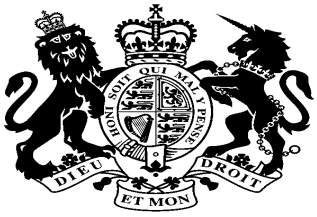

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06221/2019

THE IMMIGRATION ACTS

Heard remotely as a fully audio hearing on 11 May 2020

Decision Promulgated On 19 May 2020

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ZEESHAN ALI
(Anonymity direction not made)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr A Pipe, instructed by Visa Inn Immigration Specialists
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be (time) on (day) (date) day of (Month) 2020.

DECISION AND REASONS

1. By a decision dated 17 March 2020 the Upper Tribunal set aside the determination of the First-Tier Tribunal on the basis of an accepted error of law. Directions were given for a remote rehearing of the matter and the Upper Tribunal is grateful to the parties for the flexibility of approach and assistance

rendered in enabling this matter to proceed as a remote audio hearing. In particular for the manner in which the advocates have cooperated with each other and with the Tribunal to facilitate the exchange of evidence and pleadings in an accessible manner ensuring the hearing was able to proceed.

Background

2. The Upper Tribunal found that the First-tier Tribunal's findings relating to the nationality, date of birth, immigration history, family circumstances and health-related issues concerning the appellant's wife shall be preserved findings.
3. It was also recorded by the First-Tier Tribunal that in light of further evidence provided by the appellant it was no longer in dispute that the financial requirements of the Immigration Rules could be met. This too is a preserved finding.
4. The two issues that remain at large relate to paragraphs 320(11) and S–EC.1.5 of the Immigration Rules.
5. The appellant was born in Pakistan on 18 September 1974. He initially entered the United Kingdom lawfully as a visitor in 2002. The appellant overstayed and applied for further leave to remain as a work permit holder on 8 December 2003 which was refused.
6. The appellant met his wife, [Ms K], in 2009. She had two children from an earlier marriage and was separated but made it clear she did not want a relationship for the sake of her children. At this time, the appellant was in a short-term relationship with a Czech national.
7. In 2011 the appellant was introduced to [Ms K]'s children. On 4 September 2011 they undertook an Islamic marriage after which the appellant moved in with his new wife and her children. [Ms K] was granted a divorce from her first husband on 7 June 2012 in the English courts.
8. The appellant states he became very close to the children, became involved in their lives, including helping them with their schoolwork.
9. On 12 March 2014, the appellant and [Ms K] married under UK law.
10. The appellant's wife suffers health issues, detailed below, and the appellant claims to have provided support and help to her as a result. The appellant's wife has, however, continued to work at Tesco. It is claimed they have been a supportive employer providing light duties and limited hours which she is able to cope with.
11. The appellant states that whilst in the United Kingdom he applied on two occasions for permission to remain on the basis of the marriage. The applications were refused as the appellant did not have status to remain, even though the marriage was accepted as being genuine.
12. The appellant states he realised he should have left the United Kingdom to make an application to return which was suggested in an earlier refusal and upholding of that refusal on appeal, but he did not for which he apologised.
13. On 1 September 2018, the appellant was arrested at a hotel in London accused of working without permission. The appellant claims he decided he did not wish to fight to remain anymore and therefore arranged to pay for his own

ticket and requested voluntary departure back to Pakistan from where he made an application for entry clearance to return to the United Kingdom.

14. The appellant states that since being in Pakistan he speaks every day to his wife and stepchildren.
15. The appellant's wife confirms his history of the relationship adding in her own statement that as a result of a car accident in 2009 she was injured and in 2011 began to suffer severe back pain. An MRI scan later diagnosed bulging discs that were causing the pain, but she is unable to have surgery as a result of potential complications. In 2007 Carpel Tunnel and De Quervains Tenosynovitis was diagnosed making work difficult. The appellant's wife has more recently been diagnosed with fibromyalgia.
16. It is stated as a result of the difficulties the appellant has been "a huge part" of his wife's life and supported her through the health problems as well as being a father to her son and daughter.
17. [Ms K] states she realised her husband did not have status in the UK when she met him although they tried to regularise his status having made two applications based on marriage, which were unsuccessful.
18. Statements have also been provided by Mr [SK], the adult son of [Ms K], confirming the chronology of the relationship between the appellant and his mother. It is said the appellant 'looked out' for the whole family, cooking for them to make sure they had food and supporting them in their education especially at times when their mother was bedbound due to her chronic back problems.
19. [SK] confirms the financial support he provides for the family as well as the more practical support given, adding at [15 – 16] of his witness statement of 3 October 2019:

> "15. When Zeeshan came into our life we were rewarded with a father and a close friend due to not having a good relationship with my biological father.
>
> 16. It has been over a year now since he has been in Pakistan and life isn't the same without him."

20. Witness statements have also been provided by [FK], the adult daughter of [Ms K], confirming the chronology and the support she received from the appellant in relation to practical care and a specific connection with her education, including at undergraduate level. The statement notes her mother has been very happy with the appellant and that she wishes that he could return.
21. A further statement from [HK], the wife of [SK], has also been provided dated 3 October 2019. This confirms that all the family live in the same property in High Wycombe where they contribute towards the family expenses. This witness is employed as a Higher Executive Officer in the Department for Business, Energy and Industrial Strategy in London.
22. [HK] speaks of the support and assistance provided to her by the appellant even before she arrived in the United Kingdom, when he stayed in touch with her to prepare her for the culture she was about to face. The appellant provided support during the time she moved to and settled in the United Kingdom, in connection with her own education achievements, and subsequent application

for securing employment with the civil service under their graduate programme.

23. At [9 – 15] this witness writes:

> "9. In the two years we spent together, we have had dinner together every single night as a family, have travelled a lot - been to Wales, Cornwall and Scotland together, have celebrated birthdays and anniversaries, attended family occasions together like any other normal family does and therefore it cannot be denied that he is an important part of not only our family but my life.
>
> 10. I have been deeply involved with his immigration case since 2016 as I do not want to lose him as a father figure and someone I can always meet up to discuss any issues and rely upon.
>
> 11. I have not only travelled to the detention centre every other day to visit him after work but I have also been to the legal representatives dealing with his case in the last 3 years and I have been to his court hearing last year with him which shows how much he means to me.
>
> 12. I also visited Pakistan in August to see him.
>
> 13. His voluntary departure has massively impacted me emotionally and I am still struggling to cope with it.
>
> 14. I try to stay in touch with him as much as I can and make sure I share my life details with him.
>
> 15. I wish and hope that he will be with us soon so we can resume living like a complete family."

24. The application for entry clearance made on 9 December 2018, following the appellant's voluntary departure from the United Kingdom, is under Appendix FM of the Immigration Rules on the basis of his family life with his partner [Ms K] and stepchildren. This was refused on 22 February 2019.

25. Pursuant to paragraph 320(11) the decision maker writes:

> "You have previously breached the Immigration Rules by overstaying for a period in excess of 14 years. I am also satisfied that there are aggravating circumstances in your case, in that you were encountered taking unauthorised employment. Furthermore, you did not make any attempt to regularise your stay until 2013.
>
> I am satisfied that your actions demonstrate a flagrant disregard for the Immigration Rules spanning over a decade. I am therefore satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules. I am therefore refusing your application in accordance with paragraph 320(11) of the Immigration Rules. This decision has been authorised by an Entry Clearance Manager. In reaching this decision, I confirm that I have exercised my discretion but for the reasons outlined above I am not prepared to exercise discretion in your favour."

26. In relation to the suitability aspects the decision maker writes:

> "Under paragraph EC – P.1.1.(c) your application falls for refusal on grounds of suitability under Section S-EC of Appendix FM.
>
> The Immigration Rules state:

> S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

27. The reason it is said S–EC.1.5. is applicable is for the same reasons it is said paragraph 320(11) is engaged.
28. As noted above, the refusal pursuant to the Eligibility financial requirements is no longer an issue. Eligibility in relation to the English language requirement is also met.
29. In relation to whether exceptional circumstances exist the decision maker writes:

> "We have considered, under paragraphs GEN.3.1. and GEN.3.2 of Appendix FM as applicable, whether there are exceptional circumstances in your case which could or would render refusal a breach of article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for you or your family. In doing so we have taken into account, under paragraph GEN.3.3 of Appendix FM, the best interests of any relevant child as a primary consideration.
>
> You have provided no information or evidence to establish that there are any exceptional circumstances in your case."

The written submissions

30. In his skeleton argument prepared for the hearing before the First-Tier Tribunal by Mr Pipe he confirms the respondent had conceded the suitability relationship requirement and that the appellant had shown he can satisfy the requirements of the Immigration Rules.
31. It was submitted the appellant had not contrived in a significant way to frustrate the intention of the Immigration Rules and that his exclusion was not conducive to the public good.
32. In her written submission to the Upper Tribunal Mrs Aboni writes:

> "It is submitted that the appellant's application fell for consideration under Para 320(11) as he had previously remained in the UK as an overstayer and had worked in the UK without ever being given permission to do so.
>
> The Respondent submits that the ECO considered the appellant's circumstances and whether there were aggravating factors which justified a refusal under 320(11) in line with the guidance and the decision was upheld by the ECM.
>
> The Respondent submits that the list of aggravating circumstances is not exhaustive and that the ECO was justified in refusing the application under Para 320(11).
>
> It is submitted that the appellant was not merely an overstayer but remained in the UK for approximately 14 years without Leave, following the refusal of his application for Leave to Remain on the basis of work permit employment in 2004. This application was refused with no right of appeal, however the appellant remained in the UK in full knowledge of the fact that he was unlawfully in the UK. He failed to make any attempt to regularise his status until 2013 and made 2 unsuccessful applications for LTR on Art 8 grounds on 15 November 2013 and 4 April 2014. He than again remained unlawfully in the UK until 2015, submitting a Human Rights claim on 21 October 2015 after being served a removal decision

on 18 May 2015. This application was refused and he became Appeal Rights Exhausted on 15 September 2017.

He then again remained unlawfully in the UK until he finally made a voluntary departure on 21 September 2018. Although it is claimed that the appellant considered returning to Pakistan to seek Entry Clearance, he made no attempt to do so prior to his arrest on 1 September 2018 and has not demonstrated that he had any intention of leaving the UK had he not been arrested.

Although it is claimed that the appellant made no preparations to leave the UK because of his wife's ill-health, it is submitted that her health was not sufficiently serious to prevent his departure. Although it is accepted that she suffers from a number of medical conditions, she was able to undertake employment and had the support of her children and daughter-in-law.

The respondent submits that the appellant's flagrant disregard for the Immigration Rules spanning over a decade and persistence in remaining unlawfully in the UK does represent sufficiently aggravating circumstances to reach a conclusion that he previously contrived in a significant way to frustrate the intentions of the Immigration Rules.

The Tribunal is therefore invited to uphold the decision to refuse Entry Clearance under Para 320(11).

The Respondent submits that the decision to refuse Entry Clearance is proportionate and that the appellant has not established that it has unjustifiably harsh consequences for him or his wife and her family.

The Appellant and Sponsor religiously married in 2011 and underwent a civil marriage in 2014. It is submitted that both parties were aware that the appellant had no lawful status in the UK and that they may not be permitted to continue their family life together in the UK.

The appellant has not established that there are very significant obstacles to his wife joining him in Pakistan. She was born and spent her formative years in Pakistan, is familiar with the culture and has maintained family ties there, visiting Pakistan on a number of occasions and staying with her parents when she visited the appellant.

At the time of the FTT hearing it was claimed that the appellant was living with his parents, who did not accept the sponsor. It is now claimed that he lives with a friend in overcrowded and unsuitable circumstances, however the appellant has provided no satisfactory evidence of his current circumstances or failed to establish why he is unable to gain employment in Pakistan to support himself and his wife, relocating to another area if there are problems with his family. The appellant's son and daughter-in-law could also continue to provide financial support as they have done in the past.

Although it is accepted that the sponsor suffers from a number of medical conditions she would have the support of her husband and she has not established that she would be unable to access any medical treatment or support that she requires. The sponsor's mental health problems/depression are attributed to her pain and exacerbated by the separation from her husband but it is open to her to reunite with her husband in Pakistan.

CONCLUSION

The Tribunal is invited to find that refusal of Entry Clearance under Para 320(11) is justified and that there are no sufficiently compelling circumstances which outweigh the public interest.

The Tribunal is therefore invited to dismiss the appeal.

33. On behalf of the appellant Mr Pipe, in his skeleton argument for the Upper Tribunal, writes:

SKELETON ARGUMENT

1. **This skeleton is prepared following the Directions (T) of UTJ Hanson.**
2. **The decision of FTTJ Hobson was set aside by UTJ Hanson save for the preserved findings identified at §8(b) of his Error of Law Finding and Reasons dated 17th March 2020.**
3. This is an appeal against a decision dated 19th June 2019 refusing entry clearance to the Appellant as a partner (application date: 9th December 2018).
4. The ECM upheld the decision on 26th June 2019.
5. The application was refused under EC-P.1.1.(d) with reference to §320(11), S-EC.1.5 and E-ECP.3.1.
6. It was accepted by the Respondent, at the FTT hearing, that the financial requirements were met (§11). The relationship and English language requirements were already conceded in the refusal letter. **The Appellant therefore satisfies the substantive partner rules.**
7. The decision is a disproportionate breach of the Appellant's Article 8 private and family life rights. The substantive rules are met, the general/suitability grounds do not apply and there are, in any event, compelling circumstances.
8. In *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 (17 May 2018)* Sir Ernest Ryder, Senior President said at §34, ***'That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.'***
9. The Tribunal is referred to the representations, dated 19th December 2018 (pages A1-A5 bundle) and the grounds of appeal dated 29th March 2019.
10. The Appellant has not contrived in a significant way to frustrate the intentions of the rules (§320(11)) and his exclusion is not conducive to the public good (S-EC.1.5).
11. §320(11) states:

> *(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.

12. S.EC.1.5 states:

S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance

13. The burden of proof, in respect of the general grounds, is upon the Respondent: *JC (Part 9 HC395 - burden of proof) China [2007] UKAIT 00027.*

14. §320(11) is a discretionary provision: *Balajigari v The Secretary of State for the Home Department [2019] EWCA Civ 673 (16 April 2019*).

15. In relation to §320(11), the Tribunal is referred to *PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) (28 September 2010)*:

14. The Entry Clearance Officer, in making the decision of refusal, refers nowhere to the guidance under paragraph 320(11). It is therefore wholly unclear whether the Entry Clearance Officer has addressed his mind to the relevant question, namely whether in the circumstances of this case Mr S's breach of UK immigration law was sufficiently aggravating so as to justify the refusal. It seems to us that the Entry Clearance Officer should have specifically recognised that Mr S had voluntarily left the United Kingdom more than 12 months ago with a view to regularising his immigration status. There was no question but that the marriage was a genuine one. 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 counter-productive to the general purposes of the relevant rules and to the maintenance of a coherent system of immigration. 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. Furthermore, Mr S had made a claim under Article 8 which, standing alone, may not have been very strong. Nonetheless the family circumstances needed to be evaluated carefully in the balancing exercise to which we have referred.

15. The decision of the immigration judge in effect endorsed the approach of the Entry Clearance Officer to the application of paragraph 320(11), an approach that was not in accordance with law. Therefore his decision was vitiated by the same legal error, which amounts to a material error of law. Accordingly we set aside the decision of the immigration judge. He should have allowed the appeal on the basis that the decision of the Entry Clearance Officer was not in accordance with law. Therefore we remake the decision by allowing the appeal on this basis and remitting the matter to the primary

decision-maker, with a direction that Mr S's application be considered in accordance with this determination.

16. The Respondent has not followed the approach set out in *PS (India)*.

17. The Appellant has not contrived in a significant way to frustrate the intentions of the Rules. In any event the Respondent should have exercised her discretion differently.

18. The Appellant made a voluntary departure on 21st September 2018 in order to make the proper application. The Appellant had become Appeal Rights Exhausted on 15th September 2017 (see pages F23-F24 bundle).

19. At F6 bundle the Respondent suggested that the Appellant return and apply for entry clearance which is what he did.

20. At F7 bundle the Respondent stated, *'It is noted that you have been compliant with reporting and Home Office processes (e.g. attending interviews)'.*

21. The Appellant and Sponsor religiously married in 2011 and underwent a civil marriage in 2014.

22. The Sponsor is in ill-health and suffers from carpel tunnel syndrome, inflammation of the hands and fibromyalgia/chronic pain. The Sponsor also suffers from low mood and anxiety. The Sponsor needs the support of the Appellant and his presence would improve her mental and physical wellbeing. See pages E1-E9 bundle. The medical evidence states (see E5 bundle):

> *'[Ms] explained that she works around 20 hours a week as a customer assistant in Tesco where her colleagues are supportive. She explained that she would ideally like to work more as she enjoys it but her pain means she can only work this much. [Ms] feels exhausted and has so much pain when she finishes a shift that she has to take painkillers for the rest of the day when she gets home.'*

23. The Sponsor's health has worsened, her condition has been re-assessed and she now receives a higher PIP payment (pages S5-S6; previous PIP documentation at pages C1-C11 bundle). The Sponsor has been referred to Healthy Minds and is receiving counselling (pages S2-S4 bundle).

24. The Appellant lives with a friend in overcrowded conditions and the Sponsor could not reside with him in Pakistan.

25. The Sponsor left Pakistan in 2001 with her two children and was granted asylum in the United Kingdom (§2 page B3 bundle).

26. The Appellant has a very close relationship with the Sponsor's adult children. The Sponsor's children are in employment and her son and daughter in law are expecting a child in the near future.

27. The Respondent has not shown that §320(11) is made out and the S-EC.1.5 refusal is also flawed.

28. The requirements of the Immigration Rules are satisfied.

29. The matters cited above apply mutatis mutandis to the consideration of the claim outside of the rules.

30. In entry clearance Article 8 cases there is an obligation to promote family life rather than maintain the status quo: *Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) (6 March 2015)* and *Shamin Box [2002] UKIAT 02212.*

31. In *Quila & Anor, R (on the application of) v Secretary of State for the Home Department [2011] UKSC 45 (12 October 2011)* Lord Wilson said:

> *43. Having duly taken account of the decision in Abdulaziz pursuant to section 2 of the Human Rights Act 1998, we should in my view decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the ECtHR, in particular Boultif and Tuquabo-Tekle, are inconsistent with it. There is no "clear and consistent jurisprudence" of the ECtHR which our courts ought to follow: see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295 at para 26, per Lord Slynn. The court in Abdulaziz was in particular exercised by the fact that the asserted obligation was positive. Since then, however, the ECtHR has recognised that the often elusive distinction between positive and negative obligations should not, in this context, generate a different outcome. The area of engagement of article 8 - in this limited context - is, or should be, wider now. In that in Tuquabo-Tekle the state's refusal to admit the 15-year-old daughter of the mother, in circumstances in which they had not seen each other for seven years, represented an interference with respect for their family life, the refusals of the Secretary of State in the present case to allow the foreign spouses to reside in the UK with the British citizens with whom they had so recently entered into a consensual marriage must a fortiori represent such an interference. The only sensible enquiry can be into whether the refusals were justified.*

32. The rights of the Appellant's British wife and step-children weigh heavily in the balance and should be given detailed and anxious scrutiny by the Tribunal: *Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39 (25 June 2008).*

33. The appeal should be allowed on Article 8 grounds.

34. The Tribunal should make a full fee award.

The law

34. Paragraph 320(11) is a discretionary provision and states that applications 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."

35. In PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC) the Tribunal directed itself to the guidance on considering Entry Clearance applications under Para 320(11):

> *14. The Entry Clearance Officer, in making the decision of refusal, refers nowhere to the guidance under paragraph 320(11). It is therefore wholly unclear whether the Entry Clearance Officer has addressed his mind to the relevant question, namely whether in the circumstances of this case Mr S's breach of UK immigration law was sufficiently aggravating so as to justify the refusal. It seems to us that the Entry Clearance Officer should have specifically recognised that Mr S had voluntarily left the United Kingdom more than 12 months ago with a view to regularising his immigration status. There was no question but that the marriage was a genuine one. 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 counter-productive to the general purposes of the relevant rules and to the maintenance of a coherent system of immigration. 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. Furthermore, Mr S had made a claim under Article 8 which, standing alone, may not have been very strong. Nonetheless the family circumstances needed to be evaluated carefully in the balancing exercise to which we have referred.*

36. Home Office Guidance - General grounds for refusal - Section 2 of 5: Considering entry clearance, states:

> *This page contains guidance for entry clearance officers on what to consider when an applicant for entry clearance has previously breached the Immigration Rules and there are aggravating circumstances.*
>
> *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…*
>
> *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.

Discussion

37. There is no dispute between the parties as to the relevant legal provisions or that all cases such as this 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 the level of responsibility for the breach. It is accepted there is an overlap between assessing the discretionary element of paragraph 320(11) and article 8 ECHR in relation to the proportionality of the decision.
38. It is not disputed the appellant remained in the UK for a considerable number of years as an overstayer once his leave to enter expired. This element of the 320(11) test is met. The second element requires it to be established that there are other aggravating circumstances. This is an additional element the wording

of which shows, even if the overstaying is made out as it is in this case, that is not sufficient to warrant a 320(11) refusal, per se.

39. It is accepted the respondent's guidance set out above is not exhaustive, but the refusal letter only refers to the aggravating circumstance being satisfied as a result of the appellant being encountered undertaking unauthorised employment. No other elements are relied upon by the decision maker.

40. The appellant's arrest at a hotel in London working illegally is not disputed by the appellant in his witness statement and nor did he challenge the assertion in any proceedings before he left the UK. For the purposes of this hearing the Tribunal accepts the respondent's assertion the appellant has worked as claimed. The Reasons for Refusal letter reads "On 21 September 2018 you were apprehended by the Enforcement Team as they visited the Europa Hotel in London where you were working". In the Grounds of Appeal to the First-tier Tribunal it is written:

> "We would submit that while the appellant has a poor immigration history having remained as a overstayer in the United Kingdom, and also having been encountered working illegally, the appellant nevertheless made an immediate voluntary departure from the UK as soon as encountered (which he paid the costs for) in order to regularise his stay, and further has no criminal record."

in which there is no denial of the fact the appellant was working illegally. What is not made out on the evidence, however, is that the appellants working was in breach of visitor conditions undertaken within short time of arrival in UK, indicating a deliberate intention to work, and disingenuous visit visa application, which is not alleged in the refusal.

41. It is not made out that the applications made by the appellant on 8 December 2003, 15 November 2013, 4 April 2014 or 21 October 2015 were frivolous, on the basis of that term being defined as applications with no serious purpose, as they were to enable the appellant to regularise his status based upon, for example, the existence of the family unit.

42. It was accepted by the respondent in the refusal of 12 January 2016 that the appellant had been compliant with reporting and Home Office processes.

43. Even though the appellant overstayed and worked illegally there is still the need to properly consider the proportionality of the decision as part of the correct exercise of discretion, as these are not matters that lead to a mandatory refusal. As noted above, it was accepted by Mr Pipe there is an overlap between the discretionary element and the proportionality of the decision, a fact recognised in the respondent's guidance where the need to consider all relevant aspects is recognised. It is into this element that the decision in PS arises and therefore remains relevant today.

44. The most effective way in which to consider such issues is that set out in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 which found that in a case where removal is resisted in reliance on article 8, these questions are likely to be:

    1. Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

2. If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
3. If so, is such interference in accordance with the law?
4. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
5. If so, is such interference proportionate to the legitimate public end sought to be achieved?

45. Although this is not a removal case the questions focus the mind on relevant issues.
46. It is not disputed the appellant enjoys family life with his wife, and she with him, and that the relationships with the other family members will form part of his and their private lives. The appellant also had a private life based upon his home and friendships/associates and connections in the UK. The quality of these ties increased in quality and duration as a result of the time the appellant spent in the UK. The issue in this appeal is the proportionality of the decision in relation to the discretionary element of paragraph 302(11) and Article 8 ECHR.
47. In a human rights appeal 117B of the NIAA 2002 reads:

> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

48. As noted above, it is not disputed the appellant has been in the UK unlawfully.
49. It is not disputed the appellant speaks good English and will not be a burden on the public purse whilst recognising that in Rhuppiah [2018] UKSC 58 it was found the subsection does not say that it is in the public interest that those who are able to speak English etc should remain in the UK. It says that it is in the public interest that those who seek to remain in the UK should speak English etc. Speaking English and being financially independent may add to the strength of private/family life but that is different from saying that where the factors exist there is a public interest in favour of the claim.
50. In relation to the weight to be given to the appellant's private life it was also held in Rhuppiah that Section 117A(2)(a), when read in conjunction with section 117B(5), indicated that although courts should have regard to the consideration that little weight should be given to private life established when immigration status was precarious, it was possible to override such guidance in exceptional cases where the private life had a special and compelling character. Such an interpretation was necessary to prevent section 117B(5) from being applied incompatibly with Article 8.
51. It is also accepted the issues that led to [Ms K] being recognised as a refugee in 2001 are no longer applicable and will not prevent her return to Pakistan to join her husband per se. Mrs Aboni in her submissions refer to the lack of evidence of the housing situation of the appellant in Pakistan and differing accounts of his current domestic arrangements, which has merit. Mr Pipe also confirmed [Ms K] had visited the appellant in Pakistan relatively recently.
52. Mrs Aboni submits that this indicates no insurmountable obstacles are made out to [Ms K] joining her husband in Pakistan where their family life may continue as a result of which there will be no breach of Article 8 on this basis. The term 'insurmountable obstacles' appears in the Immigration Rules in relation to Article 8 under Appendix FM. Exceptions to certain eligibility requirements for leave to remain as a partner or parent are to be found in EX.1 and EX.2, which are for applications for leave to remain only and has no application to an entry clearance application.
53. It is also stated there is no evidence [Ms K] will be unable to obtain medical treatment for her conditions in Pakistan and that if her mental health issues arise as a result of the appellant's absence this will be resolved as they will be together. This has not been shown not to be factually incorrect but has to be considered together with the strength of [Ms K]'s connection with the UK as she is now a British Citizen, the presence of her family, home and work in this country, right to access health and other services, and the human rights of all

the family members as per Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39.

54. There is also the positive obligation to be found in Article 8 ECHR but, as noted in SS (Congo) and Others [2015] EWCA Civ 387, Lord Justice Richards drew a distinction in entry clearance cases, on the one hand, involving someone outside the United Kingdom who applies to come here to take up or resume family life when family life was originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls and cases, on the other, where someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come here. In the latter cases, the relationship will have been formed under conditions of known precariousness and it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant LTE outside the Rules, although in MM (Lebanon) [2017] UKSC 10 the Supreme Court allowed the appeal of the appellant SS (from SS (Congo)) on the particular facts and, although it did not analyse the reasoning of the Court of Appeal, made the general comment that the issue is always whether the authorities have struck a fair balance between the individual and public interests (see paras 44 and 103 in particular).

55. Mr Pipe relies upon the decision in Shamin Box [2002] UKIAT 02212 in which the Tribunal said that in entry cases, Adjudicators should not treat the Article 8 question as "one of whether there had been an unjustified interference with the right to private and family life", but should consider whether there had been an unjustified lack of respect for private and family life; and that the focus should be on whether, in the light of the positive obligations on the UK to facilitate family reunion, there has been a failure to act in the particular circumstances of the case. Nonetheless, the Tribunal said that, in interference and lack of respect cases, similar principles applied. In conducting the necessary balancing exercise, it remains relevant that a State does not have a general obligation to respect an immigrant's choice of country of residence. It also remains relevant to consider whether there are insurmountable obstacles to the family enjoying family life elsewhere.

56. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) (McCloskey J) it was held that the decision in Shamin Box [2002] UKIAT 02212 is to be followed and that the obligation imposed by Article 8 is to promote the family life of those affected by the decision.

57. In Huang and Kashmiri v SSHD [2007] UKHL 11 the House of Lords said that there would in almost any case be certain general considerations to bear in mind concerning the desirability of maintaining a fair and effective system of immigration control. The giving of weight to such factors was not however "deference". It was the performance of the ordinary judicial task of weighing up the competing considerations on both sides and according appropriate weight to the judgement of a person with responsibility for a particular subject matter and with access to special sources of knowledge and advice.

58. The key question when assessing the proportionality of the decision is whether, balancing the severity of the measure's effects on the rights of the appellant and family against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.
59. In PS it was recognised 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. It is arguably correct that the decision maker in this case did not undertake this aspect of the discretionary exercise properly as there is no mention of how this factor has been incorporated into the exercise of discretion in the refusal at all. It was accepted, however, that the Tribunal has jurisdiction to consider this element for itself. I find the voluntary return as suggested by the respondent warrants greater weight being attributed to it than it has been given to date in light of the relevant public policy considerations identified in PS.
60. The appellant accepts his past conduct was wrong and Mrs Aboni puts up a strong case as to why the appeal should be dismissed. This has to be weighed against those factors in the appellants favour which include the fact he did leave the UK voluntarily at his own expense for the purposes of making a proper application to enter lawfully as a spouse, that there is an accepted genuine and subsisting family life with his spouse, that his spouse although having Pakistan heritage is now a British citizen who lives in a family unit in the UK with her son and his expectant wife, that it is accepted the appellant meets the Immigration Rules that would ordinarily entitle him to the grant of entry sought, and none section 117B factors have been shown to count against him. There is also the positive obligation in relation to family life referred to above. The genuine marriage and relationship with his wife and between her the wider family is demonstrated in the witness statements too.
61. This is a fact specific decision in which the competing elements have been balanced against each other. Having done so I find the scales just tip in favour of the appellant in that the exercise of discretion in this case should be in his favour to avoid incompatibility with Article 8 ECHR. I find it not made out that the appellant has contrived in a significant way to frustrate the intentions of the rules or it shown that his exclusion is conducive to the public good.
62. Mr Pipe sought the making of a fee order as the First-tier Tribunal refused to make such an order. In Singh (fee award: ancillary decision) [2013] UKUT 179 (IAC) the Tribunal held that the Upper Tribunal does not have jurisdiction to consider a challenge to a decision of a First-tier Tribunal Judge to make, or not to make, a fee award. A decision on a fee award is an ancillary decision within the meaning of the Appeals (Excluded decisions) Order 2009 and is therefore not appealable. On appeal in Sandip Singh v Secretary of State for the Home Department [2014] EWCA Civ 438 the Court of Appeal agreed. The Upper Tribunal therefore has no jurisdiction to consider a challenge to that part of the decision.

Decision

63. **I remake the decision as follows. This appeal is allowed.**

Anonymity.

64. 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 12 May 2020