



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10803/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 17 May 2018

Decision & Reasons Promulgated  
On 30 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTEER

Between

RAVINDRAN GANGANA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, CHENNAI

Respondent

Representation:

For the Appellant: Mr F Khan, counsel.

For the Respondent: Mr E Tufan, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 30 March 2016 refusing him entry clearance as a spouse.

Background.

2. The appellant is a citizen of India born on 13 January 1985. He made an illegal entry into the UK in November 2007 and he came to the attention of the authorities in January 2011 when he was apprehended working illegally. On 17 February 2011 he claimed asylum using a false name, claiming to be a Sri Lankan who had been

arrested in Sri Lanka and questioned about LTTE involvement. His application was refused on 17 March 2011. The appellant was later released from immigration detention on reporting conditions, but he absconded.

3. He was encountered again in March 2014. He made a voluntary departure from the UK in July 2014 and on 29 January 2016, he applied for entry clearance as a spouse. His wife, the sponsor, is a British citizen, born on 29 January 1987. She came to the UK with her family from Sri Lanka in November 1988. They first met in 2011 and their relationship became more serious in 2012. The judge found that the sponsor knew at an early stage of the relationship and some three years before they married that the appellant did not have leave to be in the UK. They then continued their relationship for about two years before the appellant disclosed his real identity to the respondent and arranged to leave the country voluntarily [27].
4. The appellant made an application for entry clearance from India. In support of his application he produced his marriage certificate, photographs of the wedding ceremony and records of telephone calls between him and the sponsor. The respondent was not satisfied that the appellant's identity had been established in the light of his previous claim for asylum as a Sri Lankan national or that it had been demonstrated that his relationship with the sponsor was genuine or subsisting. His application was also refused under the provisions of para 320(11) of the Rules on the basis that that he had contrived in a significant way to frustrate the intentions of the Rules. The respondent went on to consider whether the application raised any exceptional circumstances consistent with the right to respect for family life to warrant consideration of a grant of entry clearance outside the Rules but found that there were no such circumstances. The decision was maintained on review.

#### The Hearing before the First-tier Tribunal.

5. The judge was satisfied that the appellant's identity was as claimed and that he and the sponsor had a genuine and subsisting marriage and intended to live with one another permanently [15]. It was asserted at the hearing that the appellant had claimed asylum as a Sri Lankan only because he was advised by solicitors to do so. The judge noted that the appellant had not complied with the guidance in SV (Alleging misconduct and suppressed evidence) Iran [2005] UKAIT 160 and BT (Former solicitor's alleged misconduct) Nepal [2004] UKIAT 311 and gave that explanation little weight [16]. She commented that the sponsor had categorised the appellant's past non-compliance with immigration controls as a "mistake", asserting that everyone made mistakes and that the appellant should be given a second chance. However, the judge was not impressed with this argument and said that the appellant's actions were not misguided: they were dishonest; the responsibility for that dishonesty rested with him and his attempts to understate his actions and to blame others did him no credit [18e].
6. The judge found that the appellant's case clearly fell within the ambit of para 320(11), saying that it was significant that his particular immigration history involved several factors listed in that paragraph as "aggravating circumstances": he had absconded,

used an assumed identity and made a false asylum application. The judge had been referred to PS (paragraph 320(11) discretion; care needed) India UKUT 440 and found that the appellant's disregard for immigration controls was far more serious than in the case of PS.

7. The judge then considered the position under article 8. She was satisfied that family life was engaged, the decision would be an interference, it was in accordance with the law and was for a legitimate aim. The sole issue to be considered was proportionality. She was satisfied that the appellant would be financially independent in the UK as the sponsor's earnings were sufficient to meet the requirements of the Rules. She commented that the appellant claimed to have passed an IELTS life skill examination, reading and listening skills but she could not locate the certificate in either the appellant's or the respondent's bundles. In her view the evidence produced was not sufficient to show that the appellant had the language skills required for integration into British society.
8. She took into account that the relationship was established during a period of unlawful residence and should be given little weight in accordance with the provisions of s.117D of the Nationality, Immigration and Asylum Act 2002. She then considered the sponsor's evidence that when she had visited the appellant in India, she had been unwell and for this reason would be unable to live there. The judge accepted that the sponsor did suffer some ill health during her visits there, but she was not satisfied that the consequences were as serious as the sponsor claimed. The judge did not accept as claimed that she could not conceive or carry a pregnancy to full term in India or would be at risk of cancer there. She accepted that the sponsor had suffered relatively short-term illnesses there which were not serious, albeit they were unpleasant and uncomfortable. They were not such that it would make it unreasonable for the sponsor to share family life with the appellant in India [30]. The judge found that it would not be unreasonable for the sponsor to go to India, that the respondent's decision was proportionate and did not breach article 8.

#### The Grounds of Appeal and Submissions.

9. In the grounds of appeal, it is argued that the sponsor had given clear evidence that she could not live in India and that this evidence was not challenged. It was therefore procedurally unfair for the judge to make an adverse finding on this issue without the sponsor having a proper opportunity to respond to the concerns the judge had about her evidence and the medical evidence. It is further argued that, even though the judge found that the sponsor had exaggerated her medical complaints, she still accepted that the sponsor had become ill when she went to India on short term visits. If the sponsor became ill in India and then returned to the UK and recovered, it would follow, so the grounds argue, that if she lived there full-time, she would be permanently, or alternatively, nearly always, ill.
10. It is then argued that at [21] the judge reviewed the decision of the respondent rather than coming to her own decision on whether the decision was in accordance with the law or for a legitimate purpose and, when considering proportionality, she failed to

distinguish between a clear failure to meet the Rules with a situation where she fell foul of a judgment of the respondent when it was not so "clear-cut" that the appellant did not comply with the Rules. It followed that the judge had not carried out her own freestanding proportionality assessment, which was fundamentally flawed. Finally, it is argued that the judge was wrong to find that the appellant did not meet the English language requirement: this was a point never taken by the respondent nor was it a live issue at the hearing.

11. At the hearing before me, Mr Khan adopted these grounds. He accepted in the light of a note from the presenting officer at the First-tier Tribunal hearing that the sponsor had been questioned about the medical evidence but he argued that the judge had not given proper weight to the letter from the appellant's GP dated 3 July 2017, to the fact that the requirements of the Rules in relation to maintenance were met, to her finding that the marriage was genuine and, more significantly, when considering proportionality to the fact that it was accepted the appellant became ill when she visited India.
12. Mr Tufan submitted that the judge had reached a decision properly open to her. The decision under para 320(11) had not been challenged and, when considering the medical evidence, the judge had been entitled to comment that the letter from the GP recording the illnesses suffered by the appellant did not specifically give an opinion from the doctor that she could not live in India but simply recorded that the sponsor felt that living there was not an option. As the appellant could not meet the requirements of the Rules, it had to be shown that there were compelling circumstances justifying a grant of leave under article 8. He further submitted that, even if the judge had erred in relation to the English language requirement, that had no material bearing on the issue of proportionality in the light of the other factors and, in particular, the appellant's immigration history.

Assessment of the issues.

13. The grounds and submissions do not satisfy me that the judge erred in law such that the decision should be set aside. There is no substance in the argument that there was no proper opportunity at the hearing of dealing with the issue of the sponsor's health and the effect on her of living in India. The presenting officer's notes from the hearing confirm that she cross-examined the sponsor on the medical evidence and the letter from the doctor as it recorded the sponsor claiming that she could not go and live in India rather than the doctor saying she could not live there. No evidence has been produced on behalf of the appellant to support the assertion in the grounds that the sponsor's evidence that she was unable to live in India for medical reasons went unchallenged at the hearing. I am satisfied that there was a proper opportunity for these issues to be explored at the hearing, that they were explored and that there was no procedural unfairness.
14. The judge was entitled to comment at [29] that there were differences between the sponsor's oral evidence and the medical evidence about the ill-health she suffered in India as set out in [29a] - [29e]. These include the fact that the medical report

described the sponsor's ill health after visits to India as allergic urticarial, urinary tract infections and gastroenteritis but it was not clear whether the doctor examined the sponsor and diagnosed those conditions or was reporting what the sponsor had told him; the medical report did not support the claim that the appellant could not carry a pregnancy to full term in India; the sponsor claimed to be ill for up to a month following visits to India but the medical report made no mention of such prolonged illnesses and the sponsor's mother had claimed that the sponsor was asthmatic but there was no mention of this condition in the report.

15. When considering the issue of the sponsor's illness, the judge was entitled to take into account her view that the sponsor in her oral evidence had been determined to secure the appellant's return to the UK and to find that this desire had coloured her evidence. She referred to the fact that the sponsor spoke in absolute terms such as "doctors in India are no good" and "girls do not work there" [28]. The judge was entitled to find that conditions in India were not as bad as the sponsor claimed.
16. In the grounds it is argued that the judge's acceptance that the appellant suffered some ill health during visits to India should have led to a conclusion that, if she lived there permanently, she would be ill permanently, or alternatively, most of the time and it followed that was unreasonable to expect her to live in India. There is no substance in this ground. The judge was entitled to find as she did at [30] that the sponsor suffered relatively short-term illnesses which were not serious, even if unpleasant and uncomfortable and that she was not satisfied that these illnesses would make it unreasonable for her to share family life in India. On the evidence before her and for the reasons she gave, these were findings of fact properly open to her and cannot be categorised as irrational.
17. The next ground argues, in substance, that the judge when considering a number of issues reviewed the respondent's decision rather than reached her own decision. The grounds refer to [21] where the judge said that she was satisfied that the respondent's reliance was based on the evidence following consideration of the key facts of the case and was a lawful and proportionate response, given the appellant's history and on that basis that the refusal was in accordance with the Rules. This refers to the refusal under para 320(11). While this phraseology could indicate that the judge was reviewing the evidence rather than making her own decision, when it is read in context, it simply indicates that the judge agreed with the respondent's decision. It is clear from [19] that the judge found that the appellant's circumstances and the evidence clearly fell within the ambit of para 320(11) and that, in the light of the aggravating circumstances she identified, this was a case where the normal course should be followed of refusing the application.
18. The grounds then refer to [23] where the judge dealt with an argument that the economic interests of the country through immigration control being in the public interest should take into account the fact that the sponsor's earning capacity now and in the future was such that her departure from the UK would be damaging to those economic interests. The judge said that she considered that argument as part of her assessment of proportionality and that, in her view, the issue was not so clear cut as

to mean that the refusal was not in accordance with the law or that it did not have a legitimate aim. It was not argued before me that those findings were flawed. The argument was that the judge failed to carry out her own proportionality assessment as she failed to draw a distinction between the appellant clearly falling foul of an immigration rule and falling foul of a judgment of the respondent which was not so clear cut.

19. There is nothing in this argument. The judge was entitled to comment that the argument about the effect of the sponsor working abroad was not clear cut and did not lead her to finding that the decision was not in accordance with the law or not for a legitimate purpose but was a factor to take into account when assessing proportionality. It was, however, clear cut that the appellant could not meet the requirements of the Rules under para 320(11) and no issue arose of simply falling foul, as the grounds seek to argue, of a decision of the respondent. In any event, the judge went on to consider proportionality taking into account that those parts of the Rules the appellant could meet. When the judge's decision is looked at as a whole, it is clear that she was making her own findings on the issue of proportionality and that she reached a decision properly open to her.
20. The final argument relates to whether the judge erred by finding that the appellant's English language skills were not sufficient to show that he would be able to integrate into British society. It was argued that the IELTS certificate dated 17 July 2015 had been in evidence and that the judge had erred in her findings about the appellant's lack of capacity in English. Even assuming this to be the case, the issue of language, whilst a statutory consideration, was peripheral in the circumstances of this appeal when assessing proportionality in the light of the other issues already considered. Even if the judge erred in this respect, the error had no bearing on the outcome of the appeal and, regardless of the appellant's fluency or otherwise in English, the judge would have inevitably come to the same decision, particularly in the light of the appellant's immigration history and the approach now required in assessing article 8 appeals when the provisions of the Rules are not met. In [57] of R (otao Agyarko) v Secretary of State [2017] UKSC 11, Lord Reed confirmed that in general in cases concerned with precarious family life, a very strong or compelling claim was required to outweigh the public interest in immigration control. In the light of the judge's findings of fact there were no such circumstances. The judge's conclusion was, therefore, properly open to her for the reasons she gave.

#### Decision.

21. For these reasons, I am not satisfied that the judge erred in law in any way requiring the decision to be set aside and the decision of the First-tier Tribunal stands.

Signed: H J E Latter

Dated: 24 May 2018

Deputy Upper Tribunal Judge Latter