



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/18137/2018

THE IMMIGRATION ACTS

**Heard at Birmingham Civil Justice
Centre
On 9 January 2020**

**Decision & Reasons Promulgated
On 27 January 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**MANDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

**ENTRY CLEARANCE OFFICER,
SHEFFIELD**

Respondent

Representation:

For the Appellant: Ms A Harvey of Counsel instructed by SMK Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This case comes back before the Tribunal to remake the decision in the appeal further to the 'error of law' decision and Directions of Deputy Upper Tribunal Judge Chapman following the hearing on 9 October 2019.
2. The facts and circumstances of the case are helpfully set out in the 'error of law' decision of Judge Chapman at paragraphs 1 and 2. It is unnecessary to repeat those matters here.

3. I am grateful for the helpful and realistic position that Mr Mills has adopted this morning on behalf of the Respondent in light of having had the benefit of considering the skeleton submissions drafted on the Appellant's behalf by Ms Harvey.
4. The issue in the appeal is narrow.
5. The Appellant is a national of India born on 5 March 1992 who made an application for entry clearance as a spouse. The application was refused with reference to paragraph 320(11) of the Immigration Rules. The decision-making Entry Clearance Officer was otherwise satisfied that the Appellant had demonstrated that he met the requirements for entry as a spouse.
6. Paragraph 320(11) was relied upon with reference to the Appellant's immigration history and alleged conduct whilst previously in the United Kingdom. Paragraph 320(11) is a discretionary provision that provides that an application "*should normally be refused*" in particular specified circumstances. The circumstances required under 320(11) are that "*the applicant has previously contrived in a significant way to frustrate the intention of the Rules by*" - amongst other things - "*overstaying*", and that "*there are other aggravating circumstances*".
7. There cannot be - and indeed there is not - any dispute that the Appellant overstayed his leave during his previous time in the United Kingdom.
8. The Respondent relied additionally upon the aggravating circumstances of the Appellant allegedly making frivolous applications to prolong his stay in the United Kingdom, and that he had worked illegally whilst in the United Kingdom.
9. Mr Mills no longer seeks to rely upon the allegation in respect of frivolous applications. It is clear that a number of applications in pursuit of leave to remain were made whilst the Appellant was previously in the United Kingdom. However it is apparent - and no longer disputed - that during the course of those applications the Appellant not only advanced additional information in successive applications (as is acknowledged in the various refusal letters), but also in the course of successive applications managed to persuade the Secretary of State that his relationship with his spouse was genuine this not having been accepted initially in the application considered and refused on 7 October 2016. In such circumstances I agree with Mills' concession that the applications could not be characterised as frivolous.
10. Mr Mills does not expressly concede that the Appellant's illegal work in the United Kingdom is not be considered as an 'aggravating circumstance'.
11. In this regard it is to be noted that the Appellant was detained whilst working illegally on 6 October 2016. Whilst there is not a detailed history of his employment in the UK provided by either side, it was acknowledged

by the Appellant's sponsoring wife at the hearing before the First-tier Tribunal that the Appellant had indeed worked whilst in the United Kingdom. It is also said in the Appellant's witness statement that he had worked in order to provide for his wife and her son from a previous relationship, and also to fund the various applications made to the Home Office and the fees of lawyers. These admitted matters indicate that the employment was not limited to the mere occasion on which the Appellant was arrested.

12. However, whether or not such employment is to be characterised as an aggravating circumstance essentially becomes moot in the current proceedings in light of Mr Mills' concession. For my part, I observe that very careful consideration would be required before reaching a conclusion in any particular case that taking employment whilst in the United Kingdom was an aggravating circumstance. Be that as it may, as Mr Mills readily recognises and as I have adverted to above, paragraph 320(11) is a discretionary provision. In the circumstances of this particular case - and bearing in mind in particular that the Appellant having been unsuccessful in his various applications then made arrangements to leave the United Kingdom voluntarily in order to make the appropriate application for entry clearance from abroad - Mr Mills concedes that the discretion under 320(11) even if its required premises were to be established should not be exercised against the Appellant. I accept that concession.
13. In those circumstances there is no outstanding reason for the Appellant's application under the Rules to be refused. That is a reflection, therefore, of where the proportionality balance lies. It is not disputed that this is an application to promote family life in that the Appellant seeks to rejoin his wife in the United Kingdom. Accordingly, there is no dispute that the provisions of Article 8(1) are engaged. In light of the satisfaction of the Rules it is now readily conceded by Mr Mills that it would be disproportionate for the Appellant to continue to be excluded from the United Kingdom. The appeal is allowed on that basis accordingly.
14. Ms Harvey requests that a fee award be made in favour of the Appellant and Mr Mills does not resist that application. Accordingly, a fee award will be made for the fees in lodging the appeal. There is no application in respect of costs.

Notice of Decision

15. I remake the decision in the appeal further to the 'error of law' decision of Judge Chapman. The appeal is allowed on human rights grounds.
16. 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: 20 January 2020

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

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

Signed:

Date: 20 January 2020

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