Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09172/2019 (V)

THE IMMIGRATION ACTS

Field House	**Decision & Reasons Promulgated**
On 13th October 2020	**On 22nd October 2020**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

EMRI DOCI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Kerr, of Counsel, instructed by Karis Solicitors Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania born in 1980. He arrived in the UK on 6th June 2002, and on 7th June 2002 applied for leave to remain using the false name Kelvis Doci with a date of birth in 1985. As a result of being found to be a minor, due to the false date of birth, he was granted exceptional leave to remain in the UK until 31st May 2003. He overstayed when his period of

exceptional leave to remain expired. In 2007 he received a police caution for battery. He made further submissions to the respondent in 2007 which were refused, and he was removed to Albania on 21st May 2010.

2. The appellant re-entered the UK illegally in 2011 and remained here until he left to make an application for entry clearance at the beginning of October 2018. On arrival in Albania he applied for entry clearance to re-enter the UK as the partner of a British citizen, Ms E [C]. The couple had commenced a relationship in 2013 and married on 8th October 2018 in Albania. The application for entry clearance as a spouse was refused on 9th January 2019. His appeal against that decision was dismissed on all grounds by First-tier Tribunal Judge Peer in a determination promulgated on the 25th October 2019.

3. Permission to appeal was granted by First-tier Tribunal Judge Bristow on 14th March 2020 and I found that the First-tier Tribunal had erred in law in a decision dated 10th June 2020, the reasons are set out at Annex A to this decision.

4. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly this remaking hearing took place via a remote Skype for Business hearing. Neither party submitted any submissions objecting to this mode of remaking in response to the directions appended to my error of law decision, and there were no significant issues of connectivity or audibility during the hearing.

Evidence & Submission – Remaking

5. The appellant's wife, Ms E [C], a British citizen, confirmed her identity and that the contents of her statement included in the bundle before the First-tier Tribunal and the letter of 8th July 2020 in the small additional bundle were true and gave oral evidence in response to cross examination by Mr Melvin. A summary of her key evidence is as follows.

6. She met the appellant in 2012, and very soon he had explained his immigration situation to her. He has never hidden any of his past actions breaching immigration law from her, and her parents were also aware of his lack of immigration status but were happy to have him in their homes and lives because they could see that the relationship was a good one for her and they grew fond of him, and he developed family relationships with her extended family. Her relationship with the appellant developed, and about a year after meeting the appellant, in August 2013, he moved in with her at her dad and step-mother's house. He became an integral part of their family, which included spending time with her grandma, and her mother and step-father and other extended family. Ms [C] decided she wanted to become a paediatric nurse, and so did a three year degree, obtaining a first in her bachelor's degree in child nursing science, and then started work full time in her "dream job" at Great Ormond Street Hospital (GOSH) in September 2017, working on the bone

marrow transplant and gene therapy ward. She loves her work, and has been doing a further master's degree module at South Bank University. The appellant delayed leaving the UK because of their committed relationship as she was studying for her nursing degree and there was no way in which she could sponsor him until she had worked for a year in her job having completed her studies. She does not think that it is reasonable for the appellant to be penalised for having applied immediately on return to Albania as they had had to wait for over 6 years to sort things out due to the terms of the Immigration Rules making a prior application impossible. She accepts that his earlier immigration history is not good but points out that the errors he made were a long time ago, when he was a much younger man, and further she does not accept that seeking a better life for himself and his family when he was, by unfortunate chance, born into an impoverished environment in Albania makes the appellant a bad person. Immigration law should not, she argues, keep apart a genuine couple who can support themselves financially and who have followed the Immigration Rules to get the correct entry clearance.

7. Ms [C] outlines how the appellant and she have shown their dedication to each other since he left the UK in October 2018 by a number of visits to see each other in Albania, France, Italy and most recently Germany. He has a Schengen visa which means that he can spend up to 90 days in any 180 in those countries. However, for Ms [C], these visits are not a satisfactory way to conduct married life. Ms [C] has suffered mental health problems as a result of her separation from the appellant: she is on medication for depression and anxiety; is having counselling; and has had to have time off sick from work due to her mental health, her work being naturally complex and intense and all the more so in the Covid-19 world.

8. Ms [C] does not feel able to move to Albania for the following reasons. Her prospects working as a nurse in Albania would be very poor, as Albania is a very poor country and salaries are very low (with data cited in support of this), and she believes that her income levels would affect not only her life and that of the appellant but also the lives of the children they plan to have in the future. The appellant has not followed the advice of previous solicitors that she and he could have a child to strengthen the appellant's application to be in the UK as she wants her children to grow up in a stable home in the UK, after the immigration matters are sorted out, as British citizens living in the UK with access to better schooling and healthcare than they would get in Albania. She would also have to learn good Albanian to work as a nurse in Albania, which currently she does not have. Further if she were to have to move to Albania she would not be able to continue to have the very regular contact and close relations with her family including parents, their partners, her grandmother who has is 90 years old and has serious health problems and benefits from her love and care. Also, if she were to move to Albania the UK, and most particularly GOSH, would lose a specialist nurse which the NHS and taxpayer has paid to train, and she would lose the job that she loves.

9. Mr Melvin, for the respondent relies upon the refusal decision and the skeleton argument of Mr Tan, as well as his own oral submissions. In summary he argues that the appellant does not qualify under the Immigration Rules because he meets the requirements of paragraph 320(11) to be refused under the general grounds for refusal and is not suitable under EC-P.1.1 (c) of Appendix FM so does not qualify under these provisions, although it is accepted that he meets the relationship requirements, the English language requirement and the financial requirements of Appendix FM.

10. It is argued for the respondent that the normal course under paragraph 320(11) should be followed given that the appellant meets the requirements for this refusal, and there is an aggravating circumstance. It is argued that PS makes little difference to this consideration as there is still a public interest in the exclusion of this appellant as he has a truly aggravating history in undermining immigration control and because there are no exceptional circumstances making refusal unjustifiably harsh because all parties have ignored immigration control in this case until the point when the Immigration Rules could be met and he returned to make his application for entry clearance. Further there is insufficient evidence that family life could not reasonably take place in Albania, and the fact that the appellant's wife suffers from anxiety in the context of the current arrangement is insufficient to mean that the normal course under paragraph 320(11) of the Immigration Rules.

11. It is also argued that the suitability requirement at paragraph S-EC 1.5 of Appendix FM is a mandatory ground and that it is met because the appellant's conduct, character, associations or other reasons make it undesirable to grant him entry clearance, because of his adverse immigration history.

12. The respondent argues that if the appellant cannot meet the requirements of the Immigration Rules then this is an extremely weighty factor which means that the interference with his family life is proportionate under Article 8 ECHR. The relationship between the appellant and his wife was formed whilst the appellant was unlawfully in the UK; the relationship continues by way of visits and that the appellant and his wife would have a support network in Albania if they live there; and as outlined above the factors argued in the appellant's favour do not suffice to outweigh the public interest in maintaining immigration control.

13. In oral submissions of Mr Kerr, and as set out in his skeleton argument, it is argued that discretion should be exercised in the appellant's favour so that the normal course should not be followed of refusing under paragraph 320(11) of the Immigration Rules because the matters which lead to this refusal took place when the appellant was much younger; because he is now in a genuine and committed relationship with a British citizen; because his British citizen wife has close relationships with her family (particularly her mother, father, step-mother and grandmother); and because his wife has an important job as a child nurse at Great Ormond Street hospital, particularly during the coronavirus

pandemic; and because trying to conduct their relationship long distance is causing his wife to suffer from suicidal ideation, panic attacks and severe anxiety which is impacting on her health and work and causing her to have time off sick.

14. It is argued that the appellant has now done the right thing and returned to Albania and made an application for entry clearance, and thus, applying PS, the public interest in encouraging those unlawfully in the UK to leave and make entry clearance applications must be weighed in his favour in considering whether the normal course should be followed. It is argued that it makes no sense to criticise or penalise the appellant for having waited until he was eligible to apply before returning, and further that the respondent has failed to give the appellant credit for his past two years in complying with immigration control residing in Albania; and the fact that he would have been able to reapply after one year abroad if he had made a voluntary departure under paragraph 320(7B) of the Immigration Rules; and the fact that the appellant and his wife have not had a child when they would not ordinarily have chosen to do so to make their case cynically more compelling as they were advised by previous immigration solicitors would be possible.

15. With respect to the refusal under the Immigration Rules by reference to paragraph S-EC.1.4 of Appendix FM that the exclusion is conducive to the public good the only issue if the appellant's immigration history, and there is a need to have regard to that significant time that has passed since the most serious conduct was committed and the appellant's positive history in leaving the UK. It is submitted that this test cannot be met as it is primarily aimed at those who have been convicted of crime and received a sentence of up to 12 months imprisonment, and so are not caught by the deportation Immigration Rules.

16. With respect to the wider consideration under Article 8 ECHR if it is found that the Immigration Rules cannot be met it is argued that the following is relevant: the important work and contribution to child health made by the appellant's wife by her work in GOSH in the UK; that her ability to work as a nurse would be compromised in Albania by her inability to speak Albanian and the quality of life in that country; that the appellant's wife has close caring relationship with her parents and their partners, her grandmother and a cousin, H, who has grown up without a colon and that H is a relevant child; that the absence from the UK of the appellant has had a serious deleterious effect on his wife's mental health. It is argued that the exceptional features of this case mean that it would not be a proportionate interference with the appellant and his wife's right to respect to family life to refuse to admit the appellant.

Conclusions – Remaking

17. I must first consider whether the appellant can meet the requirements of the family life Immigration Rules. There are two provisions which are argued to

prevent this from being the case by the respondent, namely paragraph 320(11) and paragraph S-EC.1.5 of Appendix FM of the Immigration Rules. I will examine each in turn.

18. Paragraph 320(11) of the Immigration Rules states that entry clearance should normally be refused:

> "where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
>
> (i) overstaying; or
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> (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."

19. In my error of law decision I have preserve the findings of the First-tier Tribunal that the appellant did not fall to be refused under paragraph 320(3) of the Immigration Rules but found that he meets the provision of paragraph 320(11) of the Immigration Rules by having overstayed, entered the UK illegally and obtained leave to remain by deception and that there is an aggravating circumstance in his having used an assumed identity, but that the appeal needed to be remade to establish whether discretion is properly applied to refuse on this basis or not, as paragraph 320(11) is a discretionary rather than mandatory ground of refusal. This in turn relates to the issue of the public interest identified in PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440, and a consideration of all of the wider facts of this case.

20. In PS it is said that a decision-maker must exercise great care in assessing aggravating circumstances where the automatic prohibition on entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C) of the Immigration Rules and where the respondent must having keen regard to the public interest in encouraging those unlawfully in the UK to leave and seek to regularise their status by making an application for entry clearance. As set out in my error of law decisions the central question to determine is: was the appellant's use of an assumed identity to obtain exceptional leave to remain in 2002 when he was 22 years old, now some 18 years ago, a sufficiently serious aggravating circumstance to mean, in the context of his subsequent overstaying and illegal entry, that the respondent had shown that the normal course to refuse under

paragraph 320(11) should be followed given that the appellant returned to Albania two years ago and made an entry clearance application?

21. I find that Mr Kerr also raises a relevant consideration with reference to the operation of the mandatory general ground of refusal at paragraph 320 (7B) of the Immigration Rules under which the appellant would no longer fall to be refused on this basis in light of his overstaying, illegal entry and any deception as he left voluntarily at his own expense and has been out of the UK for more than 12 months. I accept, as submitted by Mr Melvin, that there is a public interest in the refusal of those who have breach immigration control in these ways, and that parliament has expressed their view on this issue through the general grounds of refusal, but find that this must be tempered as set out in PS with the public interest in encouraging those illegally in the UK to regularise their stay through the prescribed entry clearance system. Ultimately I find that despite the number of breaches of control committed by this appellant that the fact that the most serious (deception and false identity) were now a very long time ago and the fact that he has now been out of the UK for two years means that the public interest in encouraging use of the legitimate entry clearance system weighs heavily in favour of the normal course of refusal not being followed.

22. In determining the question as to whether the normal course should be followed in refusing under paragraph 320(11) of the Immigration Rules consideration I also needs to be given to the wider facts of the case. I find that the evidence of the appellant's wife, Ms [C], is credible and indeed Mr Melvin did not attempt to submit otherwise, although he was clearly critical of her for what he saw as her lack of prioritising immigration control over her love for the appellant. I find that she gave an entirely honest account of her relationship and current situation which is consistent with the supporting documentary evidence. I find all of the documentary evidence in the updating bundle to be genuine and worthy of weight in the determination of the appeal.

23. My key factual findings are that I find that Ms [C] is absolutely committed to living in the UK where she has her extended family, with whom she has particularly close and mutually caring relationships, and to continuing her work at GOSH and enhancing her nursing skills through higher studies. The letter from Ms Newton, Ward Sister at GOSH Robin Ward, sets out that she works in a very specialised area of nursing involving specialist immunotherapy treatments to bone marrow transplants for children, and that Ms [C] is a valued member of the team and an asset to the NHS. I find that Ms [C] is unlikely to be able to do this type of work in Albania, particularly as some of the treatments she gives are unique to GOSH, and would struggle to get even regular child nursing work for sometime until she could speak and read competent Albanian. I also find that her separation from her husband for the past two years, and conducting the relationship via phone, internet chat and visits, has led to her suffering from reactive depression and anxiety which in turn has led to her being off sick from work since June 2020, being prescribed medication

and having on-going counselling from a psychotherapist. Her psychotherapist reports that recently Ms [C] has developed suicidal ideation and there has been a decline in her mental health, and I accept this is the case. Ms [C]'s presentation whilst giving evidence was entirely consistent with these documents: she was notably distressed and needed her mother to come and sit with her. I also accept that were Ms [C] to join the appellant and live in Albania that they would not have the same standard of living due to the levels of poverty in that country, but I do not find that this last matter is a factor which is one I give significant weight.

24. I therefore find that key considerations in relation to the issue of discretion are, the public interest point aside: that the appellant, bar questions over his suitability which overlap factually with this question, qualifies for leave to enter under the requirements of Appendix FM of the Immigration Rules as the respondent accepts that the English language, eligibility and financial requirements of the Immigration Rules are met; the fact that the appellant's wife is a highly specialist nurse working at GOSH for whom there is reliable evidence that she would be a loss to vulnerable children in the UK if she relocated to Albania; the fact that the appellant's wife has very close relationship with her original family which include the fact that she lives with her father and his partner and spends substantial time with her mother and grandmother and would find it very hard not live with this family close to hand; and that the fact that conducting a long distance relationship is having very serious consequences for her mental health, leading to anxiety, depression and suicidal ideation as evidenced by her own statement and evidence, letter from her ward sister from Great Ormond Street Hospital, her counsellor and GP. I find that when these issues are added to my conclusions at paragraph 21, about the public interest and proper operation of this provision in that context, that discretion should not be exercised to refuse under paragraph 320(11) of the Immigration Rules.

25. I accept that the suitability requirement at paragraph S-EC.1.5 is a mandatory ground so if the exclusion of the appellant from the UK is conducive to the public good as a result of his multiple historic breaches of immigration control detailed in this decision then he must be refused and clearly the fact that the appellant fulfils the other requirements of the family life Immigration Rules at Appendix FM is not a reason to give no weight to this section of the Rules. However, for the other reasons I set out above (particularly the public interest in encouraging the reversion to the proper systems of immigration control by those unlawfully in the UK and the distance in time since the worse breaches of immigration control by the appellant and elapse of two years since the appellant left the UK; and the fact that the appellant's wife is a higher trained and valued child nurse working on the front line with immune suppressed children during the Covid-19 pandemic who may be lost to the UK if she has to live with the appellant in Albania) I find that it is not conducive to the public good to refuse the appellant, and so the appellant does not fall to be refused under this provision either as I find that he fulfils the suitability requirements.

26. As a result, I conclude that there is no public interests in the appellant's refusal of entry clearance as he fulfils the Immigration Rules at Appendix FM for entry clearance as a husband of a British citizen partner settled in the UK. It follows that the interference with his family life, which refusal of that entry clearance constitutes, is a disproportionate interference with his right to respect for family life as protected by Article 8 ECHR.

27. I come to this conclusion whilst acknowledging the factors which I must consider under s.117B of the Nationality, Immigration and Asylum Act 2002, namely the fact that the relationship between the appellant and Ms [C] was commenced at a time when he was illegally in the UK means little weight should be given to it; and the fact that he speaks English and will be financially independent due to his wife's income are to be seen as neutral factors. However, as I find there is no public interest in the refusal, due to the appellant's ability to meet the Immigration Rules, the appellant is still entitled to win his appeal as there is nothing which weighs against the factors in his favour.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal.

3. I remake the appeal by allowing it on Article 8 ECHR grounds.

Signed *Fiona Lindsley* 15th October 2020
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania born in 1980. He arrived in the UK on 6th June 2002, and on 7th June 2002 applied for indefinite leave to remain using the false name Kelvis Doci with a date of birth in 1985. As a result of being found to be a minor, due to the false date of birth, he was granted exceptional leave to remain in the UK until 31st May 2003. He overstayed when his period of leave to remain expired. In 2007 he received a police caution for battery. He made further submissions to the respondent in 2007 which were refused, and he was removed to Albania on 21st May 2010. He re-entered the UK illegally in 2011 and remained here until he left to make an application for entry clearance at the beginning of October 2018. On arrival in Albania he immediately applied for entry clearance to re-enter the UK as the partner of a British citizen, Ms E [C]. The couple had commenced a relationship in 2013 and married on 8th October 2018 in Albania. The application for entry clearance as a spouse was refused on 9th January 2019. His appeal against that decision was dismissed on all grounds by First-tier Tribunal Judge Peer in a determination promulgated on the 25th October 2019.

2. Permission to appeal was granted by First-tier Tribunal Judge Bristow on 14th March 2020 on all grounds on the basis that it is arguable that the First-tier Tribunal erred in law in placing the burden of proof on the appellant rather than the respondent.

3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly directions were sent out to the parties by email on 23rd April 2020 seeking written submissions on the assertion of an error of law with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Submissions were received from both parties in response to these directions.

4. The matter came before me to determine whether it is in the interests of justice to decide this matter without a hearing and if so to determine whether the First-tier Tribunal has erred in law. I find that it is appropriate to determine whether there is an error of law on the papers given the submissions of the parties and the fact that neither object to proceeding in this way. Further Ms [C], the appellant's wife and sponsor, has written to the Upper Tribunal on 22nd march 2020 making it plain that she would like the appeal to progress as she is naturally very anxious about the outcome and wishes to reduce any further delay, and it would enable her to focus fully on her vital work as a paediatric

nurse at Great Ormond Street Hospital working with immune suppressed children during the global Covid-19 pandemic.

Submissions – Error of Law

5. The application for entry clearance was found to meet the eligibility (relationship & finance) requirements by the entry clearance officer, and it was accepted that the appellant satisfied the English language requirements, but he was refused under paragraphs 320(3) and 320(11) of the Immigration Rules, which led to a refusal under the suitability requirements at EC-P 1.1 (c) and S.EC1.5 of Appendix FM to the Immigration Rules. The First-tier Tribunal dismissed the appeal under paragraph 320(11), but found that the paragraph 320(3) refusal was not made out.

6. In the grounds of appeal it is argued that the First-tier Tribunal firstly erred in law because at paragraph 12 the Judge directs herself that the burden of proof is on the appellant. It is clear that in relation to the general grounds of refusal that the burden lies on the respondent, see JC (Part 9 HC 395 – burden of proof) China [2007] UKAIT 00027. However it is accepted in the later submissions of Mr S Kerr of Counsel for the appellant, dated 21st May 2020, that this error was not a material one, his having read the submissions of Mr Tan on this issue, as set out below.

7. Secondly, it is argued for the appellant that with respect to paragraph 320(11) of the Immigration Rules the First-tier Tribunal misdirected itself that the police caution that the appellant received in 2007 for battery could be an aggravating factor when this is not a factor identified within the Rules. It was also irrational to find a caution for battery which was 12 years old could be a factor which indicated that the appellant had contrived to frustrate the Immigration Rules. It is also argued that the respondent erred by failing to exercise discretion, when in accordance with PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 it is said that a decision-maker must exercise great care in assessing aggravating circumstances where the automatic prohibition on entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C) of the Immigration Rules and where the respondent must having keen regard to the public interest in encouraging those unlawfully in the UK to leave and seek to regularise their status by making an application for entry clearance. The First-tier Tribunal failed to carry out the second part of this exercise, and to give proper weight to the appellant's voluntary departure from the UK. It is also argued that the First-tier Tribunal errs in law by failing to appreciate that this is a discretionary refusal, and that the Judge failed to consider whether discretion was considered in relation to whether this appellant should be refused as someone who had contrived to frustrate the purpose of the Immigration Rules, and thus there was a failure to appreciate that this is structurally different from a mandatory paragraph 320(7B) refusal.

8. Thirdly, it is argued that there was failure to take into account, at paragraph 40 of the decision, a material fact, namely the evidence of appellant's strong connection with his wife's ill young cousin, Harry, from Harry's mother. It is further argued that the First-tier Tribunal errs in failing to consider the strong relationship between the appellant's wife and her grandmother; in asserting with no evidence that the cost of living is less in Albania than in the UK; in not giving weight to the family life that has developed between the appellant and his wife after his voluntary departure from the UK when he was not illegally or precariously in the UK; and in failing to make a finding on the ultimate question as to whether the appellant's presence is not conducive to the public good.

9. In the submissions of Mr A Tan, Specialist Appeals Team, dated 5th May 2020 it is argued that there are no material errors of law in the decision of the First-tier Tribunal and that the appeal should be dismissed. It is accepted that the burden of proof is wrongly stated as being on the appellant at paragraph 12 of the decision, but it is argued that this does not result in their being a material error of law. This is because when dealing with the refusal under paragraph 320(3) at paragraph 35 of the decision, which the First-tier Tribunal decided had not been made out, it is clear that it was understood that the burden was on the entry clearance officer. It is submitted that this approach is carried over to the consideration of paragraph 320(11) at paragraph 36 of the decision as there is reference to the rule being "made out".

10. Mr Tan argues that the appellant accepts that he has used an alias to obtain leave to remain, he has entered the UK illegally more than once and been removed, and that he has been given a police caution. It is argued that the alias and the police caution are both correctly found to be aggravating factors at paragraphs 36 and 38 of the decision, and that the list set out in PS is non-exhaustive, and the fact that the caution was a long time ago was considered by the First-tier Tribunal. There was an entry clearance manager review of the decision, which indicates that the discretionary nature of the provision was appreciated by the respondent, and this is also referred to at paragraph 37 of the decision, and it is also expressly appreciated by the First-tier Tribunal that it is important to encourage those unlawfully present to regularise their status when applying this paragraph at paragraph 44 of the decision.

11. Consideration is given to the sponsor's family and relationships with them, see paragraph 40 of the decision; consideration is given to the development of the relationship outside of the UK at paragraph 44; the consideration that family life could continue in Albania is well reasoned at paragraph 45 and it was reasonable to assume that the cost of living would be lower in Albania given the information on salaries and other economic data. Ultimately the First-tier tribunal has conducted a proper balancing exercise under Article 8 ECHR, giving proper weight to the failure of the appellant to be able to meet the requirements of the Immigration Rules.

Conclusions – Error of Law

12. The first issue to resolve is whether the approach taken to paragraph 320(11) of the Immigration Rules is a lawful one. This provision states that entry clearance should normally be refused :

> "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."

13. This is dealt with at paragraphs 36 to 38 of the decision of the First-tier Tribunal. It is clearly accepted for the appellant that he has overstayed, used deception to obtain leave and had been an illegal entrant, but the appellant challenges: the approach taken with respect to the second requirement of the provision and the conclusions that the caution amounted to another aggravating circumstance on top of his use of an alias; the approach taken to the public interest in encouraging those unlawfully in the UK to leave and obtain entry clearance as raised in PS; and the approach taken with respect to the fact that this is a discretionary rather than mandatory ground for refusal.

14. It is clear that it is accepted for the appellant that there is an aggravating circumstance (the appellant's use of an assumed identity) but it is argued that it was not legally correct to designate the police caution he received in 2007 for battery as an additional aggravating circumstance as well. At paragraph 38 of the decision the First-tier Tribunal finds that it would be wrong for too much weight to be given to the caution, after a full consideration of the circumstances in which it came about at paragraph 34 of the decision, and given particularly that it is over a decade old and for one single incident. I find however that it was an error of law to have included it as an aggravating circumstance as I do not find that it added anything to the appellant's profile as a person intending to frustrate the intention of the Immigration Rules. The aggravating circumstances outlined in the Rules are all matters which go against the smooth and proper operation of immigration control. The battery for which the appellant was cautioned by the police involved the appellant, as a 22 year old

man, being involved in a fight and hitting a drunk person outside a pub, and thus had no immigration control context or relevance whatsoever.

15. The question then arises as to whether the First-tier Tribunal has lawfully found that the respondent has firstly exercised discretion and secondly if discretion has been exercised whether in so doing it has been lawfully found that the respondent has struck a proper balance between the public interest as outlined in PS in encouraging those unlawfully in the UK to leave and seek to regularise their status by applying for entry clearance and that of keeping out those who try to seriously frustrate the operation and intentions of the Immigration Rules; and if more generally the normal course of applying the provision should follow on a full consideration of the facts of this case.

16. It is correct to observe, as the appellant does, that the original decision does not indicate that the entry clearance officer understood that paragraph 320(11) of the Immigration Rules was a discretionary general ground of refusal rather than a mandatory one. I do not find the fact that it is said that the decision was reviewed by an entry clearance manager indicates that this was understood, and this fact is not explicitly identified by the First-tier Tribunal. The First-tier Tribunal does however record at paragraph 13 of the decision that this is a general ground of refusal on which "entry clearance should normally be refused", thereby setting out its own correct understand that the refusal is discretionary rather than mandatory.

17. The First-tier Tribunal Judge did not generally consider whether there are reasons why the normal course should not be followed beyond finding that the provisions of the paragraph are, in her view, properly met and the public interest point identified in PS does not fall in the appellant's favour. The consideration of the public interest point raised in PS is found by the First-tier Tribunal not to be in the appellant's favour as he and his partner had waited to return to Albania to the point when he could qualify financially to return to the UK under the Immigration Rules on the basis of her earnings and had only spent a short time in Albania before applying for him to obtain entry clearance to come back to the UK.

18. I do not find that the reasoning relating to the public interest issue is consistent with the underlying principle as set out in PS, which might be summarised as the discretion to use paragraph 320(11) of the Immigration Rules should not be exercised to keep genuine couples able to meet the Immigration Rules out of the UK unless the aggravating circumstances were sufficiently serious. I find that the central question for this First-tier Tribunal to determine ought to have been: was the appellant's use of an assumed identity to obtain exceptional leave to remain in 2002 when he was 22 years old a sufficiently serious aggravating circumstance to mean that the respondent should have been found to have shown that the requirements of the Immigration Rules to refuse under paragraph 320(11) were met given that he had now done the right thing and returned to make an entry clearance application. Both this appellant and that in

PS had spent many years unlawfully in the UK, and I find it of no significance that PS delayed in applying for entry clearance and this appellant made the application immediately. I therefore find that the First-tier Tribunal erred in law by giving consideration to irrelevant matters in this consideration, and failing to focus on the relevant evidence.

19. Even if it were found that the aggravating circumstances of the assumed identity used to obtain exceptional leave to remain were sufficiently serious so that all of the requirements of paragraph 320(11) were met I find that the other facts of the case ought to have then been considered to see if the normal course of refusal under the provision should follow. I find that it was therefore a further error of law in failing to give consideration to relevant matters not to consider all of the surrounding circumstances, and particularly that the appellant otherwise qualified for leave to enter under the requirements of Appendix FM and the fact that the appellant's wife is a specialist nurse working at GOSH for whom there was reliable evidence that she would be a loss to vulnerable children in the UK if she relocated to Albania, before finding that the normal course of refusal under paragraph 320(11) of the Immigration Rules should follow, and that the appellant could not succeed under the Immigration Rules.

20. As I find that that the analysis under paragraph 320(11) of the Immigration Rules was flawed for the reasons set out above I find that the First-tier Tribunal erred in law in consideration of the appeal under Article 8 ECHR because it was clearly of central importance whether the appellant could meet the requirements of the family life Immigration Rules at Appendix FM, as if this was the case there would be no public interest in his removal.

21. I preserve the finding of the First-tier Tribunal that the respondent had not shown that the appellant fell to be refused under paragraph 320(3) of the Immigration Rules. I also preserve the findings of the First-tier Tribunal that the appellant meets the provision of paragraph 320(11) of the Immigration Rules by having overstayed, entered the UK illegally and obtained leave to remain by deception and that there is an aggravating circumstance in his having used an assumed identity. All other findings are set aside. What needs to be remade is the issue of whether discretion is properly applied to refuse on this basis or not: this in turn relates to the issue of the public interest identified in PS and a consideration of all of the wider facts of this case. The Article 8 ECHR appeal will then need to be remade in the context of the conclusion as to whether the appellant can show he meets the requirements to enter the UK as a spouse under Appendix FM of the Immigration Rules or not.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal, but with some findings preserved as set out above.

3. I adjourn the remaking of the appeal.

Directions - Remaking

1. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal might properly be held remotely, by Skype for Business, on a date to be fixed within the period **June to September 2020**.

2. **No later than 14 days** after these directions are sent by the Upper Tribunal (the date of sending is on the covering letter or covering email):

   (a) the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and

   (b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:

      (i) Skype contact details and a contact telephone number for any person who wishes to attend the hearing remotely, which might include the advocates, the original appellant or an instructing solicitor; and

      (ii) dates to avoid in the period specified.

3. **If there is an objection to a remote hearing**, the Upper Tribunal will consider the submissions and will make any further directions considered necessary.

4. **If there is no objection to a remote hearing**, the following directions supersede any previous case management directions and shall apply.

   i. **The parties** shall have regard to the Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic when complying with these directions.

   ii. **The parties** shall file with the Upper Tribunal and serve on each other (a) an electronic skeleton argument and (b) any rule 15(2A) notice to be relied upon within **28 days** of the date this notice is sent.

   iii. **The appellant** shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. The bundle should be compiled and served in accordance with the Presidential Guidance Note [23-26] at least **7 days before the hearing**.

5. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

6. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

7. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed *Fiona Lindsley* 10th June 2020
Upper Tribunal Judge Lindsley