IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006174

First-tier Tribunal No: HU/52899/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 May 2023

Before

THE HONOURABLE MRS JUSTICE THORNTON DBE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

UPPER TRIBUNAL JUDGE RIMINGTON

Between

IWUNOH ZEAL OBRYAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. D Papachristopoulou, Refugee and Migrant Centre Ltd.
For the Respondent: Mr. T Lindsay, Home Office Presenting Officer

Heard at Field House on 16 May 2023

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Nigeria. He has been in the UK, with leave to remain, as the spouse of a British citizen, since June 2016. A further application for leave to remain as a spouse, made under Appendix FM to the Immigration Rules, was refused by the Secretary of State on 28 April 2022. The Appellant appealed, unsuccessfully, to the First Tier Tribunal ("FTT"). The FTT upheld the Secretary of State's decision on the basis the Immigration Rules were not met and removal would not be a disproportionate interference with the Appellant's family life.

Immigration Rules Appendix FM - Family Members

2. Appendix FM of the Immigration Rules sets out the requirements for those seeking remain in the UK on the basis of their family life with a person who is a British Citizen. The requirements include that the application must not fall for refusal under Section S-LTR: Suitability which provides as follows:

> *'Section S-LTR: Suitability-leave to remainS-LTR.1.1.*
>
> *The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply.*
>
> *.....*
>
> *S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.*
>
> *S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.5. apply.*
>
> *S-LTR.2.2. 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.'*

The Secretary of State's decision

3. In refusing the application for leave to remain, the following was said in relation to the Appellant's suitability to remain:

> *'Under paragraphs R-LTRP.1.1.(c)(i) and R-LTRP.1.1.(d)(i), your application falls for refusal on grounds of suitability under Section S-LTR because in your application, you failed to disclose the following facts:*
>
> *On 31 January 2019, you were convicted for distribution of goods bearing false trade marks in 2017 and on 28 February 2019 for carrying on business of company with intent to defraud creditors or for other fraudulent purpose.*
>
> *I am satisfied that these facts were material to the application. I have considered whether you should nevertheless be granted leave to remain but have concluded that the exercise of discretion is not*

appropriate on this occasion because you failed to declare the above when we wrote out on 18 January 2022.

You therefore fail to meet the requirements for leave to remain because paragraph S-LTR.2.2.(b). of Appendix FM of the Immigration Rules applies.'

4. In addition, the Appellant was found not to meet the financial requirements and there were said to be no exceptional circumstances which would render a refusal to allow him to remain a breach of Article 8 European Convention on Human Rights.

The decision of the FTT

5. Before the FTT, it was submitted on the Appellant's behalf that his failure to disclose the convictions for dishonesty did not amount to a failure to disclose material facts because the convictions are not material. Even if they had been disclosed, they would not have had an impact on the decision.

6. The FTT rejected the submission as follows:

'10……pursuant to S-LTR 1.6 an application will be refused if:

> *'The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3-1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.'*

11 In my judgment, it is difficult to see that relatively recent convictions in respect of offences involving an element of dishonesty and in respect of which a suspended sentence was imposed are not material. I am satisfied that there has been a failure to disclose material facts in relation to the application.'

7. Later in the decision, the following was said in relation to S-LTR 2.2(b):

'16 S-LTR 2.2(b) is a discretionary ground. However, in the absence of an innocent explanation for the failure to disclose his conviction, I am not satisfied that the Appellant falls within the category of applicants with respect to whom discretion ought to be exercised.

17 Taking into account the evidence as a whole I am not satisfied that the suitability requirements are met. I am satisfied that the Appellant's application falls for refusal under S-LTR 2.2(b)'.

8. The FTT concluded that in light of this finding, it was not necessary to consider whether the Appellant satisfied the financial requirements in the rule or whether Ex.1/2 applied.

9. The FTT went on to accept the submission on behalf of the Appellant that there had been a failure to comply with procedural fairness in that the Appellant had not been given an opportunity to address the allegation of deception before a

decision had been made against him. The FTT concluded, however, that the failure was immaterial in that, had an opportunity been provided, the explanation would not have been accepted and the result would have been the same.

10. The FTT then turned to consider exceptional circumstances outside the rules. The Tribunal assessed the proportionality of the interference with family life setting out the public interest in the maintenance of immigration control alongside details of the family life. In the course of the analysis, the FTT acknowledged that the Appellant speaks English and is financially independent, characterising those as 'neutral factors'. The FTT concluded that the interference would not be disproportionate and removal was in the public interest due to the need to maintain effective immigration control.

Grounds of Appeal

11. The main ground of appeal before us is that the FTT erred in law in concluding that the failure to disclose the Appellant's convictions amounted to a material non-disclosure. On behalf of the Appellant, it is submitted that whether facts are material is a practical consideration that must be based on the facts of the particular case in question and the realistic impact of the disclosure of these facts would have had on the application, rather than a theoretical question. Whilst criminality could be a material fact in general, in the Appellant's case, it is not. Given the nature of this application, a human rights claim, the Secretary of State's decision would not have realistically been impacted even if the Appellant had disclosed a non-custodial sentence. Emphasis was placed in this regard on the fact the sentence for conviction was a suspended sentence and said to be non-custodial. It was further said that the FTT went beyond the reasons for refusal by introducing new grounds, namely S-LTR 1.6, which were not cited in the refusal letter or at the hearing before the FTT. The Appellant's criminal conviction would not have brought him under the scope of S-LTR 1.6. In the alternative, if the FTT considered the convictions were material, S-LTR 2.2b is a discretionary ground for refusal and the FTT should have exercised its discretion not to refuse in this regard.

12. The other, subsidiary, grounds of appeal are that: the FTT erred when deciding not to consider whether the Appellant met the financial requirement under Appendix FM, which it is said he does; the FTT erred in characterising the Appellant speaks English and is financially independent as neutral factors. The Appellant's established family life in the UK, his legal entry and lawful residence for the last six years and his compliance with all eligibility requirements under Appendix FM would have informed the conclusion on proportionality in the Appellant's favour. Finally, the judge erred in finding that the Respondent failed to comply with the requirements of procedural fairness as set out in the case of Balajigari, whilst going on to dismiss the implications of this on the grounds that the defect was 'immaterial'.

Discussion

13. It is not disputed that the Appellant failed to disclose the fact that he had convictions for offences of dishonesty in his application for leave to remain. The Secretary of State refused the application on the discretionary basis in paragraph S-LTR 2.2(b) that the Appellant had failed to disclose *material* facts in relation to his application.

14. There appears to be scant authority on the meaning of the term 'material' in this context. Before us, both parties agreed that the only relevant authority is Kaur v SSHD ([1998] Imm AR 1), a case where an applicant for entry clearance failed to disclose that her sponsor spouse was in prison having been arrested for murder. The Court of Appeal rejected the test for materiality as being that the facts in question were of a decisive character such that had they been disclosed the Home Secretary would have been bound to refuse entry or would in all probability have refused entry. The test was whether the facts were likely to influence the decision or, put another way whether they were facts that the applicant knew or ought to have known would be relevant to the decision making. Paragraph 3.87 of the current edition of Macdonald's *Immigration Law and Practice* cites Kaur as authority for the proposition that*:* 'a relevant fact is not necessarily a decisive fact for the purpose of determining an application. All the decision maker needs to show is that the non-disclosed fact could have influenced the outcome of the decision'.

15. The FTT came to the following view about the Appellant's convictions:

> *'11 … it is difficult to see that relatively recent convictions in respect of offences involving an element of dishonesty and in respect of which a suspended sentence was imposed are not material.'*

16. We share the FTT's view in this regard. Convictions for offences of dishonesty are necessarily material to an immigration application in which an applicant is required to establish the truthfulness of a number of matters, including his relationship and income. In the present case this included evidence about the Appellant's relationship with his spouse, her health, his wider family life and financial means. The convictions for dishonesty provided a lens through which the Secretary of State could view and assess the account provided by the Appellant. The failure to disclose deprived the Secretary of State of that opportunity. In our view, the Appellant's background of proven dishonesty could have influenced the outcome of the decision making in causing the Secretary of State to look more closely at the account provided by the Appellant. As per the decision in Kaur, it is not necessary for us to be satisfied that the convictions would have influenced the outcome and we reject the Appellant's submissions to this effect. A broad interpretation of 'materiality' is tempered by S-LTR 2.2(b) giving rise to a discretionary, rather than mandatory, basis for refusal. It enables a decision maker, armed with the full information, to form a judgment about the implications of the disclosed fact(s), in the context of the particular circumstances of the decision making.

17. Even if we are wrong in our analysis above as to why proven dishonesty is necessarily material, we consider the test of materiality to be satisfied, in the present context, by Home Office guidance on how a person's criminal history is relevant to applications (Grounds for refusal -criminality). The guidance states that "Immigration applicants are required to disclose all offences and consequent penalties both in the UK and overseas, in addition to other relevant information about their conduct, character and associations. Application forms make clear to applicants where they must disclose this information and that failure to declare may lead to refusal of that application." [our emphasis].

18. We are prepared to accept the FTT erred in upholding the materiality of the convictions for dishonesty, when apparently relying, in part at least, on the applicability of paragraph S-LTR 1.6. The Secretary of State knew about the convictions but *did not* refuse the application on this basis. However, any error by

the FTT in this regard makes no difference to the outcome of the appeal, given we consider the Tribunal was correct to find the non-disclosure was material and that the Secretary of State was entitled to refuse the application pursuant to S-LTR- 2.2(b), which is a standalone ground for refusal.

19. On behalf of the Appellant, emphasis was placed on the FTT's reference, at paragraph 11, to the suspended sentence imposed following conviction and we were referred to the Home Office's guidance on criminality which treats suspended sentences as non-custodial sentences for the purposes of refusal. We are not however persuaded that the FTT fell into any error in this regard. In our view, read fairly and in context, the reference to the suspended sentence is to emphasise the seriousness of the offending conduct, as to which there can be no criticism given a suspended sentence is a sentence where the offending is considered to have crossed the custody threshold. The reference is not to be read as the Tribunal suggesting the sentence amounted to a free standing basis for refusal.

20. Turning to the other grounds which we can deal with briefly. Insofar as it was suggested (and accepted by the FTT) that there was a failure to give the Appellant notice of the Secretary of State's concern that he had failed to declare his convictions, the decision in Ashfaq (Balajigari: appeals) [2020] UKUT 226 (IAC) established some time age that the availability of a statutory right of appeal cured such a defect of justice.

21. The judge accepted the Secretary of State's assessment that the Appellant could not meet the Immigration Rules on suitability grounds and we have found no material error in that assessment. An appellant must meet all of the relevant rules (RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039). Therefore, any assessment of the Appellant's ability to meet the financial requirements takes him no further in relation to the Immigration Rules. In relation to the Article 8 assessment, it was established shortly after Part 5A NIAA 2002 came into force that financial independence and an ability to speak English are not matters which militate positively in favour of an appellant for Article 8 ECHR purposes. They are, instead, 'neutral' in the scales of proportionality, as the FTT held ((Rhuppiah v SSHD [2016] EWCA Civ 803; [2016] 1 WLR 4203, at [59]-[62], a conclusion which was left undisturbed when the appeal reached the Supreme Court)).

Notice of Decision

22. For the reasons set out above, the appeal is dismissed.

No anonymity direction is made.

The Hon. Mrs Justice Thornton DBE

Sitting as a Judge of the Upper Tribunal
Immigration and Asylum Chamber

19/05/2023