Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001968
HU/50211/2021; IA/00924/2021

THE IMMIGRATION ACTS

Heard at Manchester
On 12 December 2022

Decision & Reasons Promulgated
On 17 February 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MUHAMMAD ABBAS
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Brown, instructed by Arshad and Company
For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision First-tier Tribunal Judge Mack ('the Judge') promulgated following a hearing at Manchester IAC on 17 November 2021.

2. The appellant is a citizen of Pakistan born on the 28 October 1985 who entered the UK lawfully on 31 July 2011 as a student. Further leave was granted from 20 July 2014 to 20 July 2017 following his marriage to a British citizen on 19 April 2012. A further period of leave to remain as the spouse of a British citizen was granted from 22 March 2017 until 23 September 2019 under paragraph D – LTRP.1.1 of Appendix FM. An application for indefinite leave to remain as the spouse of a British citizen made on 23 September 2019 was refused in a decision dated 15 January 2021 which was the appeal that came before Judge Mack.

3. The Judge sets out the reasons the application was refused and having considered the documentary and oral evidence and submissions made sets out findings of fact from [26] of the decision under challenge. The Judge concludes at [41] that the appellant was unable to satisfy all the eligibility requirements of the Immigration Rules and could not meet the criteria for the exemption to apply. The Judge went on to consider Article 8 ECHR and having weighed up the competing factors concluded that the refusal did not breach the appellant's rights.

4. Mr Brown, who represented the appellant before the Judge, relied on three grounds of appeal, that the Judge (i) failed to give proper reasons for concluding that the appellant's case warranted refusal on grounds of suitability, (ii) failed to properly assess and give adequate reasons in respect of the article 8 ECHR case, and (iii) inadequately assessed whether having regard to all the circumstances there were exceptional circumstances.

Error of law

5. The Secretary of State refused the application for ILR on grounds of suitability in the refusal for the following reasons:

> Suitability
>
> Under paragraphs R-ILRP1.1 (c) your application falls for refusal on grounds of suitability under Section S-ILR: Suitability-indefinite leave to remain of Appendix FM because:
>
> S-ILR.1.6. states:
>
> The applicant has, within the 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they received a noncustodial sentence or other out of court disposal that is recorded on their criminal record.
>
> We are aware you were convicted of multiple offences for which you have received non-custodial sentences on both 13 February 2020 and 12 October 2020. Therefore, you fail to meet paragraph S-ILR.1.6 as outlined above.
>
> S-ILR.1.7. states:
>
> The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm, or they are a persistent offender who shows a particular disregard for the law. We are aware you were convicted of

multiple offences for which you have received non-custodial sentences on both 13 February 2020 and 12 October 2020. There has been a variety of charges, which shows persistent offending and disregard for the law. Therefore, you fail to meet paragraph S-ILR.1.7 as outlined above.

S-ILR.2.2. states:

Whether or not to the applicant's knowledge –

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

(b) there has been a failure to disclose material facts in relation to the application.

We are aware you were arrested for criminal offences on 18 January 2018 prior to your application being made on 23 September 2019 and have since been convicted for these. You failed to declare this information on your application form. Therefore, you fail to meet paragraph S-ILR.2.2(b) as outlined above.

6. The convictions to which the Secretary of State refers in the refusal relate to a conviction for the possession of indecent images of children, a conviction for possession of class B drugs, and no insurance.

7. It is not in dispute that in his application for ILR the appellant answered the questions in the affirmative in relation to criminal offending but only disclosed two speeding offences.

8. The date of the application was the 23 September 2019. The date of the decision was 15 January 2021.

9. The relevant question of the application form reads:

At any time have you ever had any of the following, in the UK or in another country?

A criminal conviction

A penalty for a driving offence, for example disqualification for speeding or no motor insurance An arrest or charge for which you are currently on, or awaiting trial

A caution, warning, reprimand or other penalty

A civil court judgment against you, for example for non payment of debt, bankruptcy proceedings or anti-social behaviour

A civil penalty issued under UK immigration law.

10. The appellant admitted to receiving penalty points for speeding on 13 November 2016 and again on 24th August 2018 but nothing further.

11. The Judge was not assisted by the lack of evidence concerning the appellant's conviction which is the situation that continues to prevail, notwithstanding directions having been provided in the proceedings below for the appellant to provide such material. It was not disputed, however, that the appellant had been convicted of the offence of being in possession of indecent images, possession of class B drugs, in addition to an offence of driving without insurance. The appellant

would have received a charge sheet for his criminal proceedings but did not disclose the same and so it is not clear what category the indecent images fell within, i.e. whether category A, B or C.

12. The Judge took into account the appellant's claim that his failure to disclose his criminal history was the result of a genuine mistake, but the Judge rejected this finding the claim the appellant was in a rush when he completed the application form and so made the mistake, not likely to be true [32].

13. The evidence suggests that the appellant was arrested in January 2018 prior to the date of the completion of the application form. The Judge records the appellant in his oral evidence stating the police had taken many devices away and that as he had not received a summons he must have attended the police station to be charged. The Judge's finding at [32] that the matters relating for which the appellant had been arrested were very much live issues at the date of the completion of the application form is a finding within the range of those reasonably available to the Judge on the evidence. The Judge further noted that the appellant must have appeared in the Magistrates court before his appearance in the Crown Court on 11 December 2019, which could only have occurred as a result of the appellant having been charged. The Judge's finding that the appellant deliberately chose to fail to declare the matter when he made the application in September 2019 has not been shown to be a finding outside the range of those available to the Judge on the evidence.

14. Mr Brown submitted that as the application was made on the 23 September 2019 the suitability provision found in S–ILR.1.6 of Appendix FM do not apply as the conviction post dated the date of application.

15. S-ILR.1.6 reads:

> *"The applicant has, within 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they received a non-custodial sentence or other out-of-court disposal that is recorded on their criminal record*."

16. There was discussion before the Upper Tribunal in relation to whether there was an obligation upon the appellant to inform the respondent of his charge, conviction and sentence after the date that he completed the application form with Mr Brown submitting that there was no legal basis compelling to do so and challenging the Tribunal to draw his attention to any authority suggesting otherwise.

17. The first point to note is that S – ILR.1.6 Appendix FM is based upon a question of fact, that an individual within the 24 months prior to the date on which the application is decided, has been convicted of or admitted to an offence for which they received a non-custodial or other out-of-court disposal that is recorded on their criminal record. It is based therefore upon the existence of a factual situation not upon whether disclosure of the qualifying event was made in an application. In this case it is not disputed that the appellant was convicted of the offences within the requisite 24 month period.

18. It is also the case that the Judge's finding that the appellant deliberately chose to fail to declare his arrest for the matters for which he was subsequently charged and convicted was the sole reason those matters had not been brought to the attention of the decision-maker. It is likely to have been the case that it was only as a result of the necessary checks having been undertaken by the decision-maker when the application was being considered that the convictions came to light.

19. It is also important to note the specific wording of the suitability provision which is not restricted to a period of 24 months prior to the date the application is made but 24 months prior to the date when the application is decided. Even though the appellant chose not to disclose his convictions, an act which appears to have all the hallmarks of a deliberate attempt to deceive the decision-maker in relation to his application, that does not mean that this provision is not applicable to him.

20. I accept the submission made by Mr Brown that the appellant would have been unaware of when the Secretary of State intended to consider the application, but the existence of delays within the immigration system is long-standing and widely publicised and it is a simple statement that the appellant would have known his application was still outstanding as he had not received a decision on it. He was charged, convicted, and sentenced, during the period in which no decision had been made upon his application.

21. The question posed by Mr Brown as to how the appellant was expected to note that the relevant date was the date of decision rather than the date of application is noted, but ignorance of the law is no defence and there is a substantial volume of material available on the Internet or from advice agencies who could have been consulted if required.

22. It is settled law that a duty of candour exists in judicial review proceedings– for a discussion on the extend see R (on the application of Bilal Mahmood) v SSHD (candour/reassessment duties; ETS :alternative remedy) IJR [2014] UKUT 439 (IAC): high duty of candour at **all stages** of the process; "process which falls to be conducted with all the cards face upwards on the table and [where] the vast majority of the cards will start in the authority's hands"; as applied in Khan, R (on the application of) v Secretary of State for the Home Department [2016] EWCA Civ 416 (04 May 2016): duty of candour extends to a duty to draw the significance of a document to the attention of the judge.

23. In relation to cases where the duty of candour is enshrined in legislation, the intention of the legislation is to ensure that providers are open and transparent with people who use services. The duty of candour is a continuing duty. It requires the claimant to update the defendant (and the court, where appropriate) of any material change in circumstances.

24. Whether a duty of candour exists in the field of immigration law outside judicial review was considered by the House of Lords in Zamir v SSHD [1980] UKHL 14 in which Lord Wilberforce stated at [26]:

> 26. The appellant's first contention is based upon this paragaph: the immigration officer, he says, could have asked him if he was married, or if his circumstances had changed, but he did not. The appellant's only duty was to answer, if asked: he was under no duty to volunteer information. I do not accept this contention: indeed, it cannot be too strongly repudiated. At the very lowest, an intending entrant must not practise a deception: it has over and over again been decided, and the correctness of these decisions is incontestable, that deception vitiates the permission to enter. It is clear on general principles of law that deception may arise from conduct, or from conduct accompanied by silence as to a material fact. It can be no answer to a claim that such deception has occurred to say that no question was asked: paragaph 4 above merely confers a power, which carries a sanction if not complied with, and in no way derogates from a general duty not to deceive. I would, indeed go further than this - a point so far left open in the Court of Appeal. In my opinion an alien seeking entry to the United Kingdom owes a positive duty of candour on all material facts, including those which denote a change of circumstances since the issue of the entry clearance. He is seeking a privilege; he alone is, as to most such matters, aware of the facts: the decision to allow him to enter, and he knows this, is based upon a broad appreciation by immigration officers of a complex of considerations, and this appreciation can only be made fairly and humanely if, on his side, the entrant acts with openness and frankness. It is insufficient, in my opinion, to set as the standard of disclosure that which applies in the law of contract; the relation of an intending entrant and the authorities is quite different in nature from that of persons negotiating in business. The former requires a higher and more exacting standard. To set it any lower than as I have described is to invite - as unhappily so many of the reported cases show - a bureaucratic and anti-bureaucratic contest with increasing astuteness, manoeuvring and ingenuity on one side, and increasingly cautious technicality and procrastination on the other. This cannot be in the interest of sensitive administration.

25. It is clearly settled elsewhere that an applicant for entry clearance or leave to remain should not practice deception. In this case the sustainable finding of the Judge that the appellant deliberately withheld information relating to his criminality, including his arrest, has all the hallmarks of a deliberate deceptive act.

26. The finding that a person seeking entry to the UK owes a positive duty of candour on all material facts, including those which denote a change of circumstances since the issue of entry clearance, I find has equal applicability to a person seeking further leave to remain, including indefinite leave to remain, not only at the date of application but where a later date is specified in the relevant immigration rules, such as the date of decision, up to that period.

27. As the relevant provision of the rule provided an alternative timeline, other than the date of application, this was the date by which the appellant was required to make a full and frank disclosure in relation to his circumstances. Whilst the immigration rules are not subordinate legislation they are statements of administrative policy which indicated how, at any particular time, the Secretary of State would exercise the discretion regarding a grant of leave to remain. The Secretary of State was entitled to apply the Rules as they were in force at the date of his decision when he considered the Appellant's application for ILR and not restricted to only considering the information provided by the appellant at the date of his application.

28. The assessment of whether an individual's presence is not conducive to the public good requires due weight being given to Secretary of State's assessment, which is based upon an assessment of the needs of society as a whole rather than an individual. Even if the appellant was not a persistent offender, as that term was defined by the Court of Appeal in Binburga [2019] EWCA Civ 551, it is not made out the Judge erred in law in finding that the appellant's presence in the UK was not conducive to the public good. Indecent images and possession of Class B drugs is contrary to the laws of the UK, drugs create irreparable harm to those who become addicted to them, including death, are responsible for considerable cost to the criminal justice system of the UK, and to the NHS in treating addiction and consequences of addiction. Possession of indecent images of children is not only repugnant but also a clear indicator of conduct by a person whose presence is not conducive to the public good, as those featuring in the images, especially depending on the classification, would ordinarily be vulnerable children who are being exploited. The three common elements of this offence include (i) indecent, (ii) photographs or pseudo-photographs of, (iii) a child. The fact the images were downloaded onto the appellant's phone in digital format is covered by this offence.

29. I find no material legal error made out in the Judge's assessment of whether the appellant's presence in the UK is not conducive to the public good. I find nothing irrational or perverse about the Judge's conclusion that the appellant's conduct would have caused serious harm, especially to vulnerable or abused children whose images he possessed.

30. In relation to the issue of nondisclosure, the Refusal Letter refers to S-ILR.2.2 which states that whether or not the applicant's knowledge – (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or (b) there has been a failure to disclose material facts in relation to the application. The appellant was arrested on 18 January 2018 prior to the application made on 23 September 2019. The appellant's explanation for failing to disclose his arrest was rejected by the Judge for reasons that are clearly supported by the evidence. Suggesting those findings were against the weight of the

character witness evidence has no merit. The Judge considered the evidence as a whole including the appellant's own oral evidence. There is no merit in the argument the Judge compartmentalised aspects of the evidence and failed to properly take the same into account. Finding the appellant deliberately omitted to mention his arrest in his application form is a sustainable conclusion. The fact the appellant then failed to advise the Secretary of State of his charge, conviction, and sentence, between the date of application and decision on that application also appears to have been a deliberate failure to disclose a material fact in relation to the application.

31. I find no merit in the assertion the Judge erred in relation to the assessment of the claim under the immigration rules. The rejection of the claim on that basis has not been shown to be affected by material legal error.

32. Ground 2 asserts inadequate assessment of article 8, claiming the findings at [36] are inadequately reasoned and not balanced and do not take into account a number of factors that the appellant relied upon.

33. The first point of note is that at [36] the Judge was referring to the oral evidence received from the appellant and his wife, the lack of any medical evidence, and a reference to questions that were put to the witness at that stage of the proceedings. The finding within that paragraph was the finding that it was not found the appellant had made a mistake when filling in his application form.

34. The Judges assessment of article 8 exceptional circumstances starts at [42].

35. The Judge refers to the public interest and guidance provided in relevant case law at [46]. The Judge took into account within that paragraph certain factors including that the appellant and his wife owned a property in the UK subject mortgage, that it was not suggested the wife would be homeless if she had to sell the property, that it was not shown the appellant's wife who speaks English could not obtain work in Pakistan, that the appellant's wife could find work in a place with air conditioning to manage a skin condition, and if there was any hardship it was not made out it was insufficient to amount to an insurmountable obstacle. The Judge was clearly aware in the assessment of the cases as a whole of the length of residence of the appellant in the UK, strength of connections, personal history including character conduct and employment record, domestic circumstances, previous criminal record and a major offence of which the appellant had been convicted, and compassionate circumstances. The Judge clearly undertook the required evaluative mechanism when weighing up the competing arguments and the conclusions that the decision was proportionate, especially in light of the findings made in relation to the suitability requirements of the immigration rules, support the Judge's conclusion that the decision is proportionate.

36. Ground 3 asserts the Judge had not properly considered the consequences of the respondent's refusal arguably amounted to deportation through the back door even though the threshold for

deporting a foreign national has not been met. This is not and has never been a deportation appeal and the Judge did not treat it as such. The Judge clearly noted the nature of the decision, refusal of an application for ILR, and the challenge to the same. Whilst the grounds suggest it might be improper for the respondent to refuse the application for ILR but that the result might have led to the appellant being granted further leave, that is not what occurred. The application was refused on the basis of the public interest for the reasons set out. The refusal notice advises the appellant that if there are other reasons why he should be entitled to stay in the UK he will need to make an application, and that as he has no leave to remain in the UK he will be liable for enforced removal. That is the normal consequences for a person without leave to remain in the UK lawfully.

37. Whilst the appellant dislikes the Judge's decision and would prefer a more favourable outcome to enable him to remain in the United Kingdom, the grounds fail to establish legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

38. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

39. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed……
Upper Tribunal Judge Hanson

Dated 14 December 2022