



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

Appeal Number OA/24299/2012

THE IMMIGRATION ACTS

Heard at Sheldon  
On 9<sup>th</sup> September 2014  
Prepared 16<sup>th</sup> September 2014

Determination Promulgated  
On 24<sup>th</sup> October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

ASHRAF AHMED GERMAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr N Ahmed (Counsel, instructed by Bhavsar Patel Solicitors)  
For the Respondent: Mr D Mills (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Birk promulgated on the 6<sup>th</sup> of March 2014 in which the Appellant's appeal against the ECO's refusal of his spouse application was allowed. The grounds assert that the Judge erred in the approach to paragraph 320(11) of the Immigration Rules, not applying PA (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC), and that the approach taken to article 8 was wrong with no reasons being given why his circumstances were exceptional or the decision unduly harsh.
2. The Appellant's immigration history and the application of paragraph 320(11) of the Immigration Rules are dealt with at paragraph 14 of the determination. Having summarised the Appellant's immigration history and his statement that he was removed from the UK the Judge found that in view of the finding that the Appellant met the requirements of paragraph 281 and in respect of a continuing marriage he found that a discretion should have been exercised differently.
3. Following submissions at the hearing I indicated that if I was satisfied that this paragraph contained an error of law I would remake the decision and submissions on that and article 8

were invited. My reasons are given below. Following this indication Mr Ahmed submitted that the decision ought to be remitted to the ECO for the paragraph 320(11) point to be remade, his submission being that paragraph 320(11) required a lawful decision on paragraph 281 and the ECO's decision had been overturned on appeal.

4. That argument is misconceived. Paragraph 320(11) is a discretionary ground for refusal which applies whatever decision is made on the substantive application. It does not require a decision on the substantive application to be made one way or the other and the fact that a Judge comes to a different conclusion on the substantive application does not undermine the ECO's decision on the discretionary refusal. The substantive application is a matter to be decided on appeal too if it is maintained as a ground for refusal by the Home Office Presenting Officer.
5. Mr Ahmed also sought to raise whether the decision was lawful as there was no evidence that there had been ECM approval for the refusal under paragraph 320(11). I am not satisfied that this could properly be raised as it was not raised in the Grounds of Appeal to the First-tier Tribunal and there was no cross appeal by the Appellant. Mr Ahmed appeared to be labouring under the misapprehension that the appeal to the Upper Tribunal is in the form of a re-hearing. Even if that stage is reached with a determination being set aside the Appellant is limited to the Grounds of Appeal before the First-tier Tribunal. In any event Mr Mills found evidence that showed there was ECM approval which overrode the initial decision by the ECO not to apply paragraph 320(11).
6. The Judge erred as a decision under paragraph 320(11) required a full consideration of the Appellant's immigration history from start to finish with an assessment of aggravating and mitigating features and an explanation why, in the light of the guidance in PS it would be inappropriate to refuse the appeal on that ground. It needs to be borne in mind that the facts were to be assessed at the date of the decision and not the date of the hearing the continuation of the marriage would not be relevant to such an assessment.
7. The summary of the Appellant's immigration history is incomplete and not entirely accurate. The Judge did not set out the Appellant's immigration history fully and did not indicate what were the relevant factors to be taken into account in the assessment. In finding an error of law I set aside the decision which is remade in this determination.
8. In PS the Appellant had a poor immigration history which included an explained entry to the UK with an asylum claim which was not pursued and his voluntary return to India to apply from there for re-entry as a spouse. It was recognised that refusal of entry clearance under paragraph 320(11) could lead to individuals remaining in the UK rather than returning to their home country to make applications to regularise their position in the proper way. PS, like this case, involved a genuine marriage.
9. The Appellant had entered the UK under the working holiday maker scheme, that would have involved a declaration by him that he was only going to work incidentally to a holiday in the UK and for no more than 12 months in a 2 year period. Records from HMRC indicate that the Appellant worked for 3 years continuously from his entry until encountered and detained by immigration officers. It was only after he had been served with Removal Directions that the Appellant left the UK.
10. There was some confusion surrounding the Appellant's departure from the UK. He claimed that he taken steps to regularise his stay but there is no supporting evidence for that and no evidence of his having made an application to do so. Although he stated in his Grounds of Appeal that he

was removed it appears that he paid for his return to India albeit that he was by then subject to Removal Directions.

11. For the Home Office it was submitted that the aggravating features were that the Appellant must have exercised deception in the declaration made when he entered the UK and that was indicated by the other aggravating feature of his working continuously for 3 years following his admission. Further aggravating features were that he had not sought to bring himself to the attention of the authorities and unlike PS his departure had not been entirely voluntary as he had only left when detained and then faced with imminent forced removal.
12. For the Appellant emphasis was placed on the Appellant's voluntary departure and Mr Ahmed referred to the guidance, summarised by the Tribunal in PS. It was submitted that the aim was to encourage individuals to return which would be undermined if obstacles were put in their way.
13. Against the Appellant is clear evidence that he did exercise deception in the application made to enter as a working holiday maker. The burden is on the Secretary of State to show that deception was exercised and cogent evidence is required to show this on a balance of probabilities. That evidence comes from the Appellant's own actions, not disputed, of working for 3 years continuously. I am satisfied that it was the Appellant's intention all along to work in the UK and that the working holiday visa was a mechanism to achieve that end. In addition to that he overstayed the visa by a year.
14. Despite his claims to the contrary there is no evidence to show that the Appellant sought to regularise his position in the UK either in the form on an application made to the Home Office or from anyone that he may have instructed. Given his previous deception I am not satisfied that he did take any action to regularise his position.
15. The Appellant did not bring himself to the attention of the Home Office and was encountered working illegally following which he was detained and proceedings went so far as the making of Removal Directions against him. It is only against that background that the Appellant finally made arrangements to leave the UK, i.e. when faced with compulsory expulsion, which undermines the voluntary nature of his leaving. This is in contrast the Appellant in PS who left when he still had avenues open to him which he chose to abandon.
16. The mitigating features for the Appellant are his departure at his own expense, subject to the observations in paragraph 15 above, and his declining to pursue unmeritorious applications in-country. He can also point to the fact that the ECO did not seek to apply paragraph 320(11) but that decision was taken by the ECM.
17. Refusal under paragraph 320(11) is discretionary but applies where an Appellant has contrived in a significant way to frustrate the Immigration Rules. The Appellant's actions here encompass a number of the aggravating features listed in the rule including the use of deception, a pre-mediated intention to work and overstaying. In my view these are not countered by the only significant feature in his favour, returning at his own expense, as that was when he was forced into that position having been caught. Refusal under was I find that refusal under paragraph 320(11) was, at the time of the decision under appeal, justified and remains so.
18. The Appellant has the benefit of positive findings under paragraph 281 that he meets the requirements of the Immigration Rules. I would be surprised if objections under paragraph 320(11) were to carry much weight in the future as it seems to me that its purpose has been met. The Appellant can re-apply in the future.

19. Given the nature of the findings made I find that the refusal under this paragraph being justified is such that not only is the refusal in accordance with the law and justified but that his exclusion, at the date of the decision, was proportionate and there is no breach of article 8.

## CONCLUSIONS

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal dismissing the appeal of Ashraf German.

### Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

### Fee Award

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 23<sup>rd</sup> October 2014