Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06789 /2016

THE IMMIGRATION ACTS

Heard at Field House
On 19 April 2018

Decision and Reasons Promulgated
On 02 May 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

ERIC ADJEI YEBOAH
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
For the ENTRY CLEARANCE OFFICER, ACCRA

Respondent

Representation:
For the Appellant: Mr P Richardson, Counsel instructed by Carmelite
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Ghanaian national born on 26 May 1972 who seeks to join his British wife for settlement. The application for entry clearance was refused on 22 January 2016 under paragraph 320(11) of the Immigration Rules due to his previous adverse immigration history. There were also doubts

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about whether the relationship was genuine and subsisting and over his identity. The First-tier Tribunal made a positive finding on the relationship but nevertheless dismissed the appeal. For the reasons set out in my decision of 13 February 2018, the determination of the judge was set aside but his findings on the relationship, which were not challenged by the respondent, were preserved.

The Hearing

2. The sponsor attended the hearing but it was not considered necessary to call oral evidence and the matter proceeded on the basis of submissions only. Mr Wilding confirmed that he would have no questions for the sponsor if she were called as a witness.

3. Mr Richardson submitted that although there had been a time when refusal under paragraph 320(11) would have been justified, that time had now passed and weight should be given to the passage of time and the discretion to permit rather than deny entry. The past adverse history was accepted but Mr Richardson submitted that when the appellant had been faced with removal, he did not attempt to frustrate the arrangements made and he withdrew his outstanding bogus EEA application. Seven years later he unsuccessfully applied to visit his wife but that his was his first attempt to re-enter.

4. Mr Richardson pointed out that the appellant had known the sponsor for many years before the relationship developed. They married on 15 February 2014 and the sponsor has made four visits to Ghana. She is employed as a nurse and has the opportunity to earn more on top of her base salary. It would be difficult for her to relocate but this would not be an insurmountable obstacle. The couple were trying to conceive and there was evidence of IVF treatment.

5. Mr Richardson submitted that the sole barrier to entry was paragraph 320(11) and that was based on conduct prior to July 2007. Those events took place 11 years ago and it could not be right that the appellant should be banned for ever more. A comparison was made to the ten-year ban for non-spouses under 320(7B). Mr Richardson submitted that it made no sense for a spouse to be treated more harshly than a non-spouse particularly as they were deliberately excluded from that rule. Even the deportation ban for criminals was for ten years; less than that applied to the appellant. I was urged to consider what the appellant had been doing in the past years. He had studied and obtained a qualification as a pharmacist. There was no evidence of any offending behaviour. He showed contrition and embarrassment. Given that more than ten years had passed since his bad behaviour, his interests now outweighed that of the public.

6. Mr Wilding relied on the refusal letter. He submitted that no findings of fact were required. There was discretion to permit entry in circumstances such as the appellant's but such applications should "normally" be refused. He submitted that of the four components listed, only one need apply for a refusal but in the appellant's case there were three that were applicable - overstaying, breaching a condition of leave and using deception in an application. The aggravating factors were the use of a false identity and making a frivolous application. He referred me to the guidance on entry clearance applications (as set out at PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440). He submitted that the appellant's actions cut at the heart of immigration control and there was nothing in his favour except the passage of time. Mr Wilding reminded me that I was entitled to review the exercise of discretion myself but to find that it had been properly applied by the ECO. The public interest outweighed the other matters put forward.

7. In response, Mr Richardson submitted that the same competing factors applied to the exercise of discretion and the article 8 balancing exercise. He submitted that there was more than just the passage of time to warrant the exercise of discretion. The appellant had obtained a qualification and had a genuine relationship with a British sponsor. Full regard should be had to those factors.

8. That completed the submissions. At the conclusion of the hearing I reserved my determination which I now give.

Discussion and Findings

9. In reaching my findings, I have taken a careful note of all the submissions and the evidence, whether or not it is specifically referred to in my determination. I bear in mind that it is for the appellant to make out his case on the balance of probabilities. The issue, essentially, is whether the refusal under paragraph 320(11) is justified. It is accepted that the appellant and the sponsor have a genuine and subsisting relationship. Although the ECO also raised the issue of identity in the refusal, that has not been pursued and Mr Wilding did not raise any issues over the appellant's claim that his current application is in his true name. I also note that the ECO did not rely on such an issue in 2014 when the appellant made an application for entry clearance in the same identity as he has used for this application, for his marriage and for his educational and professional qualifications.

10. Paragraph 320 (11) covers the situation:

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.*

11. In PS the Tribunal found: "*In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance*".

12. The court also considered the guidance to Entry Clearance Officers which, in relation to aggravating circumstances, provides as follows:

> *"Please note that the list below is not an exhaustive list. Aggravating circumstances can include actions such as:*
>
> *absconding;*
>
> *not complying with temporary admission / temporary reporting conditions / bail conditions;*
>
> *not complying with reporting restrictions;*
>
> *failing to comply with removal directions (RDs) after port refusal of leave to enter (RLE);*
>
> *failing to comply with RDs after illegal entry;*
>
> *previous working in breach on visitor conditions within short time of arrive in the UK (ie pre-meditated intention to work);*
>
> *previous recourse to NHS treatment when not entitled;*
>
> *previous receipt of benefits (income, housing, child, incapacity or otherwise) or NASS benefits when not entitled; using an assumed identity or multiple identities;*
>
> *previous use of a different identity or multiple identities for deceptive reasons; vexatious attempts to prevent removal from the UK, eg feigning illness; active attempt to frustrate arrest or detention by UK Border Agency or police;*
>
> *a sham marriage / marriage of convenience / polygamous marriage in the UK; harbouring an immigration offender; facilitation / people smuggling; escaping from UK Border Agency detention;*
>
> *switching of nationality;*

vexatious or frivolous applications;

not complying with re-documentation process."

13. The guidance goes on to state:

> *"All cases must be considered on their merits, the activities considered in the round to see whether they meet the threshold under paragraph 320 (11), taking into account family life in the UK and, in the case of children, the level of responsibility for the breach.*
>
> *Where an applicant falls to be refused under 320(7A) or 320(7B), the ECO must also consider whether it is also appropriate to refuse the applicant under paragraph 320(11). Where 320(7C) applies which makes an applicant exempt from 320(7B), an ECO must consider whether a refusal under paragraph 320(11) is appropriate."*

14. The automatic prohibition of entry clearance under 320(7B) was disapplied to the appellant under 320(7C) but, as noted by the Tribunal in PS (at 14), the present case does not contain any reference to the guidance or to the question whether the appellant's breaches of immigration law were sufficiently aggravating to justify the refusal under 320(11). Nor have I seen any evidence that the matter was referred to the ECM prior to refusal.

15. I have considered for myself whether the decision not to exercise discretion was appropriate and fair in all the circumstances. Mr Richardson is right to point out that the only remaining barrier to removal is the application of paragraph 320(11). It is also right to say that the conduct for which the appellant was punished occurred in July 2007, almost 11 years ago. Furthermore, it is not the case that the only factor in the appellant's favour is the passage of time. I take note of the fact that the appellant has shown contrition and remorse for his behaviour. He has not compounded his adverse immigration history by making attempts to return on false documents nor did he seek to frustrate his removal when arrested by making further applications or commencing judicial review litigation as so many do. It is to his credit that he acknowledged he had been caught out, that he withdrew his bogus EEA claim and allowed himself to be removed without further ado. As I have stated, he did not then seek to return to the UK until making an application to visit his wife in 2014. When that was refused, no further action appears to have been taken until the present application. The appellant has also furthered his career in the meantime by studying for and achieving further qualifications as a pharmacist. He, therefore, has a skill that could be put to use in this country. He has a clean police record in Ghana. Another important factor is that he has a British wife. Given that no questions are raised over the genuine and subsisting nature of the relationship, it is a weighty matter. The sponsor works for the NHS as an ophthalmic nurse. She contributes to the economy of this country. I also have regard to Mr Richardson's submission on the comparison between the ban for criminal deportees, non-spousal applications and the appellant's refusal. I agree that it cannot be right that someone excluded from paragraph 320(7B) is then treated more harshly than a non-spouse or deportee.

16. I take account of all these factors cumulatively and find that whilst there were aggravating features in the appellant's case (as highlighted in Mr Wilding's submissions but not in the ECO's refusal), they are now insufficiently grave to justify a continued ban on entry. I agree with Mr Richardson that a 320(11) refusal would indeed have been appropriate in the past but after eleven years, the development of a relationship and a genuine marriage to a British national and where the respondent does not maintain that all other aspects of the rules have not been met, discretion should have been exercised in the appellant's favour.

17. Each case is fact sensitive and I accept that there may well be cases where a continued ban on entry is justified. Having considered all the evidence and submissions for the appellant and given the factors I have highlighted above, I am satisfied that the public interest does not require the refusal of entry clearance and I conclude that discretion should have been exercised in the appellant's favour.

Decision

18. The appeal is allowed.

Anonymity Order

19. I make no order for anonymity.

Signed

Upper Tribunal Judge Kekić

Date: 26 April 2018