



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000762

First-tier Tribunal No: EA/09482/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

21st February 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

OSVALDO ANDRE BAPTISTA ARAUJO MOREIRA
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms Osazuwa, legal representative from the Immigration Advice Service

For the Respondent: Ms Nolan, Senior Presenting Officer

Heard at Field House on 11 January 2024

DECISION AND REASONS

1. On 7 July 2023, the Upper Tribunal (UTJ Blundell and DUTJ Skinner) issued its first decision in this appeal. It held that the First-tier Tribunal (Judge Groom) had erred in law in allowing the appellant's appeal. It set aside Judge Groom's decision and ordered that the decision on the appeal would be remade in the Upper Tribunal. The FtT's finding that the appellant and the sponsor were validly married was preserved.
2. The Principal Resident Judge subsequently issued a transfer order, and the resumed hearing was listed before me, sitting alone, on 11 January 2024.

Background

3. The appellant is a citizen of Cape Verde who was born on 10 June 1987. The sponsor is a Portuguese citizen named Patricia Arauko Silva Moreira. The sponsor holds leave to remain under the EU Settlement Scheme. She and the appellant married in Cape Verde on 12 July 2019.
4. The appellant made an application for entry clearance as the sponsor's spouse on 6 August 2019. He was not legally represented at that stage. The appellant provided his details and those of the sponsor. He stated that their relationship had started after being introduced to each other on social media, via a relative. They had remained in contact by visits and online communication. The appellant stated that he had undertaken compulsory military service in the military police between 2007 and 2008. Then, at page six of the application form, the appellant provided the following information, which I reproduce verbatim and as it appears in the papers before me:

Convictions and other penalties	
At any time have you ever had any of the following, in the UK or any other country	A criminal conviction
What crime were you convicted of?	Drugs
Give details about your sentence	i went to prison for possession of a high amount of marijuana which I was convicted for 5 years and 4 months and I went to prison which I served 4 years and 7 months
Date you were sentenced	25 January 2010
Which country were you convicted in?	Cape Verde
What was your other offence	A criminal conviction
What crime were you convicted of?	possession of fire arm
Give details about your sentence	Suspended sentence of 3 years
Date you were sentenced	15 September 2008
Which country were you convicted in?	Cape Verde

5. On 31 March 2022, at which point this application still remained undecided by the Entry Clearance Officer, the sponsor withdrew it. The email which was sent from her email address on that date was in the following terms:

“Hello good evening because I have done a mistake on my application regarding my criminal conviction and on the hope of rectifying the mistakes I have escalated my case so many times that years have passed so I would like to withdraw my application and have my passport returned.”

6. In the meantime, on 19 January 2021, the appellant had made another application for entry clearance as the sponsor’s spouse. He was assisted with this application by a firm of legal representatives called londonhelp4u (“LH4U”). LH4U is not a firm of solicitors but it is registered with the Office of the Immigration Services Commissioner.
7. The appellant gave largely the same information in this application as he had in his original application. At page six of the form, however, he stated that he had never had any convictions or other relevant penalties and at page five he indicated that he had never engaged in any activities which might indicate that he was not a person of good character.
8. The Entry Clearance Officer refused the application on 5 September 2022. There were two grounds of refusal. The first was that the applicant failed to meet the Suitability requirements for a family permit as the family member of a relevant EEA citizen because he had failed to disclose in his current application the convictions which he had disclosed in his first application. The second ground was that the appellant did not meet the Eligibility requirements because he had not shown that he and the sponsor were validly married by the production of original documentation.

Proceedings on Appeal

9. On appeal, Judge Groom resolved both grounds of refusal in the appellant’s favour. For the reasons given in the Upper Tribunal’s first decision, however, the FtT’s consideration of the first ground of refusal was erroneous in law and is to be redetermined in the Upper Tribunal.
10. In preparation for the resumed hearing before the Upper Tribunal, the appellant’s current representatives, Immigration Advice Service, filed and served a composite bundle of 101 pages, a skeleton argument and a copy of the respondent’s guidance entitled *EU Settlement Scheme: suitability requirements*, version 8.0, dated 29 June 2022. These materials were sent to the Upper Tribunal by email at 0220 on the morning of the hearing. That is unacceptable on any view and I directed that a partner in the firm should write to the Upper Tribunal with a full explanation. No such explanation has been received to date.
11. Despite the late service of this material, Ms Nolan helpfully indicated that she was ready to proceed, and I considered that it was in the interests of justice to do so despite the late provision of the papers.
12. I heard oral evidence from the sponsor. I do not propose to rehearse her evidence in my decision. I will refer to her oral and written evidence insofar as it is necessary to do so to explain my conclusions.

Submissions

13. Ms Nolan relied on the refusal letter, although she noted that the second ground of refusal had been resolved in the appellant's favour by the FtT. She submitted that the sponsor had not given a credible account of the events which resulted in the disclosure of convictions in the 2019 application and the non-disclosure of convictions in the subsequent application. It was notable that the judge in the FtT had been presented with a different version of events. The appellant stated in his witness statement of 18 January 2023 that he had given LH4U all of the details of his convictions when he came to make the second application. It was now suggested that the appellant's criminal record in Cape Verde disclosed no convictions and that the sponsor had been directed by LH4U not to mention any convictions in the second application. The criminal records checks upon which that submission was premised had not been seen by the FtT.
14. Ms Nolan submitted that the suggestion that there had been a mistake in the first application had only come about latterly. Insofar as it was suggested that the mistake had come about as a result of the appellant using Google translate, that was wholly incredible in light of the amount of detail given. LH4U were clear that they had not been made aware of any convictions. If what the sponsor said was true, and the correct position was that the appellant had no convictions recorded, the obvious solution was to explain that in the application and to enclose the criminal records checks. LH4U had clearly taken care to investigate the case and to gather relevant evidence and it was not credible to suggest that they had overlooked this.
15. In any event, Ms Nolan submitted, it was seemingly accepted by the appellant that he had received a suspended sentence which did not appear on his criminal record. The proper course in those circumstances was undoubtedly to disclose the conviction. He had failed to provide full disclosure in response to the questions in the second application form and the respondent had been correct to refuse his application under the Immigration Rules.
16. Ms Osazuwa relied on her skeleton argument and submitted that the appellant had not been dishonest in his dealings with the ECO. He and the sponsor had given credible evidence of the events. As he had explained, he had been arrested and had been taken to court and received what in the UK would be called a suspended sentence. The sponsor had explained in her statement before the FtT that there had been problems with Google Translate and this was the reason for the errors. It was notable that the sponsor had pursued a complaint to the Home Office in 2021, in which she stated that innocent mistakes had been made in the first application and she had been ignored when she tried to bring these to the attention of the respondent. That complaint was made in December 2021.
17. Mr Osazuwa asked rhetorically whether the sponsor had mentioned the convictions to LH4U. She submitted that it was more likely than not that the point had been mentioned, and it was clear that there were no records of the initial consultation. There was notably no reference to the first application in the covering letter from LH4U. It seemed that Mr Ferrarini, the adviser at

LH4U, was surprised to learn of the first application when it was raised with him in March 2023. They had initially stated that they were not informed of it but had subsequently accepted that they had been informed of the first application during the original consultation (Mr Ferrarini's email of 10 January 2024 refers.)

18. The sponsor stated that she had been told by LH4U to tick the box which indicated that the appellant had no criminal convictions. Even the reference number for the first application had been provided to LH4U in the correspondence concerning the second application. This was evidently not a case of seeking to mislead the ECO, whether on the part of the sponsor or the appellant.
19. Even if there was such an intention, it remained necessary to consider proportionality, which was an integral part of the relevant paragraph of the Immigration Rules (FP 7.4(a)). The Home Office guidance was relevant in this connection. The sponsor was not able to live with the appellant in Cape Verde as she has a nine year old son from a previous relationship and she would not wish to interrupt the contact he continues to have with his father.
20. I asked Ms Osazuwa whether the criminal records checks in the appellant's bundle had ever been provided to the Entry Clearance Officer, the Home Office or the Tribunal before the morning of this hearing. She stated that it had been provided to the appellant's previous representatives. I noted that the sponsor's original witness statement made reference to her having 'tried' to resolve matters with the Home Office but that it did not state that she had provided these documents at any stage. Ms Osazuwa sought instructions from the sponsor. She submitted that a document from 2022 had been provided to the FtT. I asked whether the earlier document had ever been provided. Ms Osazuwa was not able to point to any evidence to show that it had been provided but she submitted that the LH4U had not given the appellant or the sponsor any opportunity to consider the application which was ultimately submitted.
21. I reserved my decision at the end of the submissions.

The Immigration Rules

22. The appellant's application was for a Family Permit as the family member of a relevant EEA citizen. It fell to be considered under Appendix EU (FP) of the Immigration Rules. The only relevant paragraph of that appendix for the purposes of this decision is paragraph FP7.4(a), which is in the following terms:
 - (4) An application made under this Appendix may be refused on grounds of suitability where, at the date of decision, the entry clearance officer is satisfied that:
 - (a) It is proportionate to refuse the application where, in relation to the application and whether or not to the applicant's knowledge, false or misleading information, representations or documents have been submitted (including false or misleading information submitted to any

person to obtain a document used in support of the application); and the information, representation or documentation is material to the decision whether or not to grant the applicant an entry clearance under this Appendix; or

23. In an appeal where such a ground of refusal is in issue, it is for the respondent to show that a false representation has been made. The standard of proof is the civil standard. Falsity in this context requires dishonesty. The respondent's policy, as cited at [13] of Ms Osazuwa's skeleton argument, states that 'False or misleading information, representations or documents means information, representations or documents provided with the intention to deceive.'

Analysis

24. The appellant and the sponsor maintain before me that the part of the 2019 application form which I have reproduced at [4] above is wrong. They suggest that the appellant did not go to prison for either offence and that he actually received a suspended sentence. The sponsor was insistent in her evidence that this supposed error was attributable to the appellant's use of Google Translate whilst he was completing the 2019 application form. She said that he had been arrested for an offence to do with cannabis and that he had never been imprisoned. In cross-examination, she said that the appellant had been to court and had been given a suspended sentence of five years. She said that the appellant had not been to prison for four years, or at all, and that this had been confirmed to her by various officials in Cape Verde.
25. Ms Nolan pressed the sponsor on this evidence, noting in her questions that the information given in the 2019 application was very specific and that it seemed unlikely that Google Translate would generate such wrong translations. The sponsor stated that the appellant's language of choice is Creole and that he had been required to translate from Creole to Portuguese and then Portuguese to English. She said that the appellant was unable to understand anything she said to him in Portuguese: "I have to speak in Creole for him to understand", she said. I found this evidence difficult to accept for three reasons.
26. Firstly, there is no such suggestion in the witness statements made by the appellant and the sponsor on 18 January 2023 for the appeal before the FtT. It is not suggested in those statements that the appellant had used Google Translate for the first application, or even that errors had been made in that first application. The account given in those statements was simply that there had been full disclosure in the original application and that the appellant and the sponsor had intended that the relevant information would be available to the respondent when she came to consider the second application.
27. Secondly, the appellant stated in his 2019 application form that he spoke two languages fluently: English and Portuguese. He was asked to specify the language in which he should be asked any questions about his application, and he stated that it was Portuguese, not Creole. There was in fact no reference to the appellant's first language being Creole, or to him having acute difficulties understanding Portuguese, before the resumed hearing in

the Upper Tribunal. I regret to say that I considered this suggestion of three-staged translation to be a late addition to the sponsor's evidence, designed by the sponsor to overcome the obvious sense behind Ms Nolan's question.

28. Thirdly, even if the appellant was required to translate from Creole to Portuguese and from Portuguese to English, I consider it wholly unlikely that the software would produce responses which are so wildly divergent from what was entered. The specific answer was that the appellant 'served 4 years and 7 months'. There is no evidence before me to show the process by which a three-staged translation could generate such a specific and erroneous answer if, as is claimed, the appellant stated that he had never been to prison and received only a suspended sentence. It is much more likely that the appellant completed the form himself in English or that it was accurately translated from Portuguese to English.
29. The sequence of events in this case is quite unusual. The first application was made in August 2019. The second application was made in January 2021. Both remained pending until the first application was withdrawn by email in March 2022. There is no documentary evidence before me of the appellant or the sponsor taking any steps between August 2019 and November 2020 (when LH4U were instructed) to correct what is now said to be a serious mistake in the 2019 application. A document at page 74 of the bundle is the Home Office's April 2021 response to a complaint made by the sponsor. It records that the sponsor had been chasing a decision on the first application since October 2019 and that she was 'depressed with the delay about [the] case'. There is no suggestion in this email that the sponsor had realised that the appellant had made a serious mistake in completing his application form and had taken steps to correct that error.
30. It was suggested before me that the sponsor had obtained a certificate from the Head of Criminal Intelligence of the Cape Verdean Judicial Police on 16 January 2020. This certificate is identified as 'Police Registration Certificate No 155/2020'. It names the appellant and states that 'Nothing has been found' in the police files concerning the appellant. There is nothing before me to show that this certificate was ever sent to the Entry Clearance Officer or the Home Office. Ms Osazuwa suggested in her closing submissions that the certificate was sent to the ECO by Norfolk Legal Services, from whom the sponsor obtained some assistance before instructing LH4U, but there is no documentary evidence to support that important assertion.
31. In her skeleton argument, Ms Osazuwa invited me to attach significance to a document which appears at page 71-73 of the bundle. This is a complaint which was made by the sponsor to the Home Office on 1 December 2021. It is a complaint about the delay in considering the first application. Of course, the second application had been pending for some months by this time. Within the section entitled 'Complaint Details', the sponsor wrote this (the text is reproduced verbatim):

"Me and my husband have applied for the EEA family permit back in September 2019, when the EEA family permit was still in place by the brexit rules. My husband lack of english he stated that he had a criminal conviction when he did not have any on the application form. I have been waiting for 2

years for him to be able to join me and our family here in the UK where I am legally settled, I have escalated his case several times until today date where the EEA family permit is not valid no more, I have requested help from my local MP where you are always requesting for me to be patient which I have been, the Norfolk legal services send to you the proof in which shows clearly that my husband don't have any criminal record or history and still we were ignored. even taking into consideration the pandemic that we are facing at this time the time frame for the home office to make a decision would be 6 months in my husband's case we are waiting for 2 years and with the home office stating always that is a complex case when it could be requested a criminal record from the individual instead. I would like to have or a decision even is a negative or I would like my husbands passports I am EEA citizen I travell quite often to the Netherlands Portugal and France, I am due to start my placement soon in France and thanks to you having my husband documents retained based on a decision that you are not willing to provide I am not able to travel with my husband to other countries based on your retention, so I would appreciate or a decision at this stage or my husband's passports. Yours Sincerely Patricia A. S. Moreira”

32. In her skeleton argument, Ms Osazuwa relies on this as showing that the sponsor had made reference to ‘the 2019 application and the criminal conviction’ but it is necessary to consider what the sponsor actually wrote. She did not state that the appellant had made a mistake about his sentence; she painted him as a person who did not have ‘any criminal record or history’. Whilst that version of his history accords with what is said in the second application form, it does not accord with the sponsor’s evidence that the appellant went to court for drugs and firearms offences and received a suspended sentence. Whether or not such a person has a criminal record, he evidently has a criminal ‘history’. I regret to say that I find that this was not an attempt to ‘come clean’ or to ensure that the Home Office was in possession of all material facts. It was, instead, another example of the sponsor attempting, unsuccessfully, to bridge the gap between the disclosure made in the first application and the absence of any such disclosure in the second application.
33. It is clear that the sponsor instructed LH4U to prepare the second application in around November 2000. What she told them about the appellant’s convictions is decidedly less clear. She maintains that she had a conversation with the principal of the firm (Ms Mendonca) when she first instructed them. She says that she explained during that conversation that there was already a pending application in which the appellant had stated that he had convictions ‘whereas his criminal records were not showing the convictions’. At pages 15-24 of the appellant’s bundle, there is a copy of the ‘Family Settlement Form’ which LH4U used to harvest information from the sponsor in connection with the application they had been instructed to make. At question 6.9, there is a negative answer to the question ‘Do you have any criminal convictions either in the UK or overseas’.
34. The sponsor was asked during her evidence to explain this apparent contradiction. She stated (as she had at [6] of her most recent statement) that she had made contact with LH4U when she was completing the Family Settlement Form in order to ask about this question. She said that she had

been told (by a receptionist, who had spoken with a fee earner) simply to enter an answer which accorded with the appellant's criminal record. I find it very difficult to accept that assertion, for the following reasons.

35. Firstly, as above, there is no reference to any of this in the statements which the appellant and the sponsor made for the FtT hearing on 18 January 2023. There is no suggestion that the first application form had been completed inaccurately, or that LH4U told the sponsor to state that the appellant had no convictions in the second application form.
36. Secondly, it is inherently unlikely that a professional immigration adviser who is told of a serious and potentially determinative mistake in a pending application would not take corrective action. If legal advisers at LH4U were informed about the appellant's supposed error in November 2020, there were obviously two courses of action available. Steps could have been taken to 'set the record straight' by writing to the Entry Clearance Officer with an explanation and evidence from the Cape Verdean authorities. Or a fresh application could have been made in which that explanation and that evidence was provided. If the sponsor presented to LH4U as an articulate woman who was trying to put right something which her spouse had done as a result of his poor English, it is inherently unlikely that no steps would have been taken to grasp that nettle.
37. In its first decision, the Upper Tribunal reminded¹ the appellant and his current advisers of what was said in the line of authority that includes BT (former solicitor's alleged misconduct) Nepal [2004] UKIAT 00311 : where a difficulty is said to be attributable to the action or inaction of a previous representative, the allegation does not prove itself and should be put to the representatives in question so that they have an opportunity to comment. Ms Osazuwa took note of what was said, albeit rather belatedly, and made contact with LH4U, starting on 28 December 2023. The responses from the firm state that a 'mistake' was made by the sponsor when completing the Family Settlement Form and that there is 'no record of criminal convictions during the consultation'. The author of the second email is Mr Ferarini, who had direct involvement in this case. He accepts in that email that the firm was informed of the first application during the initial consultation but that nothing was said about criminal convictions.
38. In my judgment, the picture which emerges from all of this is quite clear. There is reference on the Family Settlement Form to the first application and the firm was clearly told that an earlier application had been made. There is nothing to support the sponsor's suggestion that she told them about the criminal convictions, or the errors which the appellant had supposedly made by using Google Translate. If she had told LH4U about those concerns, steps would in my judgment have been taken by the firm to address the problem. It is inherently more likely in all the circumstances that the sponsor told them about the first application but not about what was said within it about the appellant's convictions.

¹ Ms Osazuwa suggests at [6] of her skeleton argument that the appellant was 'directed to file a complaint against his previous representatives'. No such direction was made. Paragraphs 48-49 contained an observation that the allegations against LH4U were unlikely to be accepted unless they had been put to the firm.

39. Let us suppose for a moment, however, that the sponsor did tell the firm about the convictions and did make a phone call when she was completing the box about criminal convictions. The difficulty with her account is this. Even if she was told to complete that box in a way which accorded with the appellant's criminal record, she was still aware, on her own account, that the appellant had been to court for offences connected with drugs and firearms. Those were obviously matters which potentially reflected adversely on his character, and were consequently matters which required an affirmative answer to the subsequent question on the application form: "Have you engaged in any other activities that might indicate that you should not be admitted to the UK." That question was answered in the negative on the Family Settlement Form, however, and the sponsor cannot properly be heard to say that the advice that she claims to have received from the receptionist begins to explain that answer.
40. Ms Nolan drew the sponsor's attention during cross-examination to LH4U's assertion that they had never been told about the appellant's convictions. The sponsor described it as a 'total lie'. I reject that assertion. It is clear from LH4U's email to the sponsor on 12 April 2023 that the firm keeps detailed records of communications. At pages 48-53 of the bundle there are notes of each attendance upon the sponsor and the appellant between 9 November 2020 and 28 September 2022. There is no record of anything being said, whether by the client, a fee earner or a receptionist, about the appellant's criminal convictions and the sponsor's claimed concern that the second application should be an opportunity to correct the supposed error made previously.
41. The sponsor stated in her evidence before me that she had expected LH4U to 'inform the Home Office in the second application that there had been a mistake'. I do not accept what she said in that regard. In my judgment, the truth is that neither she nor the appellant made any reference to his convictions during their dealings with LH4U. They did so because they realised that the disclosure of those convictions might have caused a problem with the first application, and they were hoping that they could get away with making no mention of those convictions in the second application.
42. The appellant and the sponsor have maintained at various times that they would not have acted in that way because the appellant had already disclosed the convictions (albeit inaccurately, on their account) during the first application. They suggest, therefore, that the Entry Clearance Officer would necessarily have compared the two application forms and would immediately have been suspicious. That is obviously exactly what did happen, but I do not accept that it was in the minds of the appellant and the sponsor at the time that they instructed LH4U and paid them to make the second application. In my judgment, it is more likely than not that they (in common with many other applicants) simply hoped that the failure to disclose those matters would not be detected by a busy entry clearance officer.
43. Insofar as the appellant relies on the criminal records certificates from Cape Verde to suggest that he has no convictions, I attach little weight to those documents. They are at odds with the evidence given by the sponsor, who

stated quite frankly that the appellant has been convicted of offences in a court. I do not know whether the certificates simply reflect the fact that the convictions are now spent according to the law of that country, or whether they are actually in error. In my judgment, it does not matter. As I have explained above, the reality of this case is that the appellant (and/or the sponsor) failed to inform LH4U that there were matters which reflected adversely on the appellant's character even if they honestly believed that his criminal record showed that he had no convictions. A man who has convictions for firearms and drugs offences is obviously required to declare such matters in response to questions which enquire about his character. Whether or not the appellant and the sponsor honestly believed that the appellant's criminal record was clear, they both knew that he had been involved in criminality which was capable of reflecting adversely on his character.

44. In reaching these findings, I have borne carefully in mind the fact that the sponsor secured a full refund from LH4U on 25 May 2021. There are a number of interesting features of the events surrounding that refund.
45. Firstly, although the sponsor told me in oral evidence that the application prepared by LH4U had been provided to her when the appellant went to enrol his biometrics (on 29 January 2021), there is nothing before me to show that she raised a complaint about the absence of reference to the appellant's criminality in the second application. Her concern (as recorded at p29 of the bundle) was instead that LH4U had not advised her that the Home Office would be obliged to consider the first application despite the making of the second.
46. Secondly, although the firm agreed to refund the full fee, there has never been any acceptance on the part of the firm that it did so because the sponsor had told them about the appellant's offending history and it had failed to act on that information. On the contrary, the firm has maintained that it was not told about the appellant's offending. It is more likely that the refund was offered because the firm had failed to give advice on the wisdom of making a second application whilst the first was still pending.
47. Thirdly, there is a lack of evidence before me concerning the sponsor's actions after she had received a refund from LH4U. On her account, she was by that stage a woman thrice wronged. She had purportedly learned that her husband had made a mess of his first application as a result of reliance on technology. She had waited for sixteen months without a decision, after which LH4U made a further application which she supposedly discovered was not completed in accordance with her instructions. Despite her claims to have been let down in those ways, there is nothing before me to show that she attempted to set the record straight at any point until she made the complaint in December 2021. There is evidence of her having instructed different representatives (Norfolk Legal Services) and evidence of her having asked her MP for assistance but there is nothing to show that she made any attempt during this period to explain to the Home Office what mistakes had been made. In any event, when she came to make the complaint in December 2021, that correspondence fell short by some margin of being a complete account of the appellant's antecedents, as I have explained above.

48. For these reasons, I do not consider that the refund which the sponsor received from LH4U in May 2021 really sheds any light on the question of whether there was dishonesty in the second application. In my judgment, the answer to that question is quite clear, and the respondent is amply able to discharge the burden upon him of showing that the answers to questions about criminality and character in the second application were intentionally false. The appellant and the sponsor recognised and understood that the disclosure provided in the first application was likely to militate against the grant of entry clearance and they have been trying, ever since they were informed of the 'complexity' of that application, to present a better version of the appellant's past. Those accounts have been inconsistent, implausible and delayed for reasons I have given above. I have taken account of all of the evidence before me in reaching that finding, including the oral evidence of the sponsor. For the reasons I have given, I did not find her to be a witness of truth.
49. In summary, therefore, I found that the information given in the first application was more likely than not to be accurate and that the appellant and the sponsor decided after that application had been pending for some time to make a further application in which those convictions were withheld.
50. Ms Osuzuwa submitted that the appellant's failure to disclose his convictions was not material. As explained in the Upper Tribunal's first decision, the test in that regard is whether the information in question was capable of affecting the appellant's ability to meet the Rules. Ms Osazuwa submits that it was not. She points to the age of the convictions, and she submits that the respondent would be required to show that the 'higher threshold of public policy, public security or public health in regulation 27 of the Immigration (EEA) Regulations 2016 was met. Assuming for present purposes that the latter submission is correct in law, it is not possible to state with any certainty whatsoever that the respondent might not properly have concluded that the appellant posed a genuine, present and sufficiently serious threat to the fundamental interests of the UK if he had disclosed the convictions. They are serious matters which incurred a lengthy period of imprisonment and there was no evidence beyond the mere passage of time to suggest that the appellant did not have the propensity to commit further such offences in the future. In my judgment, the failure to disclose those matters was plainly material to the second decision.
51. Ms Osazuwa submitted that a refusal under paragraph FP 7.4(a) is discretionary, and that the Tribunal must consider the proportionality of any such decision. Given the wording of the Rule, that submission is obviously correct.
52. The first question to be considered in assessing the issue of proportionality is the best interests of any children involved. The appellant has one son, who was born in May 2016 and lives with him in Santiago. His existence was disclosed to LH4U in the Family Settlement Form but nothing more is said about him in the papers. No application for entry clearance has been made for this child and the answers given on the form indicate that the child will not be travelling with the appellant. Given his age and his cohabitation with the appellant, it is in his best interests for the appellant to remain in Cape Verde.

53. The sponsor has two children, although the older of the two is now an adult. The younger son was born in September 2014. He lives with the sponsor and his older brother. The sponsor stated in her witness statements that she is reluctant to move to Cape Verde to live with the appellant there because to do so would interrupt the contact which her son has with his father. There is no evidence of any such contact in the papers before me. There is a document from the Judicial Court of the District of Lisbon from 2019. It is untranslated. Doing the best I can with that document, it appears to award custody of the child to the sponsor and gives permission to the child's father to visit him with 48 hours' notice to the sponsor. The whereabouts of the child's father were unknown at that time and there is, in any event, no evidence to show that he has ever availed himself of the contact which he was granted. Be that as it may, it is clear that the sponsor has an established life in the UK with her two sons. Her younger son is presumably in education in this country, although there is no evidence of that either, and it must be in his best interests to stay in the UK, with his mother, receiving the education to which he is accustomed. There is no suggestion, however, that the sponsor's son's best interests otherwise militate in favour of the appellant's admission to the UK. There is no suggestion that the appellant has developed any sort of relationship with the sponsor's son, for example. The child's best interests are therefore to remain in the UK; not for him to be joined by the appellant.
54. The sponsor also asserts that she cares for her uncle in the UK. She was asked no questions about that aspect of her evidence and I accept it, despite the absence of any further evidence on the point. It is a further reason that she is unable to relocate to Cape Verde to pursue her family life with the appellant there.
55. The sponsor is plainly upset by her ongoing separation from the appellant. They have been in a relationship since 2018 and his first application was made in 2019. Given the conclusions I have reached in relation to the sponsor's child, their continuing separation is likely in the event that this appeal is dismissed. That is a serious matter to which weight must be attached in the assessment of proportionality.
56. The delays have not been attributable to a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes, however. They have been attributable to the pandemic and also to the difficulty caused by the appellant's frank answers in the first application and his less than frank answers in the second application. The delay is not a matter which carries any real weight in the assessment of proportionality, therefore.
57. Ms Osazuwa submitted that the respondent had not followed her own policy of putting the appellant on notice of his concern that false information had been provided in the second application. That appears to be correct but it is not a matter which militates in the appellant's favour in the assessment of proportionality. This appeal is not an application for judicial review and the refusal under paragraph FP7.4(a) is considered on its merits. In those circumstances, as was explained in Ashfaq (Balajigari: appeals) [2020] UKUT 226 (IAC), the availability of the right of appeal corrects the defect of justice which would otherwise have occurred.

58. Against those matters, I take account of the public interest in maintaining a lawful and effective immigration control. The appellant's failure to disclose his convictions in the second application was in my judgment a clear and blatant attempt to circumvent those controls. As I have previously explained, I consider him to have taken a chance in submitting the second application, hoping that he would not be discovered in his selective recounting of the past. Such conduct strikes at the very heart of the system of maintaining an effective immigration control, since it is only when the respondent is fully informed of an individual's past that he is able to make a considered evaluation of the danger he might or might not present to the population of the United Kingdom. The appellant was not honest with the respondent, and he and the sponsor have not been honest before the Tribunal. Those matters weigh heavily against them in the balance of proportionality.
59. Balancing the competing considerations which I have set out above, I come to the clear conclusion that the appellant's ongoing exclusion from the United Kingdom is a proportionate course. It is in my judgment entirely proportionate for the respondent to exclude the appellant in light of his dishonesty. In reaching that conclusion, I have taken full account of the severity of the consequences for the appellant and the sponsor but I do not consider those consequences to be unjustifiably harsh in light of their conduct.
60. Having conducted a proportionality assessment as part of my assessment under the Immigration Rules, there is no need to conduct an identical assessment outwith the Rules under Article 8 ECHR. It suffices to state that the decision represents a proportionate interference with the family life enjoyed by the appellant and the sponsor.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appeal by dismissing it.

Mark Blundell
Judge of the Upper Tribunal (IAC)
19 February 2024