Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16228/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 January 2015	**On 5 May 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY
Between

ENTRY CLEARANCE OFFICER, ISLAMABAD

Appellant

and

MR KHURRAM ABBAS KHOKHAR
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Kandola
For the Respondent: Ms Currie

DECISION AND REASONS

1. Mr Khokhar is a citizen of Pakistan born in 1979. He appealed against a decision of the ECO Islamabad made on 12 March 2013 to refuse entry clearance for the purpose of settlement as the spouse of a person present and settled in the UK.

2. Although in the proceedings before me the ECO is the appellant, for convenience I keep the designations as they were before the First-tier Tribunal thus Mr Khokhar is the appellant and the ECO, the respondent.

3. The reasons for refusal were, in summary, that the appellant failed to meet the requirements of suitability for entry clearance under Appendix FM of the Immigration Rules more particularly on the grounds of his previous conviction which made his admission to the UK to be not conducive to the public good, and that he failed to meet the English language requirement.

4. He appealed.

5. Following a hearing at Hatton Cross on 3 September 2014 Judge of the First-tier Gillespie allowed the appeal.

6. The facts of the case do not appear to have been in dispute. They are summed up at paragraphs [3]ff of the determination. The appellant entered the UK in about 2005 as a visitor and overstayed. He acquired an Irish passport and used it to found a deception upon which he could remain in the UK. He used a false driving licence in order to drive here. He worked as a test analyst in information technology supporting himself by his earnings.

7. He first met the sponsor, Marium Khan, in the UK in early 2010. She is a British national present and settled here. She is in work. They formed an acquaintance which became more serious. At first she assumed he was lawfully in the UK but later that year learned his true circumstances.

8. In October 2010 he was convicted on two counts relating to documentary deception: the making of a false statement to procure a passport and the possession of improperly obtained identity documents. He was sentenced to terms of imprisonment of one year to be served concurrently. He did not seek to resist removal from the UK.

9. In October 2012 the sponsor went to Pakistan where she married the appellant. It was intended that the appellant should return to the UK as her spouse and that they live together with her parents until they are in a position to get their own home. She does not consider it reasonable that she should have to leave her family, job and settled life here in order to enjoy her married life with her husband. She cannot contemplate living in Pakistan where conditions and societal expectation would be intolerable to her. If forced to leave the UK they would seek to settle together in a Middle Eastern country.

10. In his analysis of S-EC.1.4 and 1.5 of Appendix FM the judge considered that the full text *'shows that it applies when "the exclusion of the applicant from the UK is conducive to the public good". The ordinary meaning of these words requires an enquiry into whether exclusion is conducive to the public good. There follow three instances, preceded by the causative expression "because" which are phrased as circumstances which might show that exclusion should be regarded as conducive to the public good.'* [9]

11. The judge continued (at [10]):

> *'The provision, read as a whole, is structured in such a way that the three instances following the "because" are all to be regarded as the possible instances, not as final and immutable instances, showing exclusion to be conducive for the purposes of this section. The provision cannot be understood as providing that the conviction and sentence such as the appellant suffered is necessarily sufficient of itself to render the provision applicable, without further enquiry as to whether or not exclusion would be conducive. In other words, a person might still have experienced the sentence that meets the definition in paragraph (b) but yet his exclusion might not be conducive to the public good. Were it the intention of the regulations that proof of the sentence alone brought into play the provision, then the words "the exclusion of the applicant from the UK is conducive to the public good because" would be otiose. An interpretation which treats words as superfluous or without meaning is to be avoided. A proper interpretation of this provision therefore shows that an enquiry into whether the exclusion of an applicant from the United Kingdom is in the public good is necessary. By this interpretation, S-EC.1.4 would read consistently with S-EC.1.5, which requires investigation as to whether exclusion is conducive on other less precisely defined grounds than by reference to previous conviction and sentence. It might be the intendment (sic) (although this is not expressed) that the specific definition of the conviction and sentence of the nature specified in (a), (b) and (c) of S-EC.1.4 has the effect that proof of any such conviction and sentence gives rise to a presumption that exclusion would be conducive, but even this would not eliminate the need for enquiry into the fact should an applicant seek to rebut the presumption by evidence that his exclusion is not conducive to the public good'.*

12. The judge went on (at [12]) to find the following proven: that in submitting to removal despite the establishment of a relationship with Ms Khan and her going to Pakistan to marry him and assist him to regularise his status, such, '*demonstrated a genuine intention to purge his previous evasion of immigration control and to adhere to law*'. Also there was no indication that he will reoffend or pose future risk to the public; he enjoys prospects of favourable settled circumstances in the UK; he has an established marriage relationship with a British national who has extensive and settled family connections here. Further, he is capable of supporting himself without recourse to public funds; his wife is also self-supporting and he has settled family accommodation awaiting him.

13. He went on to state that there is no perceptible public interest in the exclusion of the appellant and none at all in the consequent enforced exclusion of Ms Khan, nor in the disturbance of family life between her and her family in the UK. He held that the '*cumulative effect of the evidence shows that notwithstanding that the appellant has been sentenced to*

imprisonment as defined in S-EC.1.4(b), his exclusion from the UK is not conducive to the public good as required under S-EC.1.4.'

14. The judge continued (at [13-14]) by finding that while the appellant is a graduate and has held '*responsible employment in companies'* in the UK and is '*undoubtedly competent in English*' the certificate of competency he had produced was not from an approved provider. Because of his failure '*to meet the precise technical demands of the English language requirement'* he could not bring himself within the Rules (ECP), although apart from that *'individual failure ... he meets all other requirements of the rule.'*

15. The judge went on (at [15])ff to consider Article 8. Having noted case law that the new Rules are '*intended as a compendious codification of the extent to which the protection of Article 8 applies within the framework of the Immigration Rules and ought to be respected as such ... They do not alter the law hitherto applied in connection with Article 8 protection, the residual applicability of which remain to be examined where the Rules make inadequate provision for circumstances recognised as relevant to protection under Article 8*.' He noted that '*there should be no "freewheeling Article 8 analysis unencumbered by the Rules"*'. Regard had to be had to the extent to which an appellant might or might not meet the requirements of the Rules. Only where there were arguably good grounds for granting leave to remain outside the Rules was it necessary to go on to consider whether there are compelling circumstances not sufficiently recognised under them which would justify the grant of protection under Article 8.

16. He found that exclusion of the appellant would interfere with the rights of family and private life enjoyed by both the appellant and sponsor and that was at a level sufficient to engage Article 8. Advancing to proportionality he considered section 117 '*public interest'* questions, finding that the appellant is capable of being self supporting and has in any event adequate support from his wife and her family; he is familiar with English and has a history of employment by important companies; he will not be a burden on public finances. Also his past evasion of immigration control is '*purged'* and he now submits to immigration control. He added '*By these findings, in accordance with my finding under S-EC.1.4 above, it is shown that the exclusion of the appellant is not conducive to the public good and is not necessary in the public interest'* [17].

17. In further analysis the judge noted Ms Khan's circumstances, in particular, that she has been raised within a family home and continues to reside with other family members; that she has extensive family connections here; that she is in responsible employment. Such factors weighed strongly on the exclusion being disproportionate. Further, the likely lengthy exclusion of the appellant would force her to leave the UK. Such would be unjustifiably harsh.

18. The judge ended by stating (at [19]):

> '… *The appellant, in respect of whom there was no deportation order or any finding that his presence is not conducive to the public good, submitted to immigration enforcement … with a view to regularising his position. He and she have endured separation of almost three years; have married; have established family life; all with the genuine desire to purge the previous evasion. The only respect in which the appellant now fails to meet the requirements of the Rules is the English language requirement, with which he is in any event in substantial, albeit not full formal compliance. Continued exclusion would in my judgement be disproportionate.'*

19. The ECO sought permission to appeal which was granted on 27 November 2014.

20. At the error of law hearing before me Mr Kandola sought to rely on the grounds. Parliament had decided through S-EC.1.4 (b) that the appellant's presence in the UK is not conducive to the public good he having been sentenced to twelve months' imprisonment. Refusal was mandatory. It was not open to the judge to find to the contrary. In doing so, such fatally tainted his approach to Article 8. He invited me to set aside the decision and remake it dismissing it.

21. Ms Currie's response was that there was no error in the judge's analysis of the rule for the reasons he gave. It was a natural and proper reading of the section. Even if he was wrong it was not material and the decision should be upheld. The judge had found that the appellant could not meet the Rules. He had set out a wealth of reasons which were open to him on the evidence including his intention to purge his previous offending, that he was not at risk of reoffending, that he would have no recourse to public funds. Also the adverse impact on his spouse. He had properly identified sufficient compelling circumstances not recognised by the Rules.

22. In considering this matter I am satisfied that the judge erred in his interpretation of S-EC.

23. S-EC.1.1 reads:

> *'The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2 to 1.8 apply.'*

S-EC.1.4 reads:

> *'The exclusion of the applicant from the UK is conducive to the public good because they have:*
>
> …
>
> *(b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but*

less than 4 years, unless a period of 10 years has passed since the end of the sentence.'

24. It is accepted that the appellant was sentenced to twelve months' imprisonment and that ten years has not passed since the end of the sentence.

25. As indicated above (at paragraph 10 and 11) the judge noted: '*The language of the enactment suggest that mere conviction and sentence is not by itself sufficient to make the provision applicable. The full text of S-EC.1.4 shows that it applies when "The exclusion of the applicant from the UK is conducive to the public good". The ordinary meaning of these words requires an enquiry into whether exclusion is conducive to the public good'.*

26. The provision, in his view, was structured in such a way that the three instances following the '*because*' are all to be regarded as the possible instances, not as final and immutable instances, showing exclusion to be conducive for the purposes of the section. In other words, a person might still have experienced the sentence that meets the definition in paragraph (b) but yet his exclusion might not be conducive to the public good. A proper interpretation of the provision shows that an enquiry into whether the exclusion of an applicant is in the public good is necessary. By that interpretation, S-EC.1.4 would read consistently with S-EC.1.5, which requires investigation as to whether exclusion is conducive on other less precisely defined grounds than by reference to previous conviction and sentence. Even if there was a presumption in S-EC.1.4 (a)(b) and (c) that exclusion would be conducive enquiry would be needed should an applicant seek to rebut the presumption that his exclusion is not conducive to the public good.

27. I do not think that analysis is correct. I consider that he has misconstrued the provision. S-EC.1.1 states clearly that entry clearance on the grounds of suitability will be refused if any of S-EC.1.2 to 1.8 apply. It is mandatory.

28. A plain reading of S-EC.1.4 is that Parliament has decided that for a person such as the appellant who has been sentenced to at least twelve months' imprisonment and ten years has not passed since the end of the sentence, exclusion '*is conducive to the public interest*.' The judge was wrong to state that '*Were it the intention of the regulations that proof of the sentence alone brought into play the provisions the words "the exclusion of the applicant from the UK is conducive to the public good "because" would be otiose'*. The clear reading of the section is that the *'because'* refers to periods of imprisonment as defined in (a) to (c) which make exclusion to be conducive to the public interest. If an applicant's factual situation comes within the definitions set out in 1.4 (a) to (c) the result is an automatic exclusion under the rule.

29. It is unnecessary to construe S-EC. 1.5. as it is of no relevance in this case where the appellant falls within the definition in S-EC.1.4. (b).

30. The judge in misapplying the law erred. I consider that to be a material error. The judge was clearly correct to dismiss the appeal under the rule although he did so on the sole basis that the English language requirement was not met. However, in his assessment under Article 8 he referred not only to that aspect of the rules not being met, but was also, at [17] and [19], strongly influenced in the assessment of the balancing exercise by his conclusion that exclusion was not conducive to the public good and was not necessary in the public interest. His erroneous analysis of the rule fatally taints his Article 8 assessment.

31. I set aside the decision and proceed to remake it.

32. The appeal cannot succeed under the Rules as the case fails under S-EC 1.4 (b) as well as on the failure to meet the English language requirement. Section S-EC.1.4 states that where that paragraph applies (as I have found that it does) '*unless refusal would be contrary to the Human Rights Convention … it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors'.*

33. In considering human rights I note the guidance given by the Court of Appeal in respect of applications for leave to enter on the basis of family life with a person in the UK given in **SSHD v SS (Congo) & Ors [2015] EWCA Civ 387** (particularly at [39]ff). In this appeal there is no dispute that there is family life between the appellant and his wife. His exclusion interferes with their right to respect for that family life and to a degree of severity sufficient to engage Article 8. The decision is in accordance with the law. The issue is proportionality.

34. In assessing proportionality such needs to include consideration of the section 117 '*public interest'* issues. I see no reason to divert from the First-tier Judge's factual findings. As to Ms Khan's circumstances, she lives with family members and has extensive family connections here. She also has work. There are no children. She is a British citizen and I accept that she would find living in Pakistan difficult due to its conditions and societal expectations. It may also be that the appellant in submitting to removal has made an effort to purge his previous criminality and submit to immigration control. Further, that he, apparently, speaks English and would be financially independent.

35. On the other hand the appellant fails to satisfy the Rules not only on the English language test issue but also on the major ground that his exclusion from the UK is conducive to the public good due to his criminality. Such, in my judgement, is a significant factor against the appellant in the balancing exercise.

36. Further, while it seems she did not know of his unlawful status when they started their relationship in early 2010 it is clear she was aware of it

before he left the UK. They chose to build the relationship and marry in full knowledge of his situation. That of course was a matter for them but I do not see in considering the proportionality exercise, that it assists the appellant's case. Article 8 imposes no general obligation on a state to facilitate the choice made by a married couple to reside in it. I note that they face some years of separation. However, I also note in that regard her evidence that she would be prepared to live with her husband in the Middle East.

37. On the facts of this case I do not see that compelling circumstances exist (which are not sufficiently recognised under the Rules) to require the grant of leave outside the Rules. I conclude that it would not be disproportionate to the public end to refuse entry clearance.

38. Further, I do not see there to be any exceptional circumstances such that the public interest in maintaining refusal is outweighed by compelling factors. The appeal fails on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal showed an error of law. That decision is set aside and remade as follows:

The appeal is dismissed under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed
Upper Tribunal Judge Conway Date