Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17021/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2021	**On 25 January 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR GODE LIYANAGE NEEL PRIYANTHA NANAYAKKARA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms C. Bayati, Counsel instructed by S Satha & Co.
For the Respondent: Ms Z. Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Manuell promulgated on 7 May 2021. The judge dismissed an appeal brought by the appellant, a citizen of Sri Lanka born on 29 November 1965, against a decision of the Entry Clearance Officer dated 6 September 2019 to refuse his application for entry clearance as the spouse of a British citizen.

Factual background

2. The appellant, although currently residing in Sri Lanka, was previously a long-term overstayer. In October 2003, he entered on a short-term visitor's visa, valid for less than two weeks. He did not leave, and was eventually removed at public expense in July 2017. In the intervening period, he was convicted of common assault, claimed asylum but later withdrew his appeal against the refusal of his claim, accrued a litigation debt to the Home Office and, in 2019, married a British

citizen of Sri Lankan descent, Mrs Sujeewa Dunukewalage, in Sri Lanka. On 25 May 2019, he applied, from Sri Lanka, for entry clearance as a spouse. It is common ground that he met all eligibility requirements, including the relationship, English language, and financial requirements of the rules. However, his application failed on suitability requirements, including under paragraph 320(11) of the Immigration Rules, which at the relevant time provided as follows:

> "**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.

Suitability provisions feature in S-EC.1.5 and S-EC.2.2 of Appendix FM, and the application was refused on those grounds also, primarily in relation to the appellant's 2009 conviction for common assault, the appellant's failure to declare that he had any convictions when applying for entry clearance, and the outstanding litigation debt.

3. The Entry Clearance Officer invoked paragraph 320(11) on the basis that the appellant was a long term overstayer, had been removed at public expense, married his wife in the "knowledge that your immigration status was precarious and that you were not guaranteed readmission to the UK", and had not displayed any remorse for his previous failure to comply with the conditions imposed upon his entry.

4. The application was also refused under paragraph 320(3) (failure to produce a valid national passport or identity document), but it was conceded on behalf of the Entry Clearance Officer that that was in error, and the judge accepted as much (see [19] of his decision), so it is not necessary for me to address that issue further at this stage.

5. The appellant appealed to the First-tier Tribunal. There was some confusion as to the papers relied upon by the respondent below; it appears that she provided a bundle originally relating to the appellant's asylum claim, which was not under challenge in the proceedings. Nevertheless, the judge was able to continue on the basis of the materials before him. The hearing proceeded on the basis of submissions alone because, as recorded by the judge at [14] of his decision:

> "… there was no formal live evidence as there was no dispute of fact."

6. Paragraph 320(11) of the Immigration Rules features a two-stage analysis in order to determine whether the rule is engaged, followed by an exercise of discretion, pursuant to which the Secretary of State must consider whether it is appropriate to invoke the ground for refusal. The Secretary of State, or the Entry Clearance Officer, must first establish that the applicant had "previously contrived in a significant way to frustrate the intentions of the Rules" on at least one of a number of specified bases, including by overstaying. It was common ground before the judge that the first criterion was met; the appellant's overstaying from October 2003 until his removal at public expense on 3 July 2017 was conceded to meet the above requirement (see paragraph 23 of the appellant's skeleton argument before the First-tier Tribunal, and paragraph 8 of his grounds of appeal to the Upper Tribunal). The second limb of paragraph 320(11) concerns whether there were "other aggravating circumstances", and, if so, whether it was appropriate to exercise discretion against the appellant to refuse the application. The judge found that both limbs of the rule were met, that it was engaged and that the Entry Clearance Officer had exercised discretion appropriately.

7. In his operative reasoning, the judge stated as follows, at [20], with emphasis added:

> "Although the Entry Clearance Officer's decision does not say so in the clearest of terms, it seems to the tribunal that it was recognised that refusal under paragraph 320(11) was discretionary and required great care, which the advance referral to the entry clearance manager emphasised. There were a number of relevant factors correctly identified. The first was the appellant's long overstay. His visit visa was valid for a month yet he remained unlawfully for some 14 years, during which time he was convicted of an offence. **Plainly he must have worked illegally: he admitted to "helping" as a cleaner in his asylum interview: see Q.24. All of those actions undermine the intentions of the Immigration Rules**."

8. At [21], the judge opined that the appellant's asylum claim had been "transparently thin", having applied for assisted voluntary return in 2012, before he made the claim for asylum, and having later withdrawn it prior to his removal at public expense.

9. At [22] the judge said:

> "In the tribunal's view, the appellant's conduct in making a spurious asylum claim has plainly wasted a significant sum of public money. He has received other public services to which he was not entitled, from treatment to his gout under the NHS to clean streets and all the other provisions which the state makes for its citizens. He has been more than a mere overstayer who has in effect wiped the slate clean by returning to his home country and making a proper application, because he promoted a spurious asylum application which diverted resources from persons in genuine need and which postponed his removal for well over a year. That is undermining the intentions of the immigration rules and is aggravating conduct. The tribunal also finds. Discretion was rightly exercised against the appellant."

10. The judge then turned to the application of the suitability criteria under Appendix FM. Seemingly acknowledging the Entry Clearance Officer's omission expressly to address the exercise of discretion, the judge said at [23]:

> "Whether or not discretion was expressly exercised under paragraph 320(11) of the Immigration Rules, it was accepted on the appellant's behalf that discretion was exercised under Appendix FM. In the tribunal's view, the discretion under the suitability requirements was rightly exercised against the appellant. Although the appellant's alleged non-disclosure of his conviction in his entry clearance application form was fully remedied later in the same document, indicating that there had been a misunderstanding, there are more than sufficient other factors to show that the appellant was unsuitable, including his conviction and litigation debt, only repaid after the present appeal was in progress. The conviction is in the tribunal's view not a matter which can be overlooked in the light of the appellant's conduct as a whole, particularly in his spurious asylum application."

11. Addressing the proportionality of the appellant's continued exclusion from the United Kingdom, the judge concluded at [24] that Mrs Dunukewalage must have been aware of the appellant's illegal immigrations status when they met here in 2012 and commenced their relationship. There were no reasons the couple could not continue their family life in Sri Lanka. They were both citizens of the country and had spent considerable periods of time there, and both had worked previously. They had family in the country. The civil war ceased a long time ago.

12. The judge concluded that the appellant's exclusion from the United Kingdom was proportionate.

Grounds of appeal

13. The appellant appeals on the basis that the judge erred concerning the burden of proof born by the Entry Clearance Officer when relying on paragraph 320(11), and that he erred in his substantive consideration of whether it was engaged. The judge relied on factors not identified by the Entry Clearance Officer, whose decision was defective in any event, including matters that had not been ventilated between the parties at the hearing, and thus reached findings without evidence, in circumstances that were unfair to the appellant, who did not have the opportunity to address the tribunal on some of the factors the judge, of his own motion and without alerting the parties, held against the appellant.

14. Permission to appeal was granted by First-tier Tribunal Judge Parkes on the basis the judge erred in his application of the burden and standard of proof in relation to paragraph 320(11), and therefore erred in his approach to the remaining issues involved.

Submissions

15. Ms Bayati opened her submissions by highlighting the fact that the initial version of the decision promulgated by the judge featured tracked changes demonstrating that an earlier version of the decision related to a different case.

16. Turning to the substance of the subsequently repromulgated decision, which did not have any tracked changes, Ms Bayati submitted that the judge failed to

address himself concerning the approach that should be taken to refusals concerning paragraph 320(11). He misdescribed the decision of the Entry Clearance Officer, stating that there were "a number of factors correctly identified" in relation to the aggravating circumstances required paragraph 320(11), whereas the decision relied only upon a single reason.

17. Ms Bayati's main submission was in relation to the judge's finding at [20] that "plainly [the appellant] must have worked illegally…", which had not been an aggravating factor relied upon by the Entry Clearance Officer, or the presenting officer, or raised by the judge of his own motion. The judge took a single sentence in the appellant's asylum interview in which he said he "helped" with cleaning sometimes and, without warning and unfairly, reached a finding adverse to the appellant. The judge had also inferred that the appellant had obtained treatment for his gout in the NHS, without giving the appellant the opportunity to address him on the issue. It could have been paid for privately, submitted Ms Bayati.

18. Further, despite extensive written and oral submissions concerning the broader policy considerations inherent to an exercise of discretion under paragraph 320(11), such as that encouraged by *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC), the judge failed expressly to consider such matters.

19. Ms Bayati also submitted that the judge's consideration of the Mrs Dunukewalage's prospective relocation to Sri Lanka to live with the appellant was glib; she had left Sri Lanka in 1992 fleeing a violent marriage. The issue was not whether there would be insurmountable obstacles to the relationship continuing in Sri Lanka, but whether the refusal of entry clearance was proportionate. The judge simply failed to consider those matters.

20. On behalf of the Entry Clearance Officer, Ms Ahmad accepted that "ideally" the judge should have put the adverse points concerning working and the NHS to the appellant, but they were not "fresh" points. They were part of the evidence submitted by the respondent, and it was open to the judge to rely on them.

Discussion

21. In *AM (Fair hearing) Sudan* [2015] UKUT 656 (IAC), this tribunal held, as summarised at (5) of the judicial headnote:

> "Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."

22. In this appeal, the issue of whether the appellant had worked illegally had not been canvassed by the parties; as Ms Bayati submits, it had not been raised by the Entry Clearance Officer, nor the presenting officer, nor by the judge himself. On the contrary, there was agreement at the hearing below, as recorded by the judge at [14], that no evidence would be required "as there was no dispute of fact". By definition, whether the appellant had worked illegally was not an agreed – or disputed – fact; it was simply not an issue in the proceedings. The judge recorded the presenting officer's submissions that had described the appellant's previous residence here as a "long term overstayer" and I accept that, on one view, such long term overstaying *could* encompass the allegation that such residence was only possible had the appellant worked illegally. But the

appellant did not have the opportunity, through Ms Bayati, to address the judge on that issue, or for Mrs Dunukewalage to give evidence on the point, to the extent she had any knowledge of the matters concerned. Had the judge raised with the parties his preliminary view that the irresistible inference he proposed to draw from questions 22 to 24 of the appellant's asylum interview was that he must have worked illegally, the parties would have been able to address him on that proposed finding of fact, and its impact. By not ventilating this prospective issue with the parties, the judge's adverse conclusion against the appellant on this issue was unfair.

23. Some of the other aggravating factors relied upon the judge, for example the appellant's alleged use of the NHS, had not been ventilated between the parties. The impact of any reliance on the NHS by the appellant (if established) is a matter of weight, and the parties could have expected to be given the opportunity to make submissions on the issue. Yet they did not have that opportunity.

24. The other grounds of appeal have far less merit, but in light of the above conclusion, it is not necessary for me to consider them. The appeal succeeds on this basis alone; the judge resolved the case against the appellant on the basis of issues that were not ventilated between the parties, without giving them the opportunity to address him on those issues. The unfairness that flowed from that approach was augmented in light of what the parties justifiably assumed to be common factual ground with no disputed facts, thereby obviating the need for any evidence. Far from being a case, as the parties understood it to be, that was able to proceed on submissions alone, this was an appeal where the judge unilaterally reached findings of fact, without hearing evidence, on central issues which took the parties by surprise when the reserved decision was promulgated.

25. Regrettably, since the impact of my finding that the judge's decision rendered the hearing unfair, it follows that the decision should be set aside in its entirety, with no findings of fact preserved. Pursuant to paragraph 7.2(a) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, this appeal is remitted to the First-tier Tribunal to be heard by a different judge.

Notice of Decision

The appeal is allowed.

The decision of First-tier Tribunal Judge Manuell involved the making of an error of law and is set aside with no findings of fact preserved. The case is remitted to the First-tier Tribunal to be heard by a different judge.

No anonymity direction is made.

Signed Stephen H Smith Date 24 January 2022

Upper Tribunal Judge Stephen Smith