



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/13309/2017
HU/13314/2017
HU/13316/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre

On 15 February 2019

**Decision & Reasons
Promulgated**

On 25 February 2019

Before

UPPER TRIBUNAL JUDGE LANE

Between

S L

J L

M C

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Timson, instructed by AGI solicitors

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of China. The third appellant was born in 1975, is the mother of the first and second appellants. The first appellant is now aged 16 years and the second appellant is aged 18 years. The appellant's appealed against the decision of the Secretary of State dated 15 October 2017 to refuse them entry clearance to the United Kingdom. The First-tier Tribunal, in a decision promulgated on 24 September 2018, dismissed the

appeals. The appellants now appeal, with permission, to the Upper Tribunal.

2. This is an appeal which turns on the operation of paragraph 320 9110 of HC 395 (as amended);

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.

3. The appellant argues that the judge failed to apply the case of *PS* (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) despite referring to that decision at [9]. The appellant argues that the judge failed to give a clear indication as to why the circumstances in this case were sufficiently aggravating to attract the application of paragraph 320(11).

4. The Upper Tribunal in *PS* held that:

“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.”

5. Mr Timpson, who appeared for the appellants, submitted that the entry clearance officer had not invoked paragraph 320 in earlier applications made by the third appellant. Moreover, the judge had done no more than to give details of the poor behaviour of the third appellant but had failed to link this conduct directly to the exercise of discretion against the appellants under paragraph 320.
6. I do not agree with Mr Timpson’s submission. I consider that the judge was fully aware of the issues posed by *PS* and dealt with these in some detail at [17-19]. Whilst the judge may perhaps have been better advised to

extract principles of law from the case of *PS* rather than to distinguish the instant case from *PS* on the facts, he has identified an essential difference between the two cases, namely that, unlike the appellant in *PS* who departed voluntarily, the third appellant in the instant appeal had to be forcibly removed from United Kingdom having absconded. I agree with the judge that this factor diminishes the relevance of the policy considerations addressed in *PS*, namely that an improper use of paragraph 320 that would lead to individuals who might otherwise leave and apply for entry clearance remaining illegally and clandestinely in the United Kingdom. Further, the judge draws attention to the fact [18] that the entry clearance officer has 'expressly referred to considering the exercise of discretion and is expressly decided not to exercise discretion having considered the particular circumstances in the case.' The wording of the refusal notice has led the judge to conclude that the entry clearance officer properly considered the exercise of his/her discretion. I find that it was open to the judge to reach that conclusion. I disagree with Mr Timpson that the judge has done no more than detail the poor conduct of the third appellant; he has, in his analysis, linked that conduct to the exercise of discretion under paragraph 320. Further, there was no requirement for the entry clearance officer or the judge to use a particular form of words when applying paragraph 320.

7. I am satisfied that the exercise of discretion has been carried out properly and with a proper concern for the facts. Even if that is not the case, it is not arguable, in my opinion, that the past conduct of the third appellant would ever escape consideration by reference to paragraph 320(11), the application of which would be very likely to lead to refusal of entry clearance on any application; the link between the third appellant's conduct and 'aggravating circumstances' is, in my opinion, axiomatic.
8. I am satisfied that the first Tier Tribunal has not erred in law for the reasons advanced in the grounds of appeal or at all. In consequence, the appeal is dismissed.

Notice of Decision

These appeals are dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Given that the appeal has been dismissed, there can be no fee order in favour of the appellants

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Signed

Date 20 February 2019

Upper Tribunal Judge Lane