Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14021/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 January 2019	**On 31 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Appellant

and

MR KINGSLEY PHILLIPS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Ms S Ferguson of Counsel, instructed by Freemans Solicitors

DECISION AND REASONS

1. The appellant in this case is the Entry Clearance Officer, the respondent is Mr Phillips. However for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal, where the appellant was Mr Phillips.

2. Mr Phillips was born on 5 February 1982 and is a male citizen of Nigeria. He appealed against the decision of the Entry Clearance Officer, dated 3 October 2017, to refuse his application for entry clearance to join his spouse, the sponsor, [HB], whom he had married on 27 December 2012. In a decision promulgated on 23 October 2018,

Judge of the First-tier Tribunal P S Aujla allowed the appellant's appeal on human rights grounds, Article 8.

3. The Entry Clearance Officer appeals with permission. Mr Jarvis resiled from a number of the grounds. However the grounds he continued to rely on were as follows:

Ground 1

The judge failed to consider all the relevant additional factors in the balancing exercise, namely the appellant's active attempt to frustrate arrest or detention by UK Visas and Immigration or police, in that the appellant had claimed he was a British citizen when arrested by the police. The judge did not mention this in the assessment and therefore the assessment was flawed;

Ground 2

It was argued that the judge erred, at [27] in reliance of **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)** in that the judge wrongly placed the appellant in the category of an immigration offender who voluntarily left the United Kingdom in order to regularise his stay, whereas the appellant had been removed from the UK at public expense.

Error of Law Discussion and Conclusions

Ground 1

4. Mr Jarvis referred to the fact that a supplementary bundle had been produced at the First-tier Tribunal hearing which indicated that the appellant had told the police on one of the occasions he was arrested, that he was a British citizen, and this is relevant to the consideration of aggravating factors. The judge had not considered this. Mr Jarvis argued that lying to the police about identity, as well as nationality, is an aggravating factor. It was Mr Jarvis's submission that the losing party did not understand why they had lost, including it was not clear why for example driving without insurance was not considered to be an aggravating factor.

5. Ms Ferguson noted that the judge had correctly accepted that paragraph 320(3) was not made out and this had not been challenged by the Entry Clearance Officer. Although Ms Ferguson considered the judge had perhaps not specifically addressed in writing each factor he had made overall findings and correctly directed himself, at [30] to [31], to the balancing exercise and ultimately reached a decision on proportionality open to him. It was her submission that it was open to the judge to say that the factors were not aggravating for the reasons given. I agree.

6. In what was a careful decision the judge sets out the background to the appeal and the respondent's case, that the appellant had failed to produce a valid national passport or other document establishing identity and nationality (now not in issue) and that taking the appellant's immigration history into account there were aggravating factors. The judge heard oral evidence and specifically noted at [9] that he had taken into account the respondent's explanatory statement, the respondent's additional bundle RB2, which included a screenshot of his record at the Home Office

(this contains the recording of the appellant being encountered on 7 April 2011 when he was arrested during a joint operation and "had initially stated he was a Brit-Cit but then admitted to being a Nigerian national").

7. The judge went on to note the documents produced on behalf of the appellant. The judge properly directed himself (and there has been no challenge to those directions) in relation to the correct approach in entry clearance cases and that the burden was on the appellant initially to establish that the decision amounted to an interference of private/family life and then for the respondent to show that such decision was justified.

8. The judge also addressed Sections 117 of the Nationality, Immigration and Asylum Act 2002. The judge again correctly directed himself that the burden of proof was on the respondent in relation to the refusals on the general grounds under paragraphs 320(3) and 320(11) of the Immigration Rules. Although the judge incorrectly directed himself as to the relevant point of time to be considered, no point was taken on this and none arises as nothing turns on that date.

9. The judge confirmed that the appellant had applied on 2 August 2017 for entry clearance to join his spouse. He stated on the application that his name was Kingsley Phillips born on 5 February 1982 and he had previously been known by the name Kingsley Phillips Nwosu. The documents from his previous application for entry clearance identified him with his former name with a different date of birth, 5 February 1983. The appellant stated that he had changed his name on 17 December 2012. Within the last ten years he had made an application to remain in the United Kingdom, on 11 September 2012. He was removed from the United Kingdom on 14 September 2012 as an overstayer.

10. Whilst in the United Kingdom he was convicted of driving a motor vehicle without insurance in 2010. The appellant was married to the sponsor, with no children. The sponsor had first arrived in the United Kingdom on 4 August 1989 and also held Sierra Leonean nationality, as well as British nationality. The couple had married in Nigeria on 27 December 2012.

11. Whilst the respondent had accepted that the appellant satisfied the requirements of Appendix FM the application was refused on the general grounds for refusal. The judge records, at [16] to [18], the reasons that the respondent had given for maintaining the refusal under 320(3) and 320(11) and the judge noted the encounters of the appellant by the police in 2006, 2007, 2008 (on two occasions) and 2009 and the name he gave, Kingsley Dwayne Phillips born on 5 February 1980. In 2012 at the time of removal he provided the name Kingsley Philips Nwosu born on 5 February 1983. The respondent was satisfied that the appellant had remained illegally in the United Kingdom after the expiry of his visit visa and during that period different identities had been used. He now stated that his name was Kingsley Phillips born on 5 February 1982 and the respondent was satisfied that this conduct was consistent with what is described as having contrived in a significant way to frustrate the intentions of the Immigration Rules and the application was therefore refused under paragraph 320(11).

12. The judge further recorded the respondent's submissions at [20] which expanded on the refusal letter and included the submission that the appellant had even claimed to be a British citizen on occasion and had been arrested on various occasions and given false information, in addition to having overstayed for seven years after coming in 2005 on a multi-entry visa. It was the presenting officer's submission that the appellant's conduct was intentional, in order to frustrate the intentions of the Immigration Rules.

13. In dealing with paragraph 320(11) (which Mr Jarvis properly accepted, contrary to the initial grounds of appeal, the judge was entitled to take into consideration in conducting any Article 8 balance) the judge set out the respondent's guidance dated 14 November 2013 in relation to 320(11) and what are aggravating circumstances.

14. Paragraph 320(11) provides as follows:

> "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 redocumentation process'".

15. It was not disputed that the appellant was an overstayer and the judge took this into consideration. The judge, in addition to setting out the respondent's guidance, also set out the guidance in the headnote from **PS paragraph 320(11) discretion care needed India [2010] UKUT 440 (IAC)** (which I address in ground 2 below).

16. The judge correctly directed himself, and again there was no challenge to that direction, at [28] that the refusal of the appellant's case under paragraph 320(11) could only be upheld if there were aggravating circumstances accompanying the appellant's overstaying in the United Kingdom.

17. The judge correctly directed himself that the fact the appellant had used various identities was an aggravating circumstance and this is one of the non-exhaustive factors set out in the guidance cited by the judge at [26]. Although Mr Jarvis criticised the judge's conclusions in relation to the appellant having been convicted of the offence of driving without insurance (and I note that this was not in the grounds on

which permission was granted) the judge gave adequate reasons for finding that it did not amount to such an aggravating factor that should contribute towards the refusal of the application; I note that such an offence is not contained in the list of possible aggravating factors (although again I accept it is not exhaustive).

18. The findings of the judge were available to him. Although much was made of the fact that the judge states, at the end of [29], that "no evidence was presented on behalf of the respondent for any aggravating factors apart from those matters listed in the decision", whereas evidence was presented at the Tribunal of the fact that the appellant had claimed to be British, the judge was well aware of this, having referred to it at [20] of the decision. It is clear from a fair reading of the decision that this is contained in the judge's overall consideration of the aggravating factor of using different identities which was the context in which the appellant stated, initially, that he was British.

19. Mr Jarvis did not dispute that although the appellant initially stated he was British it is recorded in the Home Office screenshot information database, when he was stopped in April 2011, that the appellant then admitted to being a Nigerian national. It is clear that this must have also been at the time he was stopped because the record goes on to cite a further interview later the same day. It is difficult to see how this therefore could come within the definition under the guidance of "switching of nationality". There was no material error in the judge not specifically citing this issue. Ground 1 is not made out.

Ground 2

20. The grounds criticise the judge's approach to **PS paragraph 320(11) discretion care needed India [2010] UKUT 440 (IAC)** on the basis that the judge wrongly placed the appellant in a category of an immigration offender who voluntarily left the UK in order to regularise his stay, whereas the appellant is not such an individual, having been removed. However that is not what the judge did. I am satisfied that this ground is no more than a disagreement with the judge's reasoned findings which were evidence based. The judge was entitled to rely on the guidance in **PS** which provides as follows in the head note:

> "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".

21. It is entirely incorrect to state that the judge got this wrong because the appellant was removed, rather than making a voluntary departure (and I note in passing that Ms Ferguson indicated that the appellant was intending to make a voluntary departure but was removed prior to he had the opportunity to do so, although there are no findings or evidence in this regard before the First-tier Tribunal); what **PS** is saying, is that decision makers must have regard to the general public interest in encouraging those unlawfully here to leave. It is not saying that it is only in cases

where an individual has left voluntarily that such care must be taken. Rather that such care in assessing aggravating circumstances must be taken in all such cases because of the general public interest in encouraging all of those unlawfully in the United Kingdom to leave and seek to regularise their status. This is illuminated by what was said in the body of the decision at 14:

> "…
>
> If the aggravating circumstances are not truly aggravating there is in this context a serious risk that those in the position of Mr S 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".

22. There is nothing in that decision and more importantly, the principle, which cannot be applied to the appellant, notwithstanding that he was removed, rather than making a voluntary departure, for whatever reason.

23. Even if that were not the case I am not satisfied that any error in the judge's balancing exercise would be disclosed in the circumstances of the facts of the appellant's case, including that he had been outside the UK for more than six years trying to gain entry clearance to join his wife, a factor that the judge was aware of, and that he had been trying to regularise his status. This is not a case where the judge did not adequately assess the public interest but properly directed himself and came to reasoned conclusions.

24. I do not agree with Mr Jarvis that the Entry Clearance Officer does not know why they have lost; on the contrary the judge gave clear reasons that the interests of the appellant and the sponsor in this case outweigh the public interest in immigration control and therefore the maintenance of the discretionary refusal ground was disproportionate and unsustainable.

25. The decision of the First-tier Tribunal does not disclose an error of law and shall stand. The appeal by the Entry Clearance Officer is dismissed.

No anonymity direction was sought or is made.

Signed Date: 24 January 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I maintain the decision of the First-tier Tribunal to make no fee award.

Signed Date: 24 January 2019

Deputy Upper Tribunal Judge Hutchinson