IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2022-006210

First-tier Tribunal No: HU/00882/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ZEESHAN TARIQ
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Taimour Lay, Counsel
For the Respondent: Mr Tony Melvin, Senior Home Office Presenting Officer

Heard at Field House via Teams on 17 July 2023.

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of First-tier Tribunal Judge Evans promulgated on 17 November 2022 ("the Decision"). By the Decision, Judge Evans dismissed the appellant's appeal against the decision of the respondent dated 4 April 2022 to refuse on suitability grounds his application dated 10 September 2021 for entry clearance as the spouse of a British citizen.

Relevant Background

2. The respondent refused the application on the ground that both Part 9 of the Immigration Rules and section S-EC.1.5 applied. The respondent also asserted that the appellant failed to meet the minimum income requirement of £18,600 per annum.

3. With regard to the main grounds for refusal, the reasoning of the respondent was that he had an adverse UK immigration history. He originally entered the UK on 28 March 2011 with valid leave to remain on a Tier 4 (Student) visa. He was notified that his visa had been curtailed to expire on 23 July 2012, but he remained in the UK illegally beyond this date. He then made multiple frivolous applications and appeals outside the Rules in order to remain in the UK, and the respondent was satisfied that he had contrived in a significant way to frustrate the intentions of the Rules as well as the fact that he had admitted to working in breach of his visa Regulations when interviewed.

4. As he had previously contrived in a significant way to frustrate the intentions of the Immigration Rules, the respondent considered it appropriate to refuse his application under Part 9.8.2(a) and (c). For the same reason, his application fell for refusal under Appendix FM on the grounds of suitability. The respondent reiterated that the appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules. Therefore, in light of his previous conduct, the respondent considered it undesirable to issue him with entry clearance, and the respondent was not prepared to exercise discretion in his favour. So, his application was refused under S-EC.1.5.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The appellant's appeal came before Judge Evans sitting at Manchester Piccadilly on 11 November 2022. Both parties were legally represented, with Mr Timson appearing on behalf of the appellant. At the beginning of the hearing, the Judge had a discussion with the parties' representatives about the issues which he needed to decide in order to determine the appeal. He established that the issues for him to decide had been reduced because the respondent's representative had conceded, at a case management review hearing on 5 October 2022, that the financial eligibility requirements were satisfied and had also stated that the respondent no longer relied on Part 9 of the Immigration Rules.

6. In the Decision at [7], the Judge directed himself that consequently the only reason which the respondent continued to rely on was that since the appellant had made multiple frivolous applications and appeals outside the Rules, had contrived in a significant way to frustrate the intention of the Rules, and had admitted to working in breach of visa Regulations when interviewed, he fell foul of S-EC.1.5. The Judge went on to set out S-EC.1.5 as follows:

> "The exclusion of the applicant to 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."

7. The Judge's findings and conclusions began at paragraph [18] of the Decision. At [19], he observed that the representatives were unable to point him to any authority dealing with S-EC.1.5, or any specific guidance issued by the respondent dealing with it, but that Mr Timson had referred to *PS (Paragraph [32](11) - Discretion: care needed) India* [2010] UKUC 440 (IAC), in his submissions.

8. At [21], the Judge recorded that Ms Ashton, HOPO, had done little more than set out the appellant's immigration history and submit that there were no exceptional circumstances. In his submissions, Mr Timson had emphasised that the appellant had never been convicted of any criminal offence; had only been in the UK unlawfully because he had no leave at all between 2012 and 2014; had kept in touch with the immigration authorities between 2014 and 2020; and that the effect of the refusal decision was to impose a permanent ban on the appellant, thus treating him as harshly as someone who had been convicted of a very serious criminal offence. In this respect, Mr Timson contended that if this appeal were unsuccessful, any further application would be refused on the same grounds.

9. At [22], the Judge set out paragraph [14] of *PS (India)*:

> "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 that the marriage was a genuine one. The aggravating circumstances were 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 sought to do. The effect then is likely to be counter-productive for the general purposes of the relevant Rules and for the maintenance of a coherent system of Immigration. However, as explained, the Entry Clearance Officer in this case did not address the correct question and did not carry out an adequate balancing exercise under the Guidelines. Furthermore, Mr S had made a claim under Article 8 which, standing alone, may not have been very strong. Nonetheless the family circumstances needed to be evaluated carefully in the balancing exercise to which we have referred."

10. At [23], the Judge held that although *PS (India)* involved a different Immigration Rule which was no longer in force, he concluded that similar considerations applied when considering S-EC.1.5. A balancing exercise was required, which recognised on the one hand that it may be conducive to the public good to exclude from the UK individuals who have conducted themselves as the appellant had but, on the other hand, it was also conducive to the public good for such individuals to leave the UK voluntarily to try and regularise their status. It was self-evidently the case that individuals were far less likely to leave the UK voluntarily for this purpose if they believed that future applications for entry clearance would be refused. Rather, such a belief was likely to encourage them to remain in the UK unlawfully.

11. The Judge went on to consider the Home Office guidance contained in "*Suitability: previous breach of UK Immigration laws*" Version 4.0 (11 October 2021), which Mr Timson had invited him to consider.

12. At [28], the Judge said that this guidance suggested that there were aggravating circumstances if the appellant had taken part, or attempted to take part, in a sham marriage or a marriage of convenience. The Judge went on to refer to the findings made by First-tier Tribunal Judge Hussain in a decision promulgated on 27 October 2017, and by First-tier Tribunal Judge Boylan-Kemp in a decision promulgated on 14 March 2019.

13. At [31] and [32], the Judge concluded that not only did the appellant enter a marriage of convenience, but he then repeatedly relied on that marriage of convenience in applications under the EEA Regulations resulting in no fewer than three decisions of the Tribunal, in 2016, 2017 and 2019. In the light of those matters, he concluded that the appellant had not only contrived to frustrate the intention of the Immigration Rules, but also that there were aggravating circumstances. At [33], the Judge reached the following conclusion:

> "Returning to the question posed by S-EC.1.5, and the balancing exercise that I am required to carry out, I conclude that the exclusion of the appellant is conducive to the public good taking into account as matters relevant to this conduct and character, or simply as another reason, the fact that he has previously overstayed, the fact that he has contrived to frustrate the intention of the Immigration Rules, and the fact that there are aggravating circumstances. Such circumstances are that he has entered into a marriage of convenience, which he has then relied upon on a number of occasions as the basis for applications under the Immigration (European Economic Area) Regulations 2016 ("The EEA Regulations"). I have so concluded because whilst it can be said that reaching such a conclusion might encourage others not to voluntarily leave the UK to regularise their immigration status, I conclude that the countervailing argument is stronger. That is to say, if one can enter into a marriage of convenience and make a number of applications based on that marriage, then (in effect), "wipe the slate clean" by voluntarily leaving the UK before less than a year later making a further application, that might well lead others to conclude that there is little down-side to entering

> into a marriage of convenience. The appellant does not therefore satisfy the requirements of the Immigration Rules. I might have reached a different conclusion if more time had elapsed between when the appellant left the UK and when he had made the application."

14. The Judge went on to consider whether nonetheless the refusal of entry clearance constituted a disproportionate interference with the Article 8 rights of the appellant. At [44], the Judge said that, having weighed each side of the Article 8 balance carefully, there were no exceptional circumstances which meant that the decision refusing entry clearance was a disproportionate interference with the Article 8 rights of the appellant or the sponsor because it had unjustifiably harsh consequences for them.

The Grounds of Appeal

15. The grounds of appeal to the Upper Tribunal were settled by Mr Lay of Counsel. Ground 1 was that the Judge had erred in law in treating the past finding of a marriage of convenience as determinative of the question of suitability. Ground 2 was that the Judge's assessment of suitability was tainted by him having regard to an irrelevant consideration at the end of paragraph [33], where the Judge said that he might have reached a different conclusion if more time had elapsed between when the appellant left the UK and when he had made the application. Ground 3 was that the Judge had failed to have rational regard to the evidence of the difficulties the appellant's British spouse would face if she were to relocate to Pakistan. Ground 4 was that the Judge had erred in law in failing to apply the relevant threshold test for proportionality.

The Reasons for the Grant of Permission to Appeal on Ground 2 Only

16. In a decision dated 28 December 2022, First-tier Tribunal Judge Curtis gave extensive reasons for holding that Ground 2 disclosed an arguable error of law, whereas the remaining grounds did not.

17. At [4], Judge Curtis observed that paragraph 9.8.2(b) requires that, in order to invoke the discretionary suitability grounds, the application must be made outside the relevant time period in para 9.8.7. Since the respondent no longer maintained the refusal under para 9.8.2, it did not appear that she took issue with, or considered to be relevant, the date of the application.

18. At [5], Judge Curtis observed that there was no mention in S-EC.1.5, or indeed in section S-EC as a whole, of the relevance of the date of the application with reference to the date that the person left the UK, or the date on which an application was refused because deception had been used. The Judge was referred to the respondent's guidance entitled 'Suitability: previous breach of UK Immigration laws' which did contain a section (at page 8) of relevant time-periods, but this was in the context of para 9.8.7 which was not invoked by the respondent at the appeal hearing. Judge Curtis continued in paragraph [6]:

> "After careful consideration I am driven to conclude that Ground 2 discloses an arguable error of law. The Judge does not set out the basis upon which he was entitled to take into account as a relevant factor the time between the appellant's exit from the UK in his application for entry clearance. He does not set out at what point in time he would have considered that length of time to be sufficiently compelling to tip the balance in the appellant's favour. By indicating that he might have made a different decision had more time elapsed, the Judge implied that he had taken the period between exit and application into account. The grounds suggest that "rather than simply asking whether A's past conduct or other reasons made it undesirable to grant entry clearance, the FTJ has considered that 2 years since his voluntary departure is somehow not long enough for punitive exclusion - an approach that is contrary to the R's own Scheme". It seems to me that it is at least arguable that the Judge fell into error when he implied that the period of time between exit and application was relevant when it had been conceded by the respondent that para 9.8.2 was no longer in issue and when S-EC.1.5 provides for an assessment of the appellant's past conduct in a determination of whether it makes it undesirable to grant him entry clearance without explicit reference to "relevant time periods", as in para 9.8.2 and 9.8.7. Ground 2 is therefore arguable."

The Rule 24 Response

19. In a Rule 24 response dated 25 January 2023, Mr Melvin gave reasons as to why the respondent opposed the appeal. At paragraph [3], he said that if the Upper Tribunal concluded that the appellant could argue Grounds 1, 3 and 4, the respondent would adopt the reasons given by Judge Curtis for rejecting them.

20. As to Ground 2, he submitted that the Judge was entitled to reach the conclusion which he did at paragraph [33]. Factually, the Judge was correct, as the appellant had voluntarily departed from the UK on 10 December 2020 and he had made his application to re-enter the UK as a partner 9 months later, on 10 September 2021, with the application being refused on 4 April 2022.

21. As to the other grounds, he submitted that the Judge had carefully assessed the position outside the Immigration Rules at paragraphs [35] to [44], and had made findings that were open to him "without irrationality."

The Hearing in the Upper Tribunal

22. At the hearing before me to determine whether an error of law was made out, Mr Lay began by developing Ground 2. He explained that the reason why the respondent had ceased to rely on Part 9 was because Part 9 did not apply to applications made under Appendix FM.

23. I asked Mr Lay if there would have been an error if the last sentence of Paragraph [33] had been omitted. His initial response was 'no', but he then questioned the legitimacy of the Judge's balancing exercise. After

further discussion, Mr Lay accepted that the Judge was right to carry out a balancing exercise, as he did in the first part of paragraph [33], but he submitted that that the Judge had erred in bringing into play an irrelevant consideration, which was the length of time that had elapsed between the appellant's departure from the UK and him making an application for entry clearance. He submitted that the guidance to which the Judge had been referred expressly stated that case workers did not need to consider whether spousal applications had been made outside the relevant time-period.

24. Mr Melvin adopted his Rule 24 response, while acknowledging that, contrary to what he had said in that response, Part 9 did not apply. Nonetheless, there was no material error.

25. In reply, Mr Lay reiterated that he accepted that the Judge had been right to perform a balancing exercise, but the exercise had been flawed because the Judge had taken into account an irrelevant consideration. As this was a refusal under Appendix FM, it was not relevant when the appellant had made his application.

26. I then asked Mr Lay to develop a separate point, which he had intimated at the outset of the hearing, which was that he had settled a renewed application to the Upper Tribunal for permission to appeal on Grounds 1, 3 and 4, and this application was still outstanding. Mr Lay said that he had submitted a written application to the Tribunal on 16 January 2023, in which he had relied on the same grounds as had been considered by Judge Curtis.

27. I invited Mr Lay to develop Grounds 1, 3 and 4 *de bene esse,* which he did in brief terms. He said that Ground 1 was subsidiary to Ground 2, and it supported the argument put forward under Ground 2. He considered that Ground 3 was the strongest of the three grounds that had been rejected by Judge Curtis as being unarguable.

28. Although paragraph 3 of the Rule 24 Response indicated that Mr Melvin had seen the renewed application for permission to appeal to the Upper Tribunal on Grounds 1, 3 and 4, Mr Melvin assured me that he had not seen such an application, and that what he had said in paragraph 3 was just for the sake of completeness. However, he did not dispute that I had jurisdiction to decide whether Grounds 1, 3 and 4 were arguable. His position remained that the grounds were unarguable, for the reasons given by Judge Curtis.

29. With the agreement of the representatives, I reserved my decision on (a) whether Grounds 1, 3 and 4 were arguable and (b) whether an error law was made out under Ground 2 and/or on any of the other grounds, if and insofar as any of the other grounds were arguable.

Discussion and Conclusions

Ground 2

30. The head note of *PS (India)* reads as follows:

> "*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.*"

31. 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.

32. 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).

33. 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."

34. 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.

35. 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 her 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).

36. The Judge applied the *ratio decidendi* of *PS (India)* to the case before him. It appears that Mr Timson relied upon *PS (India)* for the proposition that, whatever immigration offending had occurred in the past, the slate had been wiped clean by the appellant leaving the UK voluntarily, and therefore his exclusion from the UK was no longer conducive to the public good. The Judge directly addressed this argument in paragraph [33]. He rightly recognised that a balancing exercise needed to be conducted between, on the one hand, the public interest in immigration offenders facing appropriate sanctions, and, on the other hand, the public interest in encouraging immigration offenders to voluntarily leave the UK in order to regularise their immigration status. He concluded, as it was open to him to do, that the appellant's previous immigration offending was of such gravity that the public interest in his continued exclusion outweighed the public interest in rewarding him for having left the UK voluntarily, rather than having to be removed at the state's expense.

37. I do not consider that the Judge erred in law in the observation which he made in the last sentence of paragraph [33]. The period of time between exit and application was the central issue in the case of *PS (India)*, which was relied on by Counsel for the appellant. Although the Immigration Rules in play in *PS* (*India)* were different from those that were in operation in the present case, there was no material difference in substance.

38. What the Judge said in the final sentence was a logical extension of what he had said already in the first part of paragraph [33], and it was also a response to the argument advanced by Mr Timson that the effect of a ruling in the respondent's favour would be that the appellant would be denied entry clearance in perpetuity.

39. The Judge rightly recognised that the public interest is not a fixity, and equally that the question of whether the appellant's exclusion is conducive to the public good is also not a fixity. The longer the period of exclusion, the stronger is the countervailing public interest in rewarding the appellant for his voluntary departure.

40. In short, in answer to Judge Curtis' critique which the appellant adopts, the Judge did set out the basis upon which he was entitled to take into account as a relevant factor the time between the appellant's exit from the UK and his application for entry clearance. The Judge made it very clear that he was applying *PS (India)*, and hence it is tolerably clear that, in his view, at the very least the appellant would have needed, like Mr S, to wait one year before applying in order for the public interest balance to be tipped in the appellant's favour.

41. The respondent had not conceded that the period of time between exit and application was irrelevant. The reason why the respondent conceded that para 9.8.2 was no longer in issue was not because the respondent impliedly accepted that the timing of the application had no relevance to the assessment of whether discretion should be exercised in the appellant's favour, but simply because 9.8.2 could not apply to an application under Appendix FM. While it is the case that S-EC.1.5 makes no reference to relevant time-periods, this was equally true of paragraph 320(11). Nonetheless, the Tribunal held in *PS (India)* that the timing of Mr S's application was a material consideration.

42. At paragraph [35] of the Decision, the Judge quoted from the Home Office Guidance as follows:

> "You may refuse an application for entry clearance only made under Appendix FM where there has been a previous breach of an Immigration law and the applicant has contrived in a significant way to frustrate the intention of the Rules or there are aggravating circumstances.
>
> In these cases, you do not need to consider if the application was made outside the relevant time-period in paragraph 9.8.7(b) of the Immigration Rules."

43. I do not consider that this guidance imports that the timing of the application is a matter which the caseworker should not take into account. What it imports is that at the initial stage of assessment the timing of the application is irrelevant. It does not follow that when exercising discretion as to whether to exclude an applicant on suitability grounds under S-EC.1.5, the caseworker should not give credit to an applicant who has left the UK voluntarily at his own expense and who has also elected to make his application under Appendix FM more than 12 months later.

44. In conclusion, for the reasons given above, I find that Ground 2 is not made out.

Grounds 1, 3 and 4

45. Having carefully considered the remaining grounds, and the reasons given by Judge Curtis for holding that they are unarguable, and having also taken into account the fact that Mr Lay does not claim to have engaged with Judge Curtis' reasons for rejecting them, but to have simply re-submitted the same grounds to the UT, I am not persuaded that they are arguable.

46. Ground 1 is that the Judge treated the past finding of a marriage of convenience as determinative of the question of suitability "*without regard to countervailing evidence since that time.*"

47. As stated by Judge Curtis when refusing permission on this ground, it is simply not true that the suitability finding was solely based on the marriage of convenience.

48. It is also not true that the Judge failed to have regard to the countervailing evidence. On the contrary, as I have explored in the discussion on Ground 2, in paragraph [33] the Judge balanced the considerations in favour of excluding the appellant on conducive grounds against the countervailing consideration of the appellant undertaking a voluntary departure at his own expense, but not delaying his application for re-entry until one year had elapsed.

49. As to Ground 3, irrationality is a very high threshold, and there is no merit in the argument that the Judge failed to have a rational regard to the evidence or that he erred in law in his conclusion that it would not be unjustifiably harsh for the appellant or his wife to establish their family life in Pakistan.

50. As to Ground 4, there is no merit in the argument that the Judge misdirected himself in his assessment of proportionality.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
27 July 2023