Upper Tribunal
(Immigration and Asylum Chamber) HU/02063/2020 (V)

THE IMMIGRATION ACTS

Heard by "*Microsoft Teams*" on 23 June 2021

Issued on On 30 June 2021

Before

UT JUDGE MACLEMAN

Between

RAJA AJAZ KHAN

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

For the Appellant: Mr J Greer, instructed by NK Law Solicitors Ltd
For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan, born on 31 December 1989.

2. The facts of the case are not in dispute. The appellant came to the UK as a visitor in 2011; was served with papers as an overstayer on 11 December 2012; failed to comply with reporting conditions, both before and after being encountered in a routine search in February 2015; married his UK citizen wife in an Islamic ceremony on 21 December 2017, and legally on 2 April 2019; voluntarily left the UK on 4 December 2019; and applied to re-enter on 12 December 2019, based on the marriage.

3. The ECO refused the application on 14 January 2020, under paragraphs 320 (11) and EC-P.1.1 (c) of section S-EC of appendix FM of the immigration rules, because the appellant had contrived in a significant way to frustrate the intentions of the rules; in light of his conduct and character it was undesirable to issue him with entry clearance; and the decision-maker, having referred to an Entry Clearance Manager, was not prepared to exercise discretion in his favour.

4. The appellant appealed to the FtT. His grounds relied upon *PS* [2010] UKUT 440 on the public interest in encouraging regularisation of status, and referred to the SSHD's guidance to decision-makers, although without identifying the guidance.

5. FtT Judge Thorne dismissed the appellant's appeal by a decision promulgated on 12 February 2021. At [55] the FtT itemised matters in the proportionality balance, ending at (l), under reference to *PS*, with his voluntary return, in his favour. At [56 – 57] the FtT found the favourable factors to be outweighed by "the strong public interest in maintaining fair and effective immigration control".

6. The appellant applied to the FtT for permission to appeal to the UT, on grounds entitled (1) "inadequate reasoning, entitlement to succeed under the rules" and (2) "misdirection in respect of article 8".

7. On 22 March 2021 FtT Judge Welsh granted permission.

8. Mr Greer applied to amend by adding ground (3), "misdirection in law: The immigration rules", as follows:

> "It is the Appellant's submission (at Ground 1) that the FTT has failed to consider whether the decision to exclude the Appellant was a proper exercise of the Respondent's discretion under the rules and otherwise given inadequate reasons for the conclusion that the general grounds of refusal are made out.
>
> Further, or in the alternative, the Appellant contends that the FTT inadvertently applied the incorrect immigration rule.
>
> The Immigration Rules, as in force at the date of the decision giving rise to the appeal, was as follows:
>
> > *Grounds on which entry clearance or leave to enter the United Kingdom <u>should normally</u> be refused*
> >
> > *(11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:*
> >
> > > *(i) overstaying; or*
> > >
> > > *(ii) breaching a condition attached to his leave; or*
> > >
> > > *(iii) being an illegal entrant; or(iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);*

> *And there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.*
>
> On 1st December 2020, by virtue of Statement of changes to the Immigration Rules: HC 813, of 22 October 2020 Paragraph 320(11) of the Immigration rules was repealed, and replaced by the analogous provisions at Paragraph 9.8.2
>
> *9.8.2. An application for entry clearance or permission to enter <u>may</u> 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.*
>
> This change of emphasis is significant as it is no longer the Respondent's statement of policy that those who contrive in a significant way to undermine the Immigration rules *should normally* be excluded, only that they *may* be excluded. The FTT proceeded to determine the matter on the basis of the previous Immigration Rules and, as a consequence, may have attached undue weight to the Appellant's immigration history when considering the proportionality of his exclusion."

9. Mr Diwyncz, with his customary fairness, did not oppose the amendment of the grounds, and acknowledged that the judge had been led into error through parties not drawing attention to a relevant change in the rules. He accepted that the change from *"should normally"* to *"may"*, although subtle, was a real one.

10. Having heard submissions, I indicated that there had been an error of law, although through little fault of the judge, in terms of ground (3); and that it was an error material enough to require the decision to be set aside.

11. This was always a borderline case, where the immigration history, although discreditable, was far from the worst. Some decision-makers and judges might have found that the desirability of encouraging regularisation of status outweighed past flouting of the rules; others, without falling into any legal error, might have come down on the other side. In a close case, it could not be said that but for inadvertent oversight of the change in the rules, the outcome must have been the same.

12. Parties agreed that as there is no dispute on the facts, the UT should proceed to remake the decision. They had said all they wished to say on the substantive merits. Mr Greer had described the situation as one of a

"common or garden overstayer", with no "truly aggravating circumstances".

13. I indicated that the appeal would be allowed.

14. The case remains quite finely balanced; but on considering past immigration misconduct, the family situation, the rules as they now stand, compliance with the rules in all other respects, and the further passage of time, I judge that the public interest does not now require the refusal of entry clearance, and the proportionality balance falls in the appellant's favour.

15. The decision of the FtT is set aside. The appeal, as first brought to the FtT is allowed.

16. No anonymity direction has been requested or made.

Hugh Macleman

23 June 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.