



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

Appeal Number: OA/23348/2012

THE IMMIGRATION ACTS

**Heard at Glasgow
on 15 January 2014**

**Determination issued
on 21 January 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MUHAMMAD KAMRAN FAISAL

Appellant

and

ENTRY CLEARANCE OFFICER, PAKISTAN

Respondent

For the Appellant: Mr S Martin, Jain Neil & Ruddy Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

(No anonymity order requested or made.)

DETERMINATION AND REASONS

- 1) The appellant appeals against a determination by First-tier Tribunal Judge Scobbie, promulgated on 9 September 2013, dismissing his appeal against refusal of entry clearance as a spouse.
- 2) The Entry Clearance Officer was not satisfied that the appellant was free to marry the sponsor, that the relationship was genuine or that satisfactory accommodation was available, so that his application did not meet the requirements of paragraph 281 of the Immigration Rules. He had described himself as single although he had provided a marriage certificate with his earlier visit visa application. The ECO also noted that the appellant had overstayed from 5 May 2009 until 6 April 2012. In the absence of explanation of how the appellant had supported himself, the ECO presumed that he had taken employment as well as having married in the UK. The application was also refused under paragraph 320(11) of the Rules.

- 3) Despite some misgivings regarding the appellant's apparent previous marriage, Judge Scobbie found on the evidence before him, including the oral evidence from the sponsor, her father and her sister, that the requirements of paragraph 281 were all met.
- 4) As to paragraph 320(11), Mr Martin referred Judge Scobbie to PS (Paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC). The judge said at paragraph 24 that although he was referred particularly to paragraph 10 of PS (which paragraph is simply a reproduction of guidance to ECO's) there appeared to him to be "very little which could be said on behalf of the appellant ... bearing in mind that the rule actually says that normally as an overstayer he should have his application refused." At paragraph 25 the judge expressed the view that the appellant had deliberately ignored the Rules and that there had been "more than a suspicion that he was an economic migrant", and accordingly there was nothing to justify that he should not have his application refused.
- 5) The judge went on to dismiss the case also under Article 8, taking the fact that the appellant had returned to Pakistan to try to resolve his status as a point in his favour, but finding that he had shown "scant regard" for the Rules and that he and the sponsor had married "in the full knowledge that the appellant had no right to be in the UK. Again this in my view shows contempt for the Immigration Rules of this country." At paragraph 29, the judge concluded that an effective immigration policy was a consideration rendering refusal of the application proportionate.
- 6) It was common ground that the guidance to Entry Clearance Officers still stands in the terms quoted at paragraph 10 of PS. The only example of aggravating circumstances which applies in this case is this:

Previous working in breach of visitor conditions within short time of arrival in the UK (ie premeditated intention to work).
- 7) The appellant's evidence in his statement was that he "undertook odd jobs to survive". The position as amplified through his solicitor was that he did so "on behalf of family members with whom he resided to assist them and to repay them for accommodating him and feeding him." He justified this as enabling him to survive while he had no permission to work.
- 8) Although contested in the grounds of appeal to the Upper Tribunal, Mr Martin conceded in the course of submissions (correctly, in my view) that even on the appellant's own admission his conduct amounted to working in breach of visitor conditions. What he actually did, and for what reward, remains obscure. There was never anything to prevent him returning to Pakistan, so the necessities of survival are no excuse. However, Mr Matthews accepted my observation that the evidence does not disclose that the appellant came to the UK principally to work illegally, which is presumably the mischief at which the guidance is aimed, and that this case fell at the low end of the scale of aggravating circumstances.

- 9) After listing examples of aggravated circumstances, the guidance provides generally:

All cases must be considered on their merits, the activities considered in the round to see whether they meet the threshold under paragraph 320(11), taking into account family life in the UK ...

- 10) The aim of the appellant and the sponsor is to have their family life in the UK. At the stage of considering a case on its merits and in the round, the existence of such family life interests plainly makes a considerable difference. Where family life exists, the matters in favour of refusal must be above the minimum level.

- 11) This is the *ratio* of PS:

In exercising discretion under paragraph 320(11) ... the decision maker must exercise great care in assessing the aggravated circumstances ... 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.

- 12) While the judge did mention the appellant's return in relation to Article 8, he did not refer to the above considerations before deciding the case under 320(11).

- 13) In my opinion, the judge failed to have regard to what the guidance actually says about taking into account family life, and failed to take into account the *ratio* of PS. He did not look at where this case fits on the spectrum of possibilities. If the appellant had left the UK and then sought another visit visa, or if he had applied as a spouse without leaving the UK, he could not reasonably have expected to succeed. However, his conduct in returning to make an application brought him within the category of those who should benefit from the exercise of discretion in the guidance, as explained in PS, once the other concerns expressed by the ECO were taken out of the reckoning. (Perhaps, as the judge was not entirely satisfied on those points, they were still at the back of his mind; but having reached the conclusion that the appellant was free to marry, the case had to be decided accordingly. The respondent has not sought to put this back in issue.) The aggravating circumstances were at the low end, family life was shown, and the case became a classic example of an appellant who should benefit from the exercise of discretion.

- 14) The First-tier Tribunal determination is set aside, and the appeal is allowed under the Immigration Rules.



17 January 2014
Judge of the Upper Tribunal