bangladesh. Their relationship has continued while the Appellant has been in Bangladesh. Therefore, the greater part of their relationship has taken place while the Appellant is outside the UK.

36. I have to consider what public interest factors indicate that the public interest would be served by refusing entry clearance to the Appellant. I have taken all factors into account, and find it relevant to note that the requirements of the Immigration Rules are satisfied.

37. Therefore, notwithstanding that the Appellant overstayed in the UK for a substantial period of time and previously worked illegally, I must take into account his voluntary departure, and that he now satisfies all the requirements of the Immigration Rules. I conclude that the public interest does not require him to be refused entry clearance to the UK, and that refusal would be disproportionate in the circumstances and would breach Article 8 in relation to family life.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

There has been no request for anonymity and no anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge M A Hall 12th December 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I have considered whether to make a fee award. I make no fee award. The appeal has been allowed because of evidence considered by the Tribunal that was not before the initial decision maker.

Signed Date

Deputy Upper Tribunal Judge M A Hall 12th December 2018