Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16421/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2019	**On 20th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR SANDEEP SINGH
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER - Sheffield

Respondent

Representation:
For the Appellant: Ms K Reid, Counsel
For the Respondent: Mr Bramble, Home Office Presenting Officer

REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellant

1. The Appellant is a citizen of India born on 1 September 1988. He appeals against a decision of Judge of the First-tier Tribunal Khawar sitting at Taylor House on 19 November 2018 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 24 November 2017. That decision was to refuse to grant the Appellant's application to enter the United Kingdom for settlement on the basis of his marriage to Ms Harpreet Kaur Mahl ("the sponsor") under Appendix FM

of the immigration rules and Article 8 of the European Convention on Human Rights. The Appellant and the sponsor married in India on 5 April 2017 and the sponsor gave birth to the couple's first child on 10 March 2019.

The Appellant's Case

2. The Appellant's case was that he was in a genuine and subsisting marriage with the sponsor. The Appellant entered the United Kingdom on 13 January 2010 on a student visa valid from 3 January 2010 until 28 February 2013. The Appellant and sponsor first met on 20 August 2016. The sponsor was gainfully employed in two jobs with a combined income from both employments of approximately £24,500 per annum and thus in excess of the minimum income requirement of £18,600. The Appellant took legal advice and returned voluntarily to India on 3 February 2017. The couple married in India on 5 April 2017 and remained together as husband and wife until 29 April 2017 at which point the sponsor returned to the United Kingdom. The sponsor has visited the Appellant on three occasions since their marriage.

The Decision at First Instance

3. The Judge indicated the Respondent's reasons for refusing the application. When the Appellant arrived in the United Kingdom on 13 January it was noted by immigration officers that the Appellant could not speak English to the required standard. His college withdrew their sponsorship and it appears that the entry clearance was revoked. The Appellant appealed against that, but his appeal was dismissed and he became appeal rights exhausted on 24 March 2010 after which he had no right to remain in the United Kingdom. The Appellant failed to attend a reporting event on 15 April 2010 and was circulated as an absconder. He next made contact with the Home Office on 4 January 2017 when he sought to make a voluntary departure from the United Kingdom and illegal entry papers were served on him. The Appellant departed the United Kingdom on 3 February 2017.

4. The Respondent considered that paragraph 320 (11) of the immigration rules applied to the Appellant. He had used deception in an immigration application, overstayed his leave and had been served with the illegal entry papers. He had absconded from April 2010 until January 2017 which was considered to be aggravating circumstances. He had contrived in a significant way to circumvent the intention of the rules.

5. The Judge noted that the Appellant's grounds of appeal were couched in general terms and did not specifically address the issues raised under paragraph 320 (11). The Appellant proffered a general denial of having used deception. He argued that he had received bad advice from several legal advisers as well as the college where he went to pursue his education. He realised he wanted to live in the United Kingdom happily with his wife and knew that he would have to return voluntarily to India and apply for entry clearance. The sponsor conceded in evidence that the Appellant had not attended college but did not know why that was so. She was aware that he was unlawfully present in the United Kingdom.

6. The Judge held that the couple had been introduced during an arranged marriage process and the Appellant had failed to address paragraph 320 (11) which undermined the Appellant's credibility. Although no evidence was filed by the

Respondent in relation to the Appellant's immigration history, the Appellant had not sought to deny his conduct. The Appellant had contrived in a significant way to circumvent the intentions of the rules and the Respondent was entitled to refuse the application on suitability grounds under appendix FM.

7. Considering the appeal outside the rules the Judge accepted that the refusal resulted in an interference with family life, but both the Appellant and sponsor had substantial family in India. The sponsor could reasonably be expected to return to India to reside with the Appellant and had said during cross examination that if the Appellant's appeal was refused she would return to India to do just that. She herself had only lived in the United Kingdom since 2012 when she had entered on the basis of a previous marriage. The Respondent's decision was proportionate and the Judge dismissed the appeal.

The Onward Appeal

8. The Appellant's grounds of onward appeal made four main points. The first was that the Judge was wrong to place the burden of proof on the Appellant to show that the general grounds for refusal under 320(11) did not apply to him. By contrast the authorities, such as **JC China [2007] UKAIT 27** stated that in relation to the general grounds the burden of proof was on the decision maker in this case the entry clearance officer. The Appellant did not have any positive obligation to disclose matters which would prejudice his case.

9. The 2nd ground was that the Judge had failed to make a valid finding in relation to aggravating circumstances. If the Respondent sought to rely on the Appellant's failure to report that had to be established by the Respondent but there was insufficient evidence to prove it and therefore insufficient evidence to prove aggravating circumstances.

10. The 3rd ground noted that paragraph 320 (11) was a discretionary ground. The public interest in encouraging those in the United Kingdom unlawfully to return to their country had not been taken into account. The Appellant had left the United Kingdom in order to make a new application to regularise his status. All other requirements including financial had been satisfied and the refusal was simply punitive. The Judge's findings at [46] were described as strange and speculative. The Judge had found that the Appellant had glossed over his immigration history between January 2010 and January 2017 and the sponsor was complicit in the Appellant's false representations.

11. The 4th ground argued that the appeal would have been allowed under the immigration rules but for the errors made by the Judge. Proportionality was inadequately reasoned

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Andrew on 8 April 2019. She was satisfied that there was an arguable error of law in that the Judge may have shifted the burden of proof to the Appellant when it should have been with the Respondent in accordance with **JC (China**). She concluded: "in view of this I have not gone on to consider the remaining grounds".

The Hearing Before Me

13. Counsel for the Appellant relied on the grounds of appeal. Grounds 1 and 2 were said to be interrelated. There was no burden on the Appellant and in the absence of evidence from the Respondent there was no case for him to answer. It was not for the Appellant to apply for an adjournment for the Respondent to obtain more evidence. The Judge implicitly imposed the burden of proof on the Appellant when the legal burden was on the Respondent. There would be a problem with the Appellant attempting to deny that he had overstayed as it was accepted he did not have a right to be here, but the Respondent also had to prove aggravating features such as absconding or deception and there was no evidence as to that as the Judge noted at [25] of the determination.

14. The Judge had not considered that paragraph 320 (11) was a discretionary ground and the Appellant took issue with whether the Judge had given a reasoned decision in terms of proportionality. There were factors in the Appellant's favour which potentially overcame the public interest in the Appellant's exclusion such as that he had left voluntarily. That had not been referred to by the Judge in the proportionality exercise. The Judge had adopted a punitive approach to Article 8.

15. For the Respondent it was argued that the Judge had set out the reasons for refusal given by the entry clearance officer and it was accepted that the Appellant was an overstayer and thus that paragraph 320 (11) was potentially engaged. The Appellant's witness statement had ignored the Appellant's history prior to meeting the sponsor. Whilst the evidence was sufficient to show overstaying, the Respondent accepted that there was a material error of law disclosed by the 2nd ground because the Judge had not adequately explained why there were aggravating circumstances as there was no evidence in support. The Respondent accepted that there was merit in the 2nd ground.

Findings

16. At the conclusion of submissions, I indicated that I found there was a material error of law such that I would set aside the decision at first instance and remit the matter back to the First-tier Tribunal to be reheard. It was accepted by the Respondent and found by the Judge that the Appellant could meet the eligibility requirements of Appendix FM because this was a genuine and subsisting marriage and the sponsor could meet the financial requirements. The application had been refused under the suitability requirements which required the Appellant to not fall for refusal under any of the general grounds for refusal. Paragraph 320 (11) of the immigration rules is such a general ground and as was acknowledged in the grant of permission and submissions to me the burden of proof of establishing the general ground rests on the Respondent, the standard of proof being the usual civil standard of balance of probabilities.

17. At the First-tier Tribunal hearing the Appellant's representative had pointed out that the Respondent had not filed any documentary evidence in relation to the Appellant's immigration history. The Judge relied on the lack of any denial of this history until a very brief passage in his, the Appellant's, witness statement. That

denial did not go far enough in the Judge's view because it glossed over the several years the Appellant had spent unlawfully in the United Kingdom.

18. There were potentially aggravating circumstances in this case if found to have occurred such as deception and absconding. The problem was that the Respondent had not filed or served any supporting evidence and I note that the Tribunal file does not disclose a full bundle. There is a detailed reasons for refusal letter which runs to 3 ½ pages and there was an entry clearance manager's review which principally commented on the sponsor's financial position which is no longer an issue in this case. The only other document of any significance in the Respondent's bundle was the entry clearance application which too is of limited assistance.

19. There may have been other documents, but they were not in the bundle and indeed I note that the entry clearance manager states: "I acknowledge that during the consideration of the application some of the documents provided were misplaced". This may just be a reference to financial documents but importantly it does appear that there was an interview transcript in existence at some point (because the entry clearance manager refers to it) but that document was not made available to the First-tier Tribunal Judge even though it would have been of considerable importance in the decision-making process.

20. Where facts and matters are not in dispute such as the fact that the Appellant overstayed there would not be a need for the Respondent to provide supporting evidence of overstaying. It would not be a material error of law for the Judge to find as he did that paragraph 320 (11) was engaged. The problem was that all the Judge had was an assertion by the Respondent that there were aggravating circumstances which the Appellant declined to confirm. The burden was on the Respondent and there is force in the argument that that burden was not discharged. I agree that it was not necessary for Judge Andrew when granting permission to appeal to go on to consider the other grounds. For the Judge to proceed to dismiss the appeal given the absence of evidence to support the Respondent's contention that paragraph 320 (11) applied was a sufficient material error of law to permit me to set the decision of the First-tier Tribunal aside.

21. As further evidence will need to be given in this appeal I consider, in the light of the Senior President's Practice Direction, that the appropriate course of action is to remit the appeal back to the First-tier Tribunal to be decided afresh. I would make some observations about the further evidence which would assist the First-tier. It is a matter for the Respondent what evidence he chooses to produce to support his contention that the Appellant fails the suitability requirements. Evidence of absconding might be found in a copy of the computerised CID notes or other notes kept by immigration officers and/or the Respondent as they might have some details of on what occasion or occasions the Appellant failed to sign on and when and how the Appellant was listed as an absconder. Their probative value might be that they were contemporaneously compiled.

22. The refusal notice refers to the service of illegal entry papers on the Appellant and a copy of those papers should also be filed and served if available. The issue of whether there was a transcript of an interview should also be clarified. I assume that

it was an interview with the Appellant not the sponsor and might be relevant. It might be helpful for the Judge on the next occasion to have a copy of the determination of the Tribunal dismissing the Appellant's appeal in 2010 referred to at [18] of the determination, if available. If the Respondent proposes to serve any further evidence such evidence should be filed and served at least 28 days before the next hearing.

23. It is a matter for the Appellant to decide what further evidence he wishes to adduce. If the Respondent files and serves further evidence of the sort I outline above, a bare denial of the allegations may not be considered a sufficient response. The Appellant may wish to file a more detailed witness statement dealing with his immigration history prior to his contact with the Home Office on 4 January 2017 when he sought to make a voluntary departure from the United Kingdom. Any such further evidence should be filed and served after any further evidence from the Respondent preferably 14 days before the remitted appeal hearing.

24. As I have set the decision of the First-tier Tribunal aside I do not propose to deal with the other grounds of appeal in any detail. Paragraph 320(11) is a discretionary ground. If the aggravating circumstances were to be found the issue would then be whether the Respondent had exercised discretion correctly and whether that should be reflected in any Article 8 proportionality exercise. The issue of the proportionality of the interference with the family life of the Appellant and sponsor only arises if the Appellant cannot satisfy the immigration rules because in that situation the general grounds for refusal had been applied to him. That is a matter which will have to be decided at the remitted appeal hearing. If the interference with family life is proportionate because for example there was greater weight on the Respondent's side of the scales, that would not necessarily be to apply a punitive approach to Article 8. The issue is one of proportionality and has to be decided in the round.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I direct that the appeal be remitted back to the First-tier Tribunal to be reheard de novo.

Appellant's appeal allowed to that limited extent

I make no anonymity order as there is no public policy reason for so doing.

Signed this 16 May 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have remitted the appeal to the First-tier I leave the issue of the fee award to the rehearing.

Signed this 16 May 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge