IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006277

First-tier Tribunal No: HU/51117/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 November 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KLESIA PEREIRA DE CASTRO KANIZI
(no anonymity order made)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr J Martin, Counsel instructed by Connaught Law

Heard at Field House on 5 April 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State on 24 January 2022 refusing her entry clearance to the United Kingdom under Appendix FM of the Immigration Rules.

2. The claimant is a national of Brazil. She was born in 1981. She applied for entry clearance on 2 September 2021. She wanted to join her partner who is a British citizen settled in the United Kingdom. The application was refused because the claimant had previously breached the Immigration Rules. Paragraphs 4 and 5 of the First-tier Tribunal's Decision and Reasons are particularly apt and I set them out below. The judge said:

> "4 The ECO notes the [claimant's] immigration history from the Home Office records, as well as information provided by the [claimant] during her interview with Border Force on 03 April 2019. The [claimant] first entered the UK in 2006 and remained here until 28 June 2009 when she was

> encountered leaving the UK. She admitted to Border Force in 2009 that she worked illegally as a cleaner during that period. She entered the UK in 2011 using a fraudulently obtained Italian identity card. She remained in the UK illegally until she was encountered by police in February 2018. She was detained by the Home Office until she made a voluntary departure from the UK on 14 February 2018.
>
> 5. Given the above, the ECO was satisfied that the [claimant] has breached the immigration laws on multiple occasions by working illegally in the UK, overstaying her leave to enter and then entering the UK without leave. Whilst the ECO acknowledges that the [claimant] made a voluntary departure from the UK in 2018, given the number of breaches of UK immigration law, together with the use of fraudulently obtained documents in a different identity, the ECO was satisfied that the application should be refused under paragraph 9.8.2 of Part 9 of the Immigration Rules".

3. The judge noted that the Entry Clearance Officer was satisfied that the claimant had breached immigration laws "on multiple occasions by working illegally in the UK, overstaying her leave to enter and then entering the UK without leave". The Entry Clearance Officer also noted that in 2010 the claimant had twice attempted to enter the Republic of Ireland illegally using separate false Portuguese identity documents. The judge said that in summary the claimant's immigration history both in the United Kingdom and elsewhere "shows a clear lack of regard for immigration laws". The judge then summarised the known bad behaviour as presenting three false documents in false identities to secure legal entry and abusing leave granted by working when she should not have worked and overstaying. The judge then noted that the Secretary of State had refused the application solely on suitability grounds.

4. The judge gave herself appropriate directions of law and considered the evidence before her.

5. The claimant's "sponsor" gave evidence and the judge noted that he was "vulnerable". There is evidence from a medical practitioner confirming that he is low, depressed and anxious. The judge reached clear conclusions.

6. She said that the claimant was married to the sponsor. The claimant had entered the United Kingdom in 2006 and remained until 2009 when she left. She returned in 2011 and remained there until February 2018 leaving voluntarily after she had been detained. She had made no further irregular attempts to enter the United Kingdom.

7. The claimant talked about her relationship with her sponsor. She said they met in May 2017 and started to become friendly. When she left the United Kingdom in 2018 he had been visiting her regularly and he visited her in Brazil and stayed for some two months meeting her family.

8. He then went to Brazil in October 2019 to plan and organise the wedding. Their plans were frustrated by the Covid crisis although they registered their civil marriage in Brazil on 26 March 2021.

9. The claimant then set about trying to explain her unsatisfactory conduct.

10. She said she entered the United Kingdom in 2006 without legal advice about the proper behaviour and way to seek leave, she did not understand that there were stringent requirements to be met before she could start working. If she had had proper advice she would have left when she was required to leave. She said when she was intercepted by the Entry Clearance Officer she was trying to leave the United Kingdom to return to Brazil.

11. She said she was frank with the Entry Clearance Officer.

12. She said that when she returned to the United Kingdom in 2011 she was accused of using a fraudulent Italian identity card. She thought it was a genuine document obtained through agents about which she was rather vague. She thought that she was allowed to be in the United Kingdom. On reflection she regarded herself as naïve and should have been more suspicious.

13. She confirmed that she had tried to enter the Republic of Ireland in 2010 on two separate occasions but insisted that she thought she was using genuine Portuguese identity documents that she had obtained from people she trusted. She insisted that she was not trying to deceive but had relied on informal advisers rather than professionals to assist her.

14. She said she had learnt her lesson and had applied in the regular way to come to the United Kingdom as a wife to be with her husband. She met all the requirements she believed but was refused because of suitability.

15. She insisted that she was ignorant rather than disrespectful of the Rules.

16. In submissions Counsel pointed out that the document offences were committed in 2011 which is now some time ago. The judge noted that the time lapse of eleven years "does not lessen the impact of the breach of the Immigration Rules".

17. Without any way trying to excuse the claimant's behaviour it was not suggested that she was involved in people trafficking facilitating the supply of fake documents.

18. The judge made a clear finding that the claimant had knowingly used false documents and was not merely naïve._The judge rejected her account of believing she had genuine documents or believing that she was entitled to work. The judge said at paragraph 47:

> "I find that the [claimant] has breached the immigration laws on multiple occasions by displaying active deception, frustrating the intentions of the immigration rules being an illegal entrant, overstaying, working illegally and using deception to gain entry to the UK".

19. The judge concluded that the application was correctly refused under the Immigration Rules but then turned her mind to the claim under Article 8 of the European Convention on Human Rights outside the Rules and with regard to Section 117B of the Nationality, Immigration and Asylum Act 2002.

20. The claimant is a married woman and her husband has rights too. The judge accepted that the claimant's husband is a British national and that he was born in the United Kingdom and lived there all his life where he is fully established. He was working then in the family fish and chip business and expecting to take it over in the reasonably near future as his father was approaching retirement. He had family responsibilities in the United Kingdom and he did not speak Portuguese. It would be difficult for him to live in Brazil.

21. The couple were also hoping to conceive.

22. The judge gave weight to a psychological report on both the claimant and her husband which, in layperson's terms, indicated they were missing each other and it was affecting their mental health adversely. The judge was told that the claimant regarded her husband as a positive influence and as an indication of her intent to behave responsibly said how she had not wanted to leave her partner as she described him when she last left the United Kingdom but wanted to lay the foundations for a proper application.

23. At paragraph 59 of her decision and reasons the judge said:

> "I find the refusal of entry clearance to the [claimant] would be unduly harsh and would interfere with the family life of the [claimant] and the Sponsor. It would maintain their separation across continents and circumstances whereby it is very difficult for the Sponsor to relocate".

24. The judge then found that:

> "there must come a time when an immigration offender has 'done her time' and that continued separation from a partner becomes disproportionate".

25. The judge found that a proper marital relationship cannot be maintained by visits and telephone calls. The clear implication is they needed to be together. She found it "not reasonable" for the sponsor to live in Brazil because he had established life in the United Kingdom and a right to live in his own country and a right to marry and found a family. Putting everything together the judge (at paragraph 60) found the interference in not allowing in the claimant to be:

> "not only disproportionate as a matter of human rights law, but an irrational and unjustified restriction".

26. The judge regarded this as a case where an application of the Immigration Rules gave an unjustifiably harsh consequence. The judge had "no doubt" that the sponsor was telling the truth when he talked about the couple's relationship. The judge also noted, although this was hardly in dispute, that the claimant showed she could be accommodated and supported financially in the United Kingdom. Putting everything together she allowed the appeal on human rights grounds.

27. I consider now how the decision was challenged in the grounds of appeal to the Upper Tribunal.

28. The first ground of appeal, and I suspect the strongest point, asserts that having found the claimant did not meet the requirements of the Immigration Rules the judge erred by allowing the appeal under Article 8. According to the grounds:

> "It is submitted that on the evidence before them [the judge] the high standard of exceptional circumstances cannot be said to exist and there is a lack of adequate reasoning as to how refusal leads to unjustifiably harsh consequences for the [claimant] and her husband".

29. The grounds then assert that in considering whether there are "exceptional circumstances" the judge erred. The applicable test was whether refusing leave would result in "unjustifiably harsh consequences" for the claimant or her partner. It was necessary before finding that a person has established a human right in contradiction to the Rules that the harshness was unjustifiable hardship. The hardship had to be balanced against the public interest in applying the Rules.

30. The grounds then made more specific criticisms.

31. Ground 2 contends that there is a contradiction in the finding at paragraph 36 that the time lapse of eleven years does not lessen the impact of the breach of Immigration Rules by using false identity cards in 2010 and 2011 and the finding at paragraph 60 that "there must come a time when an immigration offender has 'done her time'".

32. Ground 3 contends that the judge applied too low a standard concluding that relocation to Brazil would be "very difficult" for the sponsor and indeed the determination does not explain at all why the claimant cannot relocate to Brazil.

33. Ground 4 contends that the judge has not taken into account the fact that this is not a case of a decision that separates a couple. They married in Brazil and parted to conduct their family life from different countries.

34. Ground 5 contends that the judge did not follow Section 117B(4)(b) because the relationship was formed at a time when the claimant did not have leave and so little weight should be given to it.

35. Ground 6 contends that the judge has just not given weight to the maintenance of effective immigration control.

36. Mr Martin produced a Rule 24 notice on behalf of the claimant. I consider this in outline now. This began by asserting it was unremarkable that the appeal was allowed on Article 8 grounds outside the Rules. That is what Article 8 is there to do in appropriate cases and the decision was an holistic analysis by the First-tier Tribunal Judge.

37. The notice drew attention to correct self-directions of law.

38. Dealing with specifics it was said there was no inconsistency between paragraph 36 and paragraph 60. The judge meant that the use of false identity documents was a fact that did not change with time; however long elapsed the claimant would still have used false identity documents. Her point was that it is something that can in time be lived down.

39. He then said that in answer to the third challenge there is no insurmountable obstacle test to apply. This is an entry clearance application and the judge was entitled, indeed obliged, to give weight to the fact that the case in many respects did satisfy the Rules.

40. In response to the fourth challenge it said the criticism is simply flawed. The judge asked herself whether there was a breach of family life and found that there was. It is not expressed but the point is that married couples usually choose to live together and whilst there may be many circumstances when that is entirely justified, there will be few when keeping apart married people who want to be together will not be an interference with their private and family lives.

41. He contended too that Section 117B(4) did not assist the Secretary of State. This prescribes that “little weight should be given to ... a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully”. The claimant and her sponsor had some sort of relationship established in the United Kingdom but the marriage relationship which is fundamental to the case was established outside the United Kingdom in Brazil.

42. The notice continued that it is plain from a fair reading of the decision that the judge was obviously aware of the arguments on both sides of the balance and did her job by conducting an exercise and came to a conclusion which the Secretary of State does not like but which was lawful.

43. Before me Mr Lindsay relied on the grounds and explained that the general criticism is that there was a lack of reasoning.

44. He insisted that paragraphs 36 and 60 were contradictory and suggested that this is indicative of the bad immigration history not being factored into the reasoning. He insisted that the judge had not directed herself that she had to be satisfied if there were unjustifiably harsh consequences. It is plainly right that the judge referred to a test of “unjustifiably harsh and/or disproportionate” at paragraph 52 but Mr Lindsay argued this was simply recording a submission, it was not an indication that was the test applied by the judge and it certainly was

not an unequivocal self-direction. When the judge made her findings at paragraph 59 she referred to the consequences being "unduly harsh" and this was not the correct test.

45. He then said that there had been no clear recognition that it was not for married couples to decide where they lived but it was for those intend on emigrating to the United Kingdom to satisfy the Rules.

46. Mr Martin repeated his submission that there was no conflict between paragraph 36 and paragraph 60. He said that it was quite plain that the judge accepted that the necessary test was "unjustifiably harsh consequences" that she had identified at paragraph 52 and there was no good reason to think she had not applied it. She had recognised that there were adverse facts in this case but concluded after consideration that the rights of the claimant's husband to live with his wife in the United Kingdom tipped the scale in favour of allowing the appeal.

47. I have to reflect and decide whether the decision is lawful, that is all. Of course there are things that could have been done better but that is almost always the case.

48. I am unconcerned about the apparent conflict between paragraph 36 and paragraph 60. What is clear to me is that the judge was aware of the serious nature of the claimant's offending and was also aware of the fact that time had lapsed and her personal circumstances had moved on. The fact that the claimant has used false documents and otherwise behaved badly is not going to go away. The judge was not confused over this and the judge regarded this as an adverse factor but also regarded it as one that had lost its sting with the passage of time. She was entitled to do that. Bad behaviour had to be put in context with the subsequent events and the passage of time. The claimant's history is something that can lead to refusal. As Mr Martin pointed out in his skeleton argument before the First-tier Tribunal, the rules provide that a history of breaching immigration rules may be a reason to refuse a later application. The point is that when conducting the balancing exercise the judge was obliged to consider that she was not dealing with an appeal against *mandatory* refusal.

49. I ask myself the fundamental question which is "Does the Secretary of State know why he lost and is it a lawful finding?" The Secretary of State clearly knows why he lost; he lost because in the judge's judgment the public interest in upholding the Immigration Rules (this must be what the judge meant when she referred to the claimant not satisfying the Rules) is outweighed by the social imperative of letting married couples live together. The judge has given reasons for finding that marriage should be enjoyed in the United Kingdom. The claimant's husband does not speak Portuguese and is very settled in the United Kingdom where he has other responsibilities.

50. I consider the skeleton argument provided by Mr Martin for the First-tier Tribunal. The "unjustifiably harsh consequences" test comes from GEN.3.2.(2) of HC 395. The Secretary of State is required to consider if a decision has "unjustifiably harsh consequences" for the applicant or partner or relevant child when conducting an Article 8 balancing exercise. It is not a test for a judge because an appellant is not entitled to argue that a decision is "not in accordance with the law". It is incumbent on a judge to show proper regard to the public interest that is set out in the rules but I do not agree that the judge's decision is wrong because the judge slightly mangled the test under the rules. The judge clearly appreciated that the appeal should not be allowed on article 8 grounds because the consequences were inconvenient for the claimant's husband. Rather

she found that it would be too much to expect him to leave his family responsibilities in the United Kingdom and try to establish himself in a country foreign to him where he did not speak the main language.

51. I do not accept that paragraph 117B(4)(b) helps the Secretary of State. As I indicated in the hearing room I cannot accept that statute is to be interpreted as meaning a person would be worse off by reason of starting the relationship in the United Kingdom than if they had started the relationship in Brazil. Neither can I read it as meaning that the relationship is formed when the parties meet. As I indicated above it is a marriage relationship that matters and that was not started in the United Kingdom. This simply means the statutory requirement to give little weight does not apply. It is not that helpful to the claimant either.

52. The judge could have done a better job of identifying the test under GEN.3.2. but it was there. She was looking for some special reason before allowing the appeal and she found one. She found it was too much to expect the claimant's husband to live in Brazil. Some may think that she was too easily satisfied and I consider it be the weak spot in the decision. However it is not perverse and it is not the result of a misdirection and that really is sufficient.

53. It follows therefore that I dismiss the Secretary of State's appeal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 November 2023