Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06632/2018
HU/11272/2018

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons Promulgated**
On 8 August 2019	**On 23 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

MR PARJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Mr A Barnfield, Counsel instructed by Bedfords Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India who was born on 15 June 1984. He appeals against the determination of First-tier Tribunal Judge Fox promulgated on 14 May 2019.

2. Curiously, there are two appeals before me. Of this, in granting permission, First-tier Tribunal Judge E.M. Simpson had this to say:

> "These linked appeals concerned the same appellant who appealed against two separate ECO decisions, however it appeared from the Decision that by the time of hearing the parties agreed that one ECO decision was materially under appeal i.e. the later one of 30/04/2018, against which the appellant appealed on 17/05/2018. Why in the foregoing circumstances either the respondent had not withdrawn the earlier decision of 22/02/2018 or the appellant's earlier appeal, was not amplified. Save to state that it appeared that for all practical purposes that when determined the linked appeals sole focus was upon the substance of appeal number HU/11272/2018 in which so far as the Immigration Rules were concerned there had been agreed *inter partes* that the sole issue had been under Rule 320 (11)"

3. First-tier Tribunal Judge Fox dismissed the appellant's appeals against the decisions of the Entry Clearance Officer (supported by a review conducted by the Entry Clearance Manager) to refuse leave to enter the United Kingdom. The judge dealt with the two appeals together on the assumption that appeal number HU/11272/2018 (the later decision) was the only one needing a decision. This was a decision made by the Entry Clearance Officer on 30 April 2018 by applying what he considered to be the terms of paragraph 320(11). These are stated as follows and they are the reasons why a decision to refuse entry clearance may be made:-

> "(11) where the applicant has previously contrived in a significant way to frustrate the intention of the Rules by:
>
> (1) overstaying; or
>
> (2) breaching a condition attached to his leave; or
>
> (3) being an illegal entrant; or
>
> (4) 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**".

It is those final words and whether there are aggravating circumstances which were the subject of the judge's consideration. Those factors have been given further consideration in the case of *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 where Kenneth Parker J said at paragraph 14:-

> "The Entry Clearance Officer, in making the decision of refusal, refers nowhere to the guidance under paragraph 320(11). 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 twelve 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".

Those were the principles that the judge was required to apply.

4. In granting permission to pursue this appeal before the Upper Tribunal the First-tier Tribunal Judge said permission is granted because:-

> "(i) there was materially arguable that the decision so far as the judge's treatment of what is effectively a discretionary provision of the Rules, its discretionary nature barely being acknowledged".

The judge in granting permission then goes on to point out that the return to India of an individual to apply for entry clearance to regularise his position is something which should be encouraged and it was therefore because of the failure to acknowledge a discretionary element that the permission in this case was granted.

5. There may be instances where the decision maker has a discretion. The exercise of the discretion is informed by, not to say governed by, the Immigration Rules as I have set out above. When the discretionary element is articulated in the Immigration Rules, the discretion is to be considered in the context of the words of the Rules themselves, since this is the method that the Secretary of State has himself chosen to direct the decision-making process. Hence the judicial decision maker is entitled to follow and to focus upon whether the appellant meets the requirements of the Immigration Rules. It will only be in very rare circumstances that a person who fails to meet the requirements of the Immigration Rules that the decision maker is forced to look and see whether there are circumstances which might amount to a further, residual discretionary element outside them. In this case there was no allegation made that there were circumstances - personal circumstances pertaining to the appellant himself - which had the quality of a discretionary element which required consideration outside the Rules. Indeed the case was argued on the basis that there were no aggravating circumstances such as those identified in paragraph 320(11).

6. The appeal therefore, in my judgment, is an appeal which is bound to fail absent any evidence of there being a discretionary element that required consideration outside the Immigration Rules. None was argued before the judge, none was argued before me; consequently, there is, in my judgment, no duty upon the judge of the First-tier Tribunal to refer to the residual discretionary element.

7. The circumstances therefore in which the judge came to deal with the case were that there were alleged by the Secretary of State to be aggravating circumstances. In doing so the judge paid regard to the fact that the appellant had returned to his country of origin; indeed he referred in paragraph 14 of his determination to the

proportionality exercise which often has to be conducted in cases where the appellant remains in country as identified in such cases as *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) IJR* [2015] UKUT 00189. In other words, it is acknowledged that there will be circumstances where it is disproportionate to require a person to return to his country of origin to make an application for entry clearance when the outcome of that application will be obvious. This is of a piece with the intention of paragraph 320(11) where return to the country of origin in order to regularise one's stay is a matter which should be encouraged. But that does not mean it provides an inevitable outcome in favour of the applicant when an application is made from out of the country. In this case the judge recorded that the appellant had in fact left the United Kingdom, but he also recorded what he considered to be aggravating circumstances.

8. The appellant entered the United Kingdom and relied upon a false identity. He claimed asylum but absconded. His claim was refused for non-compliance. He then left the United Kingdom without informing the Secretary of State. Although it was said that he did not use false documents but only used a 'false identity', I cannot understand quite how that distinction assists the appellant. The Secretary of State also relied upon the appellant's immigration history, notwithstanding the fact, as acknowledged by the Secretary of State, that the respondent encourages overstayers to return to their countries of origin to regularise their status. Importantly both the Secretary of State and the judge went on to find that there were, in the circumstances of this case, aggravating features which distinguish the appellant from the usual profile of an overstayer. The judge said in paragraph 36:-

> "The appellant's profile goes far beyond that of the ordinary overstayer. He accepts that he deceived the respondent regarding his identity and pursued an asylum claim which he now accepts was false. He absconded and remained in the United Kingdom for a significant period."

9. The judge then went on to reject his exculpatory explanation that he was vulnerable as a result of the influence of others. The judge recorded that he was 24 years old when he left India and he chose to liquidate his assets to facilitate his illegal migration. In other words, it was always his intention to settle unlawfully in the United Kingdom.

10. Consequently, the challenge to this determination on the basis that the judge failed to take into account the discretionary nature of paragraph 320(11) is misconceived. The judge was expressly considering the aggravating circumstances as he makes clear in paragraph 39 relying upon the false identity and the frivolous application as being aggravating circumstances. The only challenge that could properly be made to this determination was, in my view, a challenge to whether or not those circumstances are aggravating ones. But that challenge is not made, nor could it reasonably be made.

11. The circumstances identified in the determination were plainly aggravating circumstances framed within the words of paragraph 320(11) and the judge reached a decision which was lawfully open to him. In those circumstances I dismiss the appellant's appeal against the decision of the Entry Clearance Officer.

12. No separate submissions were made under appeal number HU/06632/2018. Insofar as it remains pending, I dismiss it for the same reasons as I have given above in relation to the later appeal.

13. No anonymity direction is made.

DECISION

The decision of the First-tier Tribunal Judge discloses no material error of law and his determination of the appeal shall stand.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL
Date 17 September 2019