Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/17006/2017

THE IMMIGRATION ACTS

Heard at Field House
On 13 August 2019

Decision & Reasons Promulgated
On 3 March 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

HUSSAIN [E]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr M Hasan, Counsel, instructed by Kalam Solicitors

DECISION AND REASONS

Background

1. While this is an appeal by the Entry Clearance Officer, for the sake of continuity and clarity, I shall refer to the parties as they were before the First-tier Tribunal.

2. The Appellant is a national of Bangladesh born on 12 October 1978. He arrived in the UK illegally on 11 April 2004. Having been encountered working illegally on 17 July 2005, he made a number of unsuccessful applications to remain in the UK. On 14 June 2010 the Appellant was convicted of a criminal offence at Swansea Crown Court

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and sentenced to 8 months' imprisonment for making false representations and identity theft. On 28 September 2010 the Appellant was removed from the UK to Bangladesh. On 21 August 2017 the Appellant made an application for entry clearance to the UK under Appendix FM of the Immigration Rules on the basis of family life with his partner [RA]. The application was refused on 7 November 2017.

3. The Appellant appealed against this decision and his appeal was dismissed by Judge Sweet on 30 November 2018. The Appellant and Mrs [A] married in Bangladesh on 11 July 2012. They have a daughter born on 15 August 2013 and Mrs [A] has a son from a previous relationship born on 28 March 2003. Both children are British citizens. Before Judge Sweet the children were aged 5 and 15 respectively and in full-time education. Judge Sweet found that paragraph 320(11) of the Immigration Rules was rightly invoked by the Respondent but found that the appeal ought to be allowed outside of the Immigration Rules. Judge Sweet accepted Mrs [A]'s evidence and found the relationship was genuine and subsisting and further noted that issues raised by the Respondent in respect of the financial requirements were no longer pursued in light of the evidence adduced. The judge found that it would be a disproportionate interference with the children's human rights to expect them to live with the Appellant in Bangladesh and accordingly the appeal was allowed.

4. Permission to appeal was sought in time, on the basis that Judge Sweet failed to provide adequate reasons and failed to conduct a proper balancing exercise by reference to the public interest and other relevant factors.

5. Permission to appeal was granted by the First-tier Tribunal on 18 December 2018 on all grounds.

6. At the hearing before the Upper Tribunal, Mr Tarlow submitted, without conceding the appeal, that whilst Judge Sweet's decision may have been correct it could not be allowed to stand given the inadequacy of reasoning. Mr Hasan expressly conceded that Judge Sweet had committed a material error of law.

7. I agree with the parties that Judge Sweet erred in law. The reasoning is very brief and is essentially contained in a short paragraph at 19 to [20]. It does not sufficiently factor into the balancing exercise the Appellant's immigration history and the refusal under paragraph 320(11) of the Immigration Rules. Further, it is plain that there is an absence of any consideration of section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as required. Accordingly, I am satisfied that Judge Sweet did err in law and that the decision should be set aside.

8. Both representatives invited me to remake the decision. As the facts were not in dispute and, as Mr Tarlow had no questions for Mrs [A] who was in attendance, the parties were content to proceed with the hearing by way of submissions.

9. Mr Tarlow submitted that as he was without instructions from the Entry Clearance Officer he was content to rely on the refusal. There was no dispute about the Appellant's relationship with his wife and children, but he queried "does the existence of the children outweigh the reasons to refuse entry clearance?"

10. Mr Hasan submitted the Appellant had an established family life. It was not disputed that paragraph 320(11) of the Immigration Rules applied. However, previous applications lodged by the Appellant were based on his family life and were not frivolous. The Appellant apologised for his conduct in an affidavit and returned to Bangladesh. The financial requirements were met and there was no public interest in keeping the family separated. It was not reasonable to expect the children to live in Bangladesh. The index offence was historic.

Remaking

11. The Appellant applied for entry clearance as a partner under Appendix FM of the Immigration Rules. While the refusal raised issues under the financial requirements these are no longer in dispute. The sole issue under the Immigration Rules is whether the Appellant meets the suitability requirements and, in turn, whether the invocation of paragraph 320(11) of the Immigration Rules was correct.

12. The evidence given was that the Appellant came to the UK on 11 April 2004 and entered illegally. He lived and worked illegally in the UK until he was encountered by the authorities on 17 July 2005 working at a restaurant. Between 2005 to 2006, it is said by the Respondent that the Appellant made "a number of frivolous applications to remain in the UK" in an attempt to frustrate removal. While the Appellant does not dispute that he made applications he does dispute that they were frivolous. There is insufficient evidence in relation to these applications upon which their merits can be assessed. I note Mr Hasan's submission that the applications were based on the Appellant's family life, but these could not relate to the Appellant's family life as it currently exists, and the Appellant offers no further evidence in respect of them. Notwithstanding what is a chequered immigration history, on 6 May 2008 the Appellant made an application for leave to remain on human rights grounds in consequence of which he was granted temporary admission with reporting conditions. Thereafter the index offence was committed, and the Appellant was sentenced to a term of imprisonment which he duly served.

13. On 7 September 2010 the Secretary of State for the Home Department issued and served removal directions on the Appellant. Whilst he was removed on 28 September 2010 there is no dispute that the Appellant co-operated with removal.

14. While in Bangladesh the Appellant met his wife, Mrs [A], a British national, through an introduction by their respective families. They married in Bangladesh on 11 July 2012. Thereafter Mrs [A] continued to visit the Appellant in Bangladesh with her children and they have maintained contact from the UK. Their daughter was conceived when Mrs [A] visited the Appellant in December 2012.

15. The children are in full-time education. The evidence is that Mrs [A] is struggling emotionally being separated from the Appellant which impacts upon the children who also miss him. There is evidence from the Principal at the elder child's school that the absence of a father-figure is impairing his social skills and emotional well-being.

16. Mrs [A] is in full-time employment and earns a salary of £19,200 per annum.

17. The issues in relation to the Immigration Rules is (i) whether paragraph 320(11) of the Immigration Rules and the suitability requirements of Appendix FM should be applied in this case and, if so, is it proportionate?

18. The discretionary refusal provisions under Paragraph 320 of the Immigration Rules are set out in Parts 2-8 thereof, the following grounds for the refusal of entry clearance or leave to enter apply:

    "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."

19. The appeal can only be considered on human rights grounds and, applying the *Razgar v SSHD [2004] UKHL 27* five stage test, it is clear that the Appellant has a subsisting and genuine relationship with Mrs [A] and a parental relationship with his child and step-child, as such the Entry Clearance Officer's refusal is an interference which has consequences of gravity such as to engage the operation of Article 8. The threshold for interference is low. Ostensibly, the interference was in accordance with the law but as indicated above, the issue as to the financial requirements has been resolved. Was the decision on paragraph 320(11)/suitability grounds in accordance with the law and for a legitimate aim?

20. Paragraph 320(11) of the Immigration Rules is not a mandatory measure, but a discretionary measure and its application can be taken into account when considering all the circumstances under an Article 8 proportionality balancing exercise or GEN.3.2.(2) both of which include consideration of the best interests of the children.

21. The question is essentially whether the refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights would be affected.

22. In *PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440* the Tribunal held: *"In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance."*

23. As set out in PS, the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard 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. That is precisely what the Appellant did.

24. The guidance published for Caseworkers on 11 January 2018 in relation to the grounds for refusal of paragraph 320(11) of the Immigration Rules (when the person has previously contrived in a significant way to frustrate the intention of the Immigration Rules) states as follows:

"This relates to general grounds for refusal under paragraph 320(11) of the rules when the person has previously contrived in a significant way to frustrate the intentions of the rules. For visitors this relates to paragraph V 3.8 of Appendix V. When an applicant has previously breached the Immigration Rules and/or received services or support to which they were not entitled you must consider refusing the application. When these circumstances are also aggravated by other actions with the intention to deliberately frustrate the rules, you must refuse entry clearance under paragraph 320(11). This means when an applicant has done one or more of the following: • been an illegal entrant • overstayed • breached a condition attached to their leave • used deception in a previous application • obtaining: asylum benefits, state benefits, housing benefits, tax credits, employment, goods or services, National Health Service (NHS) care using an assumed identity or multiple identities or to which not entitled and there are aggravating circumstances, such as: • absconding • not meeting temporary admission/reporting restrictions or bail conditions • failing to meet the terms of removal directions after port refusal of leave to enter or illegal entry • previous working in breach on visitor conditions within short time of arrival in UK (indicating a deliberate intention to work) • receiving benefits, goods or services when not entitled • using an assumed identity or multiple identities • getting NHS care to which they are not entitled • attempting to prevent removal from the UK, arrest or detention by Home Office or police • escaping from Home Office detention • switching nationality • troublesome or frivolous applications • not meeting the terms of the re-documentation process • taking part, attempting to take part, or facilitating, in a sham marriage or marriage of convenience • harbouring an immigration offender • people smuggling or helping in people smuggling This is not a complete list of offences. You must consider all cases on their merits and take into account family life in the UK and, if the applicant is a child, the level of responsibility for any breach. Before you decide to refuse under this paragraph, you must refer your decision to an entry clearance manager (ECM) to be authorised."

25. The guidance also specifically states: *"Paragraph 320(11) If an applicant has previously breached the immigration laws but is applying in a category which is exempt from paragraph 320(7B) you must consider whether it is appropriate to refuse the application under paragraph 320(11)."*

26. It is not argued by Mr Hasan on behalf of the Appellant that his conduct does not come within paragraph 320(11) of the Immigrations Rules. As I indicated earlier there is insufficient evidence of the making of many frivolous applications, but the Appellant provides scant evidence as to the substance of the applications made, which leads me to conclude that they were of no or little merit. Additionally, there

are clear aggravating features in this case, namely, that the Appellant entered the UK illegally and remained in the UK illegally, working without permission and has a previous conviction for false representations and identity theft.

27. There is no doubt that the Appellant's previous behaviour and conduct falls within the parameters of paragraph 320(11) of the Immigration Rules. I note the Respondent further concluded that in light of the Appellant's character and conduct it was undesirable to issue entry clearance on suitability grounds under paragraph EC-P.1.1(c) of Appendix FM of the Immigration Rules. This is also a discretionary measure and the application of this measure is not in dispute. In the application of both provisions therefore the issue is whether discretion should be exercised in the Appellant's favour.

28. Under any Article 8 assessment the Section 55 duty in relation to the children's best interests should be taken into account. The Appellant is the father of a child aged 5 and a step-father to a 15 year old child. He has regular and ongoing contact with the children. From the documentary evidence presented to me including the photographic evidence and evidence of communication, they clearly have a very close bond. The case of *T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483* confirms that Section 55 applies to children who are in the UK when an entry clearance decision is made. Clearly, the Appellant's spouse is the mother of two children whose welfare would be affected by the determination of his spouse's location, albeit that a State has a greater margin of appreciation in determining entry clearance cases.

29. I accept the evidence of Mrs [A], that it is unreasonable to expect her to leave the UK primarily because her children are in full-time education and her elder child is at an important stage of his education. The evidence is clear and perhaps unsurprising that the Appellant's absence is having a negative impact on their well-being, particularly that of the elder child who has been observed to be struggling at school. The Appellant's absence from the UK is contrary to the best interests of both children.

30. The evidence is that travelling to Bangladesh to visit her husband is a strain on Mrs [A]. No doubt that is a result of both financial pressures and the need to care for her children and this strain is likely to be contributing to the negative experiences of the children in maintaining the status quo.

31. I also note from the refusal that it is accepted the Appellant meets the eligibility relationship requirement and the eligibility English language requirement and it is now accepted that the financial requirements are also met. That is all in the Appellant's favour.

32. I have applied Section 117B of the Nationality, Immigration and Asylum Act, noting that the maintenance of effective immigration controls is in the public interest. It is clear that the Appellant has satisfied 117B (2) and (3).

33. Under Section 117B (4) little weight should be given to a relationship when it is established by a person at a time when that person is in the UK unlawfully. I appreciate that the Appellant has developed his relationship during a period when

he was outside the UK. The Appellant and Mrs [A] married in Bangladesh where he was lawfully. Thus, I conclude that the relationship was in fact formally contracted with a qualifying partner, which Mrs [A] is because she is a British citizen, when the Appellant was outside the UK and thus weight can be attached to the relationship.

34. I find overall that because of the children there would be insurmountable obstacles to the sponsor leaving the United Kingdom and thus there is the prospect of a very long-term and without definition separation between husband and wife. Mrs [A]'s visits to Bangladesh to see her husband are impeded owing to her financial circumstances but more importantly her commitments here. I conclude that there would be unjustifiably harsh consequences for Mrs [A] and the Appellant should they be unable to be together for the foreseeable future with their children.

35. On the negative side for the Appellant, I understand that he has breached the UK Immigration Rules in a serious manner by the previous entry and continued illegal presence in the UK over a significant period and his subsequent applications and conviction, but the index offence is historic and it is not suggested that the Appellant is a person liable to cause harm to the public.

36. Taking into account all the circumstances and further to *Huang [2007] UKHL 11*, I am entirely unpersuaded that the response to the entry clearance application, which would appear to be an extended ban on entry, is in all the circumstances proportionate and does not have unjustifiably harsh consequences. In these particular circumstances, having explored the issues with regard to the family life of Mrs [A] and the children, I find that this is a case where the refusal will have unjustifiably harsh consequences further to *R (Agyarko) [2017] UKSC 11*. I find that this is a case where the refusal to exercise discretion is not proportionate.

37. I therefore allow the appeal.

Notice of Decision

38. I find a material error of law in the decision of First-tier Tribunal Judge Sweet. I set that decision aside and substitute a decision allowing the appeal for the reasons set out above.

No anonymity direction is made.

Signed Date 02 March 2020

Deputy Upper Tribunal Judge Bagral

TO THE RESPONDENT FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award owing to the fact that issues were resolved in light of the evidence adduced at the appeal stage.

Signed Date 02 March 2020

Deputy Upper Tribunal Judge Bagral