Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07439/2017

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 20 February 2019	**On 02 April 2019**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MR GURBHEJ SINGH
(No anonymity order made)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr Rene of Counsel
For the Respondent: Ms Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born in 1978. He appealed against a decision of the respondent made on 21 December 2016 to refuse his application for entry clearance under paragraph 320(11) of the Immigration Rules.

2. It is relevant to note the immigration history. It is not wholly clear but was agreed to be as follows: the appellant made an application for leave to remain in 2008 stating

he had arrived in 1997 as a visitor and had overstayed. It was refused in 2008 on the basis that there was no record of his entry or visa.

3. A second application was submitted in 2012, the appellant claiming he had been in the UK for around 14 years and had mental health issues.

4. A third application was made in August 2013 stating he feared return to India.

5. A fourth application was made in October 2013 on the basis of his relationship with a British citizen.

6. The current application for entry clearance as a spouse was made on 11 November 2014. It was refused on 29 December 2014. An appeal was allowed on 10 October 2016 to the limited extent of the decision being not in accordance with the law.

7. The respondent considered the matter afresh and refused the application for the second time on 21 December 2016. It is from that latter refusal that the appeal is brought.

8. The basis of the refusal under paragraph 320(11) was that he had *"made false representations in an application for leave to remain, made frivolous applications for leave to remain by continuously making applications for leave to remain outside the Rules on the same grounds"* and that he had *"worked illegally in the UK."*

9. Going on to consider aggravating factors the respondent noted that the appellant had admitted to working illegally and it was unclear if he had paid tax or national insurance contributions. Also, he had said in an application that he was suffering from a mental illness. However, no evidence in support was provided and he had stated in his application that he had never received treatment here.

10. Further, he had made frivolous applications.

11. The respondent concluded: *"Given the above I am satisfied that these amount to aggravating factors and I am not prepared to exercise discretion in your favour".*

12. He appealed.

First tier hearing

13. Following a hearing at Hatton Cross on 10 August 2018 Judge of the First-tier Tribunal Jones QC dismissed the appeal.

14. At [7] having noted that the appellant left the UK in November 2014 the judge stated*: "I was not informed whether he was compulsorily removed or whether he departed voluntarily. For the purposes of this decision, the distinction ultimately makes no difference".*

15. He went on at [20] to state: *"I keep in mind that the respondent had to be satisfied that any such misleading information was provided dishonestly. Absent any innocent explanation being provided by the appellant, the respondent was fully entitled so to conclude. I independently arrive at the same conclusion."*

16. Then, at [21] he considered *"… aggravating circumstances; one such … being identified in the Immigration Rules being the making of frivolous applications"*. He stated: *"I am entirely satisfied that the respondent was entitled to conclude that the appellant's previous repetitive applications were made frivolously in an attempt to prevent, or at the very least, delay his departure from the United Kingdom … The one exception is the fact that he had been married on 12 December 2013. That could properly be put forward as a material change of circumstances."*

17. The judge then went on to conclude that although there is family life, with the need for immigration control, refusal of entry clearance would not be disproportionate.

18. The appellant sought permission to appeal which was refused but was granted on 23 December 2018 on re-application to the Upper Tribunal.

Error of law hearing

19. At the error of law hearing before me Ms Cunha agreed with Mr Rene's submission that the judge's decision showed material error of law. It suffices to note the following: The judge was wrong to state that he was not informed whether the appellant was removed or departed voluntarily. There was evidence before him that he left voluntarily in order to make an application for entry clearance and regularise his position in the proper way. Further, he was wrong to state it made no difference. Voluntary departure raised different issues in respect of the public interest from those which would have been at play if the appellant had been forcibly removed: ***PS (paragraph 320(11) discretion : care needed)*** **India [2010] UKUT 440**.

20. In addition, in respect of frivolous applications the judge referred to one exception, the application based on marriage. He did not, however, examine the other applications and look at the claimed change in circumstances. He simply accepted the assertions made by the respondent.

21. It was agreed that the decision must be set aside to be remade.

Resumed hearing

22. We were able to resume the hearing immediately. Ms Cunha stated that the sole issue was paragraph 320(11). If that fell away the respondent accepted that the appellant met all the requirements of the Rules.

23. Mr Rene led the sponsor Suman Verma in brief evidence.

24. She adopted her statement. She married the appellant in December 2013. He returned voluntarily to India in 2014. Since then she has visited him eight or nine times although less often since the birth of their child, who is a British citizen, her doctor having advised against it for six months. They keep in touch by WhatsApp and similar means many times a day. She earns £30,000 a year as a bank employee, supports her husband in India and pays for her own travel.

25. In submissions, Ms Cunha acknowledged that the appellant is now seeking to regularise his status. However, in his witness statement he had not addressed his past conduct which included being untruthful twice in his applications not least in 2008 when he claimed to have arrived lawfully. He had worked illegally as well as being an illegal entrant. The respondent's decision was sustainable.

26. In reply Mr Rene accepted that there was a lack of response in the appellant's witness statement about the claims of past conduct. Nonetheless, it was unclear that the respondent had produced evidence in support of the assertion of false representations. In any event the evidence did not indicate that the four applications were frivolous. There was over three years between the refusal of the first application and the second, a significant passage of time; it was not clear that the matter refused in August 2013 about his health was in fact an application rather than a letter, as a decision was made only eight days later. The application in 2013 in respect of the relationship was clearly not frivolous. Mr Rene emphasised that the appellant had left the UK voluntarily. There is a strong public interest in encouraging those here illegally to go through the proper process and he should be given credit for that.

Consideration

27. Paragraph 320(11) states:

> *"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 redocumentation process."

28. Thus, there must have been breaches which frustrated the Rules in a significant way plus aggravating circumstances. There should be no overlap between a "*significant way*" and "*aggravating circumstances*" otherwise there would be double counting. Decision makers and Tribunals must "*exercise great care*" (per ***PS*** headnote) in deciding to apply paragraph 320(11) to a family member, and must ensure that the aggravating circumstances relied on are "*truly aggravating*" (***PS*** [14]) otherwise there is a risk of discouraging migrants from making applications to regularise their stay, which would be contrary to the public interest.

29. The refusal letter (21 December 2016) made in response to the decision made by the Tribunal in October 2016 allowing the appeal to the extent that the respondent's decision was not in accordance with the law because no evidence had been provided of aggravating circumstances, whilst it does refer to such, appears to conflate these with "*significant ways."*

30. The respondent does satisfy me that the appellant used deception by making false representations in respect of the first and second applications. The appellant effectively made no challenge to the respondent's position that there was no record that he had been granted a visit visa and had entered the UK on it in 1997. It is evidence one would reasonably expect him to have. In what appears to have been the second application he offered no evidence in support of his claim to suffer mental health problems. He has given no response to the comments of the respondent that no evidence was produced as to how such had been diagnosed as he said in the application he had never received treatment.

31. In any event, as indicated, the respondent concluded the consideration of "*contrived in a significant way to frustrate the intentions"* by stating that as well as making false representations he made *"frivolous applications … by continuously making applications for leave to remain outside the Rules on the same grounds … and that (he) had worked illegally in the UK."* That, however, was a matter which fell to be considered under "*aggravating factors*."

32. The respondent then proceeded, as required, to assess "*aggravating factors."* In that regard, he repeated that no evidence had been submitted by the appellant about mental illness and then he had worked illegally. The respondent appeared to conclude that these amounted to "*aggravating factors"* and that taken as a whole the applications had been frivolous.

33. I see several problems with this. First, the appellant did not "*continuously make applications*," the first was in 2008, the second in 2012, the rest were over two years. Also, they were not "*on the same grounds*." Circumstances change over time. A further problem is that the respondent had already apparently found against the appellant as a false representation the mental illness claim. It, as indicated, cannot be double counted. Second, the respondent's decision to characterise unlawful working as an

"aggravating factor" is inconsistent with the view taken by the Court of Appeal in ***ZH (Bangladesh) v SSHD*** [2009] EWCA Civ 8 that such employment is part and parcel of illegal residence. The result is that "*aggravating factors*" have not been established.

34. Further, despite having been alerted by the previous Tribunal in 2016 to ***PS*** and the requirement to exercise great care in assessing the aggravating circumstances said to justify refusal the respondent did not do so. The respondent should have specifically recognised that the appellant had voluntarily left with a view to regularising his status. There is no question but that the marriage is a genuine one. There is now a British citizen child. If the aggravating circumstances, as ***PS*** stated, are not "*truly aggravating*" there is in this context a serious risk that those in the position of the appellant will simply continue to remain in the UK unlawfully and will not seek to regularise their status as he has sought to do. The effect is likely to be counterproductive to the general purposes of the relevant rules and to the maintenance of a coherent system of immigration.

35. I conclude that the respondent was wrong to decide for the reasons he gave that the conduct of the appellant showed *"aggravating factors"* and that taken as a whole the applications were frivolous such that paragraph 320(11) was applicable.

36. There being no dispute that the appellant satisfies all the requirements in respect of entry clearance as a spouse under the Rules, the public interest is thus satisfied. Accordingly, the appeal succeeds on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal shows material error of law. It is set aside and remade as follows: -

The appeal is allowed.

No anonymity order made.

Signed Date: 29th March 2019

Upper Tribunal Judge Conway