



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18954/2016

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On: 25th May 2018

Decision & Reasons Promulgated
On 6th June 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

UMUT KAHRAMAN
(NO ANONYMITY DIRECTION MADE)

Appellant

And

ENTRY CLEARANCE OFFICER, ISTANBUL

Respondent

Representation:

For the Appellant: Mr Outtara, Immigration Advice Service
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Turkey born on the 5th October 1975. He appeals with permission the decision of the First-tier Tribunal (Judge A.M.S Green) to dismiss his appeal on human rights grounds.

Background and Decision of the First-tier Tribunal

2. This appeal is formally concerned with the Appellant's application to be granted entry clearance as the spouse of a British national, but it is the Appellant's immigration history, and the extent to which he made disclosure of it, which is

at the heart of the matters in dispute. I therefore begin by setting that history out as best I can from the materials before me.

3. The Appellant first came to the UK on the 12th February 2003. He entered the country unlawfully in the back of a truck. He remained here without permission to do so.
4. In early 2007 he was encountered by police and on the 18th January 2007 he was removed. The name that he gave officials was Ummet Kahraman. His date of birth was recorded as being the 10th May 1975.
5. By 3rd December 2007 he had made his way back to the UK, again making illegal entrance in the back of a truck. He was by then spelling his name Umut Kahraman and his date of birth was recorded as being the 5th October 1975. He remained here until he made a voluntary departure on the 16th November 2015.
6. Upon his return to Turkey in 2015 the Appellant made an application for entry clearance on the basis of his marriage to a British national, a Mrs Mandy Kahraman. The couple met in 2009 and were married in Scotland on 31st August 2012. They lived together in Aberdeen between 2012 and 2015.
7. That application was refused on the 11th February 2016 with reference to paragraph 320(11)(iii) of the Immigration Rules. This is a general ground for refusal which provides that an application should *normally* be refused:

(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

(i) overstaying; or

(ii) breaching a condition attached to his leave; or

(iii) **being an illegal entrant;** or

(iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);

and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.

8. It was obviously not in dispute that the Appellant had been an illegal entrant, and it was the Respondent's position that the Appellant had aggravated the offence by using the name 'Umet' instead of the name 'Ummet', the use of two different dates of birth, and the failure to declare three matters on his application form, those being: a police caution, the refusal of a visit visa, and the fact that he had been removed from the United Kingdom by immigration enforcement, all of those events having taken place in 2007.

9. On the 30th March 2016 the Appellant made the application that is the subject of this appeal. Again, he sought entry clearance as the spouse of Mrs Mandy Kahraman. The application was once again refused with reference to paragraph 320(11) of the Immigration Rules. The Respondent considered the provision to be engaged by the fact that the Appellant had been an illegal entrant. This time the aggravating factors were identified as:

- i) That when he completed his online application form, the Appellant only said that he had been in the UK between 2003 and 2007. Although he had volunteered the information about his second period of residence in the UK at interview, the ECO considered that the omission to mention this period on the application form was material;
- ii) The fact that the Appellant changed his name between Umet and Emmet and apparently used two different dates of birth;
- iii) The ECOs conclusion that it was highly likely that he was working when he was in the UK;
- iv) Repeated attempts to evade immigration control.

10. For good measure the Respondent also refused the application under paragraph S-EC.2.2 (b). By operation of paragraph S-EC.2.1 this 'suitability' requirement under Appendix FM introduces a discretionary refusal where an application has been refused for false information or material non-disclosure:

S-EC.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-EC.2.2. to 2.5. apply.

S-EC.2.2. Whether or not to the applicant's knowledge-

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

(b) there has been a failure to disclose material facts in relation to the application.

11. The First-tier Tribunal found that the Appellant had entered the UK illegally in the past, that he had worked in this country illegally, lived here for a lengthy period of time without permission to do so, and importantly, that he had been deliberately misleading when he had failed to disclose, on his application form, the fact that he had worked without permission and that he had been here twice before, rather than simply in the period 2003 to 2007. In respect of Article 8 the Tribunal says this:

“Whilst I note that the skeleton argument also addresses the Appellant’s family life and the impact of the decision upon it, I have not considered this given the fact that Mr Uttara orally submitted at the hearing that it was accepted that there was no appeal outside the immigration rules under Article 8”.

12. The appeal was, on those facts, dismissed. The Appellant now appeals on the grounds that in reaching its conclusions the Tribunal omitted to consider material facts.

Discussion and Findings

13. Before me the parties agreed that the application of paragraph 320(11) of the Rules requires the decision-maker to go through four stages.
14. First, the rule must be engaged by one of the four offences at (i)-(iv). If the applicant has not overstayed, breached a condition, entered the country illegally or used deception in an application, the rule cannot be applied to him.
15. Second, it must be established that in committing the offence at (i)-(iv) the applicant contrived in a significant way to frustrate the intentions of the Rules. Whilst it would normally be the case that such an intention could be inferred from the action itself, that would not always be the case. For instance I think it doubtful that 320(11) would be properly applied to a person who had by innocent mistake overstayed in the UK, or to a child who was brought into the country illegally without any understanding of the consequences.
16. Third, there must be some aggravating circumstance, such as absconding, using multiple identities or refusing to comply with the documentation process. This again, is a compulsory feature: absent some aggravation the rule cannot be invoked even if the applicant is guilty of one or more of the offences at (i)-(iv).
17. The third and final stage of the process is the exercise of discretion, imported into the rule by the words “should normally be refused”. This rebuttable presumption leaves room for the decision-maker to consider matters such as, for instance, mitigation, the passage of time or the United Kingdom’s obligations under Article 8.
18. As for paragraph S-EC.2.2, this is a provision drafted in very similar terms to the general ground for refusal paragraph 320 (7A) that was the subject of discussion in AA (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 773:

(7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.

19. Notwithstanding the express stipulation that the rule applies to false representation whether or not it was to the applicant's knowledge, the Court held that the terms 'false', and the rule overall, must require some intention to deceive on the part of the applicant.
20. I consider the First-tier Tribunal's approach to each of these rules in turn.

320 (11)

21. In this case it cannot be denied that the Appellant is an immigration offender. He has twice entered the UK illegally, and by his own admission remained here for long periods without permission to do so. No error can therefore be alleged on the part of the First-tier Tribunal for finding this element of the rule to be engaged.
22. The Tribunal appeared to proceed on the assumption that in being an illegal entrant the Appellant contrived in a significant way to frustrate the intentions of the rules. Again, I do not think that there could be any serious objection to that finding. He twice climbed in the back of a lorry and remained here for long periods at a time knowing that he had no leave.
23. As to whether there were 'aggravating circumstances' it would appear (although it is not stated in terms) that the Tribunal agreed with the ECO that there were. The factors identified in the determination are that he worked illegally, and that he had failed to disclose all of the relevant information on his application form.
24. I am not satisfied whether working illegally could in itself be said to constitute a feature aggravating illegal entry or overstaying, since such work is "part and parcel of illegal residence": ZH (Bangladesh) v Secretary of State for the Home Department [2009] EWCA Civ 8. It is no doubt for that reason that illegal working does not feature in the list of examples of aggravating circumstances in the rule itself. That leaves the deliberate omission to declare the full facts of his immigration history.
25. Mr Uttara makes two related complaints about the way that the Tribunal reached its conclusion that the Appellant was deliberately seeking to conceal facts from the Respondent when he made his application.
26. The first concerns the obligations arising when one fills in a form. Mr Uttara places reliance on (unidentified) Court of Appeal authority to the effect that an applicant can only be expected to answer the questions he is asked. When completing a form such as this there is a duty of candour upon the applicant but this does not extend to supplying information that the applicant does not apprehend to be pertinent, if the direct question is not put to him. The Tribunal had in turn relied on the opposing view taken by Mostyn J on this matter in Aafia Thebo v Entry Clearance Officer [2013] EWHC 146 (Admin). If there are

competing authorities on this point it is because, no doubt, it depends on the facts. In this case the form itself is capable of supporting either argument: nowhere is the Appellant asked whether he has worked unlawfully in the UK, but he is asked whether there is any other relevant matter that he would like to draw to the ECOs attention. In respect of the periods of stay in the UK, the Appellant has completed the question with reference to 2003-2007, but not mentioned the second period that he spent here. There could be a number of reasons for that. There may not have been room; he may have pressed the wrong button on the drop-down menu (on this online form); he may have thought he did not need to give that information since the ECO already had it; whether he was attempting to deceive can only be gleaned from the other evidence, and the context. The second limb of Mr Uttara's argument addresses just that.

27. The Tribunal found that when the Appellant filled in his form he deliberately sought to conceal from the Respondent the extent of his immigration offending, in particular the fact that he had returned to the UK after he was removed in 2007. I am satisfied that in reaching that finding the Tribunal appears to have overlooked the following matters:

- i) That this application was supported by documentation which clearly established that the Appellant was in the UK after 2007. This included his marriage certificate issued in Scotland in 2012 and statements from himself and his wife that they had met, formed a relationship and married during this period. The Tribunal failed to consider whether someone who was deliberately trying to conceal that he had come back to the UK after being removed in 2007 would include documentary evidence that plainly revealed that to be the case, or base his entire application on an Article 8 family life that was formed during the period in question;
- ii) That this application was made a matter of weeks after the first refusal, at which time the Respondent had plainly been made aware that the Appellant had had two extended periods of unlawful stay in the UK;
- iii) When interviewed the Appellant openly admitted that he had returned to the UK after being removed.

28. All of these factors were highly pertinent to the question of whether the omission on the application form was in fact an innocent mistake, quite possibly arising from the fact that the Appellant had 'no box to tick' or no room to give more information. The failure to weigh them in the balance renders the Tribunal's findings on deception unsafe.

29. The decision on 320(11) must therefore be set aside. I would add that the Tribunal's decision not to address Article 8 appears to be based on a misunderstanding of the Appellant's position: that Mr Uttara was not seeking

to make *Razgar* submissions 'outside of the rules' did not obviate the Tribunal's responsibility to consider whether the discretion under 320(11) should have been exercised at all. His family life with his wife was obviously relevant to that matter.

S-EC.2.2.

30. It perhaps follows from what I have said above that the findings on S-EC.2.2 cannot stand. I am not satisfied, in light of the evidence, that this provision should ever have been invoked at all. The rule can be applied if it is established that the Appellant failed to disclose facts material to the application. But it cannot be so established. He divulged the facts in question during the course of his interview, and in the documentation that supported his application. At its highest what can be said therefore, is that he omitted to mention pertinent information on his application *form*. That form was only one part of application.

Disposal

31. Whilst I am satisfied that the Respondent has not made out his case in respect of S-EC.2.2, the question of whether 320(11) was properly applied cannot simply be remade on the facts as found, since those factual findings were based on an incomplete assessment of the evidence. There is further no finding on whether or not the Appellant deliberately used a false identity as alleged by the Respondent; nor is there any Article 8 assessment.
32. The matter will therefore be relisted before me for further hearing. The parties have leave to file and serve any further evidence that they may wish to rely upon, but must do so no later than 5 working days before the next hearing date.

Decisions

33. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside.
34. The decision in the appeal will be remade following a further hearing before me.
35. There is no direction for anonymity.



Upper Tribunal Judge Bruce
4th June 2018