Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00334/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 20 September 2019	**On 11 October 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

OKE ONYENSO
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Mukherjee instructed by Rodman Pearce Solicitors.
For the Respondent: Ms S Jones Senior Home Office Presenting Officer.

DECISION AND REASONS

1. On 27 August 2019 the Upper Tribunal found a judge of the First-Tier Tribunal held erred in law in a manner material to the decision to allow the appeal.
2. Although the above appellant's skeleton argument filed in support of the resumed hearing asserts an error of law should not have been found the

case has proceeded beyond that point as such error was found and the earlier decision set aside.

3. The appellant, during the course of the Resumed hearing, accepted the documentation provided by the respondent which the First-Tier Tribunal had not received was more extensive than that the original Judge had, reinforcing the fairness point in the error of law hearing and the extent of the lack of analysis of the applications which are said by the respondent to be frivolous or vexatious. Such lack of analysis in the decision of the First-Tier Tribunal also reinforces the finding of error of law.

Background

4. The appellant is a citizen of Nigeria born on 25 May 1974. On 15 August 2017 he applied for leave to enter the United Kingdom as the husband of Mrs Onyenso a British citizen. The Entry Clearance Officer was satisfied the appellant met the eligibility requirements of E-ECP of Appendix FM but refused the application pursuant to S-EC of Appendix FM as it was found paragraph 320(11) of the Immigration Rules applied on the basis it was said the appellant had contrived in a significant way to frustrate the intention of the Rules for the reason stated in the refusal.
5. The leading case when assessing a paragraph 320(11) appeal remains that of *PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)* in which a panel composed of Mr Justice Kenneth Parker and Senior Immigration Judge Spencer (the Panel) found, as recorded in the headnote:

> *"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 that 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.*

6. At [14] the Panel write: *"if the aggravating circumstances are not truly aggravating there is in this context a serious risk that those in the position of Mr S will simply continue to remain in the United Kingdom unlawfully and will not seek to regularise their status as he has sought to do."*
7. The respondent's guidance recognised that there must be some manner of a breach plus aggravating circumstances.
8. The chronology attached to the letter now available to this Tribunal from the respondent reads:

10/11/2002 - Appellant entered the UK via Rome. Claimed asylum at Port. Outcome as void as no response to request for information.

13/12/2002 - Convicted at Uxbridge Magistrates Court on 13/12/2002 for use of a false instrument contrary to Section 3 and 6 of the Forgery

	and Counterfeiting Act 1981; seeking to enter the UK by deception contrary to Section 24 A of the Immigration Act 1971. 4 months imprisonment. 4 months concurrent.
2002 -	Failed to attend asylum interview. Letter to solicitors.
12/10/2007 -	Registered as an absconder.
30/7/2008 -	Appellant makes EEA application as family member of his cousin.
26/03/2010 -	Application refused.
30/6/2010 -	EEA application.
11/11/2010 -	Application refused
2/7/2014 -	353B consideration not actioned as asylum claim outstanding. Asylum case previously outcome as void now removed and considered.
29/8/2014 -	Asylum refused – noncertified
3/2/2016 -	Appellant encountered and arrested during an illegal working operation by the enforcement team at business address Nnena Textiles Ltd. Detention authorised and served with RED0001., and RED3, IS 86/91/91R/98/98 A/96 (EFN)
3/2/2016	Appellant refused to comply with ETD process
8/2/16 -	Appellant requested for voluntary departure
9/2/16 –	Signed disclaimer received, and ATR Voluntary departure sought and granted. Appellant instructed to purchase own ticket.
17/2/2016 -	Appellant removed on ATR (voluntary departure).
12/7/2017 -	Registered as absconder.

9. Whilst it seems ‘odd’ that the appellant should be recorded as being an absconder on a date after he left the United Kingdom the fact of the matter is he did leave voluntarily, which is not disputed.
10. The original Judge noted that the ECO’s refusal only referred to one claimed ‘aggravating circumstance’ namely the making of frivolous applications. The reviewing Entry Clearance Manager (ECM) referred to ‘numerous aggravating factors’ but the decision under challenge is that of the ECO as a review by an ECM is not a fresh decision.
11. In any event, the First-tier Judge considered separately the fact that in 2002 the appellant was convicted of an offence in the UK and sentenced to 4 months imprisonment, that the appellant was in the United Kingdom without leave between 2002 and 2016, that in 2016 he was found to be working illegally, and that the appellant had previously used an assumed identity that was not declared on his application. These issues were considered separately between [38 – 40] and at [42] of the First-tier decision in which the Judge finds he was not satisfied that these matters amounted to aggravating circumstances. As noted in the Error of Law finding these are preserved findings.
12. The issue at large in this appeal therefore relates to the one matter raised by the ECO namely the making of frivolous applications.

Discussion

13. The finding of the error of law at [11] defined a frivolous or vexation claim in the following terms:

> "11. The making of a frivolous or vexatious claim is recognised as an aggravating circumstance in the relevant guidance. A frivolous claim is where the claim has no merit whatsoever, while a vexatious claim is made for the sole purpose of harassing or injuring another party, through, for instance, continually bringing claims against them, or bringing various claims for different issues that are not based on fact or have no merit."

14. It is not suggested by Ms Jones that the sole purpose of the applications made by the appellant has been to harass or seek to injure the Secretary of State for the Home Department. The purpose of the applications appears on the face of it to be an attempt by the appellant to seek leave to enable him to remain in the United Kingdom and/or to prevent his removal to Nigeria.
15. The issue is therefore whether any of the applications can be classed as frivolous. Mr Mukherjee, when seeking an authority in support of his case that the applications made by the appellant are not frivolous relied upon a decision of the Queens Bench Division of the High Court of *R v Special Adjudicator ex parte Alves Paulino and R v Special Adjudicator ex parte George Edoukou [1996] Imm AR* judgement of which was handed down on 13 October 1995. In that Rose LJ and Wright J were considering whether an asylum application characterised by the Secretary of Status as frivolous was so, where such a claim however incredible raised an issue under the Refugee Convention. The requirement to do so arose as a result of the wording of the relevant provisions at that time to be found in RSC Order 18, rule 19 which provided:

> '(1) The Court may at any time of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleadings or in the endorsement, on the ground that –
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious.'

16. The earlier rules were replaced by the Civil Procedure Rules in relation to which the power to strike out a statement of case is now to be found in CPR Part 3. There is also provision within CPR for orders to be made against litigants who are considered to be vexatious who may be made the subject of orders forbidding them from starting civil cases in courts without permission.
17. The sections of the judgement specifically relied upon by Mr Mukherjee included reference to submissions made by one of the advocates before the High Court, Mr Tam, and the specific section of the judgement in which the Court write:

> "It does not follow that want of credibility on the part of the applicant *in itself* justifies characterisation of his claim is frivolous or vexatious. If the appellant's account is totally incredible on matters which provide the basis for engaging the Convention then his claim can properly be so described. But if his lack of credibility is not so fundamental either because, for example, it only relates to fringe matters or because arguably it does not lean on the basis of the claim, in our judgement it is not possible for an applicant's claim to be characterised either by the Secretary of State or by the special adjudicator as frivolous under 5 (3) (b)."

18. Similar provisions to those found in Order 18 are set out in section 94 of the Nationality, Immigration and Asylum Act 2002 which enables the Secretary of State to certify a claim as being clearly unfounded, the effect of which is that an individual is not entitled to an in country right of appeal and can only lodge such an appeal once they have left the United Kingdom.
19. The chronology shows the appellant did make a claim for asylum which was initially refused on the basis it was said the appellant had failed to attend his asylum interview. The chronology records that on 2 July 2014 the previous outcome in relation to that asylum application was void and removed and the claim considered on its merits. On 28 August 2014 the asylum claim was refused but the claim was not certified pursuant to section 94 indicating it was not considered by the decision-maker to be a claim that was clearly unfounded or frivolous. It is not known whether there was any merit in the claim or not or whether the claim included a combination of both protection and human rights elements. What is known from the information available is that it was not a claim that was considered suitable for certification under the applicable provisions that existed at that time; although the appellant did not seek to appeal the decision and agreed to return to the country in relation to which he was claiming a right of international protection.
20. The second application was made on 30 July 2008 in which the appellant made an EEA application as a family member of his cousin. The first issue to note is that an application as a family member of a cousin is bound to fail for, as accepted by Mr Mukherjee, a cousin does not fall within the definition of a family members to be found in Regulation 7 of the EEA Regulations which defines such person as, inter alia, either a spouse or civil partner, a direct descendant of his, his spouse or his civil partner who is under 21, dependent direct relatives in the ascending line of that person of his spouse or civil partner, or a person who is to be treated as family member of that person under subparagraph (3) of the regulation; which is not applicable on the facts. The application was not successful for the reasons set out in the refusal letter of 26 March 2010 which advised the appellant that on 19 October 2009 a letter had been sent to his representative advising that the decision-maker needed evidence of his relationship with the EEA national but that such evidence had not been provided. The application was therefore refused on the basis the appellant had not provided evidence in the form of a marriage certificate or birth certificates needed as evidence that he is related as claimed to an EEA national. The appellant does not dispute

the fact that such information was not provided by him. Without such material the application was bound to fail and, if made in the wrong category, was also arguably frivolous.

21. The appellant's case is that he was unable to provide the documents requested in time and so made the second application for a Residence Card as confirmation of right to reside as the family member of an EEA national which was refused on 11 November 2011 for the following reasons:

> "You have claimed that your mother and your sponsor's mother are sisters. Your birth certificate names Florence Ehimwenma Onyenso as your mother. Your sponsor's birth certificate names Grace Ehimwenma as his mother. However in the absence of both your mother's and your sponsors mother's birth certificates, there is no evidence to show that your mother and your sponsor's mother are sisters as claimed.
>
> Furthermore, no evidence has been submitted to show that you have been dependent upon your sponsor even in another State or in the United Kingdom. The Secretary of State is of the opinion that genuine dependants of EEA nationals have the opportunity to apply for entry clearance prior to arrival in the United Kingdom. Check show that you have not applied for such entry clearance, therefore this casts doubt upon your claim that you are genuinely dependent upon Victor Uwadiae Erhabor."

22. Mr Mukherjee's submissions that the decision was unfair or that the decision-maker should have done more has no arguable merit. There was no right of appeal against this decision, but the appellant could have sought judicial review but did not do so. The assertion the appellant should not be prejudiced as there was no place in the application form to provide details of the dependency has no arguable merit.
23. The appellant was represented by solicitors as the copy of the application form clearly shows. If the solicitors incorrectly applied on the form applicable for family member rather than dependent extended family member that is a matter for them. The decision-maker clearly understood the nature of the application but did not find that sufficient evidence had been provided. Even if the wrong application form was used which did not contain a box in which details of dependency could be provided this did not or would not have stopped the appellants representatives from providing such details in a covering letter, if they existed. The fact the appellant could not prove he and the EEA national are related and as he provided no evidence of dependency this was an application that from the outset was bound to fail as being totally without merit and therefore, arguably, frivolous.
24. Both advocates in their submissions referred to the need to assess the evidence in the round. The need to do so assessing the weight to be given to immigration control is the foundation for the decision in *PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC).* It is clearly of benefit that those in the United Kingdom should be encouraged to leave voluntarily if at all possible as this appellant did.

25. Considering matters cumulatively, the appellant is a person who entered the United Kingdom using a false identity for which he was convicted and sentenced to 4 years imprisonment. The appellant remained illegally between 2002 to 2016 without leave during which time he made frivolous applications with a view to try and extend his stay. The appellant worked illegally. It was said by the Entry Clearance Officer that the appellant's use of an assumed identity was not declared on his application form. The Judge did not find this an aggravating factor as the appellant said he was sentenced in 2002 for the use of a false passport in the UK which he sets out a Section 8, reply to 8.1, of the application form, but this is not declaring his use of an assumed identity. The false passport the appellant admitted to could have been a false passport in the appellant's own name/identity. This is, on the face of it, a further aggravating feature.
26. The appellant left the United Kingdom in February 2016. The appellant's relationship with his spouse in the United Kingdom, a British citizen, has been found to be genuine. The appellant's case is that notwithstanding his actions recorded above the decision to refuse to grant entry clearance to enable him to live and enjoy family life with his spouse is not proportionate.
27. The decision in *PS* does not state that the fact the person returns voluntarily to their home country is the determinative factor but is clearly one that warrants weight being attached to it. The grant of permission to appeal to the Upper Tribunal posed the question whether it been established that the time had come when entry should be permitted.
28. As noted above the requirement is for there to be a breach together with aggravating factors. The preserved findings show that matters other than the making of frivolous applications have not been found to warrant the appeal being dismissed. Those findings are preserved. Even weighing the important aspect of immigration control and the positive benefit to the United Kingdom in persuading those here illegally to leave voluntarily at the earliest opportunity, this is still a case in which there is clearly an existing family life recognised by article 8 ECHR. There is a positive obligation upon the United Kingdom to promote the development of family life. The appellant has been out of United Kingdom for a number of years since his voluntary departure. This is a finely balanced decision but weighing up the competing interests it is found that the making of the frivolous applications, considering the extent to which they amount to aggravating factors, does not outweigh the positive benefits identified in *PS* of encouraging those in the United Kingdom illegally to leave voluntarily. It is not established on the evidence that there are any other aggravating factors that would tip the balance in favour of the Secretary of State.
29. I find the respondent has not made out her case that the decision to refuse the application is proportionate to any further interference with the appellants right to family life with his wife.

Decision

30. **I remake the decision as follows. This appeal is allowed on article 8 ECHR grounds.**

Anonymity.

31. 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…….
Upper Tribunal Judge Hanson

Dated the 4 October 2019