



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001106
First-tier Tribunal No: HU/07645/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16 July 2023

Before
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

UMAR IQBAL
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:

For the Appellant: Mr. Z Malik KC, Mr. G Mavrantonis, Counsel, instructed by K
& A Solicitors

For the Respondent: Mr. D Clarke, Senior Presenting Officer

Heard at Field House on 14 June 2023

DECISION AND REASONS

A. Introduction

1. The appellant seeks entry clearance as the spouse of a British citizen. His human rights appeal was initially dismissed by the First-tier Tribunal. He was granted permission to appeal to this Tribunal and on 18 April 2023 a panel (Dove J and UTJ O’Callaghan) set aside the First-tier Tribunal decision, with no findings of fact made by the First-tier Tribunal preserved.
2. The representatives agreed that the remaining issues before this Tribunal are:
 - Suitability: para. 322(11) of the Immigration Rules and para. EC-P.1.1(c) of Appendix FM to the Rules.
 - Exceptional circumstances.

B. Rule 15(2A)

3. The respondent did not object to the appellant’s rule 15(2A) application in respect of the sponsor’s witness statements and accompanying documentary evidence concerned with the recent birth of the appellant’s child in the United Kingdom.
4. I granted the respondent permission to rely upon documents served under a rule 15(2A) application. Having considered the documents, I considered that they would aid my consideration of relevant facts arising in this matter.

C. Relevant Facts

5. The appellant is a national of Pakistan. He knew the sponsor in Pakistan as he grew up in the same locality. He was granted leave to enter the United Kingdom in January 2011 as a Tier 4 (General) Student and enjoyed valid leave until 16 May 2012. The respondent considered curtailment on 2 April 2012 consequent to the licence of appellant’s sponsor being revoked, but no further action was taken due to the limited length of leave remaining. A subsequent application for leave to remain as a Tier 1 (Entrepreneur) was refused and a resulting appeal was dismissed by the First-tier Tribunal on 3 July 2013.
6. The appellant was encountered on 27 April 2016 and served notice as an overstayer. Two days later he sought international protection, asserting that he was at real risk of persecution if returned to Pakistan consequent to his homosexuality. He stated that he had been aware of

his sexuality when aged 17 or 18, because he was 'orientated' towards having feelings for every 'beautiful boy'. He detailed that he had two homosexual relationships, with named persons, whilst in Pakistan. His first relationship lasted three-and-a-half years. He explained that he had been caught being intimate with his first partner by a group of school friends. They reported it back to his family, who proceeded to beat and scold him. He was held hostage by his family inside a room for a month, which he was not allowed to leave. He was only released following entreaties in which he professed to never engage in homosexual activities again. In the meantime, the whole community had been made aware of his sexuality. Having been released by his family, he returned to college without any significant problems. He entered into his second relationship in 2010. He left Pakistan in 2011 because his family wanted him to marry a woman, which he did not want to do, but refusal would have caused his death.

7. The respondent refused the application by a decision dated 14 June 2016. The claim was certified as clearly unfounded under section 96 of the Nationality, Immigration and Asylum Act 2002. The appellant's application for judicial review was refused on 20 February 2017 with Upper Tribunal Judge Jordan observing that before him was a 'last ditch asylum claim', with a 'late-developed claim to be a gay man'. The appellant was re-detained on 27 February 2017 and removed at public expense on 21 March 2017.
8. The sponsor secured her decree absolute from the Family Court on 1 February 2019. She travelled to Pakistan and the couple's Nikah was conducted on 12 April 2019. The marriage was registered on 27 May 2019. Through his marriage, the appellant is stepfather to his wife's British citizen elder child, a minor. On 27 January 2020, the appellant applied for entry clearance under Appendix FM to the Immigration Rules.
9. On 3 September 2020, the respondent refused the appellant's entry clearance application, detailing:
 - (i) The sponsor's income was below the minimum threshold of £18,600;
 - (ii) The appellant's character and conduct made it undesirable to grant entry clearance and his exclusion would be conducive to the public good: paragraph S-EC.1.5 of Appendix FM to the Rules; and
 - (iii) The appellant had remained in the United Kingdom without valid leave from 2012 until his removal at public expense in March 2017, and absconded: paragraph 320(11) of the Rules.

10. The application was refused under paragraph D-ECP.1.3 of Appendix FM.
11. The couple's child, a British citizen, was born in February 2023 and is presently aged five months.

D. Evidence

12. The appellant relies upon a witness statement dated 19 February 2021, the contents of which are known to the respondent and have been considered by me.
13. The sponsor attended the hearing and adopted the contents of her witness statements dated 19 February 2021 and 9 June 2013. She informed the Tribunal that she was a British citizen, which was a surprise to everyone in the hearing room, including the two representatives from her solicitors' firm in attendance, having not been detailed in either witness statement. Mr. Clarke was given time to confirm the true position and confirmed that she was naturalised on 19 April 2021, a date before the appellant's appeal was heard by the First-tier Tribunal.
14. She arrived in the United Kingdom in 2004, with leave to enter as a spouse. The marriage broke down, and her husband issued an Islamic divorce. She entered an Islamic marriage in this country, and soon afterwards was divorced. She returned to her first husband, but that relationship broke down and she secured the support of the police to leave the marital home. Her personal history is accepted by the respondent.
15. The Tribunal understands that her elder child, from her second, Islamic, marriage has Pakistani citizenship alone as their father is not detailed on the birth certificate, but her younger child holds both Pakistani and British citizenship: Pakistan Citizenship Act, 1951.
16. As to her husband, the sponsor explained that the families are close friends, residing five to ten minutes' walk away from each other.
17. She gave confused evidence as to when the appellant re-entered her life in the United Kingdom. It is sufficient to say that having left a relationship she relocated to another part of this country. She states that the appellant provided help to her at this time. She explained that the appellant knew her brother, and it was her brother who passed the appellant's phone number onto her. She initially detailed that the move was in March 2017, but upon being reminded by Mr. Clarke that the appellant was by that time in detention, she stated that she moved in

February 2017. She subsequently stated that she was in error, and she had moved in March 2017.

18. The sponsor has visited the appellant twice in Pakistan. Her elder child accompanied her on both occasions. The first time was in October 2019, and she stayed for three or four weeks. It was during this trip that the marriage took place in the locality of her home. The family of the appellant attended. She confirmed that both families approved of the marriage.
19. She candidly acknowledged that it was an arranged marriage. Her family informed her as to the agreement to marry before she travelled to Pakistan for the ceremony. However, she was adamant that it was not a condition of the marriage that she would aid the appellant to secure entry clearance. When asked about discussions with her husband as to where they would live after the marriage, she stated that she was not aware of her husband's circumstances, and so ignorant of his immigration history. She became aware that he was an overstayer at the First-tier Tribunal hearing, and subsequently became aware as to the substance of the asylum claim and the judicial review proceedings in the run-up to the resumed hearing before the Upper Tribunal. She clarified her evidence by acknowledging that the appellant had been removed from the United Kingdom, but she understood this to be because he overstayed. As to her plans following her marriage, the sponsor stated that it had been her intention to work and then apply for the appellant to join her in this country. She stated that it was her decision that the couple reside in the United Kingdom.
20. Mr. Clarke reminded the sponsor that she stated a fear of her ex-husband's family who resided close to the appellant's family home. She confirmed this was the case. When asked why she would place herself at risk by marrying in her home area, when she could have married anywhere in Pakistan, she replied, 'This was my family's decision, I accepted the decision'.
21. She explained that her brother made a complaint to the police about threats made by her ex-husband's family. This was in April 2019, some two years after the birth of her elder child and her leaving a previous relationship. She stated that there had been numerous threats over time, but when she travelled to Pakistan, direct threats were made to her elder child and so a complaint was made. I observe her earlier evidence that she travelled to Pakistan in May 2019, not April. She was asked to explain how her family in Pakistan were being targeted soon after the birth of her child in December 2016, when she detailed in her witness statement that they were not aware of the child's birth until

2018. She explained that when she said her 'family' did not know, she meant her parents.

22. Her second visit to Pakistan was from 5 to 22 May 2022. On both occasions, she stayed with the appellant throughout her time in Pakistan. He resides with his mother, as his father has died. She confirmed that he was working with his uncle, 'looking after shops and a school'.

E. Discussion

23. I have recorded the representatives' helpful and concise submissions.
24. The respondent asserts that the appellant failed to report on 27 November 2015 and was listed as an absconder on 11 December 2015. As to suitability:

'... I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules. Your leave as a student expired on 16/05/2012, you did not leave the UK until 2017 and this was at the public expense. You refused to leave after several removal directions were issued to you, you absconded when placed on reporting and you attempted to aggravate the Immigration Rules by applying for Immediate ILR.

This matter was referred to an Entry Clearance Manager prior to being refused and application of paragraph 320(11) was agreed.

I therefore consider it appropriate to refuse your application under paragraph 320(11) of the Immigration Rules.

...

Under paragraph EC-P.1.1.(c), your application fall for refusal on grounds of suitability under Section S-EC of Appendix FM because:

The exclusion of the applicant from the UK is conducive to the public good because the applicant's conduct and character make it undesirable to grant them entry clearance (S-EC.1.5).

Paragraph 320(11)

25. Paragraph 320(11) of the Rules establishes a discretionary ground of refusal of entry clearance or leave to enter for applications made before 09.00 on 1 December 2020:

'(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 comply with the re-documentation process.'

26. The burden of establishing the requirements of paragraph 320(11) rests upon the respondent.
27. Mr. Malik KC did not seek to persuade me that the appellant had not overstayed. Noting the conjunctive use of the word 'and' at paragraph 320(11)(iv), the focus of his submission was directed to whether the respondent was able to satisfy the second limb of the paragraph 320(11) requirement, namely that there are 'other aggravating circumstances'.
28. The respondent relies upon absconder action having been commenced in 2015 consequent to the appellant having failed to report on 27 November 2015. The panel observed at [32] of its error of law decision that there was no evidence filed by the respondent establishing the purported absconding, beyond mere assertion in the decision letter.
29. Seeking to address the panel's identified concern, the respondent filed by means of her rule 15(2A) application:
 - IS.274 Absconder Notification Form, dated 11 December 2015
 - GCID entry dated 15 December 2015 - noting the appellant as an absconder and that an IS.274 forms has been completed in full and 'saved on CID'.
 - GCID entry dated 23 December 2015 - noting 'absconder actions initiated'
 - GCID entry dated 28 April 2016 - noting that the appellant 'not reporting'.
30. This is the height of the respondent's evidence as to the appellant having absconded.

31. Mr. Malik relies upon the *obiter* observation of UTJ Allen in *R (Shabani) v. Secretary of State for the Home Department (Legacy - residence - SoS's limited duty)* IJR [2015] UKUT 0403 (IAC), at [27], that it would not be right to characterise the applicant as an absconder as the respondent had not provided documentation to show the terms on which the applicant was required to report. At its core, UTJ Allen's observation is an expression of one of the most basic rules of litigation namely that she who asserts must prove: *Sadovska v. Secretary of State for the Home Department* [2017] UKSC 54, [2017] 1 W.L.R. 2926.
32. The documentation now relied upon is simply insufficient for its task of establishing that the appellant failed to report as required, and so could properly be considered to be an absconder. No notice to report on 27 November 2015 has been filed. Indeed, no document has been filed confirming that the appellant was ever required to report. No evidence has been placed before this Tribunal that the appellant had been informed that he was to report. I observe that no witness statement from an agent or servant of the respondent has been filed seeking to address the gaps and vagaries in the present documentary evidence. By the conclusion of the hearing, I remained uninformed as to when and how the appellant was informed of his reporting requirement. Considering the limited evidence provided, and the relevant standard and burden of proof, I am satisfied that the respondent comes nowhere close to establishing that the appellant failed to report as required on 27 November 2015 and so absconded.
33. Mr. Clarke additionally relied upon the appellant's last ditch asylum application as constituting 'frivolous applications'. I observe that the application was certified as clearly unfounded.
34. For the reasons detailed below, I am satisfied that the appellant is a willing stranger to the truth whenever he perceives that he can personally gain through deceit. He has, over time, proven prepared to lie to both the respondent and various tribunals to secure his ultimate wish to reside in this country. I further find that he has been less than open over time to the sponsor in respect of his immigration history and the basis of his earlier asylum claim.
35. I am satisfied that from start to conclusion, his asylum claim was founded upon a tissue of lies. His assertion as to his homosexuality, and as to his family's attitude to him, is wholly contradicted by his family's efforts to aid him in securing a marriage to a British citizen. I find that the sole aim of the application for international protection was to delay his removal and permit him time to consolidate his residence in this country. His evidence to this Tribunal by means of his witness statement that his relationship with the sponsor 'grew stronger' after

he was removed from this country, and that his family 'in Pakistan was not initially happy with my marriage', but 'I went against their wishes and married her', there being in Pakistan a 'stigma attached to a man marrying a divorced woman with a child' is untruthful, as is the assertion that 'although this did not bother me, my family were not happy about it. I loved [the sponsor] and wanted to protect her, so I made the decision to marry her.' I am satisfied that the appellant and his family took the initiative and approached the sponsor's family to arrange the marriage. I accept the sponsor's evidence that she was first aware of the arrangement after the two families had reached agreement. I accept her evidence that both families attended the wedding and have shown support to the couple. The appellant has sought to hide the fact that he and his family took the lead in seeing to arrange the marriage, in order to hide the fact that his, and his family's, prime objective is to secure his return to the United Kingdom.

36. I find that the appellant did not aid the sponsor when she relocated in 2017. The sponsor was inconsistent in her evidence on this issue, and no cogent reason was given as to why the appellant would offer support to someone he had not seen for several years.
37. Whilst not relevant to my consideration of his absconding above, as the burden rested upon the respondent, I do not accept the appellant to be truthful in his assertion that in July 2013 he was required to report, and a little while later was informed that he was no longer required to report. This event is said to have occurred weeks after he became appeal rights exhausted, and I am satisfied that the respondent would have been aware of this relevant fact. No cogent explanation has been provided as to why the respondent would have ceased the reporting requirement. Such finding does not impact upon my conclusion above in respect of absconding, because the respondent has not filed relevant evidence as to the appellant failing to report as required in November 2015.
38. I also do not accept the appellant's evidence that he and his family have received 'many threats' from the family of the sponsor's ex-husband. The respondent has accepted the sponsor's personal history in the United Kingdom in respect of previous relationships, and she was correct to do so. I consider the sponsor to have given truthful, and candid, evidence as to the circumstances of her marriage to the appellant. However, her evidence was inconsistent as to the fears of the appellant and herself at the hands of her ex-husband's family in Pakistan. She was unable to cogently explain as to why her brother filed the first complaint with the police in April 2019, some two years after the threats are first said to have arisen. She informed me that the trigger for the report were threats made to her elder child when they

travelled to Pakistan for the wedding, but this journey was in May 2019 and so post-dates the filing of the complaint by her brother. I am satisfied that if there was any real concern as to her child being harmed on travelling to Pakistan, the sponsor would not have brought her. The sponsor was unable to cogently explain the inconsistency in her evidence as to her family not knowing about the birth of her elder child until 2018, when threats to the family were said to have commenced soon after the child's birth in 2016.

39. I am satisfied that the appellant and sponsor are untruthful as to their fears of the ex-husband's family. If such significant fears truly existed, I am satisfied that their wedding would not openly have taken place a short distance from the home of the ex-husband's family, and that the sponsor would not have willingly spent time living with the appellant and his mother in 2019 and 2022. I find that the appellant is untruthful as to his assertion of having been physically assaulted by members of the ex-husband's family in February 2021, resulting in his neck and ear being slit with a knife. He has, according to the sponsor, continued to work in the family's shops without concern. I am satisfied that if he had been attacked in the manner asserted, he would not have permitted the sponsor and her elder child to reside with him at his home for several weeks a little over a year later.
40. I find that the purported threats are merely a calculated means of seeking to establish that the sponsor cannot reside with her children in Pakistan, thereby strengthening the appellant's case for being permitted to join them in the United Kingdom.
41. However, despite my concerns as to the appellant's long-standing behaviour, I agree with Mr. Malik that the respondent is required to establish for the purpose of paragraph 320(11) that the appellant has made 'frivolous applications' - noting the use of the plural - and the respondent relies upon the asylum application alone.
42. The Immigration Rules are delegated legislation, established by section 3(2) of the Immigration Act 1971. As observed by Sedley LJ in *Pankina v. Secretary of State for the Home Department* [2010] EWCA Civ 719, [2011] QB 376, at [17], the Rules are different from, and more than, policy and have acquired a status akin to that of law for particular purposes.
43. The Supreme Court confirmed in *Mahad (Ethiopia) v. Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 48, per Lord Brown at [10], that the Rules should not be construed with the strictness appropriate for a statute, or a statutory instrument, but rather should be construed 'sensibly according to the natural and ordinary meaning of the words,

used, recognising that they are statements of the Secretary of State's administrative policy.'

44. The starting point in statutory interpretation is to consider the ordinary meaning of the word, that is its proper and most known signification: *Selvey v. DPP* [1970] AC 304, per Viscount Dilhorne LC at 339. It is presumed that the drafter uses words with correct meaning, and correct grammar: *Spillers Ltd v. Cardiff (Borough) Assessment Committee* [1931] 2 KB 23, per Lord Hewart CJ at 43, approved by the *House of Lords in New Plymouth Borough Council v. Taranaki Electric Power Board* [1933] AC 680, at 682.
45. I conclude that the use of the plural - 'applications' - was intended by Parliament. The use of a plural is not a technical usage concerned with a particular expertise, nor does it establish a technical legal term. Whilst 'a valid application' enjoys a technical meaning as established by paragraph 6 of the Rules, 'application' enjoys its natural meaning. A 'frivolous application' can therefore capture both a valid and invalid application. However, the ordinary meaning when a plural is used is to denote more than one. Consequently, I am satisfied that Parliament's intention was that the respondent is required to evidence more than one frivolous application when seeking to evidence 'aggravating circumstances'.
46. I therefore conclude that simple reliance upon the appellant's asylum application is insufficient to establish the conjunctive requirements of paragraph 320(11) and consequently the respondent is unable to establish proper reliance upon this paragraph of the Rules.

Appendix FM

47. Turning to Appendix FM of the Rules. The respondent accepts that the appellant satisfies the requirements of paragraph EC-P.1.1, save for the suitability requirement established by paragraph EC-P.1.1(c):

EC-P.1.1. The requirements to be met for entry clearance as a partner are that-

- (a) the applicant must be outside the UK;
- (b) the applicant must have made a valid application for entry clearance as a partner
- (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability-entry clearance; and
- (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.'

48. Paragraph S-EC.1.5 of Appendix FM to the Rules, as relevant to this matter:
- ‘Section S-EC: Suitability-entry clearance
- S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply.
- ...
- 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.’
49. Paragraph S-EC.1.5 is consistent with Paragraph 9.3.1 of Part 9 of the Rules concerned with general grounds of refusal, the latter not being applicable to Appendix FM. Both paragraphs are consistent with the now deleted paragraph 320(19) of the Rules.
50. The respondent’s decision of September 2020 addresses paragraph S-EC.1.5 in brief terms. I observe Mr. Clarke’s concession in respect of the additional reason provided concerning paragraph EC-P.1.1.(c), namely outstanding litigation debt, is no longer relied upon. The sole reason now relied upon by the respondent is that detailed at para. 28 above.
51. Though relied upon by the respondent at the beginning of the hearing, neither representative addressed me on the application of this paragraph, and it was not addressed in Mr. Malik’s skeleton argument dated 21 November 2022 which he continued to rely upon.
52. The burden rests upon the respondent to establish that the decision is justified. Whilst enjoying a wide discretion in respect of refusal on public policy grounds, the respondent’s reasons for making the decision are not to be trivial. Noting that the respondent enjoys other means of refusing to grant entry clearance for previous breach of time limit or conditions of previous leave, paragraph S-EC.1.5 is not to be used as a means of importing into a decision behaviour that can properly be addressed elsewhere in the Rules. In this matter, as no reasoning is now relied upon apart from reliance upon the paragraph of the Rule itself, and the respondent having been unsuccessful in respect of absconding and paragraph 320(11), I conclude that she is unable to satisfy the burden placed upon her in respect of paragraphs EC-P.1.1.(c) and S-EC.1.5

53. In the circumstances, the appellant's appeal is properly to be allowed.

F. Notice of Decision

54. The decision of the First-tier Tribunal, dated 14 October 2021, involved the making of a material error on a point of law and was set aside by a decision of the Upper Tribunal dated 18 April 2023.

55. The decision is remade, and the appellant's appeal is allowed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 July 2023