Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22656/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision and Reasons Promulgated**
On 15 November 2018	**On 23 November 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KARAMJIT SINGH
(anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFICER (NEW DELHI)

Respondent

Representation:
For the Appellant: Ms Rutherford instructed by SKB Law
For the Respondent: Mr Mills Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Moan promulgated on 6 March 2018 in which the Judge dismissed the appellant's appeal on human rights grounds.

Error of law

2. The appellant is a citizen of India born on 1 February 1977. On 15 July 2016 the appellant applied for entry clearance as a partner and parent under Appendix FM of the Immigration Rules. On 7 September 2016 the respondent refused the appellant's application against which the appellant appealed.
3. It is not disputed the appellant entered the United Kingdom illegally in 2003. The Judge records at [4] the respondent's case that the appellant failed to report as instructed after being encountered, was listed as an absconder, discrepancies given regarding the appellant's name and date of birth, and an allegation the appellant worked illegally in the United Kingdom. Having considered the evidence the Judge noted the refusal was only pursuant to paragraph 320(11) of the Immigration Rules which provides that entry clearance or leave to enter the United Kingdom should normally be refused where an applicant has previously contrived in a significant way to frustrate the intentions of the Rules by (i) overstaying; (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 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.
4. The Judge notes at [9] the sponsors evidence that the appellant did not use false details and that the difference in spelling was a mistake although it was accepted the appellant had illegally entered the United Kingdom, worked illegally (albeit on a casual basis), and absconded following a failure to report. The Judge notes the appellant's representative conceded that the circumstances required for a paragraph 320(11) refusal had been satisfied. Accordingly, the Judge finds that one of the provisions in paragraph 320 (11) (i) – (iv) had been satisfied and that one or more of the aggravating features identified in the rule had also been correctly determined by the Entry Clearance Officer (ECO).
5. The Judge had previously, at [8], reminded herself that the assessment under this provision is in fact a threefold exercise the third aspect being, as it is a discretionary ground of refusal, a need to consider all other relevant circumstances.
6. The Judge sets out the correct legal self-direction at [10] by reference to *PS India [2010] UKUT 440* and the guidance given to entry clearance officers of the need to consider other factors as well as family life before making any decision under 320 (11).
7. At [13 – 14] the Judge writes:

> 13. There was no reference to the Guidance in either the entry clearance officer's decision or the entry clearance managers review. The reference to the Appellants family life in the entry clearance decision is brief and under the guise of article 8 considerations. I accept that the decision-maker has considered many aspects of the Appellant's family life under article 8.
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> 14. There is little mention of his family life as a counterbalancing feature in the exercise of the entry clearance officer's discretion or that the Appellant left the UK in 2013. Those issues should have been considered and explicitly highlighted. Whilst that means that the decision notice was unsatisfactory, it does not necessarily mean that the outcome was wrong.

8. At [17] the Judge writes:

> 17. I consider it highly likely that, even with consideration of the counterbalancing factors, that entry clearance would have been refused because of the strong public interest. Whilst it may be the case that the Appellant met the Immigration Rules as far as the other requirements were concerned, I am also satisfied that he came within the general grounds refusal and that there were strong reasons for exercising the discretion to refuse entry clearance. However, I also acknowledge that at the appeal hearing, there is significantly more information before me than was placed before the entry clearance officer about the counterbalancing factors.

9. The Judge considers the best interests of the child which are to remain with her mother in the United Kingdom. Both the sponsor and child are British citizens and the respondent does not suggest that the child leave the UK but that the sponsor and child conduct their relationship with the appellant through regular visits to India, as they have to date. The Judge notes the appellant included in the evidence an independent social worker's report dated 19 September 2017. This is commented upon by the Judge at [27 – 28] of the decision under challenge. This is not material that was before the entry clearance officer.
10. Having considered the competing interests the Judge finds at [36] that the respondent's decision strikes a fair balance between the article 8 rights of the appellant, sponsor and their daughter of the public interest, and did not find the decision was disproportionate.
11. The appellant sought permission to appeal on 6 grounds. The first of those asserted the Home Office Presenting Officer before the First-Tier Tribunal, a Mr Tallis, had made a concession during the course of the hearing that the Judge had not taken into account. The appellant's grounds of challenge assert the Judge failed to record and determine two material concessions made in the closing submissions in addition to a number of other matters.
12. The first such concession is said to be a submission by the Presenting Officer to the effect "if the ECO had before him the detailed evidence that the tribunal now has before it, such as the social worker report, then we could not say that a section 55 compliant decision had been made". The author of the grounds and appellant's representative before the First-Tier Tribunal, Mr Muman, submits in his grounds that

in light of this the impugned decision could not be said to be consistent with the section 55 duty. Mr Muman also records that he asked the Presenting Officer to confirm that the above was an accurate recording of his submissions which he confirmed it was and that the Judge then asked the Presenting Officer for clarification given the obvious impact that his statement would have on the way the appellant would argue his case in reply. The Judge pointed out the fact the social worker's report was not before the entry clearance officer would not prevent her from being able to take it into account. The grounds reflect that the Presenting Officer did not resiled from his position that for the reasons set out in the social worker's report the entry clearance officers' decision is contrary to section 55. The grounds also assert that there is no reference to the exchange in the determination and that the Judge erred or misdirected herself in failing to take into account a relevant factor and in taking into account irrelevant factors.

13. The second concession said to have been made by the Entry Clearance Officer is when it was said to be accepted that the notice of decision was defective and that the entry clearance managers generic purported review was equally bad because it did not engage with the third stage of section 320(11). The grounds assert this concession, like the first, was not recorded in the determination and that both documents are arguably defective as at no stage does the ECO or ECM engage with the need to consider all other relevant circumstances, including section 55. The grounds argue the closest the Judge got to addressing the 'not in accordance with the law' submission is at [13 – 14] of the decision in which it appears the Judge finds in the appellant's favour yet fails to allow the appeal on this basis.
14. Another judge of the First-Tier Tribunal granted permission to appeal on this ground.
15. An earlier hearing before the Upper Tribunal, for the purposes of determining whether an error of law had been made, was adjourned by Upper Tribunal Judge Kebede on 13 September 2018 and directions given in which it is noted it was agreed by the parties that the subject matter of the grant of permission, namely concession made by the Home Office Presenting Officer at the First-Tier Tribunal hearing was a material matter and that the appeal could not proceed without further clarification of the concession by way of a Rule 24 response.
16. A response has been provided by Mrs Aboni, another Senior Home Office Presenting Officer which refers to a conversation with Mr Tallis on the telephone who was, at that time, on sick leave. No witness statement has been provided by Mr Tallis and no evidence provided that he accepts that he made any concession.
17. The appellant has filed a witness statement from Mr Muman, who has recused himself from the proceeding, dated 7 November 2018 in which Mr Muman confirms he has read the Rule 24 response. Mr Muman makes it clear he is not intending any criticism of Mr Tallis and that the focus of the challenge is to the decision of the Judge. At [8] of Mr Mumans statement he writes:

> 8. After the evidence concluded and during his submissions to the First-tier Judge ('the judge') Mr Tallis, the Home Office Presenting Officer, made the following concession, of which I made a careful and verbatim note:
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> *"If the ECO had before him the detailed evidence that the tribunal now has before it, such as the social worker report, we could not say that a section 55 compliant decision had been made"*

18. Mr Muman refers to the fact he read the note back to Mr Tallis across the bench who confirmed it was an accurate response and that Mr Tallis did not resile from his position. Mr Muman at [15] also writes:

> 15. Elsewhere his submissions Mr Tallis accepted that the ECO's Notice of Decision was defective and that the ECM's purported review was equally bad because it did not engage with the third stage of the 32 (11) approach. He went on to argue, however, that it would not have made a material difference to the decision.

19. The assertion in the witness statement that the Judge failed to record either concession is accurate and that a reading of the decision does not specifically refer to the statements as noted by Mr Muman. The grounds correctly reflect that neither of the alleged concessions are specifically referred to by the Judge.
20. Mr Mills was asked to confirm his position in light of there being no statement from Mr Tallis. Mr Mills confirmed Mr Tallis had been on sick leave and was expected to return shortly but that he was not seeking a further adjournment to allow him to attend. Mr Mills did not challenge the accuracy of the note taken by Mr Muman but stated his position was that it could not be said that what Mr Muman had recorded amounted to a concession.
21. The Upper Tribunal shall therefore proceed on the basis that the submissions made by Mr Tallis are as recorded by Mr Muman.
22. The fact the Judge did not record that a concession had been made supports Mr Mills position that whatever may have been said it was not understood by the Judge to be a concession. That term has a meaning of importance in legal proceedings for if a concession had been made by a Presenting Officer, whilst not binding upon the Judge, it would have meant the Judge would have been required to follow that concession unless she gave specific notice to the advocates that she intended to depart from it, which would have enabled them to make further submissions on the point in hand.
23. A concession is a thing that is 'granted', especially in response to demands, such as "the government was unwilling to make any further concessions". It is the action of conceding or granting something. It therefore requires a specific intention of the person making the concession that they are granting something to a third party. It is for this reason that one often sees in refusal letters statement to the effect that the decision-maker concedes that a situation is as alleged, or a particular fact. The wording referred to at [8] of Mr Muman's statement shows that rather than granting something Mr Tallis is reflecting on a situation that might have arisen had the report of the

social worker been before the entry clearance officer. The first 3 words of the statement by Mr Tallis of "If the ECO" clearly shows this is recognition that this document was not before the ECO. Mr Tallis is also recognising that had that evidence been before the decision-maker it could not be said a section 55 compliant decision had been made, but that evidence for whatever reason had not been provided by the appellant with the application. As the information was not provided and Mr Tallis expressed the view that had it been section 55 issues may have arisen this is clearly a restatement of the respondent's position that the decision of the entry clearance officer is correct in terms of applying the appropriate legal test, and not a grant of anything such as an acknowledgement that the decision is not proportionate pursuant to article 8(2).

24. In relation to the alleged second concession, that the decision-maker did not properly consider the third aspect of the paragraph 320 (11) exercise this is not a concession in the appellant's favour as clearly the full quote in Mr Mumans witness statement is to the effect that Mr Tallis' view was any error in that respect was not material.

25. I do not find it made out that there is any arguable merit in Ground 1 as I do not find it established that the Presenting Officer made any concession upon which the appellant was entitled to rely, leading to the Judge making legal error in not paying heed to and acting in accordance with such concession without giving the parties notice of her intention to determine the matter otherwise if she was not minded to follow a concession.

26. In respect of the other matters, the appellant asserts there was a factual dispute between the parties in relation to the assertion the appellant had entered the United Kingdom illegally in 2003, failed to report after being encountered in 2007 and absconded thereafter, and had given a false name and date of birth to an immigration officer and had worked illegally. The claim to have worked illegally in the United Kingdom and to have given a false name and date of birth were denied by the appellant. The appellant argues the Judge wrongly stated the appellant had accepted he worked illegally and failed to recognise the burden of proof is upon the ECO to prove these matters which were in dispute and that no evidence had been called or produced to confirm the appellant had given a false name and date of birth or that he had worked illegally in the United Kingdom. The appellant also asserts that casual employment is different from and distinct from illegal employment and that those who are employed casually fall outside the nature of employment as there are no mutual obligations to offer and perform work and no evidence has been produced of illegal employment. The appellant denied he had worked illegally asserting that any work undertaken was casual and on an ad hoc basis for his survival.

27. The finding by the Judge that the appellant has worked illegally in the United Kingdom is a finding within the range of those available to the Judge on the evidence. Casual or irregular work is a recognised status and a person is likely to be a worker if most of these apply: (i) they

occasionally do work for a specific business (ii) the business doesn't have to offer them work and they don't have to accept it - they only work when they want to (iii) their contract with the business uses terms like 'casual', 'freelance', 'zero hours', 'as required' or something similar (iv) they had to agree with the business's terms and conditions to get work - either verbally or in writing (v) they are under the supervision or control of a manager or director (vi) they can't send someone else to do their work (vii) the business deducts tax and National Insurance contributions from their wages (vii) the business provides materials, tools or equipment they need to do the work. The appellant admits working on a casual basis and even though his motive may have been to earn money to live on it is clear he had no lawful right to work in the United Kingdom on the accepted facts of this matter and the appellant's immigration history. A foreign national has no right to work in the United Kingdom unless they have been given permission to do so but there was no evidence that the appellant had been given any such permission.

28. Although the appellant claims to have given an explanation for the difference in identity details as a mistake it has not been made out that the Judge erred in law in not accepting the appellant's explanation. The Judge clearly records that explanation at [9] given by the sponsor and such a conclusion has not been shown to be an arguably perverse or irrational conclusion of the Judge to have reached.

29. The grounds challenge the exercise of discretion. This is a human rights appeal. A submission the decision was not in accordance with the law is claimed to have been made by Mr Muman but no ground of appeal on that basis exists since the amendments brought about by the Immigration Act 2014. The Judge took into account all the evidence provided including the social workers report and comes to the conclusion that the respondent had established that the refusal and interference in any protected rights was proportionate.

30. There is a challenge to the finding at [20] where the Judge mentions an ability to speak English and financial independence which the appellant claims is not only contradictory but ambushed the appellant as the application to the ECO included an original English speaking certificate to the prescribed level A1 and evidence to determine the couple's financial independence, and that the ECO did not raise English and financial independence as a ground for refusal. It is also said to be the case that no submissions were made by the Presenting Officer suggesting the appellant could not satisfy these requirements and the Judge did not ask the sponsor what level of English the appellant spoke. The ability to speak English is a neutral factor and it does not appear to be disputed that the ECO did not raise matters relating to the appellants English language or financial independence in the refusal. No arguable prejudice is made out as the Judge drew some minor adverse conclusions at [20] but did not find these issues to be determinative, either individual or cumulatively in relation to the decision to dismiss the appeal.

31. The Judge when considering section 117B at [33] makes the following finding:

> 33. The public interest in this case is very strong. Repeated absences and repeated breaches of immigration laws require firm immigration control. That is the deterrent purpose of paragraph 320 of the Immigration Rules. I place less weight on the family life of the Appellant and Sponsor because of the circumstances in which it was cultivated. The Appellant had no leave when entering into a relationship with the Sponsor and fathering their child. The Sponsor said that she only knew about his immigration status after they married. The child is wholly innocent of that conduct. There is little that is positively in favour of the Appellant noting the strong public interest.

32. The appellant asserts the Judge erred in making such findings as the tribunal is not required to place 'little weight' upon these factors have particular regard to the section 117B factors. It was also argued section 117B(4) does not say 'little weight' should be given to family life established whilst the person was unlawful and that section 117B(6) was very material but overlooked by the Judge. It is also argued that the statutory factors the Judge referred to have no purchase on this case given the appellant had voluntarily returned to India in 2013 at his own cost and was making an entry clearance application to return in accordance with the immigration rules.
33. Whilst it is accepted that the wording of section 117B(4) refers specifically to private life it has long been a principle of European law, as far back as cases such as Y v Russia that little weight should be attributed to a relationship formed when the parties are aware that the immigration status of one of them is precarious. The parties were aware that the appellant was in the United Kingdom unlawfully and it is not made out the Judge was required to place any greater weight than she did upon this aspect of the appellant's case.
34. The point of construction, referring to [37] reflects an observation made by the Judge and no more for the appeal was dismissed as a result of the finding of proportionality at [36].
35. Ms Rutherford submitted the Judge had erred in failing to properly consider the purpose of the decision in PS (India) to which the Judge makes very little reference.
36. In PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) the Tribunal 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. The Tribunal noted the guidance on the application of paragraph 320(11) to be found in Entry Clearance Guidance under the heading "Refusals", in relation to aggravating circumstances, provides as follows. As at December 2010

this read: “Please note that the list below is not an exhaustive list. Aggravating circumstances can include actions such as: absconding; not complying with temporary admission / temporary reporting conditions / bail conditions; not complying with reporting restrictions; failing to comply with removal directions (RDs) after port refusal of leave to enter (RLE); failing to comply with RDs after illegal entry; previous working in breach on visitor conditions within short time of arrive in the UK (ie pre-meditated intention to work); previous recourse to NHS treatment when not entitled; previous receipt of benefits (income, housing, child, incapacity or otherwise) or NASS benefits when not entitled; using an assumed identity or multiple identities; previous use of a different identity or multiple identities for deceptive reasons; vexatious attempts to prevent removal from the UK, eg feigning illness; active attempt to frustrate arrest or detention by UK Border Agency or police; a sham marriage / marriage of convenience / polygamous marriage in the UK; harbouring an immigration offender; facilitation / people smuggling; escaping from UK Border Agency detention; switching of nationality; vexatious or frivolous applications; not complying with re-documentation process.” The guidance goes on to state: “All cases must be considered on their merits, the activities considered in the round to see whether they meet the threshold under paragraph 320 (11), taking into account family life in the UK and, in the case of children, the level of responsibility for the breach. Where an applicant falls to be refused under 320(7A) or 320(7B), the ECO must also consider whether it is also appropriate to refuse the applicant under paragraph 320(11). Where 320(7C) applies which makes an applicant exempt from 320(7B), an ECO must consider whether a refusal under paragraph 320(11) is appropriate.” As the guidance had not be considered the appeal was allowed on the basis that it was not in accordance with the law.

37. The Judge took into account all relevant aspects and considered the discretionary aspect of 320(11) herself. There is, as stated above, no longer a ground of appeal that a decision is not in accordance with the law. In Charles (human rights appeal: scope) [2018] UKUT 00089 it was found that following the 2014 amendments to the 2002 Act it is no longer possible for the tribunal to allow an appeal on the ground that a decision is not in accordance with the law and to that extent Greenwood No 2 [2015] UKUT 00629 should no longer be followed. The headnote in Charles also records that (i) a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (“NIAA 2002”) can be determined only through the provisions of the ECHR; usually Article 8 and (ii) A person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State’s decision making under the Immigration Acts, including the immigration rules, unless the circumstances engage Article 8(2).

38. The Judge in considering the proportionality of the decision was therefore entitled to factor into the assessment the criticisms that had been made during the course of the hearing, including submissions.
39. The Judge clearly adopted a structured approach to the matter and it cannot be said that the Judge ignored any relevant factors in terms of assessing the competing interests between the appellant and Secretary of State. Whilst PS (India) stresses the importance of encouraging people to return to their home country voluntarily and make an application to return, such as this appellant did, it does not say that in any such case the appeal must be allowed. The Judge at [10] correctly records the issue PS was decided to remind us of.
40. It does not matter whether any other judge would make the decision under challenge for that is not the correct legal test. The Court of Appeal have reminded us that judges considering whether an error of law has been made must not substitute their own view of the merits of the case and determine the matter by reference to how they would make the decision, but by a proper application of the principles of error of law such as set out in R (Iran).
41. Adopting this approach I make a finding of fact that the appellant has failed to establish that the Judge has erred in law in a manner material to the decision to dismiss the appeal sufficient to warrant of the Upper Tribunal interfering any further in this matter.
42. I say, as an aside, that as noted by Mr Tallis there is now in existence considerably more evidence than that provided to the entry clearance officer including the report of the independent social worker. There is also the fact that the appellant left United Kingdom a number of years ago and the Judge's comment about the relationship between the proportionality of the decision to refuse and the fact that whilst the decision may be proportionate when made by the ECO it may not continue to be proportionate in the longer term. It may therefore be open to the appellant to make a fresh application for leave to enter supported by all the new evidence that is available and dealing with the concerns of the entry clearance officer which can be considered on its merits by the ECO.

Decision

43. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

44. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 15 November 2018