



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000375

First Tier No: HU/50245/2023
LH/02966/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26th April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

The Entry Clearance Officer

Appellant

and

GJOVALIN PRENDI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Ms A Nnamani, Counsel, instructed by Howe & Co,
Solicitors

Heard at Field House on 14 March 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of the First-Tier Tribunal against a decision, signed on 19 December 2023, of Judge of the First-Tier Tribunal Gaskell (“the judge”) allowing the appeal brought by Mr Prendi, on the ground that refusing him leave to enter breached the United Kingdom’s obligations under Article 8 of the Human Rights Convention.

2. Although the appellant is the entry clearance officer in this appeal, it is more convenient to refer to the parties as they were before the First-Tier Tribunal. I shall therefore refer in this decision to Mr Prendi as “the appellant” and to the entry clearance officer as “the respondent”.
3. I was not asked and saw no reason to make an anonymity order.

The factual background

4. The appellant is a citizen of Albania. His immigration history requires some explanation. He admits that he entered the United Kingdom illegally in September 2014 and that he was arrested in November 2016. The respondent says he was served with removal papers. The appellant says he was released on bail. His application for leave was refused in May 2017 and certified as clearly unfounded. The appellant remained in the United Kingdom and admits working illegally. The respondent says he was “located” in 2022 since when he reported fortnightly. The appellant left the United Kingdom voluntarily after obtaining permission to marry his partner, Ms P Rotariu. The couple married on 18 June 2022 and the appellant left the United Kingdom shortly afterwards. On 18 July 2022 the appellant applied for entry clearance to return to join his partner. However, the application was refused on 7 December 2022.

The reasons for refusal

5. The reasons for refusal provided by the respondent state in relevant part that the appellant’s application failed the suitability requirements of the Immigration Rules. Reliance was placed on paragraph 3.8.2 of the rules paragraphs EC-P.1.1.(c) and S-EC.1.5 of Appendix FM of the rules. The reasons stated:

“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.”

6. Between the date of decision and the final hearing of the appeal, the appellant's partner gave birth to the couple’s child. The judge noted the respondent gave consent for the tribunal to consider this ‘new matter’.

The judge’s decision

7. The judge noted the immigration history of the appellant and that the respondent’s case was that the suitability requirements of Appendix FM were not met [17(a)]. However, in identifying the issues to be decided, the judge omitted any reference to suitability grounds and directed himself to consider whether paragraphs EX.1.(a) or (b) of Appendix FM were met and, if not, whether there were compelling circumstances requiring an assessment of family life outside the rules [26]-[27]. He heard oral evidence from the appellant's partner and accepted her evidence and that

of the appellant, as set out at [18]-[25] of his decision. At [33] the judge set out reasons for finding that it would entail very significant hardship to the appellant's partner for her to be required to leave the United Kingdom to continue married life with the appellant. He went on to give reasons for concluding it would not be reasonable to expect the appellant's child to leave the United Kingdom. He noted the financial requirements of the rules were now met and he allowed the appeal on the basis there was no public interest in refusal.

The appeal

8. The grounds of appeal argued the judge erred (1) by failing to make any findings on suitability, and (2) by applying paragraph EX.1, which was only relevant to in-country appeals.
9. Permission to appeal was granted by the First-Tier Tribunal to argue both grounds.
10. No rule 24 response has been filed.

The submissions

11. Mr Wain relied on the grounds of appeal.
12. Ms Nnamani battled to defend the judge's decision, pointing out in relation to the absence of findings on suitability that the judge had accepted the positive factors which should have been relied on in exercising discretion in the appellant's favour. In effect, the errors were immaterial.
13. Mr Wain replied that findings on suitability were necessary because they would inform the proportionality balancing exercise.

The law

14. The jurisdiction of the Upper Tribunal on an appeal from the First-Tier Tribunal lies only in relation to an error of law, not a disagreement of fact. The following are possible categories of error of law, as summarised in R (Iran) & Ors v SSHD [2005] EWCA Civ 982 at [9]:

- "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
- ii) Failing to give reasons or any adequate reasons for findings on material matters;
- iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- iv) Giving weight to immaterial matters;
- v) Making a material misdirection of law on any material matter;

- vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.”

Decision on whether the judge made a material error of law

15. I agree with the grounds of appeal that the judge erred in failing to make any findings on suitability and then applying the wrong rules to reach a conclusion on proportionality. It is curious that the judge, having highlighted the issues relating to suitability, failed to resolve them. The skeleton argument filed on behalf of the appellant (which was not drafted by Ms Nnamani) perhaps did little to assist the judge.
16. The notice of decision raised two issues under suitability: paragraph 9.8.2 and paragraph S-EC.1.5, a discretionary and mandatory ground respectively. There is no indication these issues were conceded by the presenting officer. Following a structured approach to article 8, the judge was required to decide whether the appellant could meet the rules and the only live issues under the rules were those suitability points. That error must be material because whether or not the appellant met the rules was an important factor in the proportionality assessment.
17. The judge clearly compounded this error by applying paragraph EX.1, which Ms Nnamani accepted was not applicable.
18. The decision of the judge is erroneous and must be set aside. However, his positive findings of fact can be retained because the respondent has not challenged them. In the circumstances, I decided that the decision should be re-made in the Upper Tribunal. I asked for submissions on whether it would be necessary to adjourn for a further hearing or whether I could proceed to re-make the decision myself. I am grateful to the representatives for their constructive approach in agreeing that no further fact-finding was required and the re-making could proceed on the basis of submissions only.

Re-making the decision: submissions

19. Ms Nnamani relied on PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC), which applied to the aspect of the refusal made by reference to the discretionary ground in paragraph 9.8.2 of the rules. That case also concerned a person who married at a time he had no leave but who voluntarily returned to his country of origin to apply for entry clearance as a spouse. The Tribunal said at [14],

“It seems to us that the Entry Clearance Officer should have specifically recognised that Mr S had voluntarily left the United Kingdom more than 12

months ago with a view to regularising his immigration status. There was no question but that the marriage was a genuine one. If the aggravating circumstances are not truly aggravating there is in this context a serious risk that those in the position of Mr S will simply continue to remain in the United Kingdom unlawfully and will not seek to regularise their status as he has sought to do. The effect then is likely to be counter-productive to the general purposes of the relevant rules and to the maintenance of a coherent system of immigration.”

20. Ms Nnamani asked me to give weight to the appellant’s witness statement in which he expressed surprise that the respondent considered he had contrived to frustrate the intentions of the rules in a significant way because he had complied with the terms of his bail to report, he was permitted to get married and then he voluntarily left the United Kingdom in order to regularise his status.
21. Ms Nnamani went on to argue that the decision was disproportionate, asking that I give weight to the best interests of the child, who is a British citizen.
22. Mr Wain pointed out the respondent also relied on paragraph S-EC.1.5. which provided for mandatory refusal. The appellant's exclusion was conducive to the public good. In terms of paragraph 9.8.2, he argued there were aggravating factors, such as illegal working and absconding, although he conceded there was no evidence supporting the assertion the appellant had absconded in the technical sense usually meant by that term.
23. Ms Nnamani replied to point out the burden was on the respondent to establish that the suitability grounds applied.
24. I reserved my decision.

Re-making the decision: conclusions

25. I note that the only issues to be decided under the rules are the two suitability points. It was common ground that the appellant and his partner are in a subsisting relationship and that the financial requirement was now met. Ms Rotariu earns above the minimum income threshold as a result of her employment as an early years practitioner in a day care nursery. The appellant’s paternity of the child is accepted. The child is British.
26. The rules state as follows:

“Appendix FM

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.

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."

...

"Part 9

9.8.2. An application for entry clearance or permission to enter may be refused where: (a) the applicant has previously breached immigration laws; and (b) the application was made outside the relevant time period in paragraph 9.8.7; and (c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding."

27. Where it is alleged the appellant's exclusion is conducive to the public good, the burden rests on the respondent to establish any contested precedent fact. The burden lies on the respondent to justify the decision (see, by analogy, JC (Part 9 HC395 – burden of proof) China [2007] UKAIT 00027).
28. I return to the unchallenged findings of fact made by the judge. He recorded that the appellant accepted that he entered the United Kingdom unlawfully and that he remained here illegally. However, once he met the sponsor, he was anxious to regularise his status and he brought himself to the attention of the authorities in 2022. He complied with reporting conditions and sought permission to marry, which was granted. He left the United Kingdom voluntarily for the purpose of seeking entry clearance to return.
29. I shall start with the mandatory ground in paragraph S-EC.1.5. I note there is no suggestion the appellant committed any crimes other than the breaches of immigration control, for which he was not prosecuted. Nothing has been raised in evidence about the appellant holding extremist views or having associations which could suggest he might hold antisocial views. There is no evidence at all to suggest the appellant has ever been involved in any other nefarious conduct or that he maintains associations which give rise to concern. He is a person who broke the United Kingdom's immigration laws in order to work here illegally. He has been cooperative with the authorities since at least 2016. I do not see any basis for upholding the decision that his exclusion is conducive to the public good.
30. The representatives agreed that my approach to the discretionary ground contained in paragraph 9.8.2 should be to weigh the factors for myself. I

acknowledge the appellant showed blatant disregard for immigration laws by entering the United Kingdom illegally and working without permission. He plainly contrived to frustrate immigration laws but, without more, I do not accept he did so in a significant way or that there were other aggravating features. Mr Wain was unable to establish the appellant “absconded” and there is no evidence to show he did not report as required, as he claims to have done. He did not “go to ground”. Moreover, it is clear he deliberately drew attention to himself by seeking permission to marry and, having obtained permission and married the sponsor, he voluntarily returned to Albania in order to make a paid application for entry clearance. His actions bring to mind the statement of the Upper Tribunal in PS (India), which I have set out above, and I give this weight. The appellant should not be punished for doing the right thing. I do not regard the circumstances as justifying refusal under the discretionary ground either.

31. It follows that the suitability grounds have not been made out by the respondent and that the appellant has already succeeded in establishing the other requirements of the rules for partners are met. Whilst I cannot allow the appeal on the basis the decision is not in accordance with the rules, absent any additional factors, the public interest side of the scales will usually be outweighed by the appellant showing he fulfils the requirements of the rules (TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, [34]).
32. In the circumstances, it is not strictly necessary to conduct a full proportionality balancing exercise. However, I would say that the public interest is clearly outweighed by the strong family life which exists between the appellant, his partner and child.
33. I allow the appellant’s appeal against the refusal of entry clearance on human rights grounds.

NOTICE OF DECISION

The decision of the First-Tier Tribunal involved the making of an error of law and is set aside.

The following decision is substituted:

The appellant’s appeal against the refusal of entry clearance is allowed on human rights grounds (article 8).

Signed: N Froom

Deputy Upper Tribunal Judge Froom
April 2024

Dated: 18