



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08119/2015

**THE IMMIGRATION ACTS**

Heard at Manchester Civil Justice Centre  
On 12<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 12<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MUHAMMAD ADEEL UR REHMAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr P Thornhill  
For the Respondent: Mr A McVeety (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Farrelly, promulgated on 15<sup>th</sup> August 2017, following a hearing at Manchester Piccadilly on 27<sup>th</sup> June 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

**The Appellant**

2. The Appellant is a male, a citizen of Pakistan, and was born on 29<sup>th</sup> August 1988. He appealed against the decision of a refusal of entry clearance by the ECO in Pakistan,

the refusal being dated 1<sup>st</sup> September 2015. The basis of the refusal was that under paragraph 320(11) of HC 395, the Appellant had breached the conditions of his previous leave to remain in the UK as a student by working. He had also obtained leave to remain by deception because he submitted an English language test certificate which was obtained by impersonation. There were aggravating circumstances and he had made vexatious applications after being encountered in order to delay his removal.

### **The Judge's Findings**

3. Judge Farrelly in refusing the Appellant's appeal, observed that the major reason behind the refusal by the Entry Clearance Officer related to the fact that the Appellant had engaged in fraud when taking his English language test, but also that "the Appellant was required to report and on more than one occasion failed to do so", although he "attributed this to a back problem". The judge went on to observe that, "there are other aggravating circumstances that she is not meeting reporting requirements or making frivolous applications" (paragraph 12). In addition, the judge observed that his task had been made easier "by the very detailed decision of Judge of First-tier Tribunal Devlin" when the Appellant had made an earlier in-country application as a partner (paragraph 13). In that determination, the judge had not found the Appellant to be a credible witness and his sponsoring wife had continued to support his claim notwithstanding this (paragraph 15).
4. The appeal was dismissed.

### **The Grant of Permission**

5. Permission to appeal was granted on 20<sup>th</sup> February 2018 on the basis that the judge failed to make proper findings in relation to paragraph 320(11) because the Appellant had only made two applications for leave to remain, such that it could not be said that there had been a multitude of applications. Moreover, he had only failed to report once, such that it could not be said that there had been repeated failures on his part to report to the authorities. The judge had concluded that the Appellant should make a fresh entry clearance application, but such a conclusion was unsustainable given that it was coloured by the judge's apparent acceptance that paragraph 320(11) applied so as to give grants for any future application to be refused.
6. On 20<sup>th</sup> March 2018, a Rule 24 response was entered to the effect that

"The Respondent does not oppose the Appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider the refusal under paragraph 320(11) ..." (see paragraph 2).

### **The Hearing**

7. At the hearing before me on 12<sup>th</sup> June 2018, Mr Thornhill, appearing on behalf of the Appellant, submitted that the essential issue in this appeal was to do with the proper construction of paragraph 320(11). A rejection on the basis of this paragraph was

“discretionary” and not “mandatory”. This meant that the decision maker had to consider there were indeed “aggravating” circumstances. In this case, there were none. The Appellant had not habitually failed to comply with his reporting requirements. In the same way, he had not made frivolous applications. He had only made one leave to remain application, and when that was refused by the Visa Officer, he raised a human rights appeal, expressly on the basis that he had a wife in the UK, and a child, who was now 2 years of age, being born on 24<sup>th</sup> October 2016. As a question of fact, therefore, there had been an error.

8. Second, the Home Office Guidance Notes makes it clear that the interpretation of “discretionary” falls to be applied in three stages. First, there is the breach itself (such as overstaying or remaining without leave). Second, there is the existence of “aggravating circumstances”. Third, there is the exercise of discretion, and here the Guidance Notes make it quite clear that “all cases must be considered on their merits”, in order to assess “if they meet the threshold under paragraph 320(11)”. This was a case where the Appellant had undertaken reporting over a prolonged period of time, this being from May 2014 to April 2015, after which she had returned to Pakistan. There had been 24 reporting days and the Appellant had only missed one. He missed that one day because he simply forgot. A few days later he telephoned to own up to this and apologised for having forgotten.
9. For his part, Mr McVeety submitted that he will place reliance upon the Rule 24 response, and that the appeal was not opposed, and the main question now was whether this matter ought to return back to the First-tier Tribunal so that all the evidence can be considered afresh with a view to deciding whether the Appellant can put forward “specified evidence” that goes to his application for entry clearance.
10. In reply, Mr Thornhill submitted that the Appellant would have to show that his sponsoring wife earned the requisite £18,600 per annum, which she was now able to do given that she had a new job (as referred to by the grant of permission by the Upper Tribunal); that the Appellant could comply with the English language test requirement; that there had been cohabitation between the two of them (which would not be difficult to show given that there was a child of the marriage).
11. Mr Thornhill submitted that the Appellant had only failed on the threshold of “suitability” because when failing in his application he had to enter in a box a statement whether he had ever been deported, removed, “or otherwise required to leave the country” and he had said No, because he had himself wilfully returned back to Pakistan, without being forced to do so, but that was his misunderstanding, and it was the way in which she had understood the import of these requirements, but not such as would now prevent him from making another application.
12. This the Appellant could do over a five year period during which time there was a valid appeal before the immigration authorities because the Rules allowed him so to do, which meant that if this matter could be remitted back to the First-tier Tribunal, the Appellant would not lose the benefit of the five year period.

**Error of Law**

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. Paragraph 320(11) of the Immigration Rules is discretionary in its application. It looks to “aggravating” circumstances.
14. The decision by the judge here that the Appellant had made “frivolous applications” was unwarranted because there had only been one application and that was an entirely proper one.
15. In the same way, the finding that the Appellant had, in relation to his reporting requirement, “on more than one occasion failed to do so” was also factually incorrect. The Appellant had only failed to report once. Neither of these two circumstances were such as to be “aggravating”.
16. In short, paragraph 320(11) could not properly fall to be applied so that the Appellant’s appeal could be rejected. This matter is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Farrelly.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Farrelly.

No anonymity direction is made.

Signed  
Deputy Upper Tribunal Judge Juss

Date  
8<sup>th</sup> September 2018