Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001206
HU/03346/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 04 May 2022	**on 25 August 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MUKTIAR SINGH

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Ms E. Harris, instructed by ATM Law Solicitors
For the respondent: Ms S. Lecointe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 29 January 2020 to refuse a human rights claim made in the context of an application for entry clearance as the spouse of a British citizen.

2. First-tier Tribunal Judge Kaler ('the judge') dismissed the appeal in a decision promulgated on 01 October 2021. The judge summarised the reasons for refusal [4]-[6]. The respondent refused the application with reference to paragraph 320(11) of the immigration rules (general grounds for refusal) on the ground that the appellant's previous immigration history

showed that he had contrived in a significant way to frustrate the intentions of the immigration rules. She also summarised the appellant's case and the evidence given by the witnesses [7]-[11], as well as the submissions made by both parties at the hearing [12]-[15].

3. The judge turned to make her findings. She noted that the appellant met the requirements of Appendix FM of the immigration rules save for the 'Suitability' criteria [17]. She also noted that the appellant had admitted to working illegally in the UK. However, she observed that this was not given as an example of an 'aggravating feature' for the purpose of paragraph 320(11). The judge considered the fact that the appellant entered the UK illegally and absconded and noted that these were given as examples of aggravating features [18]. She went on to direct herself to the wording of paragraph 320(11) and the Suitability requirement in paragraph S-EC.1.5 of Appendix FM [19]-[20].

4. The judge went on to consider whether the interests of any children were engaged in this case but noted that the sponsor's children were adults. The appellant was not their father and had never played a parental role in their lives [23]. The judge considered the various familial relationships but concluded that none of them went beyond the normal emotional ties between adult relatives. The youngest of the children was due to attend university and could be supported by his older siblings [24]. She accepted that the appellant and the sponsor were married and had established a family life together. Their relationship developed after the appellant's removal from the UK.

5. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds:

   (i) The First-tier Tribunal erred in finding that the appellant's illegal entry in 2011 for the purpose of claiming asylum was an aggravating circumstance that might engage the operation of the general ground for refusal under paragraph 320(11) of the immigration rules. Article 31 of the Refugee Convention states that a refugee should not be penalised for illegal entry.

   (ii) The appellant's failure to comply with reporting restrictions was 'part and parcel' of illegal residence in the same way as illegal working and should not have been considered as an aggravating circumstance. The judge erred in failing to have regard to the public interest in encouraging those who are remaining unlawfully to leave the UK to apply for entry clearance through the proper channels.

   (iii) It was not open to the judge to find that the immigration history was accepted. The appellant did not accept the assertion that he had refused to move to another detention centre when asked. The judge also erred in finding that the appellant had a total disregard for immigration laws, when in fact he had made applications to regularise his status. It was not open to the judge to find that the appellant failed to report on 29 May 2009 after being encountered in Coventry

based on a bare assertion made by the respondent. It was not open to the judge to place weight on the fact that the appellant was removed at public expense when the appellant had complied with removal arrangements, including the issuing of a travel document. It was not open for the judge to conclude that illegal working was an aggravating feature.

(iv) The judge erred in failing to consider section 55 in relation to the sponsor's grandchild.

(v) The judge erred in failing to give adequate weight to the relationship between the sponsor and her two adult sons who still lived in the family home.

Decision and reasons

6. Ms Harris did not draft the grounds of appeal but drew what she could from the arguments in her submissions. Having considered the First-tier Tribunal decision, the grounds of appeal, and the oral submissions I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law that would have made any material difference to the outcome of the appeal.

7. The first ground, as originally drafted, made a rather strange point apparently seeking to argue that the appellant's illegal entry was not a 'trigger offence' for the purpose of paragraph 320(11) because he entered illegally to claim asylum. The ground argued that if the 'trigger offence' was not satisfied (described as 'stage one') then the application could not be refused under paragraph 320(11) even if there were other aggravating circumstances (described as 'stage two').

8. Ms Harris accepted that the appellant was an illegal entrant and made clear that she was not seeking to argue that Article 31 of the Refugee Convention applied in this case. There is no information about the appellant's asylum claim beyond the admission in his witness statement that he entered the UK illegally in 2001 and claimed asylum. The claim was refused and the subsequent appeal was dismissed. His appeal rights became exhausted in April 2002. There is no other information beyond this description of procedural events.

9. At the date of the respondent's decision paragraph 320 of the immigration rules stated that entry clearance should normally be refused in the following circumstances:

> '(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
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> (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.'

10. There are two broad elements to paragraph 320(11), which are part of a holistic assessment of whether a person has contrived in a significant way to frustrate the intentions of the immigration rules. First, several specified 'gateway' behaviours might prompt consideration of this general ground for refusal, which includes illegal entry. Second, there must also be 'other aggravating circumstances' in addition to the gateway behaviours.

11. As I understood the argument put forward by Ms Harris, she argued that the fact that the appellant entered illegally to claim asylum was relevant to the evaluative assessment of whether the appellant had in fact contrived in a significant way to frustrate the intentions of the rules. She referred to the case of *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC). In that case the Upper Tribunal was considering whether there had been sufficient evaluation of the additional aggravating circumstances with reference to the respondent's policy. The appellant in that case had also entered illegally and made an unsuccessful asylum claim. The case does nothing more than to point out that there must be an evaluative assessment. The judge was aware of the case because *PS (India)* was cited to her [3].

12. Having accepted that the appellant entered the UK illegally, and having made clear that she was not arguing that Article 31 of the Refugee Convention somehow obviated illegal entry, it is indisputable that the first element of paragraph 320(11) was satisfied. The appellant's argument can only bite on the judge's evaluative assessment of whether the appellant had contrived in a significant way to frustrate the intentions of the immigration rules, taking into account any other aggravating circumstances that might also be relevant to that assessment.

13. Entering the UK illegally cannot be described as anything other than an attempt to frustrate the intentions of the immigration rules, which set out a system of legal entry to the UK. However, it is generally accepted that some refugees, by virtue of the circumstances that led them to flee, might not be able to leave their country of origin by legal routes. However, that does not mean that the mere fact of having claimed asylum expunges illegal entry from being considered as a negative factor in a person's immigration history. It still forms part of the overall picture that must be evaluated.

14. There was no information before the judge to indicate the basis upon which the appellant claimed asylum. All that was known was that the claim was rejected and that a judge also found that he did not meet the requirements to be recognised as a refugee. In the absence of any good

reason to explain why he entered the UK illegally, and taking into account the fact that he was found not to be a refugee, it was open to the judge to take his illegal entry into account. This factor was not given undue weight in isolation from others.

15. It was apparent from the appellant's immigration history that his asylum claim was considered promptly and that his appeal rights were exhausted by April 2002. Even if he had claimed asylum in good faith, he was found not to have a well-founded fear of persecution in India. Having entered illegally he was recorded as having absconded and remained in the UK unlawfully for over 12 years before making an application to regularise his status in July 2014. The judge considered the appellant's vague explanation for absconding, merely stating than he was 'scared'. She also noted that there was no explanation as to why he failed to report when required to do so although she acknowledged that there might have been a period when the appellant did report [7]. It is unclear from the evidence how long the appellant did comply with reporting restrictions but given that he did not apply to regularise his status until 2014 it seems unlikely to have been for a long period. He said that he was detained on 10 October 2016 when he went to report. His failure to report from 2002 to at least 2014 was for a far more significant period.

16. In my assessment, neither of the first two grounds of appeal identify any errors of law that would have made any material difference to the outcome of the appeal. It was open to the judge to take into account the fact that the appellant entered the UK illegally in the absence of any information relating to the circumstances of the asylum claim and in the context of the fact that the appellant was not recognised as a refugee. The attempt in the second ground to argue that failing to comply with reporting conditions for 12 years was just 'part [and] parcel' of illegal entry and residence is wholly unarguable when paragraph 320(11) specifically identifies absconding and failure to comply with reporting conditions as examples of other aggravating circumstances over and above illegal entry. The judge considered whether the appellant had given an adequate explanation for such a long period of absconding. It was within a reasonable range of responses to the evidence for her to conclude that none had been provided.

17. The third ground of appeal made a series of points disagreeing with the findings made by the judge. To succeed in showing that a finding was not open to a judge an appellant must show that it was outside a range of reasonable responses to the evidence i.e. irrationality. At the hearing, Ms Harris did not seek to rely on the points made at paragraphs 7 (removal at public expense) and 8 (illegal working) of the grounds of appeal but continued to rely on the first three points.

18. The thrust of Ms Harris' submission was that it was procedurally unfair for the judge to rely on information provided by the Home Office Presenting Officer relating to an allegation that the appellant failed to report when required to do so on 29 May 2009. The information was provided directly

from the Home Office file without producing evidence and for the first time during submissions at the hearing. The appellant did not have an opportunity to respond. I accept that the issue was not raised in the decision letter and that the First-tier Tribunal decision indicates that it was raised for the first time during the Home Office Presenting Officer's submissions at the hearing [12].

19. It is quite common for the respondent's representatives to check information from their records during hearings. In some cases the additional information might trigger the appellant's representative to take instructions or a request might be made to adduce further evidence in response. Whether procedural fairness requires time to be given will depend on the circumstances. In this case the appellant was represented at the hearing. His representative would have made his submissions after the respondent had raised the issue. It would have been open to the appellant's representative to ask for time to take instructions on this point if it was considered sufficiently important. Despite this being raised as an issue in the grounds of appeal, no indication has been given as to whether the appellant accepts that he was encountered in Coventry in 2009 and was required to report or not. It could not begin to be procedurally unfair unless the appellant denied the allegation.

20. Given that the appellant was an illegal entrant it is highly likely that he was required to report to the immigration service during the asylum process. It is reasonable to infer that he would only have been recorded as an absconder in 2002 if he had failed to report as required. In the context of the wider picture of long-term absconding, the failure to report in 2009 was simply an additional example highlighted by the respondent from her records. Although the judge summarised the respondent's submissions on this point, it was not specifically mentioned in her findings from [16] onwards. There is nothing to suggest that the judge put weight on the issue.

21. I note that in his witness statement the appellant accepted that he failed to 'comply with reporting restrictions' at other times. Disingenuously, he sought to deny that this was an attempt to evade immigration control. It is difficult to see how failure to comply with reporting conditions for long periods of time could be anything other than an attempt to evade immigration control.

22. The judge weighed the circumstances and noted that some aspects of the appellant's immigration history, such as illegal working, were not given as examples of aggravating circumstances. Her main reasons given for concluding that the appellant had previously contrived in a significant way to frustrate the intentions of the immigration rules were that the appellant entered and remained in the UK illegally for many years (the first element) and had absconded (the second element) [18][21]. For the reasons given above, it is difficult to see how the respondent's late information rendered the hearing procedurally unfair when it did not appear to form any part of the judge's subsequent reasoning.

23. The appellant was on notice of the other allegation relating to his refusal to comply with a request to move detention centre because it was raised as a reason for refusal in the decision letter. Information is provided in decision letters from the respondent's records. The respondent is a government department whose records can be generally relied upon unless an appellant points out that it is inaccurate or denies an allegation such as this. The appellant responded to various other points in his witness statement but was silent on the question of whether he had refused to move to another detention centre. He did not deny the allegation. For similar reasons to those given above, the judge did not place weight on the issue nor is it clear that it would have made any material difference in circumstances where the appellant did not deny the allegation when given the opportunity to respond.

24. The final point made in the third ground of appeal was an assertion that it was not open to the judge to give weight to the fact that the appellant's repeated attempts to regularise his status at a late stage had failed. As formulated in the written pleadings the ground appears to suggest that this formed part of her assessment of the aggravating circumstances for the purpose of paragraph 320(11), but when analysed this is not the case. The fact that the appellant had made repeated applications and representations from 2014-2017 only formed part of the judge's reasoning in so far as it related to the weight to be given to the public interest considerations in the balancing exercise under Article 8 [27]. Even if the appellant seeks to characterise this as a point that should have been considered in his favour, it is clear from the outcome of those applications that he was found not to meet the requirements for leave to remain. His desire to remain did not equate to a right to remain. In those circumstances it was open to the judge to take into account the fact that the appellant did not make a voluntary departure and had to be removed at public expense despite the fact that he did not meet the requirements of the immigration rules.

25. Ms Harris did not pursue the last two grounds with any vigour. She accepted that it was difficult to argue the point relating to the sponsor's grandchild when she lived with her parents and not with the sponsor. Although two of the sponsor's adult children still lived with her at the date of the hearing her youngest son was due to leave home to start university in Bristol in September 2021 and her other son was working. No doubt there are loving familial ties between the sponsor and her adult children. However, it was not outside a range of reasonable responses for the judge to conclude that the evidence did not show that the sponsor's ties with her adult children went beyond the normal emotional ties between a mother and her adult children to the extent that there might be insurmountable obstacles to the couple continuing their family life in India. The grounds express a disagreement with the finding but fail to identify an error of law in the First-tier Tribunal decision that would have made any material difference to the outcome of the appeal.

26. For the reasons given above I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

Signed M. Canavan Date 11 July 2022
Upper Tribunal Judge Canavan

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