IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-001258
UI-2024-001530

First-tier Tribunal Nos: HU/60246/2023
LH/05751/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th of July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

Deli Bici
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer - Sheffield

Respondent

Representation:
For the Appellant: Mr L Youssefian
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 28 June 2024

DECISION AND REASONS

1. The Appellant is a citizen of Albania whose date of birth is recorded as 3rd June 1994. Having made a number of unsuccessful applications since he first entered the United Kingdom illegally on 22nd February 2015, he made voluntary departure on 30th April 2023. On 2nd May 2023 he made application for entry clearance on the basis of family life with his Polish partner, who has settled status in the United Kingdom. On 7th August 2023 a decision was made to refuse the application. The Appellant appealed to the First-tier Tribunal. On 1st December 2023 his appeal was heard by Judge of the First-tier Tribunal Scullion who in a decision promulgated on 8th December 2023 dismissed the appeal on all grounds.

2. Not content with that decision, by notice dated about 15th December 2023, the Appellant made application, in time, for permission to appeal to the Upper Tribunal. There were six grounds. The First-tier Tribunal Judge only granted partial permission. However, in a renewed application to the Upper Tribunal,

permission on all grounds was granted by Deputy Upper Tribunal Judge Alis, thus the matter came before me.

3. The six grounds in summary are:

(a) The judge erred in finding that illegal work, in and of itself, contrives to frustrate the intention of the Immigration Rules in a significant way because:

(i) guidance of the Secretary of State for the Home Department does not stipulate the same;

(ii) he failed to engage with the guidance in **ZH (Bangladesh) -v- Secretary of State for the Home Department [2009] EWCA Civ 8** which held that illegal working was part and parcel of unlawful residence in the United Kingdom;

(b) The judge erred in his assessment of paragraph 9.8.2 of the Immigration Rules:

(i) by assessing only whether the Appellant had, as a matter of fact, worked illegally in the United Kingdom rather than assess whether it was a kind of work that significantly frustrated the intention of the Rules;

(ii) by asking himself whether the illegal work should be discounted instead of whether the illegal work (which is information the Appellant had himself volunteered) was so significant as to frustrate the intention of the Rules;

(iii) erroneously suggesting that there was, “no credible evidence” to discount the illegal work;

(iv) failing to have any or any sufficient regard to the guidance in **PS (paragraph 320(11) discretion, care needed) India [2010] UKUT 440**.

(c) The judge failed to take into account any factor that mitigated against the Appellant’s illegal work in the United Kingdom which might render the Appellant’s work not an aggravating circumstance. Specifically, by:

(i) failing to have regard to the fact that it was the Appellant who had volunteered the information that he previously had worked illegally in the United Kingdom.

(ii) failing to give weight to the fact that the Appellant had only done casual, manual labour in order to support himself;

(iii) failing to give weight to the fact that the Appellant had stopped working once he got together with his wife in 2020.

(d) The judge failed to cite or consider **ZH (Bangladesh) -v- Secretary of State for the Home Department [2009] EWCA Civ 8** or **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440**.

(e) Because of the errors contended for above, erred in his determination of whether the exclusion of the Appellant from the United Kingdom was conducive to the public good, having regard to paragraph S-EC.1.5 of the Immigration Rules. Specifically, by:

(i) failing to take into account that the Appellant's previous leave to remain application in the United Kingdom, which was refused on 11th April 2023 was not refused under the suitability requirement, even though the Secretary of State was aware that the Appellant had previously worked in the United Kingdom whilst unlawfully resident.

(ii) finding, at paragraph 22 that simply because the examples in the Secretary of State's guidance (suitability: non-conducive grounds for refusal or cancellation of entry clearance or permission "version 2" were not exhaustive, the Secretary of State for the Home Department was entitled to read the conclusion that the Appellant's presence in the United Kingdom was not conducive to the public good.

(f) In the alternative to the above grounds, it is submitted that the judge's decision under paragraph 9.8.2 and S-EC.1.5 was irrational on the facts.

4. The particular paragraphs of the Immigration Rules referenced and upon which I am invited to focus, are paragraph 9.8.2 which provides:

> *"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."*

5. And S-EC.1.5 which provides:

> *"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."*

6. Before going into the merits of this appeal it is important to note that at the hearing before Judge Scullion breaches of paragraph 9.8.2.(a) and (b) were

conceded. It is also of note that the paragraph does not provide for mandatory refusal.

7. In the course of the submissions before me, the issue which I had to consider crystalised, such that the question was whether it was open to the Secretary of State to refuse entry clearance solely on the basis that the Appellant had entered the United Kingdom illegally and worked illegally.

8. In his submissions to me, Mr Youssefian took me first of all to the refusal letter itself. The basis upon which the Secretary of State had refused the application was stated as follows:

> *"You have made numerous frivolous applications that also have no merit in an effort to frustrate the system or delay the returns process, you were served with Red.001 - notifying you of the liability to be removed. On 20 July 2022, and you were to appear at Southward – Portswood Police Station on 20 Mar 2023 you did not attend this. Home office records show that you were marked as a no show for this."*

9. Further on in the refusal, the Entry Clearance Officer stated:

> *"Taking note of the above events and given that you overstayed, failed to report and worked illegally in the UK without any valid leave to remain, made frivolous applications, I am satisfied that you have previously contrived in a significant way to frustrate the intentions of the Rules."*

10. At paragraph 14 of Judge Scullion's judgment, the particular Rule was set out in full and then at paragraph 16 he set out the basis upon which the Entry Clearance Officer based the assertion that the Appellant had contrived to frustrate the intention of the Rules and these were:

(a) made numerous frivolous applications.

(b) worked illegally in the United Kingdom; and

(c) failed to report when he had been on immigration bail.

11. At paragraph 17, dealing with the previous applications, Judge Scullion said:

> *"I am prepared to accept Mr Youssefian's submissions that the Appellant made four previous applications for leave to remain when he was in the United Kingdom and that given he was entitled in law to make the applications they need not be characterised as frivolous applications."*

12. There was some discussion between the parties, as to the meaning of the phrase *"they need not be characterised as frivolous applications".* Mr Youssefian invited me to find that Judge Scullion was saying that it was not established that frivolous applications had been made. Ms Isherwood invited me to find that there was a lack of clarity. Given that Judge Scullion had set out for himself the "determining factors" it seems to me that the only reasonable interpretation of paragraph 17 is that Judge Scullion did not find that the Appellant had made applications that could be characterised as frivolous, and I so find.

13. On the question of bail, Judge Scullion dealt with that at paragraph 19 and concluded, *"I am prepared to give the Appellant the benefit of the doubt and find that taking everything into account it is likely that the Appellant did report to the police station on 20 March 2023".*

14. What the judge was left with therefore, was the finding that the Appellant had worked illegally and at paragraph 20 said:

> *"Whilst I am prepared to give the Appellant the benefit of the doubt on certain points, as I have set out above* (pausing there to observe that the notion that the judge gave the Appellant the benefit of the doubt reinforces my view that he had accepted that the previous applications were not frivolous) *I cannot find that his admission to working illegally in the UK means that it was incorrect for the Respondent to find that the Appellant had thereby 'previously contrived in a significant way to frustrate the intention of the rules'."*

15. What Judge Scullion then did, on the basis of that finding, even though the Secretary of State had relied on other grounds, was to go on to dismiss the Appellant's appeal. What the judge did not do in the submission of Mr Youssefian was to consider, when exercising discretion, the type of work undertaken by the Appellant and the circumstances that surrounded it. It was his submission that not all unlawful work could be treated or characterised in the same way. Some working, he submitted would be more egregious than others. It was Mr Youssefian's submission that the judge's approach was impermissible and that was because the guidance of the Secretary of State did not support the conclusions of the judge as being open to him.

16. It was recognised that the guidance was not placed before the judge, but it was submitted, and I agree, that it was the duty of the Secretary of State to bring the relevant guidance to the Tribunal's attention. It is also of note that this case was dealt with by way of submissions because the Presenting Officer did not attend, and no evidence could be taken from the Appellant because he was out of the jurisdiction at the time.

17. The relevant guidance, to which I was referred, is version 6 dated 14th November 2023. At page 11 it has a heading "*Previously contrived to frustrate the intention of the Rules and aggravating circumstances*". The section of the guidance goes on to say, "*When the circumstances of the previous breach of immigration laws are also aggravated by other actions with the intention to deliberately frustrate the rules, you must consider refusing entry clearance or permission*." If one pauses there, it essentially reads that unless there is an aggravating feature, there is no requirement to even consider refusing entry clearance or permission. The guidance goes on to state,

> *"This means when an application has done one or more of the following:*
>
> - *been an illegal entrant*
> - *overstayed*
> - *breached a condition attached to their leave*

- *used deception in a previous application*
- *obtaining*
    - o *asylum benefits;*
    - o *state benefits;*
    - o *housing benefits;*
    - o *tax credits;*
    - o *employment;*
    - o *goods or services;*
    - o *National Health Service (NHS) care using an assumed identity or multiple identities or to which was not entitled*

and there are aggravating circumstances, such as:

…

- *Failing to meet the terms of removal directions after port refusal of leave to enter or illegal entry*
- *Previous working in breach on visitor conditions within short time of arrival in UK (indicating a deliberate intention to work)".*

18. Reading all of that section, I was invited to find that working, without more, is not of itself sufficient basis for refusal. There must be aggravating circumstances. It was conceded that the examples were not exhaustive, but those examples which came close to dealing with employment as aggravating features, were, *"had failed to meet the terms of removal directions*" or *"previous working in breach on visitor conditions within short time of arrival in the UK".*

19. Those aggravating features did not apply to this particular Appellant. This Appellant had volunteered in the course of his asylum interview that he had worked, and I was taken to that interview where at question 22, he was asked how he had supported himself financially since coming to the United Kingdom in February 2015. He admitted having worked illegally, such as cleaning gardens, decorating houses and nothing else. He also went on to say in answer to question 34 when asked who his employers were, to say that he had not worked since 2020 and had not been working because his wife had worked and they were waiting to get the right to work, in other words, he was seeking to put his affairs in order and regularise his status.

20. I was referred to the guidance in the case of **ZH (Bangladesh) v The Secretary of State for the Home Department [2009] EWCA Civ 8**. In that case consideration was being given to whether a person who was seeking long-residence, having been in the United Kingdom for fourteen years, which was the relevant period at the time of that particular appeal, could be refused the status

he sought because he had worked. The Court looked at the guidance then in place, which stated,

> *"The applicant's employment record will often be a significant consideration. The main purpose of the two Long Residence rules is to enable people who have been working here, or otherwise contributing to the economy, to regularise their position. Therefore, caseworkers need to consider what the person has been doing while here, and what economic contribution, if any, he has made. It will not normally be in the public interest to grant indefinite leave to remain under these Rules to someone unless he has been economically self-sufficient for a significant period of the time he has spent here."*

21. What Mr Youssefian invited me to draw from that was that Judge Scullion had failed altogether to analysis the nature of the contribution, if any, made by the Appellant.

22. There is a further observation made in the judgment in **ZH** and that is that working illegally is seen as part and parcel of being unlawfully in the United Kingdom so that there is a danger of double counting when the unlawful presence in the United Kingdom is the neutral gateway to consideration of other factors. I was urged to find that Judge Scullion had given no weight to the Appellant volunteering the fact of working himself in the course of the asylum interview. It was not as if the Appellant had been encountered working, for example in a restaurant, and then prevaricating about what he had been doing. In other words, no weight had been given to the Appellant for his honesty. What the Appellant had been doing was working to survive and the fact that the Appellant had stopped when he got together with is wife in 2020 was another factor that ought to have been taken into account. There was, in the submission of Mr Youssefian, a public interest consideration in cases such as this because if the decision below were upheld individuals would stop telling the truth and would not seek to regularise their status.

23. Further, guidance which I was invited to consider, and which is set out by Judge Scullion at paragraph 31 of his decision, states:

> *"Many types of offending or reprehensible behaviour can mean that an individual's presence in the UK would not be conducive to the public good, and many factors will weigh into this such as:*
>
> - *the nature and seriousness of the behaviour*
> - *the level of difficulty we could experience in the UK as a result of admitting the person with that behaviour*
> - *the frequency of the behaviour*
> - *the other relevant circumstances pertaining to that individual*
>
> *Other examples of situations where a person's presence may not be non-conducive to the public good include the following:*

- *the person is a threat to national security, including involvement in terrorism and membership of proscribed organisations*
- *the person has engaged in extremism or other unacceptable behaviour*
- *the person has committed serious criminality*
- *the person is associated with individuals involved in terrorism, extremism, war crimes or criminality*
- *admitting the person to the United Kingdom could unfavourably affect the conduct of foreign policy between the United Kingdom and elsewhere*
- *there is reliable information that the person has been involved in war crimes or crimes against humanity – it is not necessary for them to have been charged or convicted*
- *the person is the subject of an international travel ban imposed by the United Nations (UN) Security Council or the European Union (EU), or an immigration designation (travel ban) made under the Sanctions and Anti-Money Laundering Act 2018*
- *the person has committed immigration offences*
- *if admitted to the United Kingdom the person is likely to incite public disorder*

Immigration offending

You must refuse or cancel on non-conducive grounds where there is reliable evidence of immigration offending. Examples include, but are not limited to:

- *Human trafficking*
- *Facilitation*
- *Providing false documents to assist people in the application process"*

24. Mr Youssefian submitted that the simple working by the Appellant came nowhere close to any of the kinds of behaviour to which the guidance referred, even though it is a non-exhaustive list.

25. Ms Isherwood submitted that it was a matter for the Secretary of State, who had the discretion in this matter and that persons should not be allowed to enter the United Kingdom and then start to work. She was right about that but the sanction available to the Secretary of State in such circumstances is to seek to remove the Appellant. Indeed, the guidance goes to that very point and suggests that where the Secretary of State seeks to remove a person and then the person attempts to frustrate that removal, then any future application for entry clearance might appropriately be refused. But in this case the Appellant has sought to regularise

his conduct, left the United Kingdom, made plain the fact that he had worked unlawfully and made proper application.

26. It seems to me it is in the public interest that people in circumstances such as the Appellant should regularise their status and not seek to jump the queue by leaving the country to then make application from overseas.

27. I find that the finding of Judge Scullion that the simple working by this Appellant and the sort of work that he was doing, which was being essentially a handman, was not of itself sufficient basis to refuse, without more, the application. It was not a decision in my judgement open to the Respondent given the guidance which was to be applied. In other words, there were no sufficient aggravating features which the guidance looks for.

28. The question then, having found that there was a material error of law, is what to do with this case. Ms Isherwood invited me to remit the matter on the basis that the judge's finding on whether or not there had been frivolous previous applications was unclear. I do not agree. In my view the finding was clear. For the reasons I have stated above, I find that the judge did make a finding on that and the finding was one favourable to the Appellant.

29. Since I find that it was not open to the judge to dismiss the appeal on the basis that he did, and given that the single issue, which I was invited to consider, eventually was resolved by the question whether or not the working of the Appellant without more was sufficient to refuse the application, I find that the appropriate course is for me to set the decision of the First-tier Tribunal aside and remake it on the basis that there was no sufficient basis for the Secretary of State to find that the employment, which the Appellant entered into whilst unlawfully in the United Kingdom, was sufficient for the Secretary of State to refuse the application on conducive conduct grounds.

30. The question of "suitability" within the meaning of the rules was also raised, but it was conceded by Ms Isherwood that essentially the same question would determine both approaches to this appeal and so I need say no more.

Notice of Decision

31. The decision of the First-tier Tribunal contained a material error of law. The decision of the First-tier Tribunal is set aside and remade such that the appeal is allowed.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

TO THE RESPONDENT
FEE AWARD

Insofar as there was a fee paid, I make a full fee award of £140.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 July 2024