Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04875/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34
On 19 June 2020

Decision & Reasons Promulgated
On 09 July 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

DIAMAND KOLGJINI

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Mr S Kerr of Karis Solicitors (written submissions)
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer (written submissions)

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania who was born on 18 November 1992.

2. On 2 December 2018, the appellant made an application for entry clearance to the UK under Appendix FM of the Immigration Rules (HC 395 as amended) on the basis of his family life with his British citizen partner Tyler Baldock. On 11 February 2019,

the ECO refused the appellant's application and that decision was subsequently upheld by the Entry Clearance Manager on 19 June 2019.

3. The appellant appealed to the First-tier Tribunal on the ground that the decision breached his right to private and family life under Art 8 of the ECHR. On 31 October 2019, Judge Peer dismissed the appellant's appeal.

4. On 11 February 2020, the First-tier Tribunal (Judge Shimmin) granted the appellant permission to appeal to the Upper Tribunal.

5. In directions sent on 20 March 2020, the Upper Tribunal (UTJ Smith), in the light of the COVID-19 crisis, indicated a provisional view that the error of law issue could be decided on the papers without a hearing. Submissions from both parties were invited both on the issue of whether the error of law could be determined without a hearing under Rule 34 and the substance of the error of law issue.

6. In response to those directions, both parties filed written submissions. The appellant consented to the error of law issue being determined without a hearing. The Secretary of State raised no objection to determining the error of law issue without a hearing. Both submissions addressed the substantive issues relevant to the error of law.

7. In the light of the parties' positions, I have concluded that it is just and fair to determine the error of law issue without a hearing under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

The ECO's Decision

8. The appellant's application for entry clearance was made under the partner provisions in Appendix FM of the Immigration Rules and on the basis of Art 8 outside the Rules. In refusing the appellant's application, the ECO was not satisfied that the appellant met the financial requirement in E-ECP.3.1., namely that the sponsor had a gross annual income of at least £18,600.

9. In addition, the ECO concluded that the general grounds for refusing entry clearance in para 320(3) and 320(11) applied.

10. As regards para 320(3), the ECO was not satisfied that the appellant had submitted a valid passport or other document which satisfactorily established his identity and nationality. In reaching that conclusion, the ECO relied on the fact that the appellant had previously used a different identity ("Mandi Kolgjini") with a different date of birth when making asylum applications after he first arrived in the UK in 2011 and again in 2013.

11. As regards para 320(11), the ECO was satisfied that the appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules by entering the UK illegally in 2011 and that there were additional aggravating factors in that he had made two applications for asylum in a different identity, he had then

absconded and made no further attempt to regularise his stay in the UK remaining illegally until December 2018 when he returned to Albania prior to making his present application for entry clearance.

12. Finally, the ECO was not satisfied, in addition, that the appellant met the suitability requirements in S-EC.1.5. and S-EC.2.2(b).

13. As regards S-EC.1.5, the ECO taking into account the appellant's previous immigration history and conduct concluded that his character and conduct was such that his exclusion was conducive to the public good and that discretion should not be exercised against him.

14. As regards S-EC.2.2(b), the ECO was satisfied that the appellant had failed to disclose material facts in his application, namely that he had previously claimed asylum in different identities.

The Legal Framework

15. The appellant's appeal was limited to Art 8 grounds by virtue of Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended). However, in seeking to establish that the refusal of entry clearance was a breach of Art 8, a central part of his claim was that he met the requirements of the Immigration Rules both in respect of the substantive requirements and also that the general grounds of refusal in paras 320(3) and 320(11) did not apply to him and neither did the 'suitability' requirements in S-EC.1.5. and S-EC.2.2(b). If, indeed, the appellant met all the requirements of the Rules then that would be positively determinative of his Art 8 claim (see TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [24]). If he did not meet the requirements of the Rules, then his claim outside the Rules would depend on him establishing that there were unjustifiably harsh consequences so as to outweigh the public interest and so make his exclusion from the UK disproportionate.

16. As I have already indicated, the ECO was not satisfied that the appellant could establish that the sponsor had the required annual income to meet the financial requirements in Appendix FM. I need say no more about this because, before the judge, it was accepted that at the date of the hearing (which was the relevant date for the purposes of Art 8) the appellant had established the required income and so this was not an issue before the judge (see para 32 of his determination).

17. Before the judge, the relevant provisions in the Immigration Rules which were in issue were the general grounds for refusal of entry clearance in paras 320(3) and 320(11) (which by para A320 apply even in applications under Appendix FM) and the specific 'suitability' requirements in S-EC.1.5. and S-EC.2.2(b).

18. Para 320(3) sets out a mandatory, and non-discretionary, ground for refusing entry clearance as follows:

> "Failure by the person seeking entry clearance to the United Kingdom to produce to the Immigration Officer a valid national passport or other document satisfactorily establishing his identity and nationality".

19. Para 320(11) creates a discretionary ground for refusing entry clearance ("should normally be refused") as follows:

> "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 assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

20. The relevant suitability requirements in Appendix FM provide as follows. S-EC.1.5. provides that:

> "The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

21. S-EC.2.2(b) provides as follows:

> "Whether or not to the applicant's knowledge -
>
> ….
>
> (b) there has been a failure to disclose material facts in relation to the application."

The Judge's Decision

22. Central to the respondent's case before the judge was that the appellant had twice applied for asylum in 2011 and 2013 using a different identity from that he now claimed, and a different date of birth which he now accepts is false. The appellant claimed that the previous identity he had used namely "Mandi Kolgjini" was simply an abbreviation of his real name which was "Diamand Kolgini" and that the passport which he had now presented to the respondent in that latter name with a date of birth in 1992 (rather than as he had previously claimed 1995) was a valid Albanian passport in his name.

23. That then was the factual dispute between the parties before the judge. At para 28 of his determination, the judge found against the appellant and in the Secretary of State's favour in the following terms:

> "28. Mr Kerr [the appellant's representative] submitted that the appellant accepts that the 1995 date of birth is not his true date of birth. The 1992 date of birth is his true date of birth. On his application form, the appellant answers 'no' to Q3 which asks whether he has ever been known by any other names and at

> Q16 stated that the passport used for the application, issued in June 2018, was his first passport. The application form refers to both the 2011 and 2013 asylum claims. The covering letter sent with the application form also refers to the claim made in 2011 being made under a different identity and states that the applicant is remorseful for his actions. The appellant's witness statement records that he does not believe it should be considered he was trying to give a false identity when he first came to the UK to claim asylum as he had always been known by the name 'Mandi' which is an abbreviation of 'Mr Diamand' which is his full name. This does not present as particularly remorseful. The form also refers to travel to Italy and France in 2011 and then various travels during 2018 although the journey to Turkey with the sponsor in November 2018 is not mentioned. The respondent accepts that the passport provided with the application is a valid Albanian passport but does not accept it satisfactorily establishes the appellant's identity solely on the basis of the appellant's previous conduct in misleading. I accept it is plausible that an individual with the name Diamand might use an abbreviation of 'Mandi' but of itself that is not sufficient evidence that the identity used currently is the appellant's true identity. There is no copy of the passport in the appellant's bundle or other documents relating to identity. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 requires me to take account as damaging of the appellant's credibility his previous conduct in misleading. Given the appellant's previous conduct, and in the absence of other explanation and supporting evidence before me, I uphold the refusal under paragraph 320(3)."

24. Then, as regards para 320(11) the judge again reached a finding adverse to the appellant and found that para 320(11) applied. The judge said this (at [29]-[30]):

> "29. The appellant, on his own evidence, used a passport which did not reflect his true identity when he entered the UK in 2011. The appellant also sought leave to remain in the UK for a better life. This is not a basis for an asylum claim and as the respondent submitted the appellant clearly had no fear when he voluntarily returned to his home area to reside with his parents in July 2018. The appellant's evidence is that he did not recall previous advisers telling him he was required to respond to the Home Office in answer to the respondent's records that he was an absconder. The sponsor's evidence was that she did not believe his solicitors had advised him about having to report to the Home Office. She gave no further details as to why she had formed this belief. The impression given by the sponsor was that she was naive or unwilling to reflect upon the likely reality and consequences of a situation shortly after she met with the appellant or thereafter in which, on her evidence, she knew her partner was an adult but was claiming asylum as a minor with a false date of birth. She said she didn't advise him to come clean as she didn't understand the implications. It is the case that the appellant entered illegally and having made two applications in an identity which he now admits was false he did not depart from the UK and remained illegally without any basis of stay. He was clearly aware that he had no leave to be in the UK. The Reasons for Refusal Letter is written in the light of the voluntary departure made almost six months prior to the entry clearance application so I don't accept that this was not under consideration when the ECO decided to refuse the application under paragraph 320(11).
>
> 30. The facts of PS on which Mr Kerr relied in support of the appellant's appeal are somewhat different in that the applicant in that matter had left twelve

> months prior to his entry clearance application and would not have faced automatic refusal if the provision had not been disapplied in respect of spousal entry clearance applications. The backdrop to the appellant's case is not the same even if there is a public interest in encouraging those unlawfully in the UK to leave and seek to regularise their status by an application for entry clearance. The appellant did not leave the UK more than twelve months prior to making the application. He entered clandestinely and then relied on a false identity to mislead and seek to remain in the UK. Even if I accepted that he was not aware of any requirement to report, and I find it is more likely than not that he was so aware, the use of an assumed identity is an aggravating feature. In all the circumstances, I uphold the respondent's refusal under paragraph 320(11)."

25. Applying those two findings the judge went on in para 31 to conclude that the suitability ground in S-EC.1.5. was also met. However, the judge found in the appellant's favour as regards S-EC.2.2(b), as the judge said in para 31 that its application was:

> "inappropriate in the light of the fact that taken as a whole the covering letter and application form does disclose the material fact or the previous application being made using a different identity."

26. Having reached adverse conclusions on para 320(3), para 320(11) and S-EC.1.5., the judge went on to apply Art 8 outside the Rules and concluded that there were not unjustifiably harsh consequences such that the public interest was outweighed and that the appellant's exclusion (by the refusal of entry clearance) was disproportionate.

The Submissions

27. On behalf of the appellant, Mr Kerr both in the grounds of appeal and submissions pursuant to the Upper Tribunal's directions raised, in effect, three grounds, even though they are numbered 1 and 2. Ground 1, in fact, raises two discrete points. For convenience I will call them Ground 1(a) and 1(b) and Ground 2.

28. Ground 1(a) contends that the judge wrongly placed the burden of proof in respect of the general grounds of refusal upon the appellant when, on the basis of case law such as IC (Part 9 HC395 - burden of proof) China [2007] UKAIT 00027, the burden of establishing the appellant fell within the general grounds of refusal (and the suitability requirements) lay upon the Secretary of State.

29. Ground 1(b) challenges the judge's application of para 320(3). Mr Kerr contends that the appellant did not fall foul of para 320(3) because all that provision required was that the appellant submit a valid passport. He contended that it was accepted before the judge that the passport relied upon by the appellant was in fact a valid Albanian passport. Mr Kerr contended that the judge (and the respondent seeking to uphold the judge's decision) was wrong to interpret para 320(3) as requiring the appellant to both provide a valid national passport and one that satisfactorily established his identity and nationality.

30. Ground 2 contends that the judge misapplied para 320(11). First, she failed to recognise that the provision is discretionary rather than mandatory. Secondly, Mr Kerr contends that the judge failed to have regard to the fact that the appellant had, prior to his application for entry clearance, voluntarily returned to Albania in July 2018. Mr Kerr contended that the judge had been wrong not to apply the approach of the Upper Tribunal in PS in having regard to the fact that the appellant had sought to regularise his stay simply because he had not left the UK more than twelve months prior to making his application.

31. On behalf of the Secretary of State, Mr Lindsay in his written submissions, sought to uphold the judge's decision.

32. First, he contended that, as regards Ground 1(a), the judge had not misapplied the burden of proof. The appellant's appeal was under Art 8 and the judge had specifically recognised in para 10 of her determination that it was for the respondent to justify any interference with the appellant's private and family life as being proportionate. That covered the general grounds of refusal. In any event, Mr Lindsay contended that the judge had in substance decided that the respondent had established the general grounds of refusal and the suitability requirement. He submitted that the underlying facts were not in dispute.

33. As regards Ground 1(b), Mr Lindsay submitted that the appellant's construction of para 320(3) was not correct. The fact that the appellant had produced a valid passport only satisfied part of the rule. The plain meaning of the words in the rule was that the passport (or other documents) needed satisfactorily to establish both the identity and nationality of the applicant. The latter part had not been satisfied.

34. As regards Ground 2, Mr Lindsay submitted that the judge had found that the appellant fell within para 320(11) in that he had illegally entered the UK and had also found that there were aggravating features. Mr Lindsay relied upon the fact that the judge found that the appellant had previously used a misleading (false) identity to claim asylum and date of birth to assist his claim (falsely) as a minor at the time. The judge had not relied, as the appellant contended he should not have done, on the use of a false passport previously in 2011. Mr Lindsay submitted that it was the use of a false and misleading identity in claiming asylum that was the aggravating feature. Mr Lindsay submitted that the judge had not misapplied PS. The judge had properly distinguished that case on the basis that it was concerned with an individual who had left the UK voluntarily more than twelve months before applying for entry clearance unlike the appellant.

35. Finally, in relation to Ground 2, Mr Lindsay pointed out that the ECO had clearly expressed his decision in relation to para 320(11) as being an exercise of discretion. The judge clearly recognised that it was a discretionary decision when she set out para 320(11) at para 11 of her determination with a preamble that entry clearance "should normally be refused" (emphasis added).

Discussion

36. I will deal with each of the grounds in turn.

Ground 1(a)

37. As regards Ground 1(a), I accept Mr Kerr's submission that the burden of proof in relation to a general ground of refusal is upon the respondent (see JC). I accept that that is equally applicable to the 'suitability' requirements which are of a similar nature to the general grounds of refusal in Part 9 of the Immigration Rules. The standard of proof remains throughout the civil standard of a balance of probabilities (see re B (Children) [2008] UKHL 35). Although, as the case law recognises, that standard is flexible where a serious allegation is made and the more serious the consequences are if the allegation is proved (ibid). That, however, does not increase or alter the standard of proof but merely recognises the nature of the evidence which may be required to discharge it.

38. In this appeal, of course, the appellant was not directly relying on the Rules as the ground of appeal – the only relevant ground of appeal was that the decision breached Art 8 of the ECHR. I am, nevertheless, satisfied that the same approach applies when the Rules are relevant in assessing whether a breach of Art 8 has been established.

39. The judge dealt with the burden and standard of proof in para 10 of his determination where he said this:

> "The relevant Immigration Rules are paragraph 320(3) and 320(11). Paragraph ECP.1.1.(c) and Section S-EC.1.5 and Section S-EC.2.2.(b) of Appendix FM are also relevant. Article 8 is also of relevance because the appellant states the refusal of entry clearance is a disproportionate and unlawful interference with his family life. The burden of proof is upon the appellant and the relevant standard of proof is the balance of probabilities. With respect to Article 8, it is for the respondent to show that any interference with the appellant's private and/or family life in the UK is justified, necessary and proportionate."

40. Reading this passage, it is fair to say that the judge could, perhaps, have been more specific. He does not appear, in my judgment, to set out explicitly the burden of proof in relation to the Immigration Rules. His self-direction appears to relate exclusively to Art 8, no doubt because that was the only ground of appeal before him. Mr Lindsay prays in aid that the issue of whether any interference with the appellant's private life was proportionate involves an assessment of whether the appellant met the requirements of the Rules or not. That is, in my judgment, undoubtedly correct. In that regard, the judge does place the burden of proof, under Art 8.2, upon the respondent. It does not appear from the submissions recorded in the judge's determination at paras 24 – 27 that any specific submission was made in respect of the burden and standard of proof in relation to the Immigration Rules, or indeed Art 8. I have looked at the skeleton argument prepared by Mr Kerr which was relied upon before the judge and, again, no specific reference is made to the issue of the standard and burden of proof under the Immigration Rules or Art 8.

41. Reading the judge's determination as a whole, I am unpersuaded that, despite his reference solely to the burden and standard of proof under Art 8, that he misdirected himself and misapplied the burden and standard of proof. In fact, as is clear on reading the judge's reasons, and as will become clear when I consider the remaining grounds, the judge in substance decided positively that the requirements of the general refusal provisions, in paras 320(3) and 320(11) together with the suitability requirement in EC.1.5., were met. He, in effect, placed the burden upon the respondent and then when analysing the evidence made factual findings that the requirements of those provisions were in fact satisfied. That demonstrates, in my judgment, that the judge did not in fact wrongly place the burden of disproving the requirements on the appellant.

42. Consequently, I reject Mr Kerr's submission that the judge materially erred in law in applying a wrong burden of proof in assessing whether the general grounds of refusal and in relation to suitability were met.

Ground 1(b)

43. Turning now to Ground 1(b), this concerns the proper construction of para 320(3). Mr Kerr's submission is that the ground is not met if an individual produces a valid passport. Mr Lindsay's contention is that it must be a valid passport which satisfactorily establishes the individual's identity and nationality.

44. In my judgment, the respondent's construction is to be preferred. The provision itself, naturally read, requires the production *either* of a valid national passport *or* other document: the phrase "satisfactorily establishing his identity and nationality" applies to both of those alternatives. If Mr Kerr were correct in his construction, it would appear that a valid national passport which is not that of the individual concerned would be sufficient such that this provision would not apply. But that, in my judgment, would run counter to the whole purpose of producing a document contemplated in para 320(3) and which, in its absence, leads to a mandatory refusal of entry clearance or leave. The purpose of the provision is that without a document that satisfactorily identifies an individual and his nationality then he or she must be refused entry clearance or leave as it is a fundamental part of any application for entry clearance or leave that the person seeking it is identified satisfactorily by documentation. Of course, in general, a valid passport in the name of an individual is likely to satisfactorily identify the individual who has made the application and their nationality. But it need not do so if, for example, there is any dispute as to whether or not the individual making the application is, in fact, the same person as the valid passport has been issued. It seems to me that Mr Kerr's submission as to the proper construction of para 320(3) is both contrary to its plain and natural reading and also contrary to the underlying purpose why a particular document must be provided, namely that if it does not achieve the end of establishing the individual applicant's identity and nationality, then any application for entry clearance or leave must be refused.

45. In this case, the judge concluded in para 28, that the passport, although a valid one in the name of "Diamant Kolgjini" did not satisfactorily establish that the appellant was that person with that nationality. The judge relied upon the fact that the appellant had previously (and he accepted this) claimed to have falsely made an application in the name of "Mandi" for asylum in both 2011 and 2013 with an age that would have (falsely) assisted his asylum claim as he would have been a minor, when in fact he was an adult. The judge was fully entitled to take into account the appellant's previous (accepted) deception in assessing whether the appellant should be believed he was, in fact, the "Diamant Kolgjini" who had been issued with the passport which was a matter which had to be proved in addition to what was accepted by the respondent, namely that the passport was a valid one. In my judgment, the judge was rationally entitled to find, for the reasons given at para 28 of her determination, that, although the appellant had submitted a valid passport, it was not established that was the appellant's identity or nationality.

Ground 2

46. Turning now to Ground 2, para 320(11) requires the respondent to establish (1) that the applicant has previously contrived in a significant way to frustrate the attentions of the Rules by one of the stated conducts, namely overstaying, being in breaching a condition attached to leave, being an illegal entrant or using deception in an application; (2) that there are other aggravating circumstances such as (but not exclusively restricted to) absconding, not meeting temporary admission or reporting restrictions or bail conditions, using an assumed identity or multiple identities etc.; and (3) if those are established that leave should (as a matter of discretion) be refused.

47. As regards the second requirement, the judge identified the aggravating features in the appellant's case in paras 29 and 30 of her determination. These included that he had previously sought asylum using a misleading or false identity with a false date of birth which, as the judge found, was designed to assist his claim as a minor. I accept Mr Lindsay's submission that it was the claim in a false name and with a false date of birth that was crucial to the judge's reasoning and not any use of a previous passport. The judge also noted that his asylum claim was clearly unfounded as he had returned voluntarily to Albania to reside with his parents in July 2018 before making his application for entry clearance. The judge also found that the appellant was an absconder and that he was aware of the need to report. The judge did not accept the evidence that he was unaware of that and that finding is not, nor could it reasonably be, challenged in these proceedings.

48. What is said in this appeal is that either in assessing the severity of the aggravating features or, if the judge did do this, in exercising discretion he failed to have regard to the fact that the appellant had in July 2018 returned to Albania voluntarily in order to make his application for entry clearance in January 2019. Relying on the Upper Tribunal's decision in PS, Mr Kerr submits that was a relevant factor which the judge failed to take into account.

49. I do not accept Mr Kerr's submission that the judge ignored the fact that the appellant had voluntarily departed the UK some six months prior to seeking entry clearance. He made specific reference to it in para 29 in relation to the submission that the ECO had not done so.

50. In para 30, the judge considered the submission based upon PS. That case arose under the relevant Immigration Rules prior to the introduction of Appendix FM. The individual in PS made an application for entry clearance as a spouse under the earlier provisions in para 281 of the Rules in force at that time. In that case, it was contended that a relevant factor in applying para 320(11) was that the individual had, although he had illegally entered the UK, sought to regularise his stay by voluntarily departing the UK and seeking entry clearance. The Upper Tribunal concluded (at [14]) that the:

> "The Entry Clearance Officer should have specifically recognised that Mr S had voluntarily left the United Kingdom more than twelve months ago with a view to regularising his immigration status."

51. The relevance of the individual having left the UK voluntarily more than twelve months prior to his application for entry clearance, revolved around a consideration of the interaction between para 320(7B) and para 320(7C). In particular, para 320(7B) creates a mandatory ground of refusal where an individual has previously breached the UK's immigration laws by overstaying, breaching a condition of leave, being an illegal entrant or using deception in an application. However, that mandatory refusal – which would result in any future application failing – is disapplied if the individual "left the UK voluntarily ... more than twelve months ago" (see para 320(7B)(iii)). However, in PS, para 320(7C) disapplied in its totality para 320(7B) in a case such as the one with which the Upper Tribunal was concerned, namely where the application for entry clearance was by a spouse. The Upper Tribunal nevertheless recognised that, in effect hypothetically, if para 320(7B) had been applicable in principle to the individual in PS it would not have applied because he would fall within the exemption of having voluntarily left the UK more than twelve months previously. Of course, that provision was not directly applicable, but the Upper Tribunal recognised (in the passage I have set out) that nevertheless that represented a factor which a decision maker should take into account under para 320(11). In applying para 320(11) that was relevant.

52. Following the introduction of Appendix FM, such that applications by spouses or partners are now dealt with under those provisions including the suitability requirements, para 320(7B) and para 320(7C) are equally inapplicable to an application, now made by a partner or spouse, under Appendix FM. That is made clear by para A320 which only applies a restricted number of the provisions in para 320, including paras 320(3) and 320(11) to such applications. Applications by partners are primarily, therefore, determined under Appendix FM suitability requirements. Indeed, para 320(7C) has been repealed as it is no longer necessary to have a specific exception to the application of para 320(7B) to applications by partners or spouses: para A320 simply does not make it applicable.

53. The Upper Tribunal in PS was considering a spousal application which was not governed by para 320(7B). That, in effect, is precisely the position today as para 320(7B) is not included as one of the provisions in Part 9 to apply to applications under Appendix FM. In short, therefore, although the route is slightly different, the position of the Appellant is materially the same as the individual in PS in relation to para 320(11) and the relevance that the Upper Tribunal saw, in reaching a decision under that provision, of para 320(7B).

54. The specific relevance of para 320(7B) to the individual in PS, if para 320(7B) had applied to him in principle, was that it would not in fact have applied to him because he had voluntarily left the UK more than twelve months previously. That cannot be said of the appellant in this appeal. He left the UK around six months before he made the application for entry clearance. The relevant factor, derived from the exceptions in para 320(7B) on a hypothetical basis, does not apply to the Appellant. He did not leave the UK more than twelve months before the application. The specific legislative policy or public interest specifically recognised by PS is not engaged. The judge was, in my judgment, therefore correct to conclude that PS was distinguishable from the facts of this appeal.

55. That said, I do not suggest that the fact that an individual has voluntarily left the UK (even less than 12 months before the application for entry clearance) is an irrelevant factor. Even if it does not fall within the exemption in para 320(7B), it is in my judgment a potentially relevant factor when assessing the aggravating features required to be established by para 320(11) and whether, if those aggravating factors are established, whether discretion should be exercised against an individual. Of course, the weight to be given to that factor is essentially a matter for the decision maker subject to the constraints of rationality.

56. Here, I do not accept that the judge excluded this factor from his consideration. If he had ignored it, it makes little or no sense for him to consider, and conclude in the respondent's favour, that the ECO took the appellant's voluntary departure into account contrary to the submission made on the appellant's behalf to the judge. The judge clearly recognised its relevance.

57. However, in this appeal, its relevance was somewhat less weighty than in PS given that it did not reflect a stated exception to the mandatory refusal provision in para 320(7B). It was of some weight but, particularly given the immigration history of the appellant, was not a particularly weighty one which, in my judgment, should have led the judge to conclude that the requirements of para 320(11) were not satisfied and that discretion should be exercised in the appellant's favour. On that latter point, I accept Mr Lindsay's submission that the judge clearly had, correctly, self-directed himself on the terms of para 320(11) in para 11 of his determination that if met "entry clearance should normally be refused" and therefore he had well in mind the discretionary nature of that provision. I am unable to conclude that this factor could rationally have led the judge, given the appellant's immigration history, to exercise discretion in his favour.

58. In any event, in applying Art 8 the judge considered all the relevant factors in para 38 (in particular) and concluded that the consequences of the decision would not be unjustifiably harsh so as to make the decision a disproportionate interference with the appellant's family life in the UK. Because of para 320(3) the appellant, in any event, could not show that he met the requirements of the Immigration Rules. Regardless of para 320(11) because, under the Immigration Rules, the effect of para 320(3) was that his application had to be refused. Inevitably, the judge had to approach the issue of proportionality on the basis that the claim could only succeed outside the Rules. The judge's reasoning in para 38 is an entirely legally sustainable basis for dismissing the appellant's appeal under Art 8 outside the Rules.

59. Consequently, for these reasons, I reject the Appellant's contentions under Grounds 1(a) and 1(b), and 2 that the judge materially erred in law in dismissing his appeal under Art 8 of the ECHR.

Decision

60. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of a material error of law. That decision stands.

61. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

A Grubb
Judge of the Upper Tribunal
24 June 2020

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal made no fee award as the appeal was dismissed. That decision also stands as the appellant's appeal to the Upper Tribunal has been unsuccessful.

Signed

Andrew Grubb

A Grubb
Judge of the Upper Tribunal
24 June 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email