Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08282/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 6th March 2019	**On 15th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NEERAJ KUMAR KUNWAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Miss A Faryl of Counsel, instructed by Paul John & Co Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Rayner (the judge) of the First-tier Tribunal (the FtT) promulgated on 23rd August 2018.

2. The Appellant is a citizen of Nepal born 30th October 1979. He applied for entry clearance to the UK to join his spouse Indu Rai who is a British citizen. His application was refused on 17th July 2017. The Respondent accepted that the Appellant satisfied the financial and English language requirements of the Immigration Rules but refused the application with reference to paragraph 320(11). This was on the basis that the Appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules by overstaying, and there were other aggravating circumstances, which in this case the Respondent contended amounted to making frivolous applications.

3. In brief summary it was contended that on 30th April 2014, while the Appellant was in the UK, his application for leave to remain outside the Immigration Rules on compassionate grounds was refused with a right of appeal. His appeal was dismissed on 15th May 2015 and he thereafter applied for permission to appeal to the First-tier Tribunal. That application was refused on 31st July 2015 and a further application for permission to appeal to the Upper Tribunal was refused on 11th September 2015. The Appellant became appeal rights exhausted and had no leave to remain.

4. On 6th October 2015 he made a further application for leave to remain outside the Immigration Rules on compassionate grounds and this was refused on 3rd May 2016. There was no right of appeal so the Appellant submitted a pre-action Protocol letter on 12th May 2016 but the refusal decision was maintained on 16th April 2016. On 6th July 2016 the Appellant lodged a judicial review application. This was withdrawn on 2nd November 2016 and on 15th November 2016 the Appellant made a voluntary departure from the UK.

5. The Respondent contended that the frivolous application was that made on 6th October 2015, and thereafter making a judicial review application. On this basis it was said that paragraph 320(11) applied and the entry clearance application was refused. The Respondent did not consider that the application raised any exceptional circumstances which would justify granting leave to remain pursuant to Article 8 of the 1950 European Convention outside the Immigration Rules.

6. The appeal was heard on 1st August 2018. The judge found that paragraph 320(11) was satisfied in that it was accepted that the Appellant had been an overstayer between 11th September 2015 and 15th November 2016. The judge found that the Appellant had made frivolous applications, although at paragraph 16 the judge in fact found that "at most, Mr Kunwar has made a single application." The judge found that this sufficed, as the paragraph should be read as making "one or more" frivolous applications. The appeal was dismissed.

The Application for Permission to Appeal

7. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in finding that frivolous applications had been made and therefore should not have found that paragraph 320(11) was applicable. The judge had accepted that the Respondent had the burden of proof and

it was contended that there was no evidence provided to show that the application dated 6th October 2015 was frivolous. There was no copy of the application, and in the absence of any evidence in relation to the application, it was not properly open to the judge to make a finding that the application was frivolous.

Permission to Appeal

8. Permission to appeal was granted by Upper Tribunal Judge Martin in the following terms;

> "It is arguable that the judge erred in finding that an application the Appellant made in October 2015 was frivolous such that paragraph 320(11) of the Immigration Rules applied in the absence of any evidence from the Respondent as to the nature of the application. It is also arguable that paragraph 320(11) required there to be more than one frivolous application."

9. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

My Analysis and Conclusions

10. At the oral hearing Miss Faryl relied and expanded upon the grounds contained within the application for permission to appeal. On behalf of the Respondent Mr Diwnycz did not concede a material error of law, but did not oppose the application, and submitted that it was a matter for the Tribunal to decide.

11. I find that the judge materially erred in law in concluding that paragraph 320(11) applied. The judge found that the application made on 6th October 2015 and refused on 3rd May 2016 was a frivolous application. The error of law is that there was insufficient evidence to prove that this application was frivolous. There was no copy of the application before the judge, and no copy of the refusal.

12. The judge accepted at paragraph 18 that the ground on which the application was made could not be ascertained. The judge found at paragraph 15 that the fact that the decision did not carry a right of appeal indicates that it was certified as clearly unfounded under section 94B of the Nationality, Immigration and Asylum Act 2002. The judge found at paragraph 18 that the decision had been refused and certified. It was an error of law to make these findings as there was insufficient evidence to reach such conclusions. It is in fact section 94 that certifies as clearly unfounded.

13. In fact, Mr Diwnycz had obtained a copy of the refusal decision dated 3rd May 2016 and confirmed that it had not been certified as clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002.

14. The judge, with respect, did not have sufficient information to conclude that the application dated 6th October 2015 was completely without merit, which was a finding made in paragraph 18 of the decision.

15. In my view the judge erred at paragraph 16 in finding that the Appellant had made a single application, as it would appear that in addition to the application dated 6th October 2015, the Respondent was relying upon a subsequent judicial review application.

16. As I conclude that the judge erred in finding that a frivolous application had been made in the absence of evidence proving that, the decision of the FtT is unsafe and is set aside.

17. Both representatives suggested it was appropriate to remit the appeal back to the FtT to be heard afresh. I indicated that this would only be appropriate if the Senior President's Practice Statements, at paragraph 7.2 applied and remittal would only be appropriate if the hearing was to be heard afresh. Miss Faryl confirmed that she did not suggest that any findings be preserved, and that it would be appropriate for the appeal to be remitted to be heard afresh.

18. I was therefore persuaded that the appropriate course of action is to remit the appeal to the FtT. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FtT Judge other than Judge Rayner.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FtT with no findings of fact preserved.

There was no application for anonymity and I see no need to make an anonymity direction.

Signed Date 6th March 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I make no fee award. The issue of any fee award will need to be considered by the FtT.

Signed Date 6th March 2019

Deputy Upper Tribunal Judge M A Hall