



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-005165

First-tier Tribunal No:
HU/52931/2023
LH/04324/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MRS DALLANDYSHE CAKA
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms U Dirie, Counsel instructed by Wesley Gryk Solicitors LLP

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 26 March 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Monson ('the Judge') who dismissed the appellant's appeal.

Background

2. The appellant is a citizen of Albania who applied on 26 August 2022 for entry clearance. This was refused on 5 January 2023 on suitability grounds, in particular the decision maker said:

We have considered your application under paragraph EC-P.1.1. of Appendix FM. However, you do not qualify for entry clearance under the 5-year partner route for the following reasons:

Home Office records held in the UK confirm the following:

On the 30th October 2012, you entered the UK illegally, via the port of Dover using a Belgium passport in which you was not the rightful owner of and when further questioned, you admitted that you are an Albanian national and have no form of identification. You was then served with IS151A and on the 31 91 October 2012 and was removed to Calais France from the UK.

On the 22nd November 2016 you entered the UK illegally and was served with RED.0001 .

You applied for leave to enter for Marriage/GP- L TE on 27th March 2008, you was then refused with the right of appeal on 14th August 2013.

You also applied for EU Exit Settlement Scheme- Non- EU national- Dependent on the 9th November 2020 and was refused on 22nd December 2020.

On the 28th January 2021 you applied again under for EU Exit Settlement Scheme - Non EU national- Dependent and EU Settlement Scheme- Third Country National and was issued with a refusal on both applications on 31st August 2021.

On 9th July 2022 you applied for Further Leave to Remain and was issued with a refusal on 26th July 2022.

You have previously breached the Immigration Rules by Illegally entering the UK. There were additional aggravating factors in that you absconded, and used a Belgium passport in which you was not the rightful owner of, when questioned by an Immigration Officer you admitted that you are an Albanian national and have no form of identification. In light of all of the above, I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules.

I therefore consider it appropriate to refuse your application under paragraph 9.8.2 of the Immigration Rules. This application was referred to an Entry Clearance Manager prior to being refused and application of paragraph 9.8.2 was agreed.

Under paragraph EC-P.1.1 .(c), your application falls for refusal on grounds of suitability under Section S-EC of Appendix FM because your exclusion from the UK is conducive to the public good because your conduct and character make it undesirable to grant you entry clearance.

As noted above, I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the immigration rules. Therefore, and after referral to an Entry Clearance Manager, in light of your previous conduct I consider it undesirable to Issue you an entry clearance and I am not prepared to exercise discretion in your favour. I therefore refuse your application under paragraph EC-P.1.1 (c) of Appendix FM of the Immigration Rules. (S-EC.1.5).

I am satisfied that you have failed to disclose these material facts, and given that you have been refused due to concerns relating to your immigration history, I am satisfied that they are relevant to your application. I therefore refuse your application under paragraph EC-P.1.1 (c) of Appendix FM of the Immigration Rules. (S-EC.2.2(b)).

3. The appellant appealed. The appeal came before the Judge on 11 October 2023. The Judge dismissed his appeal for the following reasons:

42. I accept that there is no reliable evidence of the appellant absconding. It may be that what the respondent had in mind was the appellant absconding after being allegedly served with a RED notice in November 2016. But the respondent has not brought forward documentary evidence to show that the appellant was served with such a notice at this time. This calls into question whether the appellant's asserted illegal re-entry in November 2016 is a mistaken reference to the appellant's admitted illegal re-entry in November 2012. If so, on the appellant's account, she was not identified at the time as having re-entered illegally. Accordingly, the potential for absconding did not arise. However, I consider that what the appellant admits happened in November 2012 is no less aggravating than the conduct imputed to her in November 2016. She re-entered illegally very soon after being removed, in defiance of that removal decision, and she did not seek to regularise her stay in the UK for 8 years, despite her application for entry clearance made in 2008 having been refused in 2013.

43. I find that the separate claim that the appellant withheld material facts in her application for entry clearance is not made out. While the covering letter sought to minimise the appellant's past offending, I do not find anything now relied on by the respondent that was not disclosed in the application form itself, apart from the appellant not volunteering that she had used a Belgian passport of which she was not the rightful owner for the purposes of effecting an illegal entry via the Port of Dover. As this was a long time ago, I do not consider that the respondent has shown that the appellant was being deliberately evasive in not declaring this detail.

44. However, I do not consider that it is unreasonable for the respondent to rely on this attempted deception as an aggravating factor in the appellant's immigration offending. The fact that, upon further questioning, the appellant admitted that she was not the

rightful owner of the Belgian passport and that she was in fact a national of Albania, does not detract from the fact that she attempted to pass herself as someone who was entitled to enter the UK as an EEA national.

45. Accordingly, on the admitted or undisputed facts, I consider that, having regard to her conduct on 30 October 2012 and her subsequent illegal re-entry in November 2012, the respondent has made out the case that the appellant has previously contrived in a significant way to frustrate the intentions of the Immigration Rules.

46. On the issue of whether the respondent should nonetheless have exercised discretion in the appellant's favour, Ms Vidal places great emphasis on the fact that the appellant returned voluntarily. But while this is true, she made her application for entry clearance almost immediately. In contrast, the appellant in PS (India) waited for a year before applying for entry clearance. The significance of the delay of one year is that in the ordinary course of events the appellant in PS (India) would have been subject to a one-year re-entry ban due to his past immigration offending, and the same applies to the appellant here, simply on account of her being an illegal entrant to the UK.

47. As set out in PS (India) at paragraphs [6] and [7], as from 1 April 2008 paragraph 320(7B) was added to the Immigration Rules. It provided that entry clearance or leave to enter should be refused where the applicant had previously breached the Immigration Laws by (a) overstaying; (b) breaching a condition attached to his leave; (c) being an illegal entrant; or, (d) using deception in an application for entry clearance, leave to enter or remain, whether successful or not, unless the applicant ... (iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State more than 12 months ago.

48. As from 30 June 2008, paragraph 320(7C) was added, disapplying paragraph 320(7B) where the applicant was applying as a spouse, civil partner or unmarried or same-sex partner under paragraph 281 or 295(a).

49. At [11] of PS (India) the Tribunal said as follows:

"The automatic prohibition of entry clearance or leave to enter the United Kingdom was disapplied in the case of Mr S under paragraph 320(7C) (see above). Furthermore, paragraph 320(7B) did not apply in his case because he had left the United Kingdom voluntarily more than 12 months before he had made his application for entry clearance. It might have been thought that the provisions of paragraph 320(7B) and (7C) were, among other things, intended to encourage a person in the position of Mr S voluntarily to leave the United Kingdom, to remain outside the United Kingdom for a significant period and then to seek to regularise his immigration status by applying properly for leave to enter the United Kingdom to

join his wife. That would appear to be to be a desirable objective of the Rules since it would encourage those who are unlawfully in the United Kingdom to leave and, as explained, to seek to regularise their immigration status.”

50. On analysis therefore, the rules have not materially changed in substance since PS (India). The automatic ban on re-entry by immigration offenders within designated time-periods (according to the gravity of their immigration offending) is now to be found in Part 9. Disapplication of an automatic prohibition on re-entry for spouses or partners is achieved through persons in these categories being exempt from Part 9, and their past immigration offending being considered only in the context of whether they fall foul of the discretionary suitability requirements contained in Appendix FM.

51. The significance of the Tribunal’s line of reasoning in PS (India) is that, although Mr S was fully entitled under the Rules as they stood to make an entry clearance application as a spouse immediately after he left the UK voluntarily, or within 12 months of doing so, he had nonetheless chosen to comply with the prohibition on re-entry within 12 months of departure. The Tribunal’s criticism of the ECO’s approach was that the ECO had not given the appellant credit for this conduct which promoted the public interest. Although he had not been obliged to accept the punitive sanction of a 12-month exclusion period for his past immigration offending, he had nonetheless done so. The fact that not only had he left the UK voluntarily at his own expense, but had chosen to remain outside the UK “for a significant period” before seeking to regularise his immigration status by applying properly for leave to enter the UK to join his wife, was a material consideration in the exercise of discretion as to whether it was appropriate to exclude Mr S under paragraph 320(11).

52. Accordingly, by parity of reasoning, I find that the respondent reasonably exercised discretion against the appellant as she did not – through her solicitors - display any contrition for her past offending and, more importantly, she applied immediately upon return, rather than undergoing voluntarily a 12-month exclusion period by way of a self-imposed sanction for her past offending.

53. The appellant did not adduce evidence of any mitigating factors in relation to her immigration offending as part of the application, and the appellant also did not rely in her application on the fact that she was a vulnerable person with mental health issues. Accordingly, I address these matters in the context of a proportionality assessment under Article 8 ECHR.

54. Questions 1 and 2 of the Razgar test must be answered in favour of the appellant, as the effect of the refusal decision is to prevent her from enjoying family life with her husband in the UK. Questions 3 and 4 of the Razgar test must be answered in favour of the respondent. On the crucial issue of proportionality, it is in the appellant’s favour

that she meets all the other relevant requirements for entry clearance as a spouse that are contained in Appendix FM. But a counterbalancing consideration is that little weight can be given to family life formed with a qualifying partner at a time when the applicant's status in the UK was unlawful. At all material times, the parties to the marriage knew that they very well might not be able to carry on family life in the UK, rather than having to carry it on in Albania.

55. While it is entirely understandable that the sponsor does not want to settle in Albania

with the appellant, it is not shown that there are insurmountable obstacles as defined in EX.2 to him doing so. Accordingly, it is difficult to contend that it would be unjustifiably harsh to require him to carry on married life with the appellant in Albania when he knew from the outset that she was an immigration offender and therefore that she might well have to go back to their country of birth; and when neither of them had a legitimate expectation that she would be allowed to come back to the UK immediately, but might have to serve a period of exclusion from the UK commensurate with the gravity of her immigration offending.

56. While I accept that there is ample evidence of the appellant's poor mental ill-health and psychological vulnerability going back as far as 2019, I am not persuaded that the appellant's immigration offending in 2012 can be excused on the ground that she was similarly vulnerable at that stage of her life. One of the people who gives a reference for the appellant refers to meeting the appellant in 2012 at university in Albania, and she gives a portrayal of the appellant's presentation at that time which is entirely positive and upbeat. There is no suggestion whatsoever that the appellant was experiencing any significant traumas in her life at that time. In any event, if she was, she was not showing it. I accept that there is medical evidence of the appellant undergoing surgery in early 2012, but she clearly recovered from the surgery relatively quickly so as to be able to go and spend time in Belgium before seeking to enter the UK later in 2012 to join her partner here.

57. It is difficult to reconcile the appellant's account of her fluctuating state of mental health in the UK with the evidence of Ms Adamou. The appellant indicates that she was in a very bad mental state from about 2013 until 2017, as a result of problems with her relationship with her partner Kamber Shabani, whom she had come to join in the UK, and because in September 2014 her third brother committed suicide by hanging himself, and then in October 2016 her mother died. She says that after leaving her partner in 2017, she started staying with friends and her nephew; started going to church; starting having English classes which she enjoyed a lot; and that her friends helped her take counselling sessions and medication for her mental health. In short, she indicates that after 2017 her health improved.

Conversely, Mr Adamou says in her evidence that when she first came across the appellant in 2019, she was a broken woman.

58. As to her current state of health, the appellant does not claim that she is unable to cope with being separated from her husband. What she says is that it has been really disappointing, difficult and stressful for them to continue their lives by way of a distant relationship, as they have not been able to live together physically as a family unit.

59. While I accept that the ongoing separation is difficult for both the appellant and the sponsor, and that it is inimical to the appellant's mental health, I do not consider that this tips the balance in the appellant's favour in the proportionality assessment. Now that the appellant has served a period of exclusion of over a year since her voluntary departure from the UK, it is open to her to re-apply on the basis that her renewed application is fully compliant with the ratio decidendi of PS (India).

60. I consider that the decision appealed against strikes a fair balance between, on the one hand, the rights and interests of the appellant and her sponsor, and, on the other hand, the wider interests of society. It is proportionate to the legitimate end sought to be achieved, which is the maintenance of firm and effective immigration controls and the prevention of disorder.

4. The appellant was dissatisfied and appealed. Permission was granted by Upper Tribunal Judge Bruce on 8 January 2024 on two grounds of appeal:
 - i. The Judge materially erred by failing to consider whether the rules were met as at the date of the appeal hearing. The appellant argued that paragraphs 52 and 53 showed the Judge straight jacketed himself in considering matters as they were at the application and decision date. The Judge failed to consider the up-to-date evidence at the hearing. An example of this is at paragraph 52 where the Judge criticises the appellant for failing to show contrition in her application, however this ignored the statement of the appellant in the appeal where various paragraphs showing contrition were present. The Judge further failed to consider the medical and other detailed evidence relied on in the appeal.
 - ii. Secondly, the Judge materially erred by misapplying the case of *PS [2010] UKUT 440*. Having found that some of the grounds were not made out the Judge still had to consider the up-to-date evidence in considering whether discretion should be exercised differently. The Judge applied an overly prescriptive and impermissible approach in applying *PS* by in essence requiring the appellant to have waited at least a year before applying for entry clearance. This asserted a minimum absence requirement which is not mandated by the immigration rules for an application under Appendix FM. It was not, under the rules, fatal

to the application. By the date of the hearing in any event the appellant had been absent for over 12 months in any event, and given the assessment is at the date of hearing his conclusion was infected by legal error. The consequence of the Judge's finding was that the appellant would meet the rules in an application at the date of hearing.

The hearing

5. The appeal came before me. On behalf of the respondent Mr Clarke accepted there was an error of law such that was material in relation to ground 2. Mr Clarke accepted there were difficulties in how the Judge applied *PS*, it is not an authority for the reasons the Judge gives.
6. Mr Clarke accepted that the proportionality assessment was infected with legal error and, in his submission, it had to be disentangled and undertaken afresh.
7. Ms Dirie submitted that the concession there was an error of law was not the end of the matter, because, as she submitted, paragraph 59 was determinative of the appeal as there was only one way in which the decision could go.
8. In relation to ground 1 she submitted that the Judge failed to take into account the evidence submitted with the appeal, and failed to consider it. It was not incumbent on him to accept the evidence, but if he rejected it he would have to give reasons.
9. If I was not with her in relation to the determinative nature of paragraph 59 then the whole appeal would have to start again in the First-tier Tribunal.

Findings and reasons

10. As accepted by Mr Clarke there is an error of law in the Judge's application of *PS*, there is nothing within *PS* which bars an appellant applying within 12 months of returning to their country and applying as a spouse though Appendix FM. I return to the significance of paragraph 59 below.
11. I am also persuaded that the Judge has failed to properly consider the evidence as of the date of the hearing, it is clear from the Judge's decision that his consideration of the evidence was restricted to the decision of the respondent. There is no engagement with the witness evidence presented by the appellant in relation to the exercise of discretion, and no engagement with the documentary evidence either.
12. As a consequence of the above the Judge's decision is set aside, the next question is what, if anything, is the significance of paragraph 59. I find this a significant paragraph of the Judge's decision, in essence he concludes

that, erroneously, the decision was lawfully made at the time, but if an application was made in October 2023 it would be successful.

13. The error is one of the relevant date of consideration. The consequence of the unchallenged conclusion at paragraph 59 reflects that the decision to continue refusing the application as of the date of hearing would be disproportionate. The Judge expressly finds:

...Now that the appellant has served a period of exclusion of over a year since her voluntary departure from the UK, it is open to her to re-apply on the basis that her renewed application is fully compliant with the ratio decidendi of PS (India).

14. I have considered the evidence submitted with the application, as well as the reasons given by the respondent. I find that the Judge clearly was finding that the appellant met the provisions of the rules at the date of hearing, and that at the date of hearing the decision to refuse entry clearance was disproportionate. The reason he did not allow the appeal was on the erroneous basis that he assessed the matter as of the date of the decision, the date upon which the respondent exercised his discretion.
15. As a consequence, I find that the Judge's decision is infected by a material error of law and is set aside. I am persuaded that the conclusion of the Judge at paragraph 59 is determinative of the appeal. I find that his assessment, unchallenged by the respondent, is reflective of the strength of the appellant's case as at the date of the hearing before the FTT.

Notice of Decision

The decision of the Judge is set aside due to an error of law.

I remake the decision allowing the appeal.

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 10th July 2024