UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

THE IMMIGRATION ACTS

Heard at: Field House
On: 12 June 2013

Before

Lord Burns

Upper Tribunal Judge Pitt

Between

Navtej Singh

Appellant

and

Entry Clearance Officer – New Delhi

Respondent

Representation:
For the Appellant: Mr Canter, instructed by Lester Dominic Solicitors
For the Respondent: Ms Martin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India and he was born on 18 November 1978.

2. This is an appeal against the decision of First-tier Tribunal Judge Morris, promulgated on 11 February 2013, which dismissed the appellant's appeal against the respondent's decision of 30 April 2012 refusing entry clearance as a spouse.

3. The background to this matter is that the appellant came to the UK as a visitor on 16 September 2003. He overstayed for over 7 years,

returning to India only on 15 September 2011. The appellant maintained that he had overstayed in order to support his sister who was in an abusive marriage and subsequently divorced. He had met the sponsor in July 2007 and began a relationship with her in 2010. They began to cohabit in September 2010. He returned to India in August 2011 and the couple married on 9 September 2011. The appellant then applied for entry clearance in February 2012, leading to the refusal which is the subject of this appeal.

4. The respondent did not accept that the appellant's intentions as regards the marriage were genuine, in essence, finding that he had only entered in to the marriage in order to gain entry to the UK. As he did not have an intention to live together permanently with the sponsor, the application was refused under paragraph 281 (iii) of HC 395 (the Immigration Rules). The respondent did not accept the appellant's explanation for overstaying his visa by at least 7 years and considered that he had come to the UK in 2003 with the express intention of overstaying and remaining here illegally. As it was considered that the appellant had acted in a manner that significantly frustrated the Immigration Rules and there were aggravating circumstances, the application was also refused under paragraph 320(11). First-tier Tribunal Judge Morris agreed with the respondent.

5. There were two main grounds of appeal, the first against the approach taken by the First-tier Tribunal Judge to various aspects of the evidence on the relationship between the appellant and sponsor and the second to her finding that the refusal under paragraph 320 (11) should stand.

6. It is convenient to take the second ground first. We were with Mr Canter that at no point did the First-tier Tribunal indicate her awareness that paragraph 320 (11) is a discretionary ground of refusal, rather than a mandatory one. Ms Martin could not take us to any part of the determination which showed that such a discretion had been noted and exercised. Secondly, it was not our view that aggravating factors were shown, over and above the appellant's period of overstaying. Paragraph 320 (11) itself contains a non-exclusive list of what might amount to aggravating circumstances. Overstaying, even for extended periods, is not included. The Judge also made no reference to the guidance on paragraph 320 (11) which contains another non-exhaustive list which again, contains no reference to extensive overstaying as an aggravating factor. She also does not appear to have referred to the guidance in the reported case of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)** which states:

> "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."

7. For all of these reasons we found that the First-tier Tribunal erred in its assessment of the application of paragraph 320 (11).

8. However, it was also our view that the First-tier Tribunal did not make a material error when finding that the appellant had not shown an intention to live permanently with the sponsor and that he had not met the requirements of paragraph 281 (iii). That meant that the appeal under the Immigration Rules had to fail despite the error as to paragraph 320 (11) and that, even if we were with the appellant in that regard, it could not be material.

9. Mr Canter's admirably clear grounds maintained that the First-tier Tribunal erred in its approach to the following:

   (i) evidence of communication between the appellant and sponsor which included telephone bills and internet communication
   (ii) the sponsor's explanation for the absence of her relatives at the wedding
   (iii) evidence of the appellant's brother-in-law, Norman Harford
   (iv) evidence showing that the couple had accessed fertility treatment in India
   (v) the undisputed fact of the couple having cohabited in the UK before the appellant returned to India
   (vi) the standard of proof

10. Dealing with the last point first, we did not find that the reference at [15] to "*doubt*" about the appellant's intentions could show that the wrong standard of proof was applied. This is not reflected in the approach taken by the Judge across the decision as a whole. The correct burden and standard of proof was set out at [7].

11. It was not our view that any of the other points raised, even at their highest and in combination, were sufficient to show an error such that the outcome of the appeal would have been different. In essence, the First-tier Tribunal Judge found that the appellant's extensive overstaying, the unreliable evidence provided by him and

his sister to explain that overstaying and his failure to return to India, even when his sister met and married Mr Harford in 2006, indicated that his intentions regarding his marriage were not genuine. On the contrary, as stated at [15], these matters showed "*his determination to remain in this country by any means*" and showed that he did not have a genuine intention to live permanently with the sponsor.

12. It was clearly open to the First-tier Tribunal to find that the appellant's history and the unreliable evidence weighed heavily against him and were an accurate indication of his motivation in entering into the marriage. The judge sets out her detailed reasons for reaching this conclusion at [12] to [14]. The appellant argues that insufficient or no weight was placed on material parts of the evidence such as the telephone bills, internet communication, the sponsor's explanation for the absence of her family at the wedding, and the evidence of the brother-in-law. This evidence, he submits, was capable of showing that his marriage was genuine. In our view, on a fair reading of the decision, where the judge, as she was entitled to, considered that the appellant's history and unreliable evidence fatally damaged his claim, this other evidence could not have made a difference to the outcome of the claim. The First-tier Tribunal found that the appellant did not have a genuine intention to live with the sponsor but pretended that he did in order to gain entry to the UK and his pretence extended to his keeping in contact with the sponsor by telephone and internet after he went back to India, seeking fertility treatment in India and so on.

13. It did not appear to us that Mr Harford's evidence could take matters much further. The judge noted it at [14(i)] and [14(iii)]. In the latter paragraph, it was found that the evidence of the appellant's sister was not reliable because she was "*complicit*" in the appellant's overstaying and that conclusion is not challenged. The same can only apply to Mr Harford, however, who also knew of the appellant's illegal status for some years but appeared untroubled by it, even though no explanation at all was put forward for the appellant needing to be here between 2006 when his sister began her relationship with Mr Harford and 2010 when he met the sponsor.

14. The judge, was not, in any event, obliged to address every part of the evidence before her. The reasons given are clear and inform the appellant adequately as to why his intentions as regards his marriage were not accepted as genuine.

15. For these reasons we did not find that the decision of the First-tier Tribunal disclosed an error on a point of law such that it should be set aside.

DECISION

16. The First-tier Tribunal did not err and the decision of Judge Morris shall stand.

Signed:  Date: 22 June 2013
Upper Tribunal Judge Pitt