Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08073/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2018	**On 9 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR FEMI ADEBOMI OWOLADE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Rowena Moffat, Counsel instructed by Wesley Gryk Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge S Meah sitting at Taylor House on 16 August 2018) dismissing his appeal against the decision of an Entry Clearance Officer to refuse to grant him entry clearance as the spouse of a person present and settled here on the ground that his exclusion from the United Kingdom is mandated by Rule 320(11). The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant is a national of Nigeria, who was born on 15 March 1989. The appellant entered the UK in 2005 with his mother and other siblings. They all came on visit visas, and they all overstayed. The appellant had a multiple visit visa which was valid from 2005 to 2015, and he admits to regularly travelling back and forth between Nigeria and the UK between 2005 and 2008. He completed his A levels in the UK, and then undertook a BA degree in Law, followed by a Masters in Law. He returned to Nigeria in 2013, but came back again on the same multi-visit visa in 2014. It was at this point that he met his future wife and sponsor. He decided to overstay again in order to develop their relationship. They intended to get married in the UK, but were not able to do so due to the appellant's immigration status. Eventually, the appellant returned to Nigeria with his sponsor in February 2017, and they got married in Ibadan State in the same month.

3. On 5 April 2017 the appellant applied for entry clearance as the spouse of his sponsor. In his application form, he made (it appears) full disclosure of his adverse immigration history.

4. On 19 July 2017 an Entry Clearance Officer (post reference SHEFO\441222) gave his reasons for refusing the appellant's application. He accepted that the appellant met all the relevant requirements of Appendix FM, including the suitability requirements, the relationship requirements, the financial requirements and the English language requirement. However, his application was refused under paragraph 320(11) of the Rules.

5. The ECO's reasoning was that the Home Office records showed that he was issued with a 10-year visit visa valid from 18 July 2005 to 18 July 2015. The maximum duration permitted in the UK on any single occasion was 6 months or 180 consecutive days. He had said in his application form that, during the validity of this visa, he had made five trips to the UK.

6. His two most recent trips to the UK were from 22 July 2008 to 14 August 2013 (5 years and 32 days), and then from 24 February 2014 to 7 February 2017 (2 years, 11 months and 14 days). It had also been noted that, "*during his most recent visits*", he had undertaken studies at Kingston University and at King's College London. He had thus undertaken studies at a time when his immigration status did not allow him to do so. In the light of his immigration history, the ECO was satisfied that he had contrived in a significant way to frustrate the intentions of the Rules by overstaying and breaching the conditions attached to his leave.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. At the hearing before Judge Meah, the appellant was not legally represented. The sponsor appeared on his behalf, and gave oral evidence.

8. In her subsequent decision, Judge Meah at paragraph [33] accepted Ms Godfrey's submission that there were significant aggravating factors in the case and that

therefore the ECO was entirely correct to apply paragraph 320(11). But she also held that both the ECO and the ECM had omitted to mention "*the aggravating factors*" required by 320(11). Nonetheless, she did not find this to be fatal in the light of what was stated in **PS (Paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC).**

9. The Judge went on to find that there were number of aggravating factors which justified the appellant's exclusion under the Rule, none of which had been relied on by the ECO or ECM.

10. Firstly, she drew an adverse inference from the fact that the bundle of documents prepared for the appeal provided no details of how the appellant had paid for his studies. She found that this was probably a deliberate omission: the likelihood was that the appellant had sought to conceal the fact that either did not pay for any of his schooling in the UK, including for his A levels, or that, if he did pay for any of them, it was on home-fee terms. Secondly, she found the evidence of the appellant and the sponsor to be incredible in relation to the attempt to blame the appellant's mother for the decision to overstay in 2005, when the appellant was aged 16. Thirdly, she found that the appellant had exhibited a propensity to deceive by repeatedly abusing the visit visa he had in his possession in order to enter the UK for the purpose of overstaying and to engage in studies which he would have known he was not entitled to undertake. Fourthly, she did not find credible the claim that the mother had simply decided to overstay with the appellant and the other children in 2005, as there was nothing from the mother to confirm what he and the sponsor were now claiming. She found that it was likely to be deliberate effort to conceal the truth behind why the appellant had overstayed. Fifthly, at paragraph [38] the Judge held that the appellant would have deceived immigration officials at the port of entry when re-entering the UK in 2008 and 2014. He would not have been given leave to enter if the Immigration Service had been made aware of extensive periods of previous overstaying and breach of conditions. Hence deception was practised on these occasions when he sought re-entry into the UK.

The Grounds of Appeal to the Upper Tribunal

11. The permission application was settled by Ms Moffat of Counsel. Ground 1 was that the Judge had failed to apply the correct burden of proof. At paragraph 11, the Judge stated that the burden of proof is on the appellant, whereas the burden of proof rested with the respondent to prove the facts relied upon as establishing that Rule 320(11) applied.

12. Ground 2 was that the Judge had failed properly to apply the two stage test under Rule 320(11). While the Judge identified the requirement for aggravating circumstances in addition to immigration breaches, the aggravating circumstances which she identified (namely significant periods of overstaying and engaging in extensive studies in breach of conditions of leave as a visitor) only constituted immigration breaches as required by the first limb of the test. The existence of more than one immigration breach was not identified in the Rules as an aggravating

circumstance, even of itself, and the examples of aggravating circumstances given in the second stage of the test do not replicate the immigration breaches listed in the first limb of the test.

13. It could not be a proper application of Rule 320(11) to rely on the same circumstances which give rise to findings on immigration breaches under the first limb of the test in order to find additionally the existence of aggravating circumstances under the second limb.

14. Ground 3 was that the Judge had failed to take into account, when considering proportionality under Article 8 ECHR, the ECO's failure to identify aggravating circumstances.

The Reason for the Grant of Permission to Appeal

15. On 11 October 2018 First-tier Tribunal Judge Hollingworth granted permission to appeal as he was satisfied that the grounds were arguable. In particular, it was arguable that the Judge had set out an insufficient review of the standard and burden of proof.

The Hearing in the Upper Tribunal

16. At the hearing before me to determine whether an error of law was made out, Ms Moffat developed the grounds of appeal. After hearing from Mr Bramble, I indicated that I was minded to find that the decision should be set aside as being erroneous in law. There was a further discussion about future disposal. Ms Moffat invited me to remake the appeal in the appellant's favour on the ground that the ECO''s decision was not in accordance with the law, and hence disproportionate. Mr Bramble submitted that it would be wrong to allow the appeal outright, without there being a further hearing to reconsider the appeal on its merits. In reply, Ms Moffat confirmed that what she envisaged was the ECO having the opportunity to reconsider his decision to refuse. She submitted that his current decision was unlawful, and so a lawful decision was awaited. She was not asking me to direct the ECO to grant the appellant entry clearance – only that the ECO should reconsider the application in accordance with the guidance given in **PS (India)**.

The Reasons for Finding an Error of Law

17. Ground 1 is that the Judge incorrectly applied the burden of proof. This ground is made out because the Judge failed to direct herself that the burden of proof rests with the respondent to make out a case under Rule 320(11), not on the appellant to rebut such a case. The Judge's misdirection as to where the burden of proof lay had a material bearing on her fact-finding exercise, because the Judge made adverse findings of fact based upon a failure by the appellant to produce supporting evidence for matters which were not raised in the refusal decision. For example, it was not part of the ECO's case that an aggravating circumstance was the appellant accessing publicly-funded, as opposed to privately-funded, education. It was not also not the ECO's case that an aggravating circumstance was the appellant deciding of his own

motion to overstay in 2005, or to embark on studying for A levels. On the contrary, the ECO was astute not to hold against the appellant immigration breaches committed when he was still a minor. A careful reading of the ECO's decision reveals that the ECO only sought to apply Rule 320(11) to the appellant's conduct *after he had reached his age of majority.* Thus, the Judge wrongly drew adverse inferences from a lack of evidence to show that the appellant's studies were privately funded; or to show that, when initially overstaying as a minor, the appellant was acting under the direction and control of his mother.

18. Ground 2 is also made out, as the two matters relied on in the refusal notice are both types of immigration breaches that are listed in the first limb of Rules 320(11). Neither of these types of immigration breach features in the list of "other aggravating circumstances" which appears in the second limb. The structure of Rule 320 (11) is that the applicant has 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 or in order to obtain documents to support an application; and there are other aggravating circumstances, such as absconding, using an assumed identity or multiple identities, and switching nationality.

19. While, as Ms Moffat acknowledges, the list in the second limb is not exhaustive, the way in which the Rule is constructed means that it is not open to the ECO to find that the Rule is engaged simply by aggregating two of the different types of immigration breach which are listed in the first limb. The ECO must identify at least one "other aggravating circumstance" which legitimately comes within the scope of the second limb.

20. Having found that the ECO had failed to identify at least one other aggravating circumstance in the second limb - as the Rule requires - it was not open to Judge Meah to attempt to cure the inherent defect in the decision notice by seeking to extract from the evidence "other aggravating circumstances" which the ECO had not relied on or by re-assigning one of the immigration breaches in the first limb to being another aggravating circumstance in the second limb. This was procedurally unfair, particularly as the appellant was not legally represented. Of particular concern is the Judge's finding that the appellant used deception when re-entering the UK on his multiple visit visa. This was a matter of complete speculation. It all depends on whether he was asked questions on arrival at port, or whether he was simply waved through.

21. In conclusion, while it is clearly open to the Judge to find that the first limb of 320(11) was met on the basis of the admissions made by the appellant in his application form, the finding that both limbs of Rule 320(11) were made out was vitiated by a material error of law for the reasons given above.

The Remaking of the Decision

22. It is unnecessary to conduct a further hearing for the purposes of the remaking of the decision. Not only is it unnecessary, but it would be futile, as the decision of the

ECO is so fundamentally flawed that the only just outcome is for the ECO to reconsider the exercise of discretion under 320(11) afresh, in accordance with the guidance given by the Tribunal in **PS (Paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)**, where the following was said in the head note:

> *The exercise of discretion under paragraph 320(11) of HC395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance at paragraph 320(7B) is disapplied by paragraph 320(7)(c), the decision-maker must exercise great care in assessing the aggravating circumstances said to 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*

23. The ECO did not exercise the necessary care in assessing aggravating circumstances. As found by Judge Meah, the ECO identified two different types of immigration breach which feature in the first limb of the test.; but the ECO did not identify "*the other aggravating circumstances*" which must also be present in order for the Rule to be engaged. There is no cross-appeal by the respondent against this finding by Judge Meah.

24. Since some time has elapsed since the refusal decision, it is pertinent to reflect on the public interest consideration illuminated in **PS (India)**. At paragraph [14], the Tribunal held that the ECO should have specifically recognised that Mr S voluntarily left the UK more than 12 months ago with a view to regularising his immigration status:

> There was no question that the marriage was a genuine one. If the aggravating circumstances are not truly aggravating, there is in this context a serious risk that those in a position of Mr S will simply continue to remain in the UK unlawfully and will not seek to regularise their status as he has sought to do. The effect then is likely to be counterproductive to the general purposes of the relevant Rules and to the maintenance of a coherent system of immigration.

25. As the appellant applied for entry clearance within a few months of leaving the UK voluntarily, he was at the time of decision on weak ground on this aspect of the public interest. However, his human rights claim must now be assessed as at the date of the hearing in the Upper Tribunal, and not as at the date of decision. Accordingly, the appellant is on much stronger ground now with respect to the public interest consideration illuminated in **PS (India)**, as he has now served a period of exclusion from the UK of some 18 months.

26. For the above reasons, the appellant has shown that the decision is unlawful under Section 6 of the Human Rights Act 1998.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The appellant's appeal is allowed on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

I make no anonymity direction.

Signed Date 13 December 2018

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have allowed this appeal, I have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and I have decided to make a fee award of £80 as the decision appealed against was legally flawed.

Signed Date 13 December 2018

Deputy Upper Tribunal Judge Monson