

LSH

KR (Immigration Rules -
Discretion) Mauritius [2003]
UKIAT 00030

IMMIGRATION APPEAL TRIBUNAL

May 2003

notified:

Date of hearing: 8

Date Determination

28/05/2003

**Befo
re:**

**Mr J R A Fox (Chairman)
Mr P R Moulden
Mr S L Batiste**

Between

APPELLANT

and

ENTRY CLEARANCE OFFICER - PORT LOUIS

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant is a citizen of Mauritius. She has been given leave to appeal the determination of an Adjudicator (Miss J Grimmett) dismissing her appeal against the Respondent's decision of 23 April 2003 to refuse her entry clearance to the United Kingdom with a view to settlement as the spouse of a person present and settled in the United Kingdom. The refusal was under paragraph 320(11) of HC 395.
2. The hearing was listed for 10:00 am. By 10:25 am the Appellant's representatives had not arrived. The sponsor was present and told us that his wife's representatives were due to meet him at 9:30 am. We proceeded with the hearing in their absence. It is clear that proper notice of the hearing had been given. The representatives had sent the sponsor a copy of the

notice of hearing giving the time and place. Miss J Sigley, a Home Office Presenting Officer, represented the Respondent.

3. The Appellant has a poor immigration history. She entered the United Kingdom as a visitor with six-months leave on 25 July 1997 but remained until 8 June 2001 without leave, except for the initial period. She also worked in breach of the conditions attached to the grant of leave. She married the sponsor on 2 May 2001 and made a voluntary departure from the United Kingdom to Mauritius on 9 December 2001 in order to make a proper marriage settlement application from there.
4. The Respondent refused the application solely on the basis of paragraph 320 (11) of HC 395, which applies where there has been a “failure to observe the time limit or conditions attached to any grant of leave to enter or remain in the United Kingdom”. Paragraph 320 contains two sets of grounds. The first are those “on which entry clearance or leave to enter the United Kingdom is to be refused. The second, under which subparagraph (11) falls, are those “on which entry clearance or leave to enter the United Kingdom should normally be refused.”
6. It is clear that the first set of grounds are mandatory whilst the second, applicable in this case, are discretionary. Paragraph 21(b) of Part III of Schedule 4 to the Immigration and Asylum Act 1999 provides that an Adjudicator must allow an appeal if he considers that, if the decision or action involves the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently. In such circumstances an Adjudicator must consider the way in which the discretion has been exercised. The Adjudicator did little more than agree with the Respondent’s conclusion that this was a case which came within the category where entry clearance “should normally be refused”. Where the Respondent’s decision involved the exercise of discretion the Adjudicator should have considered all the material facts. The question of whether there has been a proper exercise of the discretion cannot be answered except against a background of clear findings as to all the material facts. It is clear that the Adjudicator did not do this. Although some material facts are mentioned the Adjudicator does not, for example, begin to consider the facts going to the heart of the underlying marriage application. She has in effect considered most of the factors which go against the Appellant and few of those which may tell in her favour. There is no mention of the fact that the Appellant made a voluntary return to Mauritius in order to make a proper marriage application. There is no assessment of the submission that the Appellant meets all the requirements for marriage settlement under the Immigration Rules. Whilst it is not likely that the Appellant will succeed under Article 8 if she fails under the Immigration Rules the

Adjudicator should have given more detailed consideration to the Article 8 grounds against the background of clear findings of fact.

6. Neither Mr Sigley nor the sponsor objected to remittal. The determination is flawed. When allow the appeal to the extent that it is remitted for hearing afresh before an Adjudicator other than Miss J Grimmett.

**P R Moulden
Vice President**