Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10368/2019

THE IMMIGRATION ACTS

Heard remotely via video (Teams)
On 19 July 2021

Decision & Reasons Promulgated
On 3 August 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

JULIAN GJERGI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr S Kerr, Counsel, instructed by Lawfare Solicitors
For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Microsoft Teams. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. This is a remaking decision following the identification of material legal errors in the decision of Judge of the First-tier Tribunal B A Morris, promulgated on 18 March 2020, dismissing the appellant's appeal against the refusal of his entry clearance application (a human rights claim for the purposes of s.82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act")) as the spouse of a British citizen dated 28 May 2019.

2. In my 'error of law' decision, promulgated on 9 February 2021, I found that Judge Morris erred in her legal approach when assessing, as a condition precedent, whether the appellant was an absconder and, if the appellant was an absconder, that Judge Morris erred in her failure to factor into account the discretion within paragraph 320(11) of the Immigration Rules when determining whether the respondent's reliance on paragraph 320(11) breached section 6 of the Human Rights Act 1998.

3. As no issue has been raised by either party with the judge's factual finding that the respondent failed to prove her allegation that the appellant had worked illegally, and as this was a discrete issue, I "ring-fenced" this factual finding.

4. The appellant's partner gave birth to their child (a daughter) on 20 August 2020. The child is a British citizen and is residing with the appellant's spouse (Amy Gjergji) in the UK. At the conclusion of the 'error of law' hearing conducted on 4 February 2021 Ms Pettersen, Senior Home Office Presenting Officer, indicated that the respondent would not object to the Tribunal considering the birth of the child and the appellant's relationship with his child, to the extent that this may constitute a 'new matter' as understood in s.85 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

5. The appellant is a national of Albania who was born on 16 February 1997. He first entered the UK illegally in December 2013. He made an asylum claim but this was refused and certified under section 94 of the 2002 Act as 'clearly unfounded'. According to the instant decision under appeal the appellant was served with an Administrative Removal decision on 15 January 2014 and, on 3 October 2014, he failed to comply with his reporting conditions and was considered an absconder. He was next encountered by police on 11 March 2016 and served with a document confirming his unlawful immigration status. He then made further submissions for the purpose of lodging a fresh human rights claim which eventually resulted in an appealable decision made on 14 December 2017 refusing his human rights claim.

6. An appeal against this decision was dismissed by Judge of the First-tier Tribunal NMK Lawrence in a decision promulgated on 19 September 2018. In brief summary, whilst Judge Lawrence accepted (as did the Secretary of State) that the appellant was in a genuine and subsisting relationship with his spouse, he found that there were no insurmountable obstacles (as required by EX.1 of

Appendix FM of the Immigration Rules) to the couple relocating to Albania in order to maintain their relationship. Nor was the judge satisfied that the refusal of the human rights claim resulted in a disproportionate interference with Article 8 considered as a free-standing right.

7. The appellant voluntarily departed the UK on 14 December 2018 and made an application for entry clearance to join his spouse on 11 February 2019. This application was refused on 28 May 2019. The respondent accepted that the relationship, financial and English language requirements of Appendix FM, relating to entry clearance as a partner, were all met. The application was however refused under both the Suitability requirements and paragraph 320(11) of the Immigration Rules. In respect of the relevant Suitability requirements (S-EC.1.5.) the respondent considered that the appellant's exclusion was conducive to the public good because, according to Home Office records, the appellant entered the UK illegally and had been encountered working illegally. In respect of the refusal under paragraph 320(11), the respondent relied on the appellant previously being an illegal entrant and having both absconded and worked illegally. As mentioned above, Judge Morris found that the respondent failed to provide evidence that the appellant was working illegally and this finding was ring-fenced.

The hearing to remake the decision

8. Both the appellant and his spouse attended the hearing remotely. The respondent relied on a bundle of documents prepared for the First-tier Tribunal hearing including the appellant's visa application, the respondent's decision and a review by an Entry Clearance Manager.

9. The appellant relied on a bundle of documents that had been prepared for the First-tier Tribunal hearing. This included, inter alia, statements from the appellant and his spouse, statements from the spouse's mother, father and grandparents, and evidence of e-tickets relating to the spouse's visits to see the appellant. The appellant additionally provided a further supplementary bundle of documents including a second statement from Amy Gjergji relating to the birth of her daughter and confirming that she has a close knit family in the UK and that she currently resides with her family in the UK, her daughter's birth certificate, and pay slips relating to the appellant's mother and father's employment.

10. At the outset of the hearing Mr Linday indicated that he had reviewed the papers with some care and, although the respondent maintained that her decision was reasonable when made in 2019, in light of the ring-fenced findings made by the First-tier Tribunal, the absence of any further evidence from the respondent relating to the appellant's alleged absconding, and in light of the birth of the appellant's child, the material elements supporting the respondent's refusal of entry clearance have largely fallen away and that the respondent would not be making any further submissions. In these circumstances it was

not necessary to take any further oral evidence from the appellant's spouse and Mr Kerr made no submissions. I wish to thank Mr Lindsay for carefully considered and sensible approach to this appeal.

The legal framework

11. It is not in dispute that the appellant meets the Eligibility requirements for entry clearance as a partner (Section E-ECP of Appendix FM of the Immigration Rules). Given the First-tier Tribunal's retained factual findings there was no outstanding issue in respect of the Suitability requirements (which were only linked to the unproven assertion that the appellant had worked illegally).

12. Paragraph 320(11) falls under part 9 of the Immigration Rules and is a discretionary basis for refusal of an entry clearance application. It reads:

> Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused
>
> …
>
> (11) 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. The Immigration Rules should be read sensibly, recognising that they are statements of the Secretary of State's administrative policy (see the observations of Lord Browne JSC in **Mahad v Entry Clearance Officer** [2009] UKSC 16; [2010] 1 WLR 48, para. 10).

14. The aggravating features identified in paragraph 320(11) are not exhaustive but illustrative. The requirement of aggravating circumstances must be in addition to the basic elements identified in paragraph 320(11) (i) to (iv). This is clear as a matter of construction. The use of the conjunctive 'and' at the end of paragraph 320(11) (iv) can only sensibly be interpreted as requiring, in addition to one or more of the factors in paragraph 320(11) (i) to (iv), the existence of aggravating circumstances. The existence of "other aggravating circumstances" is a condition precedent to the exercise of discretion to refuse entry clearance under paragraph 320(11).

15. The definition of an absconder is not contained in the Immigration Rules. The Home Office "Removals, Enforcement and Detention General Instructions 'Non-compliance and absconder process', version 8.0, published on 30 January 2018 (the guidance extant both at the date of the respondent's decision and at the date of the hearing to remake the First-tier Tribunal's decision) states, at page 6:

> In-country absconder
>
> An in-country absconder is defined as a migrant who either:
>
> - escapes from Immigration Enforcement detention
> - breaches one or more of the conditions imposed as a condition of immigration bail served to them on the appropriate notice
>
> **and**, in all cases, whose whereabouts are unknown and all mandatory procedures to re-establish contact with the migrant have failed.

Discussion

16. No issue has ever been taken with the genuineness of the appellant's relationship with his spouse. This had been put beyond any doubt by the birth of their daughter in August 2020. The respondent has given her consent to the birth of the appellant's daughter to be considered by the Upper Tribunal as a new matter (within the meaning of s.85 of the 2002 Act).

17. It is readily apparent from the face of the statement from Mrs Amy Gjergji, which was not challenged by Mr Lindsay, that, although she has never physically met her father, the appellant does have a genuine parental relationship with his daughter. The only reasons they have not physically met are the respondent's decision refusing entry clearance and the travel restrictions imposed as a result of the Covid-19 pandemic. In her unchallenged statement Mrs Amy Gjergji described how she and her daughter had video calls with the appellant on a daily basis and how their daughter already recognised the appellant's voice and his image. I have no doubt in finding that there exists a genuine parental relationship between the appellant and his daughter.

18. Although **Mahad** disapproved the use of guidance as an aid to construction, in **Pokhriyal v SSHD** [2013] EWCA Civ 1568 Jackson LJ noted a qualification to that approach in cases where a rule is ambiguous and the Secretary of State has in her published guidance adopted an interpretation more favourable to applicants. Given the absence of any definition in the immigration rules of absconding, it is appropriate to consider the Secretary of State's own view as to what is required for someone to be considered an in-country absconder.

19. In **JC (Part 9 HC395- burden of proof) China** [2007] UKAIT 00027 the Tribunal held that, in relation to all the general grounds contained in part 9, the burden of proof rests on the decision maker to establish any contested precedent fact. The establishment of a person being an absconder in paragraph 320(11), when

specifically raised in a refusal decision, constitutes a precedent fact that must be established by the respondent.

20. The respondent's guidance in respect of absconders indicated that, in all cases, in order to be an absconder, the person's whereabouts had to be unknown and all mandatory procedures to re-establish contact must have failed. The respondent has not produced any evidence that all mandatory procedures to re-establish contact with the appellant had failed, or indeed that any of the mandatory procedures had even been undertaken. The respondent failed to demonstrate that she had undertaken any procedures to re-establish contact with the appellant. The question whether the appellant was an absconder was one of precedent fact and the respondent's chronology of the appellant's immigration history contained in the Reasons for Refusal Letter had no evidential value of its own. The respondent failed to provide any evidence to establish that the appellant was an absconder and therefore failed to discharge the burden of proving the precedent fact of absconding. The respondent has therefore not discharged the burden of proving that the only remaining condition precedent for the application of paragraph 320(11) has been made out. Given that the appellant meets all the requirements for a grant of entry clearance as a spouse under Appendix FM (and therefore meets the requirements of the immigration rules designed to give expression to Article 8 considerations, this will be positively determinative of his Article 8 appeal (**TZ (Pakistan) and PG (India) v SSHD** [2018] EWCA Civ 1109, at [34]).

21. In the alternative, even if I am wrong in the above assessment, I am satisfied that the decision to refuse entry clearance is disproportionate. I will assume that the respondent has demonstrated that the appellant was an absconder. I note the absence of any indication in the respondent's decision that she appreciated that a refusal under paragraph 320(11) is discretionary. But even if the respondent had considered how her discretion should be exercised and was rationally entitled to conclude that the discretion should be exercised against the appellant, in the context of a human rights claim a judge must consider for him or herself whether the manner in which the discretion was exercised breaches Article 8 ECHR.

22. There is a public interest in refusing admittance to the UK of those who have contrived in a significant way to undermine the immigration laws. Of relevance in the context of an entry clearance human rights claim is s.117B(1) of the 2002 Act. Account must however also be given to the appellant's conduct after he was encountered again in 2016, conduct which demonstrated compliance with the immigration laws. The appellant maintained contact with the Home Office, complied with the conditions imposed on him, and voluntarily left the UK when his appeal was dismissed. **PS (Paragraph 320(11) discretion: caring needed) India** [2010] UKUT 440 (IAC) ("**PS**") indicates that regard should be given to the public interest in encouraging those unlawfully in the UK to leave and seek to regularise the status by an application for entry clearance. This is a relevant factor in the general proportionality assessment. I additionally note

that the appellant was a minor when he first failed to comply with his reporting conditions.

23. No issue has been taken with the maintenance and English language factors in s.117B(2) and (3), although these factors are only neutral. Although the relationship was originally commenced when the appellant was in the UK unlawfully, he has since left the UK and complied with the requirements of the immigration laws by making a proper application to return lawfully. The factors in s.117B(4) and (5) therefore now have little relevance in the circumstances of an entry clearance application.

24. S.117B(6) does not in terms apply to the appellant as he is not facing removal. He does however have a genuine and subsisting parental relationship with a qualifying child. The child's mother (the appellant's spouse) is a British citizen with a close knit family in the UK with whom she currently lives (having regard to the letters from the spouse's parents and grandparents) and she is employed in the UK. Applying the principle considered in EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874 there is no doubt that the child's best interests are to be with both her parents. Albeit in the context of EX.1 (which has no applicability in the context of an entry clearance decision), the Home Office guidance (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957302/family-life-_as-a-partner-or-parent_-private-life-and-exceptional-circs-v13.0-ext.pdf) on family life relationships suggests that, as a starting point, it would not normally be expected that a qualifying child would leave the UK (page 51 of 96). Having cumulative regard to the fact that child's mother is a British citizen with a right of abode, that the child is a British citizen, that it is in the child's best interests to remain in the UK with both her parents, and having regard to the age of the appellant when he failed to comply with his reporting conditions, and having regard to his subsequent compliance with the immigration rules and immigration laws, I find that the decision to refuse him entry clearance constitutes a disproportionate interference with Article 8 ECHR.

Notice of Decision

The human rights appeal is allowed.

D.Blum 19 July 2021

Signed Date
Upper Tribunal Judge Blum