Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10882/2019**

THE IMMIGRATION ACTS

Heard remotely at Field House **Decision & Reasons Promulgated**
On the 24th May 2021 *via Teams* **On the 21st June 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AR (PAKISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M. Bradshaw, Counsel (Direct Access)
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

The hearings in this appeal were conducted remotely in circumstances that were consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were the bundles from the appeal before the First-tier Tribunal, and a new bundle prepared for the Upper Tribunal proceedings, the contents of which I have recorded.

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The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly.

1. An anonymity order is necessary in these proceedings to guard against the risk of jigsaw identification of a child whose identity is protected by an order of the Family Court, and also on account of the sponsor's status as a victim of domestic violence. See my order at the end of this judgment.

Introduction

2. This is an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") against a decision dated 10 May 2019 to refuse entry clearance to the appellant, a citizen of Pakistan, sought on the basis of his marriage to a British citizen, the sponsor in these proceedings, whom I shall refer to simply as S.

3. The appellant's appeal was originally heard and dismissed by First-tier Tribunal Judge Parkes in a decision promulgated on 17 December 2019. On 4 February 2021, I set aside the decision of Judge Parkes, with certain findings of fact preserved, and directed that the appeal be re-heard in this tribunal: see the **Annex**. It was in those circumstances that the appeal was listed before me on 24 May 2021.

Factual background

4. S is a victim of domestic violence at the hands of her former partner, F. She is now happily married to the appellant, a citizen of Pakistan who seeks entry clearance as a spouse.

5. S and F have a daughter together, C. The appellant has begun to form a step-father relationship with C, which he maintains using remote means from Pakistan. A Family Court order is in force governing S and F's child arrangements with C. The order provides that C is to live with the mother, and grants the father limited fortnightly contact with C. Under the terms of the order, the mother may take C overseas for no more than a month at a time. The arrangement is to remain in force until C is 18.

6. It is common ground that the marriage between the appellant and S is genuine and subsisting. All other eligibility criteria under Appendix FM are met. The entry clearance officer refused the application on the basis of the appellant's very poor immigration history, relying on paragraph 320(11) of the Immigration Rules, for reasons to which I shall return. The Entry Clearance Officer's decision featured the following statement:

> "I note that no satisfactory reason has been put forward as to why the sponsor in the UK is unable to travel to Pakistan to be with you."

The Entry Clearance Officer did not refer to the Child Arrangements Order dated 6 December 2016, a copy of which had been provided in the bundle of supporting

documents provided with the application, at pages 133 to 136. As stated above, that order prohibits C from leaving the UK for more than a month at a time, and grants that she is to live with S, her mother, in this country, while enjoying fortnightly contact with her father for one night.

7. The appellant was born in 1983. He was admitted to this country as a student on 5 December 2006, with leave until 31 October 2009. He applied to extend his student visa using a "non-genuine" document, leading to the application's refusal on 12 February 2010. He subsequently applied for residence documentation as the spouse of an EEA national exercising treaty rights. His application for a residence card was refused on the basis that the marriage was one of convenience. The appellant appealed against the refusal, and on 15 December 2011 the First-tier Tribunal upheld the Secretary of State's decision that the marriage between the appellant and his wife was one of convenience. That finding has not been successfully challenged. The appellant subsequently made three further applications for European residence documentation, in 2014 and 2016. The appellant and his EEA wife divorced on 5 October 2017. He was detained in late October 2017, and departed to Pakistan voluntarily, at his own expense, on 16 November 2017.

8. Earlier in 2017, prior to his voluntary departure, the appellant met S. They planned to marry here, having discussed the proposal with their families. They gave notice to the relevant registrar, but the appellant was detained by the Secretary of State, and he left the country voluntarily shortly afterwards, at his own expense. The appellant and S married in Pakistan in August 2018. C attended the ceremony and then returned to the UK with S. In February 2019 the appellant made an application for entry clearance as S's spouse. That application was refused and it is that decision which is under appeal in these proceedings.

9. The appellant submits that paragraph 320(11) is a discretionary provision, and that, even if it is engaged, in light of mitigating features in his immigration history, the best interests of C, and the wider circumstances of his relationship with S, it should not be applied. The use of paragraph 320(11) should take account of the public interest in encouraging those with poor immigration histories voluntarily to leave the country, pursuant to *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC). Even if it is appropriate to apply paragraph 320(11), submits Mr Bradshaw, it would be unjustifiably harsh for the appellant not to be admitted, and the appeal should be allowed outside the rules. His relationship with C is genuine and subsisting, even maintained as it is from Pakistan. In light of the Family Court order, this is not a case where it is possible for C and S to relocate to Pakistan to live with the appellant, even if doing so were consistent with her best interests. Maintaining the family's separation would be unjustifiably harsh.

10. The Entry Clearance Officer's position, as advanced by Mr Whitwell, is that it is difficult to envisage someone with a worse immigration history. The appellant used a "non-genuine" document in support of an immigration application, and entered a marriage of convenience in a further attempt to circumvent immigration control. Thereafter, he submitted three abusive EEA applications, and did not leave the

country until over seven years after the expiration of his leave to remain, as found by Judge Parkes in findings that I preserved.

11. At the relevant time, paragraph 320(11) of the Immigration Rules provided:

> "320. 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 intention 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."

12. Mr Whitwell submits that the appellant meets each limb of the two-stage criteria under paragraph 320(11); he was an overstayer of some vintage, and there were plainly aggravating features. He was found by the First-tier Tribunal to have absconded and to have worked illegally. His attempted explanation concerning the marriage of convenience was rejected by Judge Parkes, in findings that have been expressly preserved. The appellant is plainly an individual to whom entry clearance should "normally" be refused, he submits.

Documentary evidence

13. The appellant provided three lengthy bundles in electronic form. The first featured documents for these proceedings. The second and third were his bundle, and that of the respondent, from before the First-tier Tribunal respectively.

The hearing

14. At the outset of the hearing, it transpired that the appellant's solicitor was, in fact, his sister-in-law, S's sister. She is a qualified solicitor, but as a close family member, I queried with the parties whether it was appropriate for her to be representing the appellant. Mr Bradshaw readily accepted that this was an unsatisfactory arrangement, and explained that he had been as surprised as I was, as his understanding was that he had been instructed by Duncan Lewis solicitors, the firm

for which S's sister usually works. I indicated that I had some concerns about proceeding on the basis that Mr Bradshaw had been instructed by a family member of the appellant, rather than by a solicitor acting independently. The solution, suggested by Mr Bradshaw, was for him to put in place a direct access arrangement with the appellant, which his clerks set up immediately. I adjourned the proceedings for a brief period to enable this to take place. Thus, by the time the substantive hearing was underway, Mr Bradshaw appeared before me on a direct access basis.

15. The hearing took place remotely in order to guard against the spread of Covid-19. At the conclusion of the proceedings, both parties indicated they were content with the fairness of the hearing having been conducted remotely.

16. There were two witnesses, S and her father, G, with whom she and C currently live. Each gave evidence and adopted their statements. In the case of S, she adopted her statements dated 27 February 2021, 9 November 2019, an undated statement at page 119 of the bundle, and a further undated statement submitted with the application for entry clearance at page 121. G adopted his statements dated 27 February 2021 and 2 November 2019. Each witness was cross-examined. I do not propose to set out the entirety of their evidence here, but will do so to the extent necessary to reach, and give reasons for my findings, below.

Legal framework

17. This is an appeal brought on the ground that the refusal of entry clearance to the appellant would be unlawful under section 6 of the Human Rights Act 1998, on the basis that it would breach the United Kingdom's obligations under Article 8 of the European Convention on Human Rights ("the ECHR") (right to respect for private and family life).

18. As Baroness Hale explained in *R (oao Bibi) v Secretary of State for the Home Department* [2015] UKSC 68 at [25] to [29], and in *R (oao MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10 at [38] and [40] to [44], the European Court of Human Rights has for long distinguished between the negative and positive obligations imposed by Article 8 of the ECHR. Contracting parties to the ECHR are subject to negative obligations not to interfere with the private and family lives of settled migrants, other than as may be justified under the derogation contained in Article 8(2). By contrast, in cases concerning the admission of migrants with no such rights, the essential question is whether the host state is subject to a positive obligation to facilitate their entry. In positive obligation cases, the question is whether the host country has an obligation towards the migrant, rather than whether it can justify the interference under Article 8(2). But the principles concerning negative and positive obligations are similar. As the Strasbourg Court held in *Gül v Switzerland* (1996) 22 EHRR 93:

> "In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation…" (paragraph 106)

19. Part 5A of the 2002 Act contains a number of public interest considerations to which the tribunal must have regard when considering the proportionality of the refusal of entry clearance. In addition, it is settled law that the best interests of the child are a primary consideration when assessing proportionality under Article 8(2) of the ECHR.

Discussion

20. I reached the following findings having considered the entirety of the evidence, in the round to the balance of probabilities standard.

21. I find that paragraph 320(11) of the Immigration Rules is, in principle, engaged. The appellant was an overstayer for over eight years. That alone is sufficient to engage the first limb of the provision. That overstaying was accompanied by significant aggravating features, in the form of the appellant's attempted reliance on both a false document, and even once that had been revealed by the Secretary of State, entering a marriage of convenience. The First-tier Tribunal found the appellant to have worked illegally and to have absconded. But for the fact paragraph 320(11) only applies "normally", it plainly applies to the circumstances of this case.

22. In relation to the question of whether it is appropriate for the discretionary ground for refusal in paragraph 320(11) to be relied upon, it is necessary to consider the broader circumstances of the appellant's case, including the matters highlighted in *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC), including the public interest in encouraging voluntary departures. I must also address the appellant's family circumstances, including the best interests of C, which are a primary consideration, and to which I turn first. The views of the Secretary of State as to when paragraph 320(11) should be engaged ordinarily attract significant weight.

23. First, I must highlight a matter I drew to the attention of the parties at the resumed hearing. At [24] of my error of law decision there was a 'slip of the pen'; the reference to findings of fact up to [19] of the First-tier Tribunal's decision being preserved should have been to [22]. As Mr Bradshaw very fairly accepted, although the appellant disagreed with the findings of fact reached by the First-tier Tribunal at [20] to [22], he was unable to mount a perversity challenge in relation to any of them. There was no analysis in my decision which would have justified setting aside those findings of fact, pursuant to the well established jurisprudence concerning when this tribunal is entitled to revisit a finding of fact reached by the First-tier Tribunal. I will proceed in this decision on the basis that all findings of fact reached by the First-tier Tribunal up to [22] have been preserved.

Best interests of C

24. There is a considerable body of evidence demonstrating regular and affectionate contact between the appellant and C, in the form of WhatsApp and other social media transcripts, which take up many hundreds of pages in the bundle. The witness statements paint a consistent picture.

25. I found S to be a credible witness and accept her evidence that the appellant has begun to assume a father-like role to C from Pakistan. I accept that C addresses the appellant as 'papa' when speaking to him on FaceTime or the telephone; S's evidence in this respect was internally consistent, in-depth and consistent with her written statements. There was no real challenge to that aspect of her evidence under cross-examination.

26. C has visited the appellant in Pakistan once, for the wedding in 2018. Prior to his departure, C had begun to build a relationship with the appellant. I accept that, at that stage, a combination of C being only three years old, and the fact that the appellant and S were not yet married (and not living together: see the fourth unnumbered paragraph of S's statement accompanying the application for entry clearance, at page 121 of the bundle; see also the description of living apart in Pakistan ahead of the wedding until after the marriage itself), meant that the relationship between the appellant and C will have strengthened more in its remote format following the marriage between S and the appellant, at a faster pace, than would have been the case before the appellant's voluntary departure. I accept that, before the appellant left the UK, it would, in principle, have been possible for the appellant to begin to form a step-parent relationship with C, and that that relationship would have been augmented when C visited Pakistan for the wedding, and through modern means of communication subsequently.

27. At times, S and G appeared to suggest that the appellant bore sole parental responsibility for C, from Pakistan. While I accept that C's relationship with her birth father does not preclude the appellant from developing a genuine and subsisting relationship with C, I do not accept that the appellant takes certain decisions in relation to C *in isolation*. For example, G's evidence was that the appellant chose C's school. I do not accept that the appellant *alone* was responsible for this decision, from Pakistan. S would have been involved at the very least, not to mention F. I do not accept that the appellant is more of a parent to C than S is, even accounting for the relative normality that the pandemic has brought to relationships being maintained through remote means of communication. I do not find S to have been dishonest. Her deference to her husband was evident, and while it may seem to her that the appellant takes all significant decisions concerning C, I consider that she has underestimated her own role in the process. The dynamics of S's unchallenged account of her past as a victim of domestic violence from her abusive former partner mean that she is likely to feel an acute bond and reliance upon the appellant, whose conduct towards her is the polar opposite of the abusive conduct she has experienced in the past, on the basis of the materials before me. S's cultural background ascribes a significant role to the male leaders of households (see, for example, her account of her father discussing her prospective marriage with the appellant's family in her statement at page 121), and a significant element of her emphasis on the appellant's role in C's life decisions will be attributable to the role of men in her community. I did find G to have exaggerated aspects of his evidence concerning the role of the appellant, but that feature of his evidence does not undermine the evidence of S, which stands under its own strength.

28. I accept that the appellant is *consulted* about significant decisions concerning C, and heavily involved in them, just as any stepfather would be consulted about a step-daughter's life decisions during her childhood. S writes movingly in statements about the positive impact the appellant has had on her, and in turn, C: see, for example, paragraphs 17 and 18 of her fourth witness statement. In addition, I accept that C's remote learning during the pandemic has enabled the appellant to be a part of her education in a way which would not have been possible previously. S's evidence under cross-examination in that respect was entirely consistent with her statement. The appellant celebrates C's birthdays with her remotely, and sends gifts, not just for birthdays, but at other times, too: see paragraph 30 of S's fourth statement. I accept, as S writes in her fourth statement, that C is confused as to why the appellant remains in Pakistan. She wants to see him in person and live with him as her father.

29. I find that the appellant has a genuine and subsisting (step) parental relationship with C. He is married to her mother and has assumed a day to day role in her life, albeit remotely. Such remote relationships have acquired a significance and normality over the last year. The fact that the appellant's relationship with C is conducted remotely does not prevent it from acquiring a parental-like role. Modern families frequently encompass contact arrangements such as those that feature in this case, and the fact that F has limited contact with his daughter does not preclude the appellant from being able to form a genuine and subsisting parental relationship.

30. It is plainly in C's best interests that she is able to see the appellant. It is in her best interests to live in the same country as the appellant as the remote form of their relationship is a substandard substitute for enjoying family life on a face to face basis.

31. C also benefits from her extended family in this country. She is settled in education. It is in her best interests to remain here near her family, continuing in her education, in the country of her citizenship.

32. Drawing this analysis together, I must address the best interests of C in the "real world" context of her circumstances. C is a British citizen. She can live only in this country, as she cannot be removed from this country without permission from F, or an order of the court, for more than a month at a time. The need for C to maintain a relationship with F militates decisively in favour of C remaining in this country, even were it not for the court order. It is in C's best interests to remain here so she can continue her relationship with F, pursuant to the current contact arrangements, whereby S is the primary carer. I have already found that it is in the best interests of C to live in the same country as the appellant. It is, therefore, in C's best interests for the appellant to live in this country, the only possible country of residence for her, allowing him fully to assume his role as her step-father, supporting her mother.

Paragraph 320(11): "should normally be refused…"

33. Against that background, I turn to the question of whether this case is one of those in which entry clearance should "normally be refused". As this tribunal held in *PS*

(India), a decision maker applying paragraph 320(11) must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and to seek to regularise their status by an application for entry clearance. It is also necessary to take into account an applicant's family circumstances: *PS* at [14]:

> "…the family circumstances needed to be evaluated carefully in the balancing exercise to which we have referred."

34. While, contrary to what Mr Whitwell submits, one can readily envisage more serious immigration offending, the appellant's immigration misconduct was certainly at the very serious end of the spectrum of severity, involving a non-genuine document, a marriage of convenience, absconding, frivolous applications, and unlawful working. The Secretary of State's responsibility for the maintenance of effective immigration controls should result in a vast majority of cases involving immigration misconduct of this magnitude being refused. Refusal in these circumstances would be consistent with the Secretary of State's guidance, *General grounds of refusal – Considering entry clearance*, version 29.0, 11 January 2018, as set out at [25] of Mr Bradshaw's skeleton argument. Although that policy has been superseded by new guidance accompanying changes to Part 9 of the Immigration Rules, this appeal falls to be considered by reference to paragraph 320(11), rather than the current equivalent position, and the guidance previously in force. The Secretary of State's policy attracts great weight in this balancing assessment, as can her views on individual case-specific decisions to invoke paragraph 320(11).

35. The difficulty, however, with ascribing dispositive weight on the views of the Secretary of State in this matter is that, having invoked paragraph 320(11), the refusal letter wholly failed to engage with the unique family circumstances of this appellant, S and C. When the Entry Clearance Officer stated, "I note that no satisfactory reason has been put forward as to why the sponsor in the UK is unable to travel to Pakistan to be with you", she singularly failed to engage with the very powerful reasons that *had* been advanced. This sentence featured under the refusal letter's discussion of "exceptional circumstances", but the factors raised by the application are considerations that are highly relevant to the exercise of discretion under paragraph 320(11) in any event. I find that the Entry Clearance Officer failed to engage with a relevant consideration, meaning her views as to the public interest in applying a discretionary provision such as paragraph 320(11) carry far less weight insofar as those views relate specifically to these proceedings. This tribunal can only ascribe determinative significance to the views of the Secretary of State if those views are rational and formed on the basis of consideration of all relevant factors, which is not what took place here. That is not to say the Secretary of State's general policy concerning the importance of maintaining an effective immigration and border control does not attract weight: it does, as Parliament has stipulated in section 117B(1) of the 2002 Act. Normally those who abuse the immigration control system, such as this appellant, cannot expect to be readmitted to the United Kingdom. However, to the extent the Secretary of State has specifically sought to justify the invocation of paragraph 320(11) *in this case*, her opinion carries less than the

customary weight it would usually attract, due to her failure to engage with the specific features of the factual matrix.

36. In my judgment, this is a case falling outside the range of those cases in which paragraph 320(11) should "normally" be applied, when the balancing exercise inherent to the engagement of the provision is conducted.

37. I take account of the other factors which Mr Bradshaw invites me to consider: the passage of time since the appellant's most significant immigration breaches, the passage of time since his voluntary departure, his desire to comply with the law, through making an appropriate out of country application, and the public interest in encouraging people to leave the country voluntarily in order to regularise their immigration status. The appellant's voluntary departure attracts some weight, although not as much as it would have, had he left at a much earlier stage, before being detained.

38. In isolation, the above factors would not tip the balance in favour of the appellant. However, when one factors in the best interests of C, and the wider circumstances of S, a different approach is required. This is a dimension of the application which the Secretary of State has wholly failed to deal with in her written decision and so I am without the benefit of her considered views on this issue; Mr Whitwell relied on the refusal letter without qualification. S was a victim of domestic violence, as outlined in powerful terms in her statements. Despite that, and to her credit, she has maintained a relationship with her abuser, for the sake of their child, C. The best interests of C militate strongly in favour of the appellant being granted entry clearance for the reasons already given. C's relocation to Pakistan is out of the question, as is the prospect of S severing her relationship with C in order to relocate to Pakistan on her own to be with the appellant. The best interests of C are a primary consideration. While they are not a paramount consideration in this jurisdiction, they combine with the factors outlined in paragraph 37, above, to provide a cumulative weight that has the effect of making the exercise of this discretionary power against the appellant inappropriate.

39. It is nothing to the point, contrary to Mr Whitwell's submission, that the appellant left the country in order to "take advantage" of the so-called "five year" route to settlement under Appendix FM. As Mr Bradshaw submitted, the appellant complied with the legal requirement to which he was subject to leave the country (albeit, I observe, belatedly). That being so, in principle he is entitled to apply under Appendix FM on the five year route, but for the applicability of paragraph 320(11). Of course, the appellant may well have been able to apply outside the rules from within the country under section 117B(6) of the 2002 Act, which would have been likely to have placed him on the "ten year" route to settlement. I do not consider that the appellant is to be penalised for leaving the country under these circumstances. In any event, the out of country route has taken over two years thus far, not including the time spent in Pakistan before submission of the application which amount to around 18 months. S's unchallenged evidence was that the time spent between the appellant's removal and the entry clearance application was attributable to her

gaining employment sufficient to meet the financial requirements of the rules; S has two employed roles, which together meet the financial requirements of Appendix FM. It is hardly surprising that S, a single mother to a young child, and victim of domestic violence, took some time to obtain roles that met the financial eligibility criteria.

40. The Entry Clearance Officer accepted that the appellant met all eligibility requirements.

41. I now find that he meets the suitability requirement also, as it is not appropriate to apply paragraph 320(11) for the reasons set out above. Pursuant to *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [34], where an appellant meets the requirements of the Immigration Rules, that will be positively determinative of an Article 8 appeal. I allow this appeal on human rights grounds on the basis that the eligibility requirements for entry clearance are met and the suitability concerns advanced by the Secretary of State are not sufficient to engage paragraph 320(11). The appeal succeeds under Article 8 as articulated by the rules.

Article 8 outside the rules

42. Many of the broader factors which feature in the above assessment would be relevant to an Article 8 assessment outside the rules, in any event. The parties addressed Article 8 outside the rules. For completeness I do so now in any event.

43. Factors in favour of the appellant's non-admission include:

    a. The public interest in the maintenance of effective immigration controls, encompassing the general need to refuse re-entry to those who breach immigration control in a significant way, such as this appellant (section 117B(1), the 2002 Act);

    b. The appellant used a non-genuine document in an immigration application, relied on a marriage of convenience to obtain EEA residence documentation, made a series of frivolous applications, and absconded, thereby aggravating his already significant overstaying;

    c. Paragraph 320(11) of the Immigration Rules is, in principle, engaged by this appellant's conduct;

    d. Although the appellant left the UK voluntarily, he did so only upon being detained, after a considerable period of overstaying.

44. Factors militating in favour of the appellant's admission:

    a. The appellant and S meet all eligibility requirements under the rules. The neutral factors concerning the appellant's ability to speak English and be financially independent are neutral factors under section 117B(3) of the 2002 Act;

b. The appellant left the UK voluntarily at his own expense. While there are significant aggravating features in his prior immigration misconduct, those such as this appellant are to be encouraged to leave voluntarily in order to regularise their status from overseas;

c. The appellant enjoys a genuine and subsisting parental relationship with C, albeit as a stepfather, and in circumstances in which the relationship is conducted remotely;

d. It is in C's best interests that the appellant be admitted to this country;

e. There is no prospect of C relocating to Pakistan due to the order of the Family Court and the need for her to remain in the same country as her father, nor would it be possible for S to leave C in this country to relocate to Pakistan on her own;

f. In her decision, the Secretary of State failed to engage with the unique circumstances of S and C, meaning her views attract less weight.

45. In my judgment, the factors in favour of the appellant being admitted outweigh those in favour of maintaining the entry clearance refusal. While the Secretary of State's views ordinarily attract great weight, as set out at paragraph 35, above, she has failed to engage with the highly case-specific factors advanced by this appellant in support of his application, as pointed out in S's witness statements prepared for these proceedings (and in the statement provided to support the entry clearance application itself). By relying on the refusal letter without qualification, as Mr Whitwell did, the Secretary of State has perpetuated this error, meaning that the weight which would otherwise and ordinarily be attached to her case-specific views cannot apply to the same extent in this appeal. The margin of appreciation enjoyed by the Secretary of State has been applied on an erroneous basis. In addition, the appellant is entitled to some credit for returning to Pakistan voluntarily. The best interests of C are for the appellant to be admitted. She has formed a bond with the appellant and views him as her stepfather. She calls him 'papa'. Her relocation with S to Pakistan is out of the question.

46. In my judgment, the best interests of C combine with the other factors in favour of granting the appellant entry clearance so as to outweigh the interests of the community as a whole in these specific circumstances. A fair balance would be for the appellant to be granted entry clearance.

47. Even had I not allowed the appeal under Article 8 as articulated by the Immigration Rules, I would have allowed the appeal under Article 8 outside the rules in any event.

<u>Notice of Decision</u>

The appeal is allowed on human rights grounds on the basis that the appellant meets the requirements for entry clearance under Appendix FM.

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 their 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.

Signed *Stephen H Smith* Date 9 June 2021
Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable for the following reason. The appeal succeeded largely on the basis of a factual matrix and evidence which was put before the Secretary of State and with which the Secretary of State failed to engage. Had the Secretary of State engaged with the materials relating to S and C, these proceedings may well have been avoided.

Signed *Stephen H Smith* Date 9 June 2021

Upper Tribunal Judge Stephen Smith

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10882/2019

THE IMMIGRATION ACTS

Heard at Field House
On 4 February 2021
Extempore decision

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

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(ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M Bradshaw, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Parkes promulgated on 17 December 2019 dismissing the appeal brought by the appellant, a citizen of Pakistan, against a decision of the respondent to refuse his application for entry clearance to the UK as the spouse of a British citizen. The application was submitted

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on 28 February 2019 and the refusal decision under challenge before the judge was dated 10 May 2019.

Factual background

2. The appellant, although currently in Pakistan, previously resided in this country. He arrived as a student in December 2006, with leave to remain until the end of October 2009. Shortly before the expiry of his leave, he made a further application in support of an attempt to secure additional leave as a student. That application was refused as he used a "non-genuine document" in support. The appellant did not dispute those allegations, either at the time, or before the First-tier Tribunal.

3. The appellant subsequently obtained a certificate of approval for marriage and sought to marry an EEA national. Following his marriage, his subsequent application for a residence card as the family member of an EEA national was refused, on the basis that the marriage was one of convenience. On 15 December 2011, a differently constituted First-tier Tribunal dismissed the appellant's appeal against that refusal, accepting the respondent's contention that the marriage had been one of convenience. Thereafter, the appellant remained in this country, making a number of additional applications under the EEA regime before departing voluntarily on 16 November 2017. That was after he had been served with papers upon being detained by Immigration Officers, having been encountered working illegally.

4. The Entry Clearance Officer refused the appellant's application for leave to enter on the basis of paragraph 320(11) of the Immigration Rules. Paragraph 320(11) features in the "general grounds for refusal" under the heading "Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused". The provision states:

> "(11) Where the applicant has previously contrived in a significant way to frustrate the intention 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."

5. The basis upon which the Entry Clearance Officer had relied on paragraph 320(11) was that the appellant had entered a marriage of convenience, had submitted frivolous applications, had failed to report and had been encountered working illegally. The Entry Clearance Officer's decision noted that the appellant had chosen to leave the United Kingdom voluntarily, however, the Entry Clearance Officer was not satisfied that that outweighed the previous immigration history of the appellant and his disregard for the Immigration Rules.

6. The decision of the First-tier Tribunal under consideration in these proceedings followed a hearing in December 2019. The judge heard evidence from the sponsor, the appellant's British wife, and from a Dr [R] and a Mr [B]. The judge identified at [14] of his decision that the main issue in the appeal was whether the appellant was able to meet the suitability requirements and whether his exclusion under paragraph 320(11) was justified. The judge noted that it was common ground that the appellant had relied on a false document and observed that that was "a serious matter as clearly the appellant hoped to obtain a grant of leave to which he was not entitled". The judge then noted that, contrary to the submissions that had been made on his behalf, that was aggravated by his failure to leave the UK when his application had been refused on that basis.

7. The judge then considered the circumstances of the appellant's marriage to the EEA national, and specifically the 2011 decision of the First-tier Tribunal in which that marriage was found to be one of convenience. The judge summarised the explanations that had been provided by the appellant and his witnesses in these proceedings, concluding that there were no good reasons to depart from the findings reached by the judge in 2011, thereby accepting the earlier findings of the First-tier Tribunal that the marriage was one of convenience. The judge noted that the subsequent EEA applications advanced by the appellant on the basis of his relationship with the EEA sponsor in relation to whom he had been found to be in a marriage of convenience, were "properly described as frivolous".

8. At [20] to [22], the judge outlined the additional aggravating features said to exist in relation to the appellant; his failing to report and his unlawful working. In fairness to the appellant, the judge observed that his unlawful working was "not the most significant aspect of the circumstances under paragraph 320(11)". The judge also considered the appellant to have fallen foul of paragraph S-LTR.4.3 of the Immigration Rules, in addition to having engaged paragraph 320(11).

9. The judge then addressed at [24] whether the appellant's continued exclusion from the UK was justified and proportionate. He addressed the nature of the relationship with the sponsor. I emphasise that there was no dispute on the part of the Entry Clearance Officer that the relationship between the appellant and the sponsor was genuine and subsisting. The judge noted that the relationship enjoyed between the sponsor and the appellant commenced when the appellant was in this country without leave and therefore here illegally. As such, the relationship carried less weight in the balancing exercise.

10. The judge noted at [25] that the appellant's sponsor has a child from a previous marriage, and that contact is shared between the sponsor and her ex-husband. In those circumstances, the judge found that the appellant did not have a parental relationship with the stepdaughter, although he accepted that they "may have formed a close relationship". The judge considered a report provided by an independent social worker at [26], and at [27] reached his overall operative conclusions in the case that the appellant's behaviour was such that paragraph 320(11) was engaged and that its use was justified in the circumstances of the appellant's case.

Grounds of Appeal

11. There are two grounds of appeal. The first is that the judge failed to take into account relevant factors when addressing the engagement and applicability of paragraph 320(11) of the Rules. In the case of *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC) a panel of this Tribunal stated at [9] as follows:

> "Paragraph 320(11) then offers the opportunity for a discretionary bar to be applied in somewhat uncertain circumstances. The uncertainty is sought to be reduced by the promulgation of guidance under paragraph 320(11). The guidance provides that a refusal of entry clearance or leave under paragraph 320(11) may be given on a discretionary basis where an applicant has been an immigration offender or in breach of UK immigration or other law and where there are aggravating circumstances."

12. At [14] the panel noted that it was important that the Entry Clearance Officer, when considering whether to invoke paragraph 320(11), should bear in mind the incentives that may exist to those seeking to regularise their status by leaving the country of their own accord and making an application for their return from overseas. The panel said as follows:

> "If the aggravating circumstances are not truly aggravating there is in this context a serious risk that those in the position of (the appellant in those proceedings) 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 counterproductive to the general purposes of the relevant Rules and to the maintenance of a coherent system of immigration control. However, as explained, the Entry Clearance Officer in this case did not address the correct question and did not carry out an adequate balancing exercise under the guidelines."

13. The grounds of appeal and the submissions advanced before me contended that the judge failed to follow the guidance in PS and fell into the very trap that was identified by the Tribunal on that occasion when promulgating its guidance. The judge failed to consider at all whether the decision of the Entry Clearance Officer was counterproductive to the general purpose of the discretionary rule. There were a number of factors which the judge should pursuant to PS have considered but did not.

(a) First, the judge is said to have failed to ensure that only "truly aggravating" factors are held against an individual. In the case of this appellant it is submitted that the judge should have ascribed more significance to his voluntary departure from the United Kingdom coupled with his two and a half years out of the country before making an application for his return.

(b) Secondly, the judge failed to ascribe any significance to the fact the appellant meets the substantive requirements for eligibility for entry clearance as a spouse and that there is no question that the appellant and sponsor are in anything other than a genuine and subsisting relationship, and finally the judge is said to have failed to take account of the "close relationship" that he found the appellant to enjoy with his stepdaughter.

14. Mr Bradshaw contends that this ground of appeal is not a mere disagreement of weight on the part of the judge. Rather, in his submission, there were a number of factors which the judge was bound to take into account but which he failed to consider. Accordingly, the conclusion that paragraph 320(11) was engaged and that its use was justified could not be sustained. The appellant had been deprived of the balancing exercise which should lie at the heart of any consideration of paragraph 320(11).

15. Pursuant to ground 2, the appellant contends that the judge failed to carry out any or any adequate Article 8 assessment. Mr Bradshaw highlights how the operative reasoning of the judge at [14] to [27] does not even mention the term 'Article 8'. There is no express finding in relation to whether family life is engaged between the appellant and the sponsor. Although the judge did address – and dismiss – the possibility of Article 8 family life existing between the appellant and his stepdaughter (the daughter of the sponsor), the reasoning provided by the judge for reaching that finding is said to be irrational. There the judge observed that contact arrangements were in place in relation to the appellant's daughter and her father. Contact is shared between both natural parents. In those circumstances, found the judge, the fact that the child's natural father continues to enjoy a parental relationship with her precludes the possibility of the appellant being able to enjoy a relationship of parental quality with the child. On behalf of the appellant it is submitted that that was an irrational finding as the jurisprudence relating to Article 8 does not admit the conclusion that whether family life can be engaged by modern family arrangements is a mutually exclusive question.

16. On behalf of the respondent, Mr Walker contends that the judge gave a full and reasoned assessment of the applicability of paragraph 320(11), that he reached findings that were open to him on the facts of the case and that properly understood, the judge's overall analysis was precisely that which was required by Article 8 of the Convention. For example, see the references in [27] of the judge's decision to the exclusion of the appellant being "both justified and proportionate". That is the language of Article 8, submits Mr Walker.

Discussion

17. The grounds of appeal as formulated and developed by Mr Bradshaw are compelling. Paragraph 320(11) of the rules requires a balancing exercise to take place. It is significant that the judge addressed not one of the factors that had been advanced in relation to why the appellant's admission would be desirable. While it may well be that the conclusion that the judge reached in relation to that issue would have been open to him in the event that a proper analysis under paragraph 320(11) took place, it is not possible from the perspective of the Upper Tribunal to have the requisite confidence that the judge undertook such analysis. Nor can it be said that any error was immaterial. As Mr Bradshaw submits, the appellant was entitled to the benefit of a balancing exercise, addressing all relevant factors going to and against the discretionary reliance on paragraph 320(11). I cannot say that, had such analysis taken place, it would necessarily have been bound to fail.

18. There is further support for the erroneous nature of the judge's analysis at [23] of the decision. There the judge held against the appellant the fact that he is said to have fallen foul of paragraph S-LTR.4.3 of the Rules. That is a paragraph which is not engaged in the entry clearance context and was therefore by definition an irrelevant consideration. It concerns applications for leave to remain made by those already in the country. I accept Mr Bradshaw's submissions that that aspect of the judge's analysis of Rule 320 was therefore tainted; the judge approached the discretionary exercise on the inaccurate premise that the appellant would fall foul of another provision of the Immigration Rules in any event. Given the provision was not engaged, that was an irrelevant consideration.

19. I find that ground 1 is made out.

20. In relation to ground 2, I accept the Secretary of State's submission that the judge did use the language of Article 8 at various points, even if he did not use the term expressly. He addressed at [27] the concept of proportionality and was mindful of well-established Article 8 concepts at earlier points in his analysis. For example, at [24] he addressed the weight to be ascribed to the relationship between the appellant and the sponsor, given it was developed at a time the appellant was in the United Kingdom unlawfully. That is the territory of Article 8.

21. However, what is not clear is whether the judge conducted the overall balancing exercise which is required outside the Rules, even if it were the case that Rule 320(11) had been engaged and was appropriate to be relied upon. In the bundles prepared for the First-tier Tribunal were details relating to the contact arrangements between the sponsor and her daughter. The contact order prohibits the removal of the daughter from the United Kingdom without the permission of the Family Court or the written consent of every person with parental responsibility for the child, which includes the child's father. There was no suggestion in the materials that I was taken to that the child's father would be willing to entertain the prospect of the child being taken to Pakistan. The significance of this aspect of the Article 8 materials before the judge was that it demonstrated significant barriers to the sponsor having the option of relocating to Pakistan in order to be with the appellant that way. To do so would require her either to leave her child, with whom she does enjoy a genuine parental

relationship, on her own with her father in this country, or would require her to seek the father's permission or the leave of the court in order to take her to Pakistan. The judge did not engage with that very significant feature of the underlying factual matrix to these proceedings. He failed to engage with that aspect of the evidence in the context of failing to conduct an overall proportionality assessment. It follows that ground 2 succeeds.

22. The question then arises as to the next steps. Mr Bradshaw submits that this is a case which has so many findings of fact that it is necessary for it to be remitted to the First-tier Tribunal for a full factual hearing to take place. I disagree. At [15] to [19] of the decision, the judge outlines the evidence that he heard relating to the appellant's former marriage to an EEA national and the findings of the First-tier Tribunal in 2011 that that was a marriage of convenience. As Mr Bradshaw very fairly accepted before me, it is difficult for him to mount a perversity challenge to those findings.

23. There were a series of disagreements of weight and fact which featured in the grounds and Mr Bradshaw's submissions in relation to certain of the judge's findings, for example that which features at the end of [19] where the judge concludes that the appellant's subsequent EEA applications were frivolous. I find there is no reason for this Tribunal to interfere with those findings. They are not affected or otherwise undermined by the making of any error of law. Those findings must therefore be preserved. However, the entirety of the remaining Article 8 analysis including the applicability of paragraph 320(11) of the Rules and the judge's overall Article 8 assessment to the extent that he conducted one must be set aside.

24. I therefore direct that the matter should be reheard in this Tribunal with the judge's findings up to [19] preserved, and the focus of the forthcoming hearing in this Tribunal will be the extent to which discretion should be exercised to invoke paragraph 320(11) in order for an overall Article 8 assessment to be conducted, taking into account all relevant factors.

Form of resumed hearing

25. The parties were content that a remote hearing would be in the interests of justice and consistent with the overriding objective.

Notice of Decision

The appeal is allowed.

[*Remaining details concerning arrangements for the rehearing omitted*.]