Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10118/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th November 2019	**On 13th December 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS A H
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER
(Sheffield Visa Section)

Respondent

Representation:
For the Appellant: Ms J Norman, Counsel, instructed by Sterling & Law Associates
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This decision follows a resumed hearing before the Upper Tribunal and a decision dated 13th August 2019 which found and error of law and set aside the decision of the First-tier Tribunal pursuant to Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

2. The particulars of the application, refusal of the Secretary of State and appeal are set out in that error of law decision but essentially, the Entry Clearance Officer refused the appellant's application on 10th April 2018, noting that the applicant had applied for entry clearance to join her partner, but their records showed that she had previously attempted to enter the UK on 27th February 2017 using a Hungarian passport in the name of Rac Judit with a different date of birth. In support of the current application she had produced a Ukrainian passport with a different name and date of birth of 11th August 1975. It was concluded that she had failed to establish her identity and the application was refused under paragraph 320(3) of the Immigration Rules. Further, as she was not the rightful holder of the Hungarian passport it was concluded it was fraudulently obtained and that she had contrived in a significant way to frustrate the intentions of the Rules by deception and her application was refused under paragraph 320(11) of the Immigration Rules and approved by the Entry Clearance Manager.

3. The appellant's appeal, on human rights grounds, was dismissed at first instance and she appealed to the Upper Tribunal. The decision of First-tier Tribunal promulgated on 12th April 2019 was set aside owing to an error of law. There had been inadequate engagement with the argument that the application of paragraph 320(11) effectively imposed an indefinite ban and a failure to consider the appellant's sponsor's children further to **Beoku-Betts v SSHD [2008] UKHL 9**.

4. At the resumed hearing before me her husband, the sponsor, attended and gave oral testimony, confirming that he and the appellant were still in a relationship and that he had significant funding difficulties through having to instruct solicitors and thus he had been unable to visit his wife within the last year.

5. The only grounds for refusal were in relation to paragraph 320(3) of the Immigration Rules and 320(11) of the Immigration Rules. The Entry Clearance Officer considered GEN.3.1 and GEN.3.2 under Appendix FM, but found there were no exceptional circumstances. The appellant was refused entry clearance under D-ECP.1.3 of the Immigration Rules because of the application of paragraphs 320.

6. A substantial amount of evidence about her identity and nationality were produced with the application and the appeal bundle. In addition to the original valid Ukrainian passport she included a certificate from the State Migration Service of Ukraine with an English translation, a Ukrainian birth certificate with English translation and a valid Ukrainian national identity card. At paragraph 10 of my decision dated 13th August 2019 it was recorded that the First-tier Tribunal had found the issue of identity and Paragraph 320(3) had been resolved. This provision was not a matter pursued by the Entry Clearance Manager nor before me. The issue focussed on Paragraph 320(11).

7. The evidence given was that the appellant had met her husband, Jonathan H, a British national, in the United Kingdom in December 2013 and they began a relationship soon thereafter. The appellant moved in with him in June 2015. In February 2017 when they travelled to Italy, on return, she was stopped at port and she disclosed her Hungarian passport. Although initially she stated that this was her name, she then admitted she was a Ukrainian national. It was at this point she was refused entry under paragraph 320(7A), which carries a warning that future applications would be refused under paragraph 320(7B) and effectively a ten year ban.

8. The appellant had, following her previous refusal under paragraph 320(7A), returned to Ukraine and in June 2017 the appellant and sponsor were married in Ukraine and subsequently she applied for entry clearance. She was now a family member for the purposes of the Immigration Rules.

9. The mandatory refusal provisions under Paragraph 320 of the Immigration Rules are disapplied as follows

'A320. Paragraphs 320 (except subparagraph (3), (10) and (11)) and 322 do not apply to an application for entry clearance, leave to enter or leave to remain as a Family Member under Appendix FM, and Part 9 (except for paragraph 322(1)) does not apply to an application for leave to remain on the grounds of private life under paragraphs 276ADE-276DH'.

…

320. In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2-8 of these Rules, the following grounds for the refusal of entry clearance or leave to enter apply:

…

Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused

…

(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:

(i) overstaying; or

(ii) breaching a condition attached to his leave; or

(iii) being an illegal entrant; or

(iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);

and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

10. The issues argued before me in relation to the immigration rules were (i) whether it was permissible to apply paragraph 320(11) in cases where paragraph 320(7A) should not be applied (ii) even if that was the case, should paragraph 320(11) be applied in this case and was it proportionate? The application of 320(11) acted in lieu of a permanent ban when much of Paragraph 320 was disapplied and a ten-year ban was applicable under Paragraph 320 (7A and 7B).

11. As indicated, the appeal can only be considered on human rights grounds and, applying the **Razgar v SSHD [2004] UKHL 27** five stage test, it is clear that the appellant has a subsisting and genuine marriage with Mr H and, as such the Entry Clearance Officer's refusal is an interference which has consequences of gravity such as to engage the operation of Article 8. The threshold for interference is low. Ostensibly, the interference was in accordance with the law but as indicated above, I am satisfied that the issue as to identity under paragraph 320(3) has been resolved. Was the decision on paragraph 320(11) grounds in accordance with the law and for a legitimate aim?

12. The argument Ms Norman put forward was that the appellant's conduct fitted within the category of paragraph 320(7A) rather than 320(11) as was acknowledged by the decision maker who *initially* rejected her application for leave to enter in February 2017.

13. Paragraph 320(7A) states that leave will be refused as follows:

> *"(7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.*
>
> *(7B) where the applicant has previously breached the UK's immigration laws (and was 18 or over at the time of his most recent breach) by:*
>
> *(a) Overstaying;*
>
> *(b) breaching a condition attached to his leave;*
>
> *(c) being an Illegal Entrant;*
>
> *(d) 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);*
>
> *unless the applicant:*
>
> *(i) overstayed for -*
>
> *(a) 90 days or less, where the overstaying began before 6 April 2017: or*

(b) 30 days or less, where the overstaying began on or after 6 April 2017

and in either case, left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State;

(ii) used 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 more than 10 years ago;

(iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than 12 months ago;

(iv) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 2 years ago; and the date the person left the UK was no more than 6 months after the date on which the person was given notice of liability for removal, or no more than 6 months after the date on which the person no longer had a pending appeal or administrative review; whichever is the later;

(v) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 5 years ago;

(vi) was removed or deported from the UK more than 10 years ago or;

(vii) left or was removed from the UK as a condition of a caution issued in accordance with section 22 of the Criminal Justice Act 2003 more than 5 years ago.

Where more than one breach of the UK's immigration laws has occurred, only the breach which leads to the longest period of absence from the UK will be relevant under this paragraph."

14. Conduct which attracts a 320(7A) refusal will not attract the subsequent ten-year ban under 320(7B) where the application is for entry clearance as a family member in recognition of the balance under Article 8. The only exclusion available, therefore, to a decision maker is 320(3) which was no longer pursued, (320(10) was not applicable) or 320(11) and, in accordance with the law, invoked for the protection of the rights and freedoms of others in securing immigration policy. As highlighted, paragraph 320(11) is not a mandatory measure but a discretionary measure. In theory it can just be continually reapplied in family cases which would defeat the purpose of the disapplication of much of paragraph 320 but I am not persuaded paragraph 320(11) can never be applied in cases where an application has previously been refused under paragraph 320(7A). The use of paragraph 320(11) does not automatically impose a 10 year ban as an appellant can always renew an application and the matter be revisited by the Entry Clearance Officer or appeal. Each case must be fact specific.

15. Additionally, it is not open to me to redetermine the discretion or its application and it is not open to me to redirect the Entry Clearance Officer as to which provision he might apply.

16. Nevertheless the approach and the use of Paragraph 320(11) can be taken into account when considering all the circumstances under an Article 8 proportionality balancing exercise or GEN.3.2.(2) both of which include consideration of the best interests of the children and which was addressed in a cursory manner by the Entry Clearance Officer.

17. The question is essentially whether the refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights would be affected.

18. Albeit that I cannot determine which provisions under the Immigration Rules might be applied, caselaw has established that the decision maker needs to exercise great care, where paragraph 320(7B) is disapplied when in assessing aggravating circumstances said to justify refusal. That exercise must be relevant to the balancing exercise when assessing the final limb of the five-stage test under **Razgar,** that is proportionality. Would there be unjustifiably harsh consequences owing to the refusal of the entry clearance application on 10th April 2018, now shy two years by a matter of months. I bear in mind Section 85(4) of the Nationality, Immigration and Asylum Act 2002.

19. **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440**:

> *"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."*

PS in particular looked at the approach in paragraph 320 (7B) in relation to the discretion under the previous appeal regime. Nevertheless, by analogy I consider that the same great care should be exercised where paragraph 320(7A) has been implemented previously and disapplied and that similar consideration in relation to the application of Paragraph 320(11) may be factored into the balancing exercise on proportionality.

20. Following an application for admission of late evidence by Ms Norman, and without objection from Mr Walker, I admitted under Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 the Entry Clearance application details recorded by the Entry Clearance Officer. These notes record that the British citizen spouse was employed with London Transport on a salary of £48,575 per annum and that evidence of their marriage was provided

together with the financial details supporting the application. In particular, what was recorded on 9th March 2018 was the following:

> *"Matches seen and results noted pre issue and ECR in maiden name CID check: match to alias used living illegally in UK – CID details STD/5038395 – travelled on fraudulently obtained Hungarian passport and false identity. Has disclosed previous ID and RLTR."*
>
> *"Has stated in VAF that she divorced him in 2014 but no divorce doc submitted. Once this is seen this can[e] be issued:", and:*
>
> *"Lots of photos together with the sponsor and his children and holidays together. Were travelling together as a couple when RLTR in Feb last year and in an interview with sponsor he said they had plans to marry. Satisfied a genuine relationship of about four plus years from pictures and supporting docs from family and friends and not just to regularise the stay."*

21. It is also clear on 13th March 2018 that there was "*requested verification check on passport (approved by ECM NF)*".

22. It appeared that, knowing the facts of the case, it was intended that a visa should be granted. There was no explanation as to the alteration in the thinking of the Entry Clearance Officer between 9th March 2018 and the date of the refusal on 10th April 2018. It is difficult thus to discern the *aggravating* features.

23. As set out in **PS**, 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. That is precisely what the appellant did.

24. The guidance published for Home Office staff on 11th January 2018 in relation to the grounds for refusal of paragraph 320(11) of the Rules (when the person has previously contrived in a significant way to frustrate the intention of the Rules) states as follows:

> *"This relates to general grounds for refusal under paragraph 320(11) of the rules when the person has previously contrived in a significant way to frustrate the intentions of the rules. For visitors this relates to paragraph V 3.8 of Appendix V.*
>
> *When an applicant has previously breached the Immigration Rules and/or received services or support to which they were not entitled you must consider refusing the application. When these circumstances are also aggravated by other actions with the intention to deliberately frustrate the rules, you must refuse entry clearance under paragraph 320(11).*
>
> *This means when an applicant has done one or more of the following:*
>
> - *been an illegal entrant*
> - *overstayed*

- *breached a condition attached to their leave*
- *used deception in a previous application*
- *obtaining:*
    - *asylum benefits*
    - *state benefits*
    - *housing benefits*
    - *tax credits*
    - *employment*
    - *goods or services*
    - *National Health Service (NHS) care using an assumed identity or multiple identities or to which not entitled*

and there are aggravating circumstances, such as:

- *absconding*
- *not meeting temporary admission/reporting restrictions or bail conditions*
- *failing to meet the terms of removal directions after port refusal of leave to enter or illegal entry*
- *previous working in breach on visitor conditions within short time of arrival in UK (indicating a deliberate intention to work)*
- *receiving benefits, goods or services when not entitled*
- *using an assumed identity or multiple identities*
- *getting NHS care to which they are not entitled*
- *attempting to prevent removal from the UK, arrest or detention by Home Office or police*
- *escaping from Home Office detention*
- *switching nationality*
- *troublesome or frivolous applications*
- *not meeting the terms of the re-documentation process*
- *taking part, attempting to take part, or facilitating, in a sham marriage or marriage of convenience*
- *harbouring an immigration offender*
- *people smuggling or helping in people smuggling*

This is not a complete list of offences. You must consider all cases on their merits and take into account family life in the UK and, if the applicant is a child, the level of responsibility for any breach. Before you decide to refuse under this paragraph, you must refer your decision to an entry clearance manager (ECM) to be authorised."

25. The guidance also specifically states:

> *"Paragraph 320(11)*
>
> *If an applicant has previously breached the immigration laws but is applying in a category which is exempt from paragraph 320(7B) you must consider whether it is appropriate to refuse the application under paragraph 320(11)."*

26. In her entry clearance application, which generated the decision under appeal her identity had been resolved (the Entry Clearance Manager did not focus on this provision) and as at the date of hearing before me the issue under paragraph 320(3) had been resolved. It was not therefore an aggravating circumstance in this regard.

27. Using deception in a previous application and an alias identity was identified but there appeared to be no explanation for the change of thinking of the Entry Clearance Officer and the GCID notes intimated that entry clearance would be granted. Secondly, there is an injunction in the guidance to take into account family circumstances. It would appear the immigration officials were unaware of the extent of the family circumstances of the appellant and sponsor – that is with regard the children and their best interests.

28. Under any Article 8 determination the Section 55 duty in relation to the children's best interests should be taken into account. Mr H is the father of two children aged 9 and 13 years with whom he has regular and ongoing contact. He has the children every other weekend, every Wednesday and for a number of weeks during the year during the holiday time. **T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483** confirms that Section 55 applies to children who are in the UK when an entry clearance decision is made. Clearly, the appellant's spouse is the father of two children whose welfare would be affected by the determination of his spouse's location, albeit that a state has a greater margin of appreciation in determining entry clearance cases. The best interests of the children are for the retention of the status quo in terms of the regular contact with their father.

29. I accept the oral evidence of the sponsor, who confirmed consistently that he was unable to leave the United Kingdom because of his relationship with his children. From the documentary evidence presented to me including the photographic evidence and the oral testimony of the sponsor they clearly have a very close bond and he provides substantial maintenance, in the sum of over £600 per month. It is inherently likely that his removal to Ukraine would affect that contribution and thus be contrary to the children's interests. The separation between the sponsor and his ex-wife was not amicable but they now cooperate and co-parent with a degree of cordiality although relations apparently became strained and deteriorated when the UK Borders Enforcement Team raided the sponsor's home, while his children were staying with him, in search of the appellant, who was, as they should have known, no longer in the UK.

30. It is clear therefore that the sponsor has family life with his two children and he works here; he cannot realistically relocate to Ukraine without very significant obstacles. No doubt the children have already had enough upheaval in their lives and there was also evidence that they had had a good relationship with the appellant when she was in the United Kingdom. His removal would seriously undermine the relationship between the father and the children.

31. As the sponsor stated, he had been unable to afford to go to Ukraine to visit his wife for many months. No doubt that is a result of both financial pressures and the need to care for his children on a very regular basis. There are long term and insurmountable obstacles to the sponsor moving to the Ukraine to be with his wife.

32. I also note from the entry clearance refusal that the appellant met the Rules under EC-P.1.1 of Appendix FM, the criteria of suitability under Section S-EC of Appendix FM, the eligibility requirements of E-ECP.2.1 to 2.10, the financial requirements of E-ECP.3.1 to 3.4 and the eligibility English language requirement of E-ECP.4.1 to 4.2. That is in the appellant's favour.

33. I have applied Section 117B of the Nationality, Immigration and Asylum Act, noting that the maintenance of effective immigration controls is in the public interest. It is clear that the appellant has satisfied 117B (2) and (3). I can accept that under Section 117B (4) little weight should be given to a relationship when it is established by a person at a time when that person is in the UK unlawfully. As set out, however, by Lord Wilson in **Rhuppiah v Secretary of State [2018] UKSC 58**, at paragraph 49**, Section** 117 B is not intended to be a strait jacket,

> '*the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility*'.

34. I realise that the appellant was in the UK and developed her relationship during a period when she was here unlawfully but, the appellant and her sponsor married in the Ukraine where she was lawfully residing in the Ukraine. Thus I conclude that the relationship was in fact formally contracted with a qualifying partner, which Mr H is because he is a British citizen, when the appellant was outside the UK and thus weight can be attached to the relationship.

35. I find overall that because of the nature of the relationship between the sponsor and his children there would be insurmountable obstacles to the sponsor leaving the United Kingdom and the prospect of a very long-term and without definition separation between the husband and wife. The sponsor's visits to Ukraine to see his wife are impeded owing to his financial circumstances but more importantly his commitments here. I conclude that there would be unjustifiably harsh consequences for the sponsor and the appellant should they be unable to be together for the foreseeable future.

36. On the negative side for the appellant, I understand that she has breached the UK Immigration Rules in a serious manner by the previous entry and use of a Hungarian passport to which she was not entitled and obtained unlawfully, but further to **Huang [2007] UKHL 11**, I am entirely unpersuaded that the response to the entry clearance application in 2017 over two years ago, which would appear to be an extended ban on entry, is in all the circumstances proportionate and does not have unjustifiably harsh consequences.

37. In these particular circumstances, having explored the issues with regard the family life of the sponsor and the children, which were only very briefly considered by the Entry Clearance Officer, I find that the refusal will have unjustifiably harsh consequences further to **R (Agyarko) [2017] UKSC 11**.

38. I therefore allow the appeal of AH.

Notice of Decision

Appeal Allowed.

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 because there are minors involved. 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 *Helen Rimington* Date 9th December 2019

Upper Tribunal Judge Rimington

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 no fee award owing to the complexity of the matter.

Signed *Helen Rimington* Date 9th December 2019

Upper Tribunal Judge Rimington