



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002834

First-tier Tribunal No: HU/05048/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 17 August 2023**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

**KABIR OLAYIWOLA LAWAL
(NO ANONYMITY ORDER MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms A Jones of Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard by remote video at Field House on 8 August 2023

DECISION AND REASONS

1. By the decision of Upper Tribunal Judge Lindsley dated 7.9.22, the appellant, a national of Nigeria, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Hawden-Beal) promulgated 12.5.22 dismissing his appeal against the respondent's decision of 1.11.21 to refuse his application made on 30.7.21 for Entry Clearance (EC) to the UK as the spouse of TA, a British citizen, pursuant to Appendix FM of the Immigration Rules.
2. Following the brief but helpful submissions of the two legal representatives, I reserved my decision to be provided in writing, which I now do.
3. In refusing the EC application, the respondent considered that the appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules. This phrase relates to the discretionary ground of refusal under paragraph 320(11) of the Rules. His application was also refused under Appendix FM with reference to the suitability requirements. The proposed

decision was referred for review to an Entry Clearance Manager who affirmed the decision to refuse the EC application under Part 9 of the Rules.

4. In relation to Appendix FM, whilst the respondent was satisfied as to the eligibility English language, relationship, and financial requirements of the Rules, it was concluded that he did not meet the suitability grounds of E-ECP of Appendix FM, with reference to the mandatory grounds under S-EC.1.5, on the basis that his exclusion from the UK was conducive to the public good. The section refers to example reasons, including conduct, character, associations, or other reasons which make it undesirable to grant entry clearance.
5. In assessing both the general grounds for refusal and the suitability requirements under Appendix FM, the respondent noted that the appellant was encountered working illegally in the UK in 2009, having entered the country by unknown illicit means. He thereafter absconded from reporting and was not encountered again until arrested by the Police in 2015, on which occasion he initially provided a false identity, disproved by the checks made at that time. His subsequent application for Leave to Remain (LTR) was refused and judicial review permission refused. He was eventually removed to Nigeria at public expense in 2017. Neither was it accepted that there were any GEN3.1 and 3.2 exceptional circumstances so that the decision would result in unjustifiably harsh consequences for the appellant or his family.
6. In summary, the grounds of appeal, relied on in Ms Jones' brief submissions, argue that the First-tier Tribunal failed to understand the role entrusted to it and instead of considering whether the appellant did in fact meet the suitability requirements of the Immigration Rules found that the decision was not unreasonable and was within the discretion vested with the entry clearance officer, thus applying a judicial review supervisory test rather than the jurisdiction of a statutory appeal.
7. The grounds and the submissions of Ms Jones challenge the findings at [24] that as the Entry Clearance Officer had "addressed his mind to the relevant question," the decision to refusal EC was justified. Complaint is also made about [28] of the decision where the judge stated that "The discretion to issue entry clearance rests solely with the respondent and until the respondent considers that the appellant has expurgated or mitigated his poor immigration history, she had the discretion to continue to refuse to grant him entry clearance subject only to oversight by the courts, if the appellant appeals." Ms Jones submitted that the point was a simple one: the judge misunderstood the role of the First-tier Tribunal. She asserted that the judge should have decided the appeal in the context of the Rules but failed to do so.
8. In response, Mr Mullen agreed with Ms Jones that the point was a simple one but submitted that the judge had made a correct self-direction by reference at [17] of the decision to PS (paragraph 320(11) discretion: care needed) [2010] UKUT 440 (IAC), as well as the Home Office Entry Clearance Guidance. It was also submitted that the judge gave appropriate weight to all factors, for example, not holding against the appellant that he had been removed at public expense. Mr Mullen submitted that the judge reached a conclusion open to the Tribunal in all the circumstances.
9. Paragraphs [24] and [28], to which Ms Jones directed my attention, have caused me some concern, requiring a careful analysis of the Tribunal's decision. In both paragraphs, the judge finds that the Entry Clearance Officer's decision was 'justified' because they had addressed their mind to the 'relevant question.' It is

those statements which give rise to the complaint that the judge was in error effectively exercising a judicial review supervisory role.

10. However, for the reasons summarised below, I am not persuaded by the argument that the Judge misunderstood the proper role of the First-tier Tribunal in a statutory appeal against the respondent's decision.
11. Paragraph 320(11) is one of the grounds on which entry clearance or leave to enter the UK "should normally be refused," in other words a discretionary ground, whereas the suitability ground under S-EC.1.5. is a mandatory ground for refusal. The refusal decision relied on both grounds.
12. Reliance on PS needs to be approached carefully as the conclusion in that case was that the decision of the Entry Clearance Officer was not in accordance with the law, a ground of appeal not open today. The complaint was that the Entry Clearance Officer had not addressed their mind to the relevant question as to whether there were aggravating circumstances and did not conduct a balancing exercise. The Entry Clearance Officer "*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.*" The Upper Tribunal panel found that by merely endorsing the approach of the Entry Clearance Officer, an approach which was not in accordance with the law, the First-tier Tribunal Judge had fallen into the same error as the Entry Clearance Officer.
13. Unlike the Tribunal in PS, the First-tier Tribunal could only decide the appeal on article 8 ECHR grounds, though whether the relevant Rules were met is obviously a weighty consideration in the proportionality balancing exercise under article 8.
14. I am satisfied that when asking rhetorically at the beginning of [17] of the decision whether the respondent's decision was justified, the judge was conducting the balancing exercise referred to in PS and the Guidance: "*All cases 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, in the case of children, the level of responsibility for the breach.*" This requirement for a balancing approach was cited by the judge at [17] of the decision as part of the extract of PS.
15. In furtherance of that balancing approach, the judge correctly noted at [18] that the factors referred to in 320(11) were insufficient alone to justify refusal of EC; there has to be an aggravating feature, such as those listed at the end of 320(11). Not only did the judge refer to the case law but also the Home Office Entry Clearance Guidance and the Guidance on Suitability v4.0 from October 2021. At [20], the judge noted that the suitability guidance effectively repeated that set out in PS. It is clear that the judge gave careful consideration to the Guidance.
16. At [21] the judge reviewed the relevant factors, and found that the appellant had entered illegally, absconded from reporting, and provided a false identity, concluding at [23] that there were at least two if not three aggravating factors. Those were clear findings of fact. Apart from how he entered the UK, it was noted at [24] that the appellant did not challenge any of the relevant factors. However, even if the appellant had entered the UK lawfully, as claimed, the judge found he had overstayed. In the appellant's favour, the Tribunal concluded that he had been removed unlawfully to Nigeria. This is evidence of a balanced approach rather than a mere supervisory review of the Entry Clearance Officer's refusal decision.

17. The judge went on at [25] to take into account the mandatory public interest considerations under s117B of the 2002 Act and at [26] to undertake the proportionality balancing exercise under article 8 ECHR, continuing through [27].
18. Whilst the judge expressed the view that the Entry Clearance Officer had addressed their mind to the 'relevant question,' and found that the refusal of EC was justified, I am not satisfied that the judge was merely endorsing the Entry Clearance Officer's decision without consideration of the requirements and guidance. 'Justified' may not have been the best way to express the findings but I am satisfied that the First-tier Tribunal considered for itself whether the appellant met the suitability requirements of EC-P.1.1.(c) and section S-EC of Appendix FM of the Rules, made specific findings as to aggravating factors, conducted a balanced assessment, and correctly went on to the article 8 proportionality balancing exercise to determine whether decision was disproportionate under article 8 ECHR, with the conclusion at [29] of the decision.
19. It follows that, for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 August 2023

