Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06267/2015

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 8 November 2017	**On 10 November 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SHAKUNTALABEN DALUBHAI CHAUHAN
(anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFICER -NEW DELHI

Respondent

Representation:
For the Appellant: Mrs Simms instructed by Howard Kennedy LLP.
For the Respondent: Mr C Bates Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Colyer promulgated on 23 February 2017 following a hearing at the Nottingham Justice Centre.

Background

2. The appellant, a citizen of India, applied for entry clearance to the United Kingdom as a partner under Appendix FM of the Immigration Rules. The application was refused pursuant to paragraph 320(11) on the basis the appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules and in relation to the financial requirements in respect of the sponsor's documentation regarding self-employment.
3. The Judge sets out findings of fact from [24} of the decision under challenge which can be summarised in the following terms:

    a. In the application for entry clearance the appellant provided the sponsor's details stating in reply to question 84 that the relationship between her and the sponsor is "friend" [25].
    b. The applicant made a concession that her previous conduct had not been in line with what was expected under the immigration law but provided an explanation. This information was consistent with that provided by the decision maker in the refusal [26 – 27].
    c. The decision-maker was satisfied paragraph 320(11) was applicable as a result the following facts recorded in the refusal:

> "You entered the United Kingdom on 25th/06/2003. You held a visit visa which was valid from 02/12/2003. On 17/05/2006, you were arrested and served with form IS151A is an over stayer. On 15/06/2006, you were sentenced to 5 months imprisonment following your conviction for possessing a false instrument; you were in possession of a false British passport. You were removed from the United Kingdom on 08/09/2006.
>
> You have made a number of applications and have been encountered by police and immigration authorities in the United Kingdom. You have used the following identities: Shakuntalaben Dalubhai Chauhan, Shakuntalaben Vadnerkar and Shakuntalaben Vasudev Vadnerkar. You have used the following dates of birth: 07/10/1958, 07/10/1959 and 17/10/1959.
>
> Taking the above into account, I note the following:-
>
> You entered the United Kingdom in June 2003. Your leave expired in December 2003. You then spent a period of almost three years in the United Kingdom without any leave to enter or remain. You are therefore an over stayer.
>
> You have used a number of different identities and dates of birth. You were convicted in possession of a false instrument when you are found to be in possession of a false British passport; this indicates that you attempts to switch nationality in order to remain in the United Kingdom.

> Given all the above, I am satisfied that you have previously contrived in a significant way to frustrate the intention of the Rules, and I therefore refuse your application under paragraph 320(11) HC 395 as amended."

d. The explanation provided by the appellant was considered by the Judge and is set out in the decision under challenge but was not found to be reliable in all the circumstances. The Judge finds that as the appellant had an Indian passport she would have been aware of the official forms and procedure for obtaining a valid passport and the explanation given for obtaining a false British passport was found to lack credibility. The Judge records that the appellant's conviction is for a very serious immigration offence and that the decision-maker was correct to be satisfied that the appellant had contrived in a significant way to frustrate the intentions of the Rules and refusing the application by reference to paragraph 320(11) [30].
e. The Judge notes that 320(11) is a discretionary remedy and that the entry clearance officer in this appeal refused to exercise discretion and that it was not appropriate to grant leave on a discretionary basis [32 – 36].
f. The decision-maker refers to discrepancies in documents accompanying the application form relating to financial matters for which the Judge notes the appellant's explanation and sponsor's statement [37 – 38].
g. The Judge notes that even though documentation may now be in the appeal bundle it was not with the application leading to it being found the decision-maker was correct in the reasons for refusal in respect of the financial requirements [39].
h. The Judge notes the refusal refers to specific evidence and documents not being submitted regarding income from dividends, the failure to submit documents relating to the sponsor's income from pensions and deficiencies in tax documents submitted; leading to a conclusion the appellant failed to provide the detailed documentary evidence required under the Rules and therefore could not meet those requirements. [40 – 45].
i. The Judge thereafter considered article 8 ECHR as this matter was raised in the grounds. The Judge finds the appellant had established she had a genuine and subsisting relationship with her British partner who had lived in the UK most of his life and is settled here, having previously lived in India and visited on a number of occasions. The Judge found that the appellant and her partner are able to live together in India [46 – 47].
j. The Judge finds there are no insurmountable obstacles to relocation to India [48].

k. In relationship to a public interest argument, [56 – 62], the Judge considers section 117B of the 2002 Act.
l. Article 8 conclusions are set out at [63 – 66] in which it is found the respondent's decision is proportionate to any interference with a protected right.

4. The appellant sought permission to appeal which was granted on a limited basis by a Designated Judge of the First-tier Tribunal in the following terms:

> The second ground relates to the treatment of the appeal against the refusal under paragraph 320(11) of the Immigration Rules. It is arguable that the Entry Clearance Officer's decision made no express reference to the issue of discretion. The issue was addressed by the Entry Clearance Manager (ECM) in his review at paragraph 4 of the second page. Is arguable that the Judge erred in treating this as a consideration and refusal to exercise discretion because the ECM's statement can be read as a finding that there was no issue of discretion being exercise ball [sic] because the application had not been made by reference to those paragraphs of the Immigration Rules mentioned in paragraph 320(7C)(A)(i). Paragraph 320(7C) was deleted on 9 July 2012 by HC 194 so was not relevant to the decision under appeal.

5. Mrs Sims accepts the scope of the grant of permission which is limited to the second ground set out above, only.

Error of law

6. In relation to the grant of permission referring to what the author of the grant believed was how the ECM's statement can be read I do not find it made out that the ECM was suggesting that there was no issue of discretion being exercisable. The ECM notes in the review:

> "The grounds of appeal refer to Paragraph 320(11) and state that an exception should have been made for the appellant under Paragraph (7C)(i) of the Immigration Rules. However, Paragraph (7C)(i) refers to a spouse, civil partner or unmarried or same-sex partner under Paragraph 281 or 259 A. The appellant submitted her application on 20 May 2014. The Entry Clearance Officer rightly assess the application under Appendix FM which came into force on 9 July 2012. I am therefore satisfied the decision to refuse under Paragraph 320(11) was correct. The decision was also checked and upheld by another ECM at the time of refusal.

7. The ECM deals with the appellant's arguments relating to the element of discretion in the following terms:

> The grounds of appeal assert that discretion ought to have been exercised differently. This appears to imply that the appellant cannot meet the requirements of the relevant rule as reliance is being placed on the exercise of discretion. In any event there is no explanation why the appellant thinks that discretion ought to have been exercised differently. Having examined the case and supporting evidence available I am satisfied that the decision is correct and I am not prepared to exercise discretion in the appellant's favour.

8. The original grounds of appeal against the decision of the ECO argued that exception should be applied. As noted by the ECM the grounds in effect assert that discretion ought to have been exercised differently not that discretion was not exercised by the ECO. Indeed, at [2] of the original Grounds of Appeal the appellant pleads "That the person making the decision should have exercised differently a discretion conferred by immigration rules." The review by the ECM does not state that discretion should not have been exercised but flags up that the appellant fails to establish in her grounds of appeal in what way discretion ought to have been exercised differently. The ECM having reviewed the decision was not prepared to exercise the same discretionary power in a manner different from that of the ECO. Any assertion that the ECM was arguing the exercise of discretion was not applicable has no arguable merit.
9. The Judge was aware of the appellant's arguments regarding discretion and discretionary powers and refers at [32] to the decision in *PS (paragraph 320(11) discretion care needed) India [2010] UKUT 440* and the header of that decision in which the Upper Tribunal state:

> *"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 (7 B) Mr supplied by paragraph 320 (7 C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal 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."*

10. The Judge noted that in that appeal the appellant returned to his home country with a view to making an application from outside the United Kingdom to join his wife in the United Kingdom, in other words, he sought to regularise his immigration status in the United Kingdom. The Judge further notes from *PS* the following:

> "it might have been thought that the provisions of paragraph 320 (7B) and (7C) were among other things, intended to encourage a person in the position of Mr S voluntarily to leave the United Kingdom, to remain outside United Kingdom for a significant period and then to seek to regularise his immigration status by applying properly for leave to enter the United Kingdom to join his wife. That would appear to be a desirable objective of the rules since it would encourage those who were unlawfully in the United Kingdom to leave and, as explained, to seek to regularise their immigration status."

11. The key findings by the Judge in relation to the discretionary issues and paragraph 320(11) are found at [35] – [36] which are in the following terms:

> 35. The Entry Clearance Officer in this appeal, in making the decision of refusal, declines to exercise discretion. It is clear that the Entry Clearance Officer has addressed his/her mind to the relevant question, namely whether in the circumstances of this case the appellant's breach

of UK immigration law was sufficiently aggravating so as to justify the refusal.

36. I agree with and accept the respondent's submissions and decision on this aspect of the appellant's case for the same reasons. I find that the decision of the respondent to refuse the appellant's application under paragraph 320 (11) was correct.

12. The text of the refusal, set out at [3c] above, was challenged by Mrs Simms on the basis it was argued that all the factors it was argued the Judge should have considered and taken into account were not considered. These factors were set out in the skeleton argument before the First-tier Tribunal.
13. The finding of the Judge was not that the ECO has not considered the discretionary aspect but that having considered it he or she was not minded to exercise discretion in the appellant's favour. This is the true meaning of the phrase "declines to exercise discretion.
14. If the decision maker has lawfully exercised discretion the Tribunal must either (a) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (b) reach a different decision in the exercise of its own discretion. In this appeal, the Judge upheld the decision.
15. It is not disputed that the ECM had established the precedent facts which brought into play the finding that the appellant had contrived in a significant way to frustrate intention of the Rules.
16. In relation to the appellant's reliance upon *PS* a more detailed analysis of that decision shows that in *PS* the Tribunal held that, 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. The Tribunal noted the guidance on the application of paragraph 320(11) to be found in Entry Clearance Guidance under the heading "Refusals", in relation to aggravating circumstances, provides as follows. As at December 2010 this read: "Please note that the list below is not an exhaustive list. Aggravating circumstances can include actions such as: absconding; not complying with temporary admission / temporary reporting conditions/bail conditions; not complying with reporting restrictions; failing to comply with removal directions (RDs) after port refusal of leave to enter (RLE); failing to comply with RDs after illegal entry; previous working in breach on visitor conditions within short time of arrive in the UK (ie pre-meditated intention to work); previous recourse to NHS treatment when not entitled; previous receipt of benefits (income, housing, child, incapacity or otherwise) or NASS benefits when not entitled; using an assumed identity or multiple identities; previous use of a different identity or multiple identities for deceptive reasons; vexatious attempts to prevent removal from the

UK, eg feigning illness; active attempt to frustrate arrest or detention by UK Border Agency or police; a sham marriage / marriage of convenience / polygamous marriage in the UK; harbouring an immigration offender; facilitation / people smuggling; escaping from UK Border Agency detention; switching of nationality; vexatious or frivolous applications; not complying with re-documentation process." The guidance goes on to state: "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 and, in the case of children, the level of responsibility for the breach. Where an applicant falls to be refused under 320(7A) or 320(7B), the ECO must also consider whether it is also appropriate to refuse the applicant under paragraph 320(11). Where 320(7C) applies which makes an applicant exempt from 320(7B), an ECO must consider whether a refusal under paragraph 320(11) is appropriate." As the guidance had not be considered the appeal was allowed on the basis that it was not in accordance with the law.

17. This appeal is factually different as it is not a case of a right being usurped by another provision of the Rules although the Tribunal was invited, by analogy, to find the similar processes applicable. As it is the Immigration Rules that state in relation to paragraph 320(11) that an application for entry clearance should normally (my emphasis) be refused where the applicant has previously contrived in a significant way to frustrate the intention of the Rules, it is clear this is not a mandatory ground of refusal. That fact was known by the ECO and the Judge as there a specific reference to this in the refusal of entry clearance.

18. It is not made out that the decision-maker was unaware of the obligations contained in the published guidance when considering a discretionary ground of refusal and, according to the ECM review, also referred the decision to be checked by another ECM at the time of refusal which was upheld. It may be that the ECO's decision is not set out in the manner in which Mrs Simms asserted it should be, the failure of which amounted to arguable legal error in that there is not a list of the factors the guidance indicates needed to be considered with findings in relation to each and every aspect, but it is not made out that the decision-maker failed to consider the relevant factors or failed to consider the exercise of discretion.

19. Mrs Simms submitted that the specific wording of the rule with the finding in relation to 320(11) appearing halfway down the second page before consideration of whether the application raises exceptional circumstances is indicative that the decision had been made with relation to 320(11) at the earlier stage before considering exceptional circumstances later on in the decision, sufficient to amount to arguable legal error.

20. The ECO, having dismissed the matter under the Rules both in relation to 320(11) and in finding the appellant could meet the financial requirements of Appendix FM, considered the matter outside the

Rules. This in itself involves consideration of an exercise of discretion although one considered within the framework of article 8 ECHR. In relation to this aspect, the decision-maker wrote:

> "I have also considered whether your application raises any exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 of the European Convention on Human Rights, warrant consideration by the Secretary of State of a grant of entry clearance to come to the United Kingdom outside the requirements of the Immigration Rules. I am satisfied that it does not. Your application does not fall for a grant of entry clearance outside the rules."

21. The above finding reinforces the earlier conclusion of the ECO that on the facts it was not appropriate to exercise discretion in the appellant's favour. It also appears on the facts of this matter that in light of the evidence before the Judge the finding that the decision of the ECO to refuse the application was correct and reflects the strong aggravating factors applicable in this case.
22. It is my primary finding that the appellant has failed to arguably establish that the ECO failed to consider the exercise of discretion in relation to this matter as asserted by the appellant. It is not made out that the ECO and two ECM's who reviewed the decision failed to understand the requirement to consider this aspect prior to making the final decision in relation to paragraph 320(11). The conclusion by the Judge that discretion was exercised at [35] has not been shown to be infected by arguable legal error material to the decision to dismiss the appeal; sufficient to warrant a grant of permission to appeal to the Upper Tribunal.
23. The Upper Tribunal also canvassed the argument that as permission to appeal was refused in relation to the financial requirements of Appendix FM any challenge on the limited basis advanced will have no realistic prospects in securing a grant of leave to enter making any error, even if established, not material.
24. Mrs Simms was asked during the course of her submissions how, if a finding had been in the appellant's favour, she thought the appellant could succeed with the application. Her reply that if the ECO considered discretion the appeal may be allowed is arguably incorrect. I say this for two reasons the first of which is that an exercise of discretion in the appellant's favour would only be applicable to paragraph 320(11) which is a discretionary ground of refusal. If, notwithstanding the clear evidential basis supporting a finding that the appellant had contrived in a significant way to frustrate the intentions of the rules, it was found there was some other additional element that did not warrant the application being refused on that basis it would still be incumbent upon the appellant to establish that she could satisfy the requirements of Appendix FM. The unchallenged conclusion that the maintenance requirements had not been shown to be satisfied on the basis of the evidence before the decision-maker shows that the application will fail in any event.
25. Whilst the Upper Tribunal understands that individuals may wish to pursue discrete points in cases if they feel that it may create

difficulties for them at a later stage if findings are maintained, there still has to be merit in such a challenge. The primary finding in relation to this matter is not only that the assertion the ECO failed to exercise discretion is not made out but that it has not been established, in any event, that there is any material error in the decision to dismiss the appeal.

26. It is open to the appellant to make a fresh application at any time during the course of which she will be able to provide full range of financial documents required by Appendix FM with reference to FM – SE, and will be able to make detailed submissions in relation to any potential application of 320(11) which may be sufficient to persuade a future ECO of the merits of her case and that it may be appropriate for her to be granted the leave is sought.

27. In relation to article 8 ECHR; this is examined in detail by the Judge who finds at [64] that the appellant's private and family life may be continued in India and in which the Judge gives adequate reasons for concluding that any interference with a protected right is, on the facts of this matter, warranted.

28. No arguable legal error material to the decision to dismiss the appeal is made out. This application is dismissed.

Decision

29. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

30. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Judge of the Upper Tribunal Hanson

Dated the 9 November 2017