



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000699
First-tier Tribunal No:
LH/05508/2023

Extempore decision

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 September 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Entry Clearance Officer

Appellant

and

Tal Hayat
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr P Lawson, Senior Home Office Presenting Officer
For the Respondent: Mr Peer, Senior Lawyer, Peer & Co.

Heard at Birmingham Civil Justice Centre on 10 September 2024

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision of First-tier Tribunal Judge Blackwell ("the judge") dated 13 December 2023. The judge allowed an appeal brought by the appellant, a citizen of Pakistan, born on 1 January 1987 against a decision dated 20 October 2022 to refuse his human rights claim made in the form of an application for entry clearance. The judge heard the appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The Entry Clearance Officer now appeals against the decision of the judge with the permission to appeal of First-tier Tribunal Judge Saffer.
2. For ease of reference I will refer to the parties as they were before the First-tier Tribunal.

Factual background

3. The appellant was arrested in the United Kingdom for immigration purposes on 1 March 2014. He gave a false name. He later revealed to the Secretary of State that his true identity was Hayat Tal, and claimed to have entered the UK lawfully three months earlier using a visa. No record of his lawful entry or visa issued to him has been found. He was placed on reporting restrictions, failed to report, and was treated as an absconder.
4. In 2017, the appellant made an application for leave to remain which was rejected. In 2020, he made arrangements to obtain travel documentation to return to Pakistan and voluntarily left the United Kingdom at around that time. On 6 April 2021, he applied for entry clearance under Appendix FM of the Immigration Rules, sponsored by his wife. That application was refused by a decision dated 7 September 2021 and the appellant's appeal against the refusal of that decision was dismissed by the First-tier Tribunal by a decision promulgated on 18 July 2022 ("the 2022 decision"). That appeal was heard by Judge Blackwell who was also the judge in this case.
5. On 20 October 2022, the appellant made another application for entry clearance. The application was refused by a decision dated 27 January 2023. In refusing the decision, the Entry Clearance Officer relied on paragraphs 9.8.2 of the Immigration Rules and paragraph S-E.C.1.5. of Appendix FM. Those provisions provide as follows:

"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 that a failure to cooperate with the documentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding."

"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 S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

6. Relying on the appellant's immigration history the Entry Clearance Officer said:

"In light of all the above I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules by overstaying breaching conditions attached to your leave, being an illegal entrant and working illegally. There were additional aggravating factors in that you used a false identity, failed to

comply with enforcement processes, such as failing to report or absconding.”

7. The appellant’s application therefore failed on suitability grounds. There were no exceptional circumstances outside the Rules such that it was unjustifiably harsh to refuse the application.
8. The appellant appealed to the First-tier Tribunal. It was heard by the same judge – Judge Blackwell – who previously heard his earlier appeal. The hearing took place on 8 December 2023.

Decision of the First-tier Tribunal

9. Before the First-tier Tribunal, the appellant had applied for the judge to recuse himself given that he had heard and dismissed the appellant’s earlier appeal. The judge refused the application at the hearing, and gave written reasons paras 4 to 18 of his decision. Neither party has challenged that aspect of the judge’s reasoning. The judge plainly correctly applied the authorities concerning the appearance of bias and reached a decision he was entitled to reach (although, as will be seen, when a judge has previously heard an appeal involving the same appellant or witnesses, the adoption of any earlier findings is thrown into sharp relief in the event of any inconsistencies).
10. The substantive issues before the judge were as follows. First, there was an issue as to whether the respondent had failed to disclose the records of the appellant’s 2004 interview with the Secretary of State. The judge resolved that issue on the basis that he was satisfied that the appellant had received full disclosure of all Home Office records that were still in existence. There has been no cross-challenge by the appellant to those findings and I say no more about them. Secondly, the judge said that he had to resolve whether the appellant failed the suitability requirements contained in paragraph S-E.C.1.5. of Appendix FM. Thirdly, whether the appellant could succeed under Article 8 outside the Rules.
11. The judge heard evidence from the appellant’s wife, Mrs Begum. He had previously heard evidence from her at the earlier appeal in 2022. He directed himself concerning the impact of his own earlier decision pursuant to *Devaseelan* and the associated authorities. He cited extensively from his own previous decision, reaching findings which included the following.
12. First, the judge recalled his earlier finding that the immigration history as cited by the Entry Clearance Officer in the refusal letter then under consideration was accurate, and that he accepted it as being true. The history as cited by the Entry Clearance Officer in the decision of 7 September 2021 that was under appeal in the 2022 decision was as follows:

“You were arrested for immigration purposes on 01/03/2014 and gave the name of Yousafzai Hayat. When you were interviewed later you gave the name of Hayat Tal and stated that you entered the UK 3 month [sic] previously via Heathrow using your own passport with a visa; however there was no record that you were ever granted a visa. It is therefore considered that you were an illegal entrant

You were placed on weekly reporting restrictions and failed to report and classed as an absconder and we were unable to establish your whereabouts.

... in light of all the above, I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Immigration Rules. You entered the UK illegally and there were additional aggravating factors in that you used a false identity when arrested and failed to comply with enforcement purposes by absconding for six years.”

13. The judge went on to say at para. 31 of his decision in these proceedings that “I accept this [i.e. the immigration history in the 7 September 2021 decision] to be true”.

14. Secondly, the judge found that the sponsor was a truthful witness, and that her mental health conditions explained why she had struggled to recall some aspects of what had taken place in her evidence.

15. Thirdly, there was no objective evidence to support the sponsor’s evidence that the appellant had been under the control of an agent when he gave false details upon his arrest in 2014.

16. Fourthly, the judge quoted his own findings in the 2022 decision by which rejected the appellant’s explanation for absconding in 2014 namely that he feared the Taliban. In the 2022 decision, the judge found that had the appellant been afraid he would have claimed asylum previously. At para. 33 of the decision presently under challenge the judge quoted the findings he reached in the 2022 decision at paras 30 to 37. I will quote an extract from that embedded quote here:

“35. I therefore find that the appellant has (i) previously contrived in a significant way to frustrate the intention of the rules; (ii) there are aggravating circumstances including using a false identity, and failure to comply with the enforcement process, including failing to report and absconding.

36. I also find that, for those reasons, the exclusion of the applicant from the UK is conducive to the public good due to the appellant’s conduct, so it is undesirable to grant him entry clearance.

37. Accordingly, the claim within the immigration rules must fail.”

17. Having summarised matters in those terms the judge said:

“...there is simply no evidence for me to depart from the findings at paragraphs 30 and 31 [of the 2022 decision] that the appellant initially gave a false name and had entered the UK illegally. The new evidence in the contemporaneous Home Office minutes confirms this”.

18. The operative reasons given by the judge for allowing the appeal were essentially two-fold. First, the appellant now accepted responsibility for his actions. He had not sought to attribute responsibility to others, as he had done previously. Secondly, in summary, the passage of time now meant that it would be appropriate to grant entry clearance to the appellant. At para. 44 the judge said:

“44. Whilst it was not put to me in submissions, I note also that the Immigration Rules themselves suggest that the passage of time may lessen previous bad conduct. Where an applicant has been

convicted of an offence and sentenced to less than 12 months imprisonment the passage of five years since the end of the sentence is sufficient to remove it from S-EC.1.4(c). When an applicant has been sentenced to a period of at least 12 months but less than 4 years the passage of 10 years since the end of the sentence is sufficient to remove it from S-EC.1.4(b). Obviously the passage of these periods does not conclusively show the appellant satisfies the suitability test (SEC.1.5), but leaves open the possibility that they do.”

19. The judge added that he had not been told when the appellant’s absconding had concluded, but at para. 47 he said that he inferred that it had ended in 2017 when he made an application in that year for leave to remain.
20. The judge allowed the appeal. He found that the Immigration Rules were met and concluded that there was no public interest in refusing the application. He said this at para. 49:

“In light of the above I consider that, in light of the passage of time and the appellant’s contrition, his past conduct does not justify continued exclusion under the suitability condition. In making this finding I have regard to the time periods referred to at paragraphs 44 and 45 above and the appellant’s previous conduct not being criminal in nature, so less culpable.”

Issues on appeal to the Upper Tribunal

21. There are two grounds of appeal.
22. First, the judge erred by failing to address the concerns raised by the Entry Clearance Officer in the refusal letter to which I have already referred. This ground is pleaded under the rubric of “making perverse or irrational findings”, although the substance of this ground and Mr Lawson’s submissions before me were on the basis that the judge had failed to take into account a material consideration.
23. Secondly, the judge had failed properly to address the public interest factors contained in Part 5A of the 2002 Act when assessing Article 8 outside the Immigration Rules.
24. Mr Lawson also submitted that it was unfair for the judge to resolve the case against the Entry Clearance Officer on a basis that had not been ventilated between the parties, as the judge appeared to accept that he had at para. 44 (“Whilst it was not put to me in submissions, I note also that...”).
25. The appellant submitted a Rule 24 response dated 19 April 2024. Mr Peer relied on a helpful skeleton argument dated 6 September 2024 settled by Mr Nazir Ahmed of Counsel.
26. Resisting the appeal, Mr Peer submitted that there was no irrationality on the part of the judge. The judge addressed all factors raised by the Entry Clearance Officer, he heard the evidence, dealt with the issues and arrived at a conclusion he was entitled to reach. There was nothing perverse about that conclusion. As for the judge’s reliance on factors that had not been ventilated in submissions, that point had not been relied upon by the grounds of appeal and it should not be entertained by this Tribunal as a new point introduced at the hearing.

The law

27. An error of law includes a misdirection in law and a failure to take into account a material consideration. The approach of an appeal court or Tribunal to a decision of the sort under consideration in these proceedings was explained in the judgment of the Court of Appeal in *Re Sprintroom Limited* [2019] EWCA Civ 932 at para. 76:

“So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion.”

28. Refusals under paragraph 9.8.2 of the Rules are discretionary. In *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 (IAC) this Tribunal gave guidance on the predecessor provision to paragraph 9.8.2. The Tribunal held in the judicial headnote that:

“In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance.”

Discussion

29. By way of a preliminary observation, as I pointed out to Mr Peer at the hearing, the judge incorrectly stated that the Secretary of State had relied *only* on paragraph S-EC.1.5. of Appendix FM. I respectfully consider that the judge was mistaken in that respect. The refusal letter clearly invokes paragraph 9.8.2 of the Immigration Rules. That is a more focussed ground for refusal than the general “character conduct and associations” reasoning contained in paragraph S-E.C.1.5 of Appendix FM.
30. Paragraph 9.8.2 requires the Entry Clearance Officer, and a judge hearing an appeal against the refusal of a human rights claim, to determine whether, first, an appellant has previously contrived in a significant way to frustrate the intention of the Rules and, secondly, to consider whether there are other aggravating circumstances in addition to the initial immigration breach.
31. I agree with Mr Lawson that the judge did not perform that assessment. Rather than address that two stage analysis by reference to the reasoning relied upon by the Entry Clearance Officer in the refusal letter, the judge performed a broader assessment to determine whether the passage of time justified the appellant’s continued exclusion. I therefore accept that the judge failed to take into account a material consideration by failing to perform his analysis by reference to the correct Immigration Rule and, in doing so, failing to address the reasoning expressly relied upon by the Entry Clearance Officer in the refusal letter as quoted above.

32. I accept that the judge appeared to address one aspect of the reasoning relied upon by the Entry Clearance Officer, namely the length of the appellant's absconding. As I have already said, at para. 47 the judge inferred that that absconding lasted until 2017. That aspect of the judge's reasoning was in error, for the following reasons.
33. In the 2022 decision the judge had made a finding of fact that the Entry Clearance Officer's then summary of the appellant's immigration history involved him having absconded for six years from 2014, which would have been until 2020. The judge expressly found that that history was "true". There was no evidence before the judge to displace that starting point, consistent with the *Devaseelan* guidelines, nor any explanation from the judge as to why his own previous findings no longer continued to apply in that respect. That meant, secondly, that the judge's inference as to when the appellant's absconding came to an end led to a miscalculation of the passage of time, which was erroneously to the appellant's benefit. To the extent it was relevant, the passage of time should have been calculated from 2020 when the appellant left the United Kingdom, rather than 2017 as that was when - on the judge's own findings in the 2022 decision - the appellant was still an absconder.
34. I therefore agree with the Entry Clearance Officer that the judge failed to address the factors relied upon in the refusal letter. That is dispositive of this appeal in favour of the Entry Clearance Officer. It also follows that ground 2 is made out. The judge did not engage in a separate analysis of Article 8 pursuant to an assessment outside the Rules. Of course, having considered that he had allowed the appeal by reference to Article 8 under the Rules, it was not, on the judge's analysis, necessary for him to do so. However, in circumstances where as here the judge had performed that earlier analysis erroneously, it followed that the approach the judge took to the broader public interest in the maintenance of immigration controls had been addressed by reference to an erroneous starting point. I therefore find that ground 2 is established.
35. I set the decision of the First-tier Tribunal aside, with no findings of fact preserved.
36. It is necessary for me to determine next whether the matter should be retained in the Upper Tribunal or remitted to the First-tier Tribunal. I unhesitatingly remit it to the First-tier Tribunal. The primary reason for this is that the judge reached conclusions based on submissions that had not been ventilated between the parties. It is essential that this matter is fully argued by reference to matters that both parties are able to address and of which each is on notice.
37. I therefore remit this appeal to the First-tier Tribunal to be heard by a judge other than Judge Blackwell.

Postscript

38. The day after I delivered this judgment on an *extempore* basis, the Upper Tribunal received an email in the following terms from Mr Peer:

"Dear Respected UTJ Smith,

I write further to yesterday's Upper Tribunal hearing. Post hearing, I was able to talk to Counsel MR Ahmed - and we discussed the outcome and also the matter being referred to the FTT IAC.

I am hereby making a request, to change my position - that the matter be kept in the UT rather than submitting it back to the FTT IAC for a full hearing.

I would be grateful if this request can be noted on the file.”

39. I maintain my decision to remit the hearing to the First-tier Tribunal. The judge took into account factors against the Entry Clearance Officer which had not been raised by the appellant and which the judge had not raised with the parties himself at the hearing. The judge’s findings of fact were reached in a manner that was inconsistent with his own previous judicial findings in the 2022 decision. In those circumstances, it is appropriate for the matter to be remitted to the First-tier Tribunal in accordance with paragraph 7.2 Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal. I therefore refuse the request to set aside my decision to remit the matter to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Blackwell.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Transcript approved on 26 September 2024