Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18215/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 7 October 2021

Decision & Reasons Promulgated
On 15 November 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ARBEN DOKA

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Mr R Dhanji instructed by Malik & Malik Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania who was born on 20 December 1977. On 15 July 2019, the appellant made an application for entry clearance to join his wife, a British citizen, Mrs Amy Doka in the UK under Appendix FM of the Immigration Rules (HC 395 as amended).

2. On 16 October 2019, the Entry Clearance Officer ("ECO") refused that application. Whilst the ECO accepted that the appellant met the 'eligibility' requirements of the

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Rules in Section E-ECP, the ECO applied the general refusal provisions in para 320(3) and (11) of the Rules and also concluded that the appellant's application should be refused on suitability grounds under Section S-EC.1.5. The basis for those decisions, as will become clear shortly, concerned the appellant's poor immigration history. The ECO also concluded that the refusal of entry clearance did not breach Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Wood on 18 March 2021.

4. The judge, as had been accepted before him, was satisfied that the appellant met the substance of the "partner" rules in Appendix FM. Before the judge, the ECO continued to rely upon para 320(11) and para S-EC.1.5 of Appendix FM.

5. Based upon the appellant's immigration history, Judge Wood found that para 320(11) applied in that the applicant had "previously contrived in a significant way to frustrate the intentions of the Rules" and that there were aggravating circumstances which justified exercising discretion to refuse entry clearance. It was common ground before the judge that, if that was his conclusion under para 320(11), then in addition the appellant's application for entry clearance fell to be refused on the suitability ground set out in S-EC.1.5. of Appendix FM, that his exclusion was "conducive to the public good" because of his character, associations, or other reasons which make it undesirable to grant him entry clearance.

6. Having concluded that the appellant could not meet the requirements of the Rules for entry clearance, the judge went on to consider the appeal, as he was required to do, under Art 8 of the ECHR outside the Rules and concluded that the public interest outweighed the impact upon the appellant's family life (which the judge accepted) with his spouse.

7. As a consequence, Judge Wood dismissed the appellant's appeal under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal to the Upper Tribunal on two grounds.

9. First, in applying para 320(11), the judge had erred in law in determining whether the appellant's conduct was "truly aggravating" by failing properly to have regard to the fact that the appellant had left the United Kingdom to return to Albania voluntarily in order to make the entry clearance application as a spouse. The judge had erred in law by giving that factor only "limited" weight in his assessment.

10. Secondly, in assessing the appellant's claim outside the Rules under Art 8 the judge had erred in law by stating that there was an "overwhelming" public interest in the

proper maintenance of immigration control. In doing so, the judge had wrongly concluded that the public interest outweighed all other considerations.

11. On 21 May 2021, the First-tier Tribunal (Judge C J Gumsley) granted the appellant permission to appeal on both grounds.

12. On 6 August 2021, the ECO filed a rule 24 notice seeking to uphold the judge's decision on the basis that the judge had not erred in law in concluding that the general refusal provision in para 320(11) applied and had given clear and cogent reasons for his decision.

13. The appeal was listed for hearing on 7 October 2021 at the Cardiff Civil Justice Centre. At that hearing, the appellant was represented by Mr Dhanji and the ECO by Mr Howells.

The Submissions

14. On behalf of the appellant, Mr Dhanji relied upon the two grounds upon which permission to appeal had been granted.

15. As regards ground 1, Mr Dhanji accepted that the appellant fell within the rubric of para 320(11) on the basis of his prior immigration history which included entering the UK on a number of occasions claiming a false nationality and using false Danish and Italian passports, together with entering the UK illegally on a number of occasions. However, Mr Dhanji submitted that the judge was required to determine whether that conduct, falling within the rubric of para 320(11), was "truly aggravating" as spelt out by the Upper Tribunal in PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC). Mr Dhanji submitted that the judge had failed properly to take into account, applying PS, when assessing whether there were "truly aggravating" circumstances, that the appellant had voluntarily left the UK in 2019 in order to make an entry clearance application as a spouse. That was, Mr Dhanji submitted, required in order to take into account the importance of encouraging individuals with no right to remain in the UK voluntarily to leave the UK and seek to regularise their immigration status. Mr Dhanji submitted that in para 40, the judge had been wrong only to give "limited" weight to the fact that the appellant had voluntarily left the UK, because he had only done so on the advice of a lawyer.

16. As regards ground 2, Mr Dhanji submitted that the judge had been wrong in para 52, when carrying out the balancing exercise under Art 8.2, to give the public interest in the proper maintenance of immigration control "overwhelming" weight such that he suggested that the public interest could not be outweighed. That, Mr Dhanji submitted, was an error of law.

17. On behalf of the ECO, Mr Howells relied on the rule 24 response.

18. As regards ground 1, Mr Howells submitted that the weight that the judge should give to the fact that the appellant voluntarily left the UK was a matter for the judge.

Mr Howells accepted that it was some mitigation and the judge had taken that into account referring to it in paras 8, 24 and 40. Mr Howells submitted that the judge had referred to, and correctly directed himself, in relation to PS, at para 27. Mr Howells submitted that the appellant had a very poor immigration history which the judge was entitled to take into account and it was reasonably open to him to conclude that the appellant's conduct was "truly aggravating".

19. As regards ground 2, Mr Howells submitted that the judge had not misdirected himself in para 52 when he stated that the public interest in proper immigration control was "overwhelming". That, Mr Howells submitted, had to be read in the context of the first sentence in para 52 which referred to the "gravity of the appellant's conduct" as being a "key aspect of the appeal". Mr Howells submitted that the judge was not saying that in all cases the public interest in proper maintenance of immigration control is overwhelming but rather that, given the appellant's past conduct, it was "overwhelming" in this appeal in that it outweighed the impact upon the appellant's family life.

20. Mr Howells invited me to dismiss the appellant's appeal to the Upper Tribunal.

Discussion

21. It was common ground before me that the relevant provision concerning the issue of whether the appellant can meet the requirements of the Immigration Rules is para 320(11) which sets out a discretionary general ground of refusal. That provision applies to applications for entry clearance by Family Members under Appendix FM (see para A320).

22. Paragraph 320(11) sets out a general ground of refusal where entry clearance "should normally be refused" in the following terms:

> "(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".

23. In PS, the Upper Tribunal (Kenneth Parker J and SIJ Spencer), emphasised that in order for para 320(11) to apply then the "aggravating circumstances" set out in that

provision must be "truly aggravating" (see [14]). The reason for this was given as follows:

> "14. .... It is therefore wholly unclear whether the Entry Clearance Officer has addressed his mind to the relevant question, namely whether in the circumstances of this case Mr S's breach of UK immigration law was sufficiently aggravating so as to justify the refusal. It seems to us that the Entry Clearance Officer should have specifically recognised that Mr S had voluntarily left the United Kingdom more than 12 months ago with a view to regularising his immigration status. There was no question but that the marriage was a genuine one. If the aggravating circumstances are not truly aggravating there is in this context a serious risk that those in the position of Mr S will simply continue to remain in the United Kingdom unlawfully and will not seek to regularise their status as he has sought to do. The effect then is likely to be counter-productive to the general purposes of the relevant Rules and to the maintenance of a coherent system of immigration….".

24. In other words, in determining whether the breach of the UK immigration laws as set out in the first part of para 320(11) justified, on a discretionary basis, the refusal of entry clearance those circumstances must be "sufficiently aggravating so as to justify the refusal" (see [14]).

25. In this appeal, Mr Dhanji seeks to rely upon PS, as he did before Judge Wood, and submits that the judge failed to give due weight to the fact that the appellant left the UK prior to seeking entry clearance in order to regularise his immigration status as a spouse.

26. It will be helpful if I set out a number of passages in the judge's decision.

27. The first contains the judge's summary of the appellant's immigration history which was accepted by Mr Dhanji before the judge. The judge said this at paras 12–13:

> "12. I also had regard to the appellant's witness statement at page 4 of the bundle, even though he did not give evidence. He confirmed that he married Mrs Allsop (Dota) on 2 July 2019 in Tirana, Albania. He explained that when he first came to the UK, he had claimed asylum and stated he was Kosovan. This was in 1999. His asylum claim was refused in March 2000. He was removed to Albania in 2001. In 2003, he married and had three children but he was divorced in 2007. He attempted to enter the UK in February 2008 using a false Danish passport and driving licence but was intercepted and returned to Albania. He repeated the same thing in December 2009, this time with a false Italian passport. Again he was detected and returned a few days later.
>
> 13. He then entered the UK illegally in June 2010, and did not leave until November 2011. He re-entered in January 2012 and remained for a few months. He next came back to the UK in September 2017, shortly before meeting Mrs Allsop. ..."

28. At paras 23–28, the judge dealt with para 320(11). At para 23, the judge noted that the ECO only relied upon para 320(11) and no longer relied upon para 320(3) as she had in the refusal decision. Then the judge continued as follows:

> "24. The Upper Tribunal has urged caution in relation to the exercise of the discretion which is created by 320(11), where, as in this case, the appellant seeks re-entering into the UK in order to settle with a partner. All cases must considered on their

own merits taking into account the extent of family life in the UK. These cases are all very fact specific.

25. Under 320(11), entry may be refused where the appellant previously contrived in a significant way to frustrate the intention of the Rules. There must also be some aggravating features to justify the refusal of entry clearance. There is guidance which sets out the circumstances where this condition might be satisfied. The circumstances set out in the guidance include previously working in breach of visa conditions within a short amount of time (i.e. premeditated intention to work), previous use of a different identity, and vexatious or frivolous applications.

26. Notwithstanding the caution that must be exercised in this type of case, I find that the appellant did clearly contrive in a significant way to frustrate the intention of the Immigration Rules. Indeed, the parties accepted as much at the hearing. What remained in issue for me was whether there were sufficiently aggravating circumstances in the case such as to justify the refusal of entry clearance into the UK. The appellant claims there is insufficient evidence of aggravating circumstances, or of circumstances which are sufficiently aggravating to justify the exercise of discretion against the appellant. The respondent alleges that the appellant has used false identity documents, made a vexatious claim for asylum under a false name, and has worked in the UK illegally over an extended period.

27. I have also had regard to the matters set out in PS (paragraph 320(11)) discretion: care needed) India [2010] UKUT 440 (IAC)) where it was suggested that aggravating circumstances must be 'truly aggravating' otherwise there is a risk that those in the appellant's circumstances will continue to remain in the UK unlawfully and will not seek to regularise their status.

28. There is no doubt an important balance to be struck between the interests of the appellant in exercising his right to a family life, in this case with his wife, and the broader interests of the community, to include the public interest in having an efficient system of immigration which is properly in force".

29. Then at paras 29–36, the judge set out the circumstances of Mrs Dota and the impact upon her of either going to live in Albania with the appellant or of remaining in the UK without him. The judge did not doubt the genuineness of their relationship.

30. Then at paras 37–41, the judge considered the appellant's past immigration history and para 320(11):

"37. I then turn to examine the appellant's immigration history. It is, on any view, a bad history. It dates back to 1999 when he made a claim for asylum using a false identity. He was forcibly returned to Albania on a number of occasions. He used false passports on more than one occasion. In total, the appellant has illegally entered (or attempted to enter) the UK on 6 occasions. He worked illegally during his stay in 2017–2019, when he was in a relationship with the sponsor. I have no doubt that he worked, or arrived intending to work, on the other occasions he came to the UK.

38. It was put to me that the appellant has shown remorse. He has certainly made that point in writing. However, without seeing him in person, it is difficult to gauge whether any expressions of contrition are genuine, or a matter of convenience. His conduct over the last 20 years has demonstrated, on a repeated basis, that he has no regard for the laws of the UK. Mrs Allsop has also expressed regret on his behalf. Again, I found these expressions to be unconvincing. It was clear that in

her own mind, his unlawful conduct was justified on the basis of him wanting to make a better life for himself. There was little indication that she objected about his presence in the UK unlawfully, or his working without leave. She did not appear to have suggested he move back to Albania until they were both legally advised that it might be in their interest to do so. I am afraid I did not sense any great regret in Mrs Allsop's answers to questions on this point. In fairness to her, she loves the appellant, and that was clearly her priority.

39. Nor do I accept the point made in the grounds of appeal that the conduct relied upon happened ten years ago, or that it was not 'intentional'. The appellant's last unlawful entry to the UK, in the back of a lorry, was in 2017. He was still working illegally in 2019 prior to departing to Albania. The application was made in July 2019, about two weeks after they were married. It seems likely that he was working illegally until only a few weeks before the application. The behaviour relied upon by the respondent forms a chain of events which stretches from 1999 to 2019. In my judgment, it is prolonged, repeated, intentional, and relatively recent conduct. I do not see that the passage [of] time constitutes significant mitigation in this case.

40. Of course, I do have regard to the fact that the appellant left the UK voluntarily. This is some mitigation. However, in my view it is limited in the context of this case. He did not leave until he was advised by a lawyer to do so. It was not the result of any contrition for his previous behaviour, or a desire to do the right thing, so much as it was the appreciation that it was potentially in his best interest to marry in Albania, and then to make an application for entry clearance. It was clear from Mrs Allsop's evidence that they had under-estimated the difficulties in obtaining that leave in the light of the appellant's immigration history. It is my view that in this regard, this case can be readily distinguished from PS (India), as well as in relation to the fact that the poor immigration behaviour has continued until relatively recently.

41. In my judgment, having regard to its totality, the appellant's immigration conduct in this appeal is what can properly be regarded as 'truly aggravating', as defined in PS (India). Whilst there is some mitigation to be found in the circumstances of the appellant, and in particular those of the spouse, it is my [ ] view that the discretion to exclude the appellant from the UK was appropriately exercised in this case. The nature and duration of the appellant's conduct, taken with the fact that he was still continuing to flout Immigration Rules immediately prior to the application, means that it more than offsets any mitigation that might arise in this case (as set out above)".

31. Then at para 42, the judge reached this conclusion:

"42. I find that the exercise of the discretion by the respondent under paragraph 320(11) in this case was appropriate and measured. For the same reasons I take [the] view that the appellant also fails to satisfy the requirements of S-EC.1.5. in terms of [ ] his suitability for entry clearance. I agree that there were clear grounds for refusing the application, and that the appellant has failed to satisfy the burden and standard of proof that he complies [with] the Rules".

32. There is no doubt that the judge had well in mind the approach set out in PS upon which Mr Dhanji relied. The judge quoted from PS at para 27 that the circumstances must be "truly aggravating" and again said that in para 41. In addition in para 27, the judge noted the approach in PS that there was a need for the circumstances to be "truly aggravating" otherwise there was a risk that an individual would continue to

remain in the UK unlawfully and not seek to regularise their status. That reflects the relevance of an individual voluntarily leaving the UK as a factor in assessing whether the circumstances are "truly aggravating".

33. In relation to that last issue, the judge plainly referred to the appellant's voluntary departure shortly before making the current application for entry clearance at a number of points in his decision including at paras 8, 24 and, of course, in para 40.

34. It is the judge's approach to the appellant voluntarily leaving the UK in para 40 that forms the basis of ground 1 relied upon by Mr Dhanji. He submits that, properly to apply the approach in PS, the judge should not have given that factor "limited" significance. I do not accept that submission.

35. First, nothing in PS indicates what weight should be given to this factor when assessing the totality of the circumstances.

36. Secondly, it is important to note that in PS the only public interest factor was that the individual was in the UK unlawfully and the ECO (and by extension the first instance judge) failed to give any consideration to the fact that the individual in that appeal had voluntarily left the UK. It was the total failure to take that factor into account which led the Upper Tribunal in PS to set aside the Immigration Judge's decision and to allow the appeal on the basis that the ECO's decision was not in accordance with the law (see [11]-[13] and [14]-[15]).

37. By contrast, in this appeal the judge plainly did take into account that the appellant had voluntarily left the UK. He referred to it on a number of occasions and in para 40 said that it was "some mitigation". However, having regard to the totality of the appellant's past immigration history, the judge concluded in para 41 that "any mitigation" was more than offset by that conduct. On any view, the appellant's past immigration history was very poor. He had, as the judge pointed out, sought to enter the UK illegally on six occasions. He had made a false claim for asylum using a false nationality. He had attempted to enter the UK on two of those occasions using false Danish and Italian passports. He had remained in the UK illegally for periods of time between 1999 and 2019 most recently since 2017. The judge found that the appellant had worked illegally at various times in the UK including up to the point at which he voluntarily left the UK. It was not, in my judgment, an unreasonable characterisation of the appellant's behaviour for the judge to describe it in para 39 as: "prolonged, repeated, intentional, and relatively recent conduct".

38. The judge did, thereafter, in para 40 give the fact that the appellant left the UK voluntarily some weight as "some mitigation". However, there was, in my judgment, no error in the judge giving it "limited" weight in the light of the appellant's previous immigration history and bearing in mind that the appellant had voluntarily left the UK on the advice of his lawyer in order to seek to regularise his claim to be in the UK as a spouse. The relevance of this latter matter was, as the judge pointed out in a number of regards having assessed the evidence elsewhere in his determination, that the appellant (and indeed his wife) had not shown any

genuine contrition or remorse for the sustained immigration breaches by the appellant. That finding, which is not in fact challenged, was clearly open to the judge on the evidence having taken into account the appellant's witness statement and heard his wife give oral evidence.

39. In my judgment, nothing in PS required the judge, as a matter of law, to give the fact that the appellant left the UK voluntarily, in the circumstances of the overall assessment of the appellant's past immigration history and behaviour, greater weight than he in fact did by treating it as "some mitigation". But, in assessing whether the appellant's immigration breaches were "truly aggravating", given the nature of those immigration breaches which I have set out, it was almost inevitable that a judge would find that, despite the impact upon the appellant and sponsor, those circumstances were "truly aggravating" and justified the exercise of discretion under para 320(11) to refuse the appellant entry clearance as a spouse.

40. For these reasons, I reject ground 1.

41. Turning now to ground 2, this focuses on what the judge said in para 52 of his determination as follows:

> "52. In my judgment, the gravity of the appellant's conduct is the key aspect of the appeal. There is an overwhelming public interest in the proper maintenance [of] immigration controls. Unfortunately, the appellant has a singularly poor history during which he has demonstrated a steadfast determination to completely disregard those controls. As a result, the balance is clearly in favour of excluding the appellant from the UK, notwithstanding the obvious impact the decision will have on his life with the sponsor, who is a British citizen".

42. Mr Dhanji's construction of para 52 is simply impossible. Read as a whole, it is quite plain that the judge is stating that the public interest is "overwhelming" in the circumstances of the appellant's case having regard to the gravity of his previous conduct and breaches of immigration law. The relevant sentence criticised by Mr Dhanji is sandwiched between two sentences which both relate to the gravity and seriousness of the appellant's past immigration conduct. That immigration history was, indeed, as the judge said "very poor". It was a weighty and significant factor weighing in favour of the public interest. In my judgment, it was reasonably and rationally open to the judge to find that its weight was such that it overwhelmed - i.e. demonstrably outweighed – the impact that the refusal of entry clearance would have on the family life of the appellant and his wife.

43. For these reasons, I also reject ground 2.

44. Consequently, I am satisfied that the judge did not err in law in reaching his finding that para 320(11) applied and that the refusal of entry clearance was a proportionate interference with the appellant's (and his wife's) family life.

Decision

45. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

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

Signed

Andrew Grubb

Judge of the Upper Tribunal
15 October 2021

TO THE RESPONDENT
FEE AWARD

Judge Wood made no fee award as the appeal had been dismissed. That decision also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
15 October 2021