



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26805/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1st August 2018

Decision & Reasons Promulgated
On 17th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ISMAIL AKGUL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISTANBUL

Respondent

Representation:

For the Appellant: Mrs S Bassiri-Dezfouli of Counsel, instructed by Law Lane Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge A M S Green (the judge) of the First-tier Tribunal (the FtT) promulgated on 26th April 2018.
2. The Appellant is a Turkish citizen, born 21st September 1987. He applied for Entry Clearance to join his wife, Dilan Akgul (the Sponsor).
3. The application was refused initially on 1st November 2016. That decision was reviewed and maintained on 9th March 2017. The Respondent then issued a further refusal decision dated 8th March 2018.

4. The appeal was heard by the FtT on 12th April 2018 and dismissed. The judge heard evidence from the Sponsor, her mother and sister.
5. The judge found the Respondent had been correct to refuse the application for Entry Clearance with reference to paragraph 320(11), finding that the Appellant had previously contrived in a significant way to frustrate the intention of the Immigration Rules.
6. The judge found that the Appellant and Sponsor are in a genuine relationship, and that the Sponsor has dual Turkish and British nationality. The judge found that it would not be unjustifiably harsh for the Sponsor to reside in Turkey with the Appellant. The judge noted that the Sponsor had visited the Appellant twelve or thirteen times in Turkey, and stayed with him at his family home. The judge was aware that the Sponsor has a disability, but did not accept that she required constant care from her mother, noting that the Sponsor goes out to work. The judge found that if the Sponsor and Appellant did not wish to live with the Appellant's family in Turkey, they could live elsewhere in Turkey, and the Sponsor living in Turkey would not amount to either insurmountable obstacles or very compelling circumstances.
7. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds, settled by Counsel, are summarised below.
8. It was contended that the judge's decision was perverse. The judge had indicated in his decision that there were three issues raised by the Respondent in refusing Entry Clearance, upon which he needed to make a decision. These were paragraph 320(11), whether there was adequate financial maintenance and accommodation, and whether there were exceptional circumstances such that the application should be allowed outside the Immigration Rules with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
9. It was submitted that the judge had materially erred by failing to make any findings on the financial and accommodation issue.
10. It was contended that the judge had erred in considering paragraph 320(11). It was submitted that the judge was wrong to conclude that paragraph 320(11) must be applied.
11. It was submitted that the judge had erred in considering Article 8 and was wrong to conclude that it would be proportionate for the couple to live in Turkey. The judge had also erred by failing to make any findings on the Sponsor's family life in the UK, and had made no findings on evidence given by the Sponsor's mother and sister who had attended the hearing.
12. Permission to appeal was granted on limited grounds by Judge Grimmett on 1st June 2008 in the following terms;
 2. It is arguable that the judge erred in failing to consider the financial situation of the couple which was an issue raised by the Respondent. I could find no arguable error in the judge's finding that the Sponsor could live in Turkey with the Appellant as she has dual British and Turkish nationality.

13. The Tribunal sent the grant of permission to the parties, pointing out that permission had been granted on limited grounds. The Appellant was advised that he may apply to the Upper Tribunal for permission to appeal on a point of law on any ground on which permission had been refused.
14. Following the grant of permission directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside. The Respondent did not lodge a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Upper Tribunal Hearing

15. Mrs Bassiri-Dezfouli confirmed that there had been no further application for permission to appeal to the Upper Tribunal, in respect of the grounds upon which permission had been refused.
16. It was noted that the grant of permission expressly found that there was an arguable error, in that the judge failed to consider the financial situation of the couple, but there was no arguable error in the finding that the Sponsor could live with the Appellant in Turkey. There was however no reference at all to paragraph 320(11) which was one of the grounds upon which permission to appeal was sought.
17. Mr Kotas indicated that he would have no objection to Mrs Bassiri-Dezfouli making submissions in relation to paragraph 320(11) as permission to appeal on that point had not expressly been refused.
18. I then heard submissions on behalf of the Appellant. I was asked to find a material error of law in that the judge had made no findings whatsoever in relation to finance or accommodation.
19. I was also asked to find a material error of law in that the judge had made no findings on the evidence of the Sponsor's mother and sister.
20. I was asked to find that the judge erred in his consideration of paragraph 320(11) for the reasons given in the grounds seeking permission to appeal. The judge had not taken into account that the application of paragraph 320(11) could discourage people from leaving the UK voluntarily and then applying for Entry Clearance through the proper channels.
21. Mr Kotas accepted that the judge had erred in law in failing to make any findings on finance and accommodation but submitted that the error was not material.
22. Mr Kotas submitted that the findings made by the judge on paragraph 320(11) were unassailable. The judge had taken into account the appropriate case law, and was aware of the need to exercise care in applying paragraph 320(11). It was submitted that the judge had directed himself correctly in law and made findings which were open to him on the evidence.

My Conclusions and Reasons

23. The judge made no findings either in favour of the Appellant or adverse to the Appellant in relation to finance and accommodation. This is an error of law as this was an issue raised as a reason for refusal by the Respondent. I do not however find that the error is material for the following reasons.
24. The judge did not err in concluding that the Appellant and Sponsor could live together in Turkey. Permission to appeal was not granted on that point.
25. I do not find the judge erred in consideration of paragraph 320(11). The judge at paragraph 13 sets out paragraph 320(11). At paragraph 14 the judge then refers to PS India [2010] UKUT 440 (IAC) which is the appropriate case law to be considered in relation to paragraph 320(11). The judge records part of the guidance in that decision, in that great care must be exercised in deciding to apply paragraph 320(11) to a family member, and must ensure that the aggravating circumstances relied upon are truly aggravating, otherwise there is a risk of discouraging migrants from making applications to regularise their stay, which would be contrary to the public interest.
26. This demonstrates that the judge is aware of the need to exercise care, and is aware of the correct guidance. The judge goes on to set out an extract from the Entry Clearance guidance in relation to paragraph 320(11).
27. The judge accepts that the Appellant and Sponsor are in a genuine and subsisting relationship and they have family life. However the judge records that the Appellant in the past has been an illegal entrant to the UK. In addition the judge found aggravating circumstances, those being, and it is not disputed, that the Appellant used a false Greek passport under an assumed identity. The judge found that the Appellant did not cooperate with the immigration authorities. Reference is made to a UKBA minute sheet produced in evidence, which records that the Appellant was discovered in Calais with a false passport. The Appellant would not say how he had entered France, where he obtained the passport, how much he obtained the passport for, or his intention on reaching the UK. He did not wish to answer any questions.
28. Therefore in my view the judge was entitled to find that the Appellant had not cooperated with the immigration authorities although Mrs Bassiri-Dezfouli did not accept this.
29. It may be the case that some judges would not have upheld the Respondent's decision in relation to paragraph 320(11) but that is not the point and not the appropriate test to be applied. The grounds submitted on behalf of the Appellant on this issue amount to a disagreement. They do not disclose a material error of law.
30. The judge applied the correct case law, was aware of the guidance, and was clearly aware that caution must be exercised before applying paragraph 320(11). I can discern no error of law on this point.
31. The judge then goes on to consider proportionality and Article 8, concluding that there would be no unjustifiably harsh consequences caused by refusal of Entry Clearance.

The judge does not make any specific finding on evidence given by the Appellant's mother and sister. I have considered their witness statements. The evidence contained in those statements is that the Sponsor was depressed and disappointed when separated from the Appellant and realised that a serious mistake had been made in breaching the Immigration Rules. The statement of the Sponsor's mother states that the Sponsor is discriminated against in Turkey because of a disability, in that she has a prosthetic leg and that the Sponsor is depressed. This evidence relates to the Sponsor visiting the Appellant in Turkey and living with him. The Appellant has not been granted permission to appeal on that issue. I therefore do not find any material error of law in the judge failing to make findings on the evidence given by the Sponsor's mother and sister.

32. In my view, there was no material error of law. Failure to make findings on finance and accommodation and the witness evidence, does not affect the outcome of the appeal. Therefore those errors are not material.

Notice of Decision

The decision of the FtT does not disclose a material error of law. The decision is not set aside. The appeal is dismissed.

The FtT did not make an anonymity order. No application for an anonymity was made to the Upper Tribunal. I see no need to make an anonymity direction.

Signed

Date 1st August 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 1st August 2018

Deputy Upper Tribunal Judge M A Hall