IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001786

First-tier Tribunal No: HU/55664/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 21st of November 2024

Before

UPPER TRIBUNAL JUDGE BULPITT

Between

Md Ripon Baksh
(NO ANONYMITY DIRECTION MADE)

Applicant

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mr N Ahmed, Counsel instructed by ASM Immigration
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

Heard at Field House on 11 November 2024

REMAKING
DECISION AND REASONS

1. The appellant is a 35 year old Bangladeshi national who lives in Sylhet. On 19 November 2022 he applied for entry clearance to come to the United Kingdom and join his wife, who is a British citizen, and their British son who at that time was two months old. The respondent refused the appellant's application in a decision dated 23 March 2023. The appellant appealed against the respondent's decision but his appeal was dismissed by First-tier Tribunal Judge Mulholland on 21 March 2024. At a hearing before Deputy Upper Tribunal Judge Skinner that took place on 11 September 2024, Judge Mulholland's decision was found to contain an error of law and was set aside. As a result, the appellant's appeal against the respondent's decision of 23 March 2023 has been listed before me to be reconsidered afresh.

2. In anticipation of this hearing a composite bundle was prepared containing 340 pages including Judge Mulholland's decision, the appellant's bundle and the

respondent's bundle of evidence. The appellant sought to additionally rely on a "supplementary bundle" of evidence which consisted of 14 pages and included further statements from the appellant and his wife Ms Begum. There was no objection to this new evidence and I considered that admitting this evidence would be consistent with the Tribunal's overriding objective of a fair and just hearing. At the hearing I heard oral evidence from Ms Begum who was cross examined and I heard helpful submissions from Mr Tufan and Mr Ahmed. At the conclusion of the hearing I reserved my decision which I now provide along with my reasons.

The Agreed Facts

3. The facts are largely agreed by the parties. Where facts are disputed I consider the evidence and resolve those disputes in my analysis below. For now it is helpful to set out those fact that are agreed as follows:

4. In February 2011 the appellant came to the United Kingdom having been granted a student visa. Having arrived in the United Kingdom the appellant began a relationship with Ms Begum. His leave to remain in the United Kingdom was due to expire on 30 April 2013 but it was curtailed early after the appellant's college's licence was revoked, so that his leave to remain ended on 18 January 2013. Thereafter the appellant remained in the United Kingdom as an overstayer without making any application for further leave to remain.

5. On 16 January 2014 he was encountered by Immigration Officials who served him with notice of an intention to remove him and detained him. Removal directions were set but cancelled. On 15 April 2024, whilst still in detention, the appellant sought asylum on the basis of his political opinion. The appellant and Ms Begum undertook an Islamic wedding ceremony, conducted over the telephone, while the appellant was detained on 22 April 2014. The appellant's asylum claim was refused on 7 May 2014 and an appeal against that refusal was dismissed on 22 May 2014. On 10 July 2014 the appellant was removed from the United Kingdom to Bangladesh at public expense.

6. The appellant's relationship with Ms Begum has continued since his removal from the United Kingdom. On 29 January 2016 they had a legal marriage in Bangladesh. They have made two previous application for entry clearance but both were refused by the respondent on suitability grounds on 18 October 2016 and 20 September 2019. The appellant appealed against the latter refusal but his appeal was dismissed by First-tier Tribunal Judge Howard on 13 April 2021.

7. Ms Begum has visited the appellant in Bangladesh 5-6 times since he left the United Kingdom. Following a visit in 2022 Ms Begum fell pregnant and on 18 September 2022 the couple's son Musa was born in London. Musa has visited the appellant once with Ms Begum, staying with the appellant between 27 December 2023 and 28 January 2024.

The Respondent's Decision

8. In her letter dated 23 March 2023 the respondent gave three reasons for why, applying the Immigration rules (the Rules), she refused the appellant's application.

i. Applying paragraph 9.8.2 of the Rules, the respondent considered it appropriate to refuse because the appellant had previously breached immigration laws and contrived in a significant way to frustrate the intention of the rules and there were aggravating factors.

ii. Applying paragraph S-EC.1.5 of Appendix FM of the Rules the appellant failed to meet the suitability criteria because his conduct meant it was undesirable to grant him entry clearance.

iii. Applying paragraphs E-ECP.3.1 – E-ECP.3.4 of Appendix FM of the Rules the appellant failed to meet the eligibility criteria because he did not meet the financial requirements of the Rules.

9. The letter goes on to consider whether there are exceptional circumstances which mean the application should be granted despite the fact the requirements of the Rules were not met but found that there are not.

Legal Framework

10. The appeal is brought on the sole ground available which is that the respondent's decision is unlawful under section 6 of the Human Rights Act 1998 (see section 84(2) Nationality Immigration and Asylum Act 2002 (the 2002 Act)).

11. Section 6 Human Rights Act 1998 requires the respondent's decisions to be compatible with a person's Convention rights. The appellants case is that the decisions are not compatible with the right to respect for the family life he has with Ms Begum and Musa, which arises by virtue of Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms (the Convention).

12. Article 8(1) of the Convention provides for the right to respect for a person's private and family life. Article 8(2) provides that this right must not be interfered with by a public authority "except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

13. Once Article 8(1) is engaged it falls to the respondent to justify the proposed interference. The state has a "margin of appreciation" when considering whether a fair balance has been struck when assessing whether an interference with family life complies with Article 8(2). The Immigration Rules reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. It follows therefore that where Article 8(1) is engaged and the requirements Immigration Rules are met then interference with the private and family life cannot be justified under Article 8(2) of the Convention (TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [34]).

14. If the requirements of the Immigration Rules have not been met, then to produce a decision that complies with the Article 8 Convention right to respect for an individual's family life, it is necessary to undertake an overarching assessment to determine whether in all the circumstances the interference with the appellant's family life that refusal of his application involves, is proportionate. Where an overarching proportionality assessment is required, it is for the appellant to establish that the strength of his private and family life outweighs the public interest in maintaining effective immigration control. A very compelling

case will be required to outweigh the public interest where the requirements of the Immigration rules have not been met (Agyarko v SSHD {2017] UKSC 11 at [57]).

15. When undertaking that proportionality assessment regard must be had to the specific factors set out in section 117B of the 2002 Act which include the public interest in maintaining effective immigration control and the public interest in people living in the United Kingdom being able to speak English and being financially independent and the limited weight to be attached to a private life established while in the United Kingdom precariously. It is also necessary to ensure that the decision has regard to the need to safeguard and promote the welfare of any child involved (see CAO v SSHD (Northern Ireland) [2024] UKSC 32 st [63]).

The Issues in this appeal

16. Applying the above legal framework I must first determine whether the appellant's application falls to be granted under the Rules. Having considered the evidence, Judge Mulholland found that the appellant does meet the financial requirements of the Rules and that finding has been preserved. Accordingly, it is common ground that the appellant meets the eligibility requirements of the Rules and the third reason the respondent gave for refusing the appellant's application under the Rules therefore no longer applies.

17. The parties agreed that it remains for me to determine: (i) whether the appellant's application should be refused applying paragraph 9.8.2 of the Rules and (ii) whether the appellant's application should be refused applying paragraph S-EC.1.5 of Appendix FM of the Rules? If the answer to both those questions is no then the appeal must be allowed applying TZ (Pakisatan).

18. If the answer to one of those questions is yes, then it remains necessary to undertake a proportionality assessment to determine whether the interference with the appellant's family life that refusal of the application involves is compliant with Article 8(2) of the Convention.

Analysis and Findings

Should the application be refused applying paragraph S-EC.1.5 of Appendix FM of the Rules?

19. Although this is identified above as the second question to be determined, I deal with it first because, as I indicated during the hearing, in my judgment the answer is straightforward and is no.

20. S-EC.1.5 of Appendic FM of the Rules provides as follows:

> *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.*

21. It is notable that no consideration is given in the respondent's decision to the first line of S-EC.1.5 and the question of whether the exclusion of the appellant is conducive to the public good. As Mr Ahmed pointed out, the Home Office

guidance for decision makers such as Entry Clearance Officers makes clear that "non-conducive to the public good means that it is undesirable to admit the person to the UK, based on their character, conduct, or associations **because they pose a threat to UK society.**" (my emphasis). In this way this suitability ground for refusal compares to the Secretary of State's ability to make a deportation order excluding someone from the United Kingdom where their criminality means that their deportation is conducive to the public good. It is also identical to a specific ground for refusal that exists under paragraph 9.3.1 of the Rules.

22. Here, there is nothing to indicate that the appellant poses a threat to United Kingdom society so that his exclusion from the United Kingdom is conducive to the public good. There is nothing to suggest that the appellant has criminal convictions. There is nothing to suggest that he has any criminal associations and nothing to suggest that he has been involved in any conduct that suggests he poses any threat to society in the United Kingdom.

23. The application of this paragraph of the Rules on the basis of the appellant's immigration history was misconceived and contrary to the Home Office guidance on the purpose of this paragraph of the Rules.

Should the appellant's application should be refused applying paragraph 9.8.2 of the Rules?

24. Paragraph 9.8.2 of the Rules provides as follows:

> 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.**

25. By virtue of paragraph 9.1.1 of the Rules only parts (a) and (c) of paragraph 9.8.2 apply to an application such as the appellant's made under Appendix FM of the Rules (it was Judge Mulholland's consideration of 9.8.2(b) that meant his decision had to be set aside).

26. There is no doubt that the appellant has previously breached immigration laws and therefore that 9.8.2 (a) applies to him. The indisputable fact is that the appellant overstayed and remained in the United Kingdom for more than a year after his leave to remain expired in contravention of immigration laws.

27. The appellant argues that paragraph 9.8.2 (c) does not apply to him. He says that his asylum claim in April 2014 was a genuine claim and not a frivolous one. The respondent's decision letter by contrast asserts that the appellant made frivolous applications in 2014. The assertion of frivolous applications (plural) is clearly wrong, as the appellant only ever made one claim - his asylum claim made

on 15 April 2014. Although that claim was unsuccessful being swiftly rejected by both the respondent and a Judge on appeal, no evidence has been adduced to establish that it was frivolous. Such evidence could have included evidence of what was said in the claim or evidence of the Judge's determination of the claim. In the absence of any evidence to show it was a frivolous claim as opposed to a simply unsuccessful one I find this assertion not to be established on the evidence.

28. The appellant further argues that paragraph 9.8.2 (c) does not apply to him because he did not receive the notification that his leave was curtailed early and that this was why he did not apply to extend his leave to remain. He denies therefore frustrating the intention of the Rules. Having been detained he says that he was not responsible for the removal directions being cancelled in February 2014. In support of this, the appellant has adduced a "monthly progress report" from 2014 which indicates that at the time removal directions were cancelled in February 2014 there was some confusion about whether the Home Office had withdrawn the curtailment decision.

29. Judge Howard considered these issues in the appeal hearing on 11 February 2021 following the refusal of one of the appellant's earlier applications for entry clearance, although at that time the relevant Rules were different (instead of being in part 9 of the Rules they were in paragraph 320). Having done so Judge Howard found at [24] and [25] that the appellant frustrated the efforts of the respondent to inform him that his leave had been curtailed and chose instead to remain in the United Kingdom without attempting to regularise his stay; that the only reason the appellant came into contact with the respondent was an enforcement visit to a restaurant where the appellant was found working illegally; and that once in detention the appellant sought to frustrate removal by refusing to leave the detention centre and refusing to sign relevant documents.

30. The findings of Judge Howard are my starting point when considering whether paragraph 9.8.2 (c) applies to the appellant (see Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702). I note that these were findings made much closer in time to the events described than now and were reached after a full consideration of the evidence, including evident from the appellant and Ms Begum. The findings are also consistent with the fact the appellant did overstay for more than a year after his leave expired and it took six months from when the appellant was detained until he was finally removed at public expense.

31. I am not persuaded that the monthly progress report adduced provides any reason to deviate from Judge Howards findings. Whilst the report does indicate that at one time the respondent thought the curtailment decision had been withdrawn, it also refers to the appellant refusing to leave the detention centre on 23 January 2014 which is of course entirely consistent with the finding made by Judge Howard and would clearly amount to frustrating the intention of the Rules.

32. Viewing the evidence in the round and taking Judge Howard's findings as my starting point I am satisfied that paragraph 9.8.2 (c) applies to the appellant as he contrived in a significant way to frustrate the intention of the Rules by evading immigration officers for more than a year between January 2013 and January 2014, working illegally during that time and failing to comply with enforcement processes and at least one attempt to remove him once he was in detention in 2014.

33. Paragraph 9.8.2 of the Rules is explicit that where the requirements of (a) and (c) are established, an application for entry clearance **may** be refused. Whether to refuse the application on this basis is therefore an matter which requires an exercise of discretion. The final question therefore is whether discretion should be exercised so as to refuse the application. In my judgement deciding whether to exercise discretion and refuse the application involves the same proportionality assessment, balancing the impact of refusal on the appellant and his family against the public interest as is required when considering the whether refusal is the appellant's article 8 Convention rights. I therefore turn to this question in order to resolve this appeal.

Is it proportionate to refuse the appellant's application?

34. To answer this question I adopt the balance sheet approach of setting out the competing factors on each side of the proportionality exercise before weighing them against each other to reach a conclusion.

35. In support of refusal is the public interest in maintaining effective immigration control (see section 117B(1) of the 2002 Act). Through his conduct in 2013 -2014 the appellant was wilfully seeking to undermine effective immigration control, remaining without leave and frustrating attempts to enforce immigration control. In this regard it is significant that the appellant ultimately had to be removed at public expense. This prolonged and deliberate conduct means the public interest side of the scales begin with considerable weight.

36. As Mr Ahmed points out however, the strength of the public interest is not fixed but is moveable. I accept Mr Ahmed's argument that here, the public interest is reduced by the passing of more than a decade since the appellant's frustration of immigration control. Although it does not all apply to applications made under Appendix FM of the Rules, the fact the passing of time reduces the public interest in refusal in these circumstances is reflected in the way part 9 of the Immigration Rules is drafted. Paragraph 9.8.7 for example identifies a different approach to be taken to applications depending on the length of time that has passed since the failure to comply with the Immigration Rules. It is also significant that during the decade since his removal, the appellant has been compliant with immigration control only making appropriate applications and respecting the unsuccessful outcomes.

37. In all the circumstances I find that while there is a public interest in refusing the appellant's application because of his previous failure to comply with immigration law and attempts to frustrate the enforcement of immigration law, the strength of that public interest is much reduced now that more than a decade has passed without repeat of the bad conduct.

38. On the other side of the scales is the family life that the appellant now shares with his wife and Musa. The best interests of Musa is a primary consideration in this balancing exercise. As a British citizen it is in Musa's best interests that he remains in the United Kingdom so that he can benefit from the privileges of his citizenship. Despite the fact he has only spent a month in the company of the appellant, I am also satisfied that it is in Musa's best interests that he is raised by both his mother and father. Combining these factors, it is apparent that the best interests of Musa would involve the appellant's application being granted so that the family can be together in the country of Musa birth and where he holds citizenship.

39. The weight to be attached to the appellant's family life with Ms Begum and Musa is increased by the fact that the appellant meets all the eligibility criteria of

the Rules and also by the fact that this is a family life that has now endured for more than a decade in difficult circumstances. The wish of the appellant and Ms Begum to have children has been a feature of the appellant's applications for entry clearance over the last eight years and Ms Begum has suffered a miscarriage in the past. This traumatic history will undoubtedly have deepened the family life that has endured.

40. I acknowledge the arguments made in the respondent's decision letter that the appellant and Ms Begum have continued their relationship and had Musa in the full knowledge that the appellant did not have permission to come to the United Kingdom and without any legitimate expectation that he would be granted permission to come to the United Kingdom. I recognise that they do not have a right to choose where to live. However I do not consider these arguments reduce the weight of the family life the appellant, Ms Begum and Musa share.

41. The real question is whether the family life shared by the appellant, Ms Begum and Musa is sufficiently strong to outweigh the legitimate public interest in maintaining effective immigration control. This is not a question of entitlement or choosing where to live but instead is a question of balancing the competing interests. Here, for the reasons I have explained I find that the public interest in refusal has reduced with the passage of time, while the strength of the appellant's family life has increased over the same passage of time, particularly with the birth of Musa, whose best interests are a primary consideration. In these circumstances, when balanced against each other, I find that the appellant's family life does outweigh the public interest in refusing him entry to the United Kingdom.

42. Accordingly I conclude that discretion to refuse the application on the basis of paragraph 9.8.2 of the Rules should not be exercised so that that the appellant's application should be granted in accordance with the Rules. For the same reasons I find that the respondent's decision to refuse the appellant's application amounts to a disproportionate interference with his Convention right to respect for his family life.

Notice of Decision

The appellant's human rights appeal is allowed

Luke Bulpitt
Upper Tribunal Judge Bulpitt

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 November 2024