Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00606/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 February 2018	**On 28 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ENTRY CLEARANCE OFFICER - SHEFFIELD

Appellant

and

SRS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr. D. Clarke, Home Office Presenting Officer
For the Respondent: Mr. B. Amunwa, Counsel instructed by J McCarthy Solicitors

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of First-tier Tribunal Judge Keane, promulgated on 8 November 2017, in which he allowed SRS's appeal against the Entry Clearance Officer's decision to refuse leave to enter the United Kingdom as a spouse.

2. For the purposes of this decision I refer to SRS as the Appellant and to the Entry Clearance Officer as the Respondent, reflecting their positions as they were before the First-tier Tribunal.

3. I have made an anonymity direction, following on from that made in the First-tier Tribunal.

4. Permission to appeal was granted as follows:

> "The grounds argue that the Judge had not given sufficient weight to the public interest in the exclusion of foreign criminals from the UK, refusal would simply maintain the status quo. It is also argued that the Judge had not properly considered what is reasonable in the context of the past history of the relationship. The fact that the Sponsor did not wish to live in Jamaica was insufficient to show refusal was disproportionate.
>
> Where couples from different countries chose to marry and wish to live together one of them will have to live outside the country of their nationality and there is no automatic right of a British national to have their spouse live in the UK. The Appellant and Sponsor were aware of the circumstances when they married. The grounds are arguable as the comparison with deportation is apt in the circumstances."

5. The Sponsor attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Submissions

6. Mr. Clarke accepted that, were I to find that there was no error of law in the Judge's treatment of Appendix FM of the immigration rules, he was in difficulty in showing that there was an error of law in the rest of the decision. However, if the Judge's approach to the suitability requirements had been erroneous, the other grounds of appeal relating to Article 8 "outside the rules" were relevant.

7. He submitted that there had been an inadequate consideration of the public interest when considering S-EC.1.5. He provided the suitability requirements from Appendix FM as they were at the date of the decision, and the case of MW [2016] EWCA Civ 1273. I was referred to the 2007 Act which provided that offences where sentences of over 30 months imprisonment had been handed down did not "fall off the radar", and were relevant for the purposes of the immigration rules. This had been referred to in the Respondent's decision.

8. He submitted that the reasoning in S-EC.1.5 was distinct to that under S-EC.1.4. Rehabilitation was not determinative. I was referred to [10] of the decision. The Judge had erroneously taken into account S-EC.1.4. He had found that there was "not a shred of evidence emanating from the Respondent which bore materially on those issues of fact which Section EC.1.5 was concerned with". It was submitted that there was evidence of a conviction with a sentence of imprisonment of 42 months.

9. He submitted that the public interest included public revulsion or the deterrence of criminals. Caselaw held that the level of criminality needed

to be taken into account when considering whether something was unduly harsh. The Judge had not considered the seriousness of the offence and there been no holistic assessment. Rehabilitation was the only factor that the Judge had considered. To simply state that because the Appellant was rehabilitated the public interest was weighted at one particular level could not be right. Criminality should be taken into account, and rehabilitation should not have been determinative of the public interest assessment.

10. I was referred to the case of MW and the analogy to deportation appeals, [33] to [42]. Convictions outside the United Kingdom were of importance in assessing the public interest.

11. Mr. Clarke submitted that if the assessment under the suitability requirements was wrong then the proportionality assessment under Article 8 was undermined. The Judge's finding that the rules were met had an impact on his assessment of whether the relationship could continue abroad. It was clear when considering the Sponsor's evidence set out at [5] that the test of insurmountable obstacles would not be met. I was referred to the case of Agyarko. However, Mr. Clarke accepted that this was the only point that could be made in relation to the other grounds, as it depended on whether there was an error in the Judge's consideration of Appendix FM.

12. Mr. Amunwa referred to his skeleton argument. He submitted that the argument regarding the Judge's treatment of Article 8 was fundamentally misconceived. He referred to the decision of First-tier Tribunal Judge Freer promulgated in January 2015, in particular [45], [51], [52] and [66]. Judge Freer had made these findings with the aid of the decision of First-tier Tribunal Judge Archer promulgated in 2013. His findings had not been disturbed by the Upper Tribunal decision. Judge Keane had the full assistance of the previous decisions and was not persuaded that he had been presented with evidence to depart from the findings of Judge Freer. I was referred to [10], the findings regarding the Appellant's rehabilitation. He submitted that Judge Keane had considered with some care the offence which the Appellant had committed.

13. He submitted that there was no error in the Judge's reference to S-EC.1.4 because this paragraph was referred to in S-EC.1.5. These two paragraphs were related but S-EC.1.5 followed a different structure as it was aimed at catching conduct which fell short of convictions covered by S-EC.1.4. For example, where somebody had been convicted of shoplifting on many occasions but had not been convicted to a period which amounted to 12 months, that person would be caught by S-EC.1.5. It was a sweep up provision. In the Appellant's case the Respondent had used a sweep up provision in respect of a conviction which did not fall under S-EC.1.4 because of the passage of time of ten years. He submitted that using S-EC.1.5 in that way was dissonant with the purpose of S-EC.1.4. After a certain period of time it was possible for someone to qualify under S-EC.1.4, and therefore to qualify under Appendix FM. If the Respondent

was right in using S-EC.1.5 in this way, there was very little hope for anybody convicted of an offence for which he was sentenced to over 12 months to succeed under Appendix FM, and it was clear from the structure of the rules, and S-EC.1.4, that this should not be how it operated.

14. It for was for the Judge to conclude whether the Appellant's exclusion was undesirable. His conclusion was in line with the two previous decisions. No further evidence had been marshalled by the Respondent. In full view of all of the facts, the Judge found that the Respondent had not discharged the burden to show that the Appellant's exclusion was conducive to the public good. He had gone one step further than this and made a specific finding that the Appellant's exclusion was not conducive to the public good.

15. He submitted that nothing had been said at the hearing before me, and no evidence had been presented in the grounds, which had not been considered. The Judge had considered the offence. To use S-EC.1.5 in this way effectively undermined the balance contained in S-EC.1.4.

16. In relation to the consideration of human rights outside the immigration rules, the Judge had not erred in considering the immigration rules first. Having found as he did that the Appellant met the suitability requirements, this was a powerful consideration in the Appellant's favour. He weighed it with care at [11], and gave it appropriate weight. His findings in relation to Article 8 outside the rules were entirely uncontroversial given his finding under the rules. He had made a clear finding in [11] that it was not reasonable to expect the Sponsor to leave the United Kingdom.

17. He submitted that the Judge was aware of the length of time that this case had taken. There had been an interference in the development of family life for some considerable time and this was all relevant in the Article 8 analysis. There was no material error of law in [11]. There was an entirely adequate assessment of the public interest and the grounds were an attempt to open up the clear factual findings that had gone against the Respondent on two occasions in the First-tier Tribunal.

18. With reference to the case of MW, that case had considered S-EC.1.4, and the Appellant's case fell under S-EC.1.5. The Court of Appeal had not considered the cooperation of S-EC.1.4 and S-EC.1.5. It had not considered the use of S-EC.1.5 when S-EC.1.4 could not be used because a period of ten years had passed.

19. In response to the submission that the balance in S-EC.1.4 was undermined by the use of S-EC.1.5, Mr. Clarke submitted that there was a threshold of exceptional circumstances in S-EC.1.4, but that all that was required under S-EC.1.5 was the presence of a conviction. It was necessary to engage with the substance of the conviction to establish the weight to be given to the public interest. The Judge had drawn in

consideration of S-EC.1.4 in [10]. The issue under S-EC.1.5 was that the conviction and the substance of the conviction was sufficient to meet the mandatory exclusion under S-EC.1.5. In relation to the submission regarding the Sponsor leaving the United Kingdom, the reasonableness test was erroneous. I was referred to the case of Agyarko, [42] and [43].

Error of law

20. I have carefully considered the grounds and the decision. The grounds are not clearly drafted, and I observe that there is no challenge in the grounds to any of the findings in [10]. This paragraph states:

> "It was for the respondent to discharge the burden of proving to the balance of probabilities that the exclusion of the appellant from the United Kingdom was conducive to the public good because of his character, associations or other reasons. A judge hearing the appellant's appeal against the earlier decision to refuse entry clearance found that the appellant had not committed a further offence and indeed that he had been rehabilitated [….]. Although the judge's decision was set aside on the ground that the respondent was entitled to exercise discretion pursuant to paragraph 320(18) then in force the judge's finding as to the appellant's conduct in committing further offences and as to his rehabilitation was not disturbed and if it be necessary for me to do so I approbate his findings. The respondent did not induce relevant material in the notice of decision, by way of the Entry Clearance Manager's review or at the hearing. The respondent merely relied on the conviction and resultant sentence and the respondent did not rely on Section S-EC.1.4 perhaps mindful that more than ten years had elapsed since the end of the appellant's sentence. There was not a shred of evidence emanating from the respondent, which bore materially on those issues of fact which Section EC.1 .5 was concerned with. Coupled with the findings of the Judge to which I have referred there were merely the witness statements of the sponsor and the appellant's letter which emphasised adamantly that the appellant has not reoffended and has lived a respectable life since committing his one offence. For the respondent's finding that the exclusion of the application (sic) from the United Kingdom is conducive to the public good I substitute my own finding that his exclusion is not conducive to the public good and that it is not undesirable that he be granted entry clearance."

21. I find that the Judge correctly stated that it was for the Respondent to discharge the burden of proving on the balance of probabilities that the Appellant's exclusion was conducive to the public good. There was no dispute about this. I find that the Judge correctly considered the findings of the previous Judge. He found that the Respondent had not adduced any further evidence, and there was no challenge to this. He stated that the Respondent had relied merely on the conviction and sentence.

22. It was submitted by Mr. Clarke that it was sufficient for the Respondent to rely on the conviction and sentence for the purposes of S-EC.1.5. If this is right, as submitted by Mr. Amunwa, it is difficult to see how anyone convicted for an offence of over 12 months can succeed under Appendix

FM, and the way in which S-EC.1.4 is drafted clearly indicates that there is the scope for someone with a conviction of over 12 months to meet the requirements of Appendix FM. As referred to by the Judge, there was no reliance on S-EC.1.4, "perhaps mindful that more than ten years had elapsed since the end of the Appellant's sentence". It was further submitted by Mr. Clarke that the Judge had not properly considered the Appellant's offence, but I find that this is not the case. The Judge was fully aware of the offence which the Appellant had committed. He set out the contents of the notice of decision [3]. It is was clear that he had taken into account fully the previous decision of the First-tier Tribunal relating to the Appellant's offence and his behaviour subsequent to this offence. The finding had been made by Judge Freer that the Appellant had been rehabilitated, and Judge Keane adopted that finding. I find that Judge properly considered the offence for which the Appellant had been convicted.

23. I find that, given the findings of Judge Freer in 2015 that the Appellant had been rehabilitated, it was open to Judge Keane to find that the Respondent needed to do more than merely rely on an offence which no longer fell within paragraph S-EC.1.4. It was open to the Judge to give weight to the finding that the Appellant had been rehabilitated in coming to his conclusion that the Respondent had not shown that the exclusion of the Appellant was conducive to the public good. It would have been an error had the Judge not considered the Appellant's rehabilitation, be that either with reference to the findings of Judge Freer, or by making findings on the basis of the evidence before him given the wording of S-EC.1.5. The burden lay on the Respondent to show that the exclusion of the Appellant was conducive to the public good, and she was aware that the Appellant had been found by the Tribunal to have been rehabilitated. She provided no evidence to displace these previous factual findings. S-EC.1.5 must involve a consideration of an applicant's circumstances when the application is made. It is not dependent on past conduct alone.

24. I find that the Judge adequately considered the public interest when considering S-EC.1.5. It is clear that the rehabilitation of the Appellant must be a weighty factor when considering the public interest, it cannot be otherwise. In the face of a finding that the Appellant had been rehabilitated, I find there is no error in the Judge's finding that the Respondent had merely relied on the conviction and sentence without any reference to what had occurred in the ten years since, and therefore that she provided no evidence which bore materially on the issues under S-EC.1.5.

25. I have considered the case of MW but I find, as submitted by Mr. Amunwa, that this is concerned with the use of S-EC.1.4. The Appellant's application was decided with reference to S-EC.1.5. There is no consideration in MW of the interrelation of these two paragraphs.

26. I find that there is no error of law in the Judge's consideration of whether or not the Appellant met the suitability requirements, and whether or not the Respondent had discharged the burden of proof to show that the Appellant's exclusion was conducive to the public good. He was aware of the previous decision which had gone in the Appellant's favour, and of which the Respondent was aware. He did not err when finding that the Respondent had not discharged the burden of proof.

27. I further find that there is no material error of law in [11], the Judge's consideration of Article 8 outside the rules. It was accepted by Mr. Clarke that, if the Judge's treatment of the suitability requirements did not involve the making of an error of law, the further grounds of appeal were difficult to argue. The Judge correctly considered the immigration rules first. Given that the only reason that the application was refused was in relation to the suitability requirements, a matter which goes directly to the public interest, and given that I have found that the Judge did not err in his consideration of the suitability requirements, and therefore found that the Appellant met the requirements of the immigration rules, I find there is no material error of law in [11].

Decision

28. The decision of the First-tier Tribunal does not involve the making of a material error of law and I do not set the decision aside.

29. The decision of the First-tier Tribunal stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 23 February 2018

Deputy Upper Tribunal Judge Chamberlain