IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002552

First tier number: HU/51553/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th of March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

The Entry Clearance Officer

Appellant

and

ROBERTO OLIVEIRA CORREA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Ms K Tobin, Counsel, instructed by Mentor Legal LLP

Heard at Field House on 14 March 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of the Upper Tribunal against a decision, signed on 11 June 2023, of Judge of the First-tier Tribunal Knight ("the judge") allowing the appeal brought by Mr Oliveira Correa, a citizen of Brazil, on the ground that refusing him leave to enter breached the United Kingdom's obligations under Article 8 of the Human Rights Convention.

2. Although the appellant is the entry clearance officer in this appeal, it is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer in this decision to Mr Oliveira Correa as "the appellant" and to the entry clearance officer as "the respondent".

3. I was not asked and saw no reason to make an anonymity order.

The factual background

4. The appellant's immigration history needs to be set out in some detail. He entered the United Kingdom in February 2010 and was granted six months' leave to enter as a visitor. He overstayed his leave. On 17 November 2010 he was sentenced to 16 weeks' imprisonment following his conviction for assault occasioning actual bodily harm. He was removed on 12 January 2011. The appellant says he re-entered the United Kingdom in February 2012, accompanied by his ex-partner, Ms Dassoler, and their two daughters. However, on 10 April 2015, he was granted a period of discretionary leave until 22 November 2017. On 23 September 2015 he was given a suspended sentence of six months' imprisonment in connection with offences relating to false documents. The appellant again overstayed and departed in December 2020.

5. In 2016 the appellant had met his current partner, Ms Duarte Pinheiro, a Brazilian citizen who is settled in the United Kingdom. She lives here with her son. The appellant married her on 26 February 2021 in Brazil by proxy (Ms Duarte Pinheiro was in the United Kingdom). While in Brazil he made an application for entry clearance as a partner on 10 June 2021. He returned to the United Kingdom on 31 December 2021 and was removed to Brazil on 11 January 2022. His application was refused on 17 February 2022. The appellant returned to the United Kingdom through the Republic of Ireland in May 2022.

6. In the light of the appellant's immigration history, the respondent decided the appellant had contrived in a significant way to frustrate the intention of the Immigration Rules, or there were other aggravating circumstances in addition to the immigration breach, applying paragraph 9.8.2 of the rules. The aggravating circumstances identified were the appellant's two convictions. Additionally, the appellant's application was refused on suitability grounds by reference to paragraph S-EC.1.5 of Appendix FM of the rules. The respondent decided that, due to the appellant's character and conduct, it was undesirable to issue the appellant entry clearance. The respondent was not prepared to exercise discretion in the appellant's favour. Finally, the respondent refused the application by reference to paragraph S-EC.2.2(b) of Appendix FM of the rules because the appellant failed to disclose his convictions or his previous marriage in his application.

7. In terms of eligibility, the appellant met the financial and English language requirements of Appendix FM. However, the respondent did not accept the appellant's marriage was valid because he had not established

he was divorced from his previous wife, applying paragraph E-ECP.2.7 of Appendix FM. In fact, the respondent did not accept the appellant enjoyed family life with his partner.

The judge's decision

8. Having set out the evidence and submissions of the parties, the judge made the following findings:

> "52. The evidence to suggest that the Appellant has previously been married is extremely limited. The Respondent has suggested that the Appellant has previously claimed to be married, and that the Respondent's records support this. However, the Respondent has not been able to provide a marriage certificate, or evidence of one ever having existed. Further, no application has ever been made that would have depended on the Appellant previously having been married. The Respondent says that it would be open to the Appellant to provide a document from the Brazilian authorities certifying that he has never been married. However, I do not accept that the Brazilian authorities would be able to provide such a document. In particular, for such a document to be accurate, the authorities would need a centralised and immediately updated system of all marriages, both within Brazil and throughout the world. Such a system could not exist, because of the wide variety of ways that marriages can be solemnised throughout the world. Even if such a document was limited to certifying that a marriage had not taken place in Brazil, it would still involve a considerable amount of effort to create the systems necessary for it to be produced. The suggestion that the Brazilian authorities would be able and willing to provide such a document is far-fetched and I do not accept it.
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> 53. The reality is that the Appellant's account is entirely credible: in Brazil when living together people would describe themselves as married, even if not legally married. That is what has happened in this case. The Appellant has never before been married. I accept the Appellant's evidence on this point.
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> 54. The Appellant has now married the Sponsor. There was no inconsistency in the dates on which the Sponsor was in Brazil and the date of the marriage, because it is the Appellant's case that the marriage was conducted by proxy. The Respondent has not challenged the Appellant's expert evidence that marriages in Brazil can be conducted by proxy, and I accept that evidence, which is consistent with the other documentary evidence in the case and the oral and written evidence of the Appellant and the Sponsor. I accept that they are now married. This lends added weight to the conclusion that the Appellant was not previously married, because if he remained in a subsisting marriage that he was previously in, then he would not have been able to marry the Sponsor.
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> 55. The Appellant's application did not disclose his previous convictions. This was an oversight by his legal representatives. The Appellant was not aware that this oversight had occurred. It would be futile for the Appellant to attempt to mislead the Respondent about his previous convictions, because he knows that the Respondent is aware of them. In particular, in 2010 he

was visited in prison by a member of the Respondent's staff with a view to removing him from the United Kingdom. As such, the Appellant has not intentionally used deception, and deception was not intentionally used on his behalf. Rather, a mistake was made on his behalf, which was not his fault.

56. The Appellant lives in the United Kingdom with the Sponsor. He sees his elder daughter almost every day, because she requires support with her child. She had a caesarean section, which meant that she required more help than most new mothers would. She does not have a partner to support her. She receives less support from her mother than from the Appellant.

57. Each of the witnesses for the Appellant gave accounts which were internally consistent, consistent with each other, and consistent with other available evidence in the case. All of them were credible witnesses on whose evidence I can place reliance. I accept their accounts."

9. In this way, the judge resolved the disputes as to the appellant's previous marriage and the failure to disclose the marriage or convictions.

10. The judge confirmed his finding that the appellant's relationship with Ms Duarte Pinheiro, whom he referred to as "the Sponsor", was genuine and subsisting, at [58], before turning to the suitability issues. He concluded as follows:

"60. The Respondent suggests that the Appellant's application should be refused under paragraph S-EC.1.5 of Appendix FM to the Immigration Rules because the Appellant's exclusion is conducive to the public good, in particular because of his immigration history and his criminal convictions which the Respondent says make it undesirable for him to be granted entry clearance. The Appellant's criminal convictions are weighty matters, particularly his previous conviction for assault occasioning ABH in a domestic context. The Appellant's overstaying and general attitude to immigration control also counts against him. However, I note that none of these matters, even added together, would amount to automatic grounds for deportation. Further, the second offence the Appellant committed did not trigger deportation proceedings. As time has gone on those offences have fallen further into the past, and their relevance to the Appellant's current application diminishes. Weighed against the Appellant's convictions and immigration history, when considering the Appellant's conduct, character, and association, are the strong family connections he has and the assistance that he provides to his daughter. This shows a completely different side to his character: he is a caring and devoted father and grandfather. I conclude that the convictions, taken together with the immigration history, do not lead to the conclusion that the Appellant's exclusion from the United Kingdom is conducive to the public good.

61. Pursuant to paragraph S-EC.2.2 of Appendix FM to the Immigration Rules, entry clearance will normally be refused on grounds of suitability where false information has been submitted in support of an application, or material facts have not been disclosed. I found that the Appellant was not previously married, and so there was no failure to disclose a previous marriage. However, the Appellant admits that his application failed to disclose his criminal convictions. Despite this fact, the non-disclosure was

not his fault, and was done without his knowledge. In the circumstances of the case I conclude that it would be disproportionate to hold against the Appellant something of which he was unaware. As such, his appeal does not fail on the grounds of suitability on this basis.

62. Pursuant to paragraph 9.8.2 of the Immigration Rules, entry clearance may be refused where the Appellant has breached immigration rules and has contrived in a significant way to frustrate the intention of the rules or there are other aggravating circumstances. The Appellant has plainly previously breached immigration laws on numerous occasions, as set out in the RFRL. The overall sum of his attitude to immigration control, and his criminal convictions, mean that there are aggravating circumstances. However, Ms Tobin points out that the Appellant correctly left the United Kingdom in order to make the fresh application in this case. That is to his credit. Although the Appellant subsequently re-entered the United Kingdom, he did so after the application in this case. Nonetheless, I do weigh this in the balance when determining the Appellant's overall attitude to immigration law, and his willingness to breach it. The Appellant most recently entered the United Kingdom via Dublin. This meant that he entered without going through passport control. However, I accept Ms Tobin's point that the Appellant would be used to entering the United Kingdom without a visa, because he is Brazilian, and so he is a non-visa national. I have not found that the Appellant acted deceptively by entering via Dublin. I have found that the Appellant answered the questions of immigration officers in Dublin before being allowed into Ireland. This gave him no reason to believe he would be prohibited from entering the United Kingdom when he continued on his journey to London.

63. I conclude that the Appellant's breaches of immigration law are not of such severity and are not so aggravated that it would be proportionate for his application to be refused on this basis. As such, paragraph 9.8.2 of the Immigration Rules does not apply. In reaching that conclusion I have borne in mind the whole of the Appellant's immigration history as set out in the RFRL."

11. At [64] the judge noted the appellant was outside the United Kingdom when he made his application. He concluded all the requirements of the Immigration Rules were met. In the remainder of the decision the judge made findings on article 8, applying a structured approach.

The issues on appeal to the Upper Tribunal

12. The grounds seeking permission to appeal made the following points in the first ground:

- The judge failed to provide a balanced approach in his assessment of the appellant's past criminality and propensity for breaching immigration control;
- The judge failed to give significant weight to the fact the appellant established a family and private life while in the United Kingdom unlawfully and he had ignored enforcement notices served in 2010 and 2013 and also the refusal of leave to enter;

- The judge erred by recording at [27] that the appellant was allowed entry to the United Kingdom on 31 December 2021 as records showed he was in fact refused leave to enter and removed to Brazil;
- It could not be said the appellant did not act deceptively because he entered the United Kingdom without a visa through the Republic of Ireland in May 2022; and
- The judge erred by failing to apply paragraph EC-P.1.1.(a) which requires the applicant to be outside the United Kingdom.

13. Permission to appeal was refused by the First-tier Tribunal but granted on renewal to the Upper Tribunal. Upper Tribunal Judge Kamara gave the following reasons:

> "The appellant unsuccessfully sought entry clearance as a partner, having previously resided in the United Kingdom unlawfully. While his appeal was pending, he entered the United Kingdom via the Republic of Ireland. It is arguable that the judge failed to fairly assess the suitability issues for all the reasons set out in the first ground."

14. No Rule 24 response has been filed.

The submissions

15. Mr Wain referred me to the additional evidence filed by the respondent under Rule 15(2A). In short, these documents show the appellant arrived at Heathrow on 31 December 2021 and was refused leave to enter. Removal directions were set. Ms Tobin explained this was not disputed. The appellant said in his witness statemen he was allowed into the United Kingdom and asked to leave, which he did (see [34] and [35]).

16. Mr Wain relied on all the elements of the first ground set out above as showing the judge had erred by misdirecting himself on the suitability issues, which in turn infected his assessment of proportionality. At [7] the judge had noted paragraph EC-P.1.1.(a) but he did not apply it. He knew the appellant was in the United Kingdom because he gave oral evidence at the appeal. The judge erred by regarding the fact the appellant met the requirements of the paragraph as a factor in his favour. The rule had to be met at the date of hearing, whereas the judge applied it only to the date of application.

17. Mr Wain relied on the third headnote from the case of Begum (employment income; Rules/Article 8) [2021] UKUT 00115 (IAC) which reads as follows:

> "(3) There may be situations in which, even though it is found on appeal that P meets the requirement of a particular rule, which the Secretary of State wrongly concluded P did not meet, and which led her to refuse the application, circumstances have, nevertheless, come to light that mean the Secretary of State can legitimately invoke some other provision of the Rules, in order to deny P entry. One can also envisage an extreme case (eg. forced marriage) where, whether or not the Rules make express provision

> for it, the true position is such that the very purpose of Article 8 would be subverted by facilitating P's entry. Or, more generally, it may appear that deception has been employed or that the applicant has behaved in such a way that public policy requires their exclusion."

18. Mr Wain argued the judge's treatment of the failure to disclose point, in which he accepted the appellant's evidence blaming a mistake by his legal representatives was inadequate because it failed to apply the well-known guidance in BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311. In that case it was held that there must be evidence that such allegations have been put to former solicitors or representatives and their response elicited before any weight can be placed on such accusations.

19. Mr Wain argued that the error on suitability was material to the proportionality balancing exercise. The appellant's criminal history should have been factored in.

20. Mr Wain argued the judge's expression of the appellant's case contained errors of fact. For example, at [27] he said the appellant was allowed to enter the United Kingdom whereas he had been refused a visit visa. At [22] he said the appellant was presumably granted leave to enter, whereas he had not been. He had claimed asylum and then withdrawn his claim. Finally, at [62] the judge said the appellant had not acted deceptively be entering the United Kingdom through Dublin whereas he must have known he was not allowed to do so.

21. Ms Tobin, who had represented the appellant before the First-tier Tribunal, suggested the respondent's grounds were confused and they conflated suitability and article 8. The judge's reasoning on suitability was thorough and the respondent was simply disagreeing with the outcome. She took the suitability points in turn.

22. Ms Tobin argued the correct approach to paragraph EC-P.1.1.(a) was to look at the circumstances at the date of application, which is what the judge did. The conducive ground provided for mandatory refusal. The judge took into account all the relevant circumstances, including the appellant's disregard for immigration control, his convictions and his family circumstances. He was entitled to find the appellant had not failed to disclose his convictions and this was due to an error by his representatives. He explained in his statement why there would have been no sense in concealing his convictions. Paragraph 9.8.2 provides for discretionary refusal and the judge's reasoning at [62] was adequate. She relied on PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC), at [14], and pointed out the appellant had left the United Kingdom to apply for entry clearance.

23. Ms Tobin said the judge had conducted a full proportionality balancing exercise and there was no material error of law in the decision.

24. Having heard full submissions I reserved my decision on whether the judge's decision contains a material error of law.

The law

25. The jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal lies only in relation to an error of law, not a disagreement of fact. The following are possible categories of error of law, as summarised in R (Iran) & Ors v SSHD [2005] EWCA Civ 982 at [9]:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

26. It is important, as has been repeatedly emphasised in many authorities, not to construe disagreements of fact as errors of law. See, for example, the Presidential panel in Joseph (permission to appeal requirements) [2022] UKUT 218 (IAC) at [13].

Decision on error of law

27. Having carefully considered the oral submissions made to me, the relevant parts of the judge's decision and the evidence relied on by the parties, I have concluded that the respondent has not succeeded in showing the judge's decision is vitiated by any error of law. The decision might properly be described as extremely generous and it is not a decision which many other judges would have made. However, that is not the point. Despite Mr Wain's vigorous arguments, I am driven to conclude that the appeal in this case is in effect a disagreement with the outcome.

28. As seen, a number of provisions were deployed by the entry clearance officer, which have been described as suitability grounds, although paragraph 9.8.2 is outside Appendix FM and is better described as a general ground for refusal.

29. The suitability and general grounds can all be addressed together. It is clear the judge was aware of the appellant's immigration history and that

he took it into account. It is clear the judge recognised that the appellant's immigration history is extremely poor and that he took that into account. He set out the rules and distinguished between mandatory and discretionary rules. He was aware of the convictions.

30. I have noted Mr Wain's arguments about mistakes of fact. However, I do not regard them as sufficient to undermine the judge's reasoning. The reference in [27] to the appellant being allowed to enter the United Kingdom is, in my judgement, simply a case of loose language. If he had said the appellant had been "granted" leave to enter, that might be different. The fact is the appellant presented himself to immigration control and was refused leave to enter. However, a flight could not be arranged immediately and, rather than detain him, the immigration officer granted him bail.

31. The judge's reference at [22] to the appellant re-entering and being granted six months' leave may be factually incorrect but the use of the word "presumably" indicates the judge recognised there was a degree of speculation about this. I do note the notice of decision stated that Home Office records showed he "subsequently overstayed", which would imply leave had been granted in order for the appellant to overstay it. As a result, given the confusion, nothing turns on the point.

32. As far as [62] is concerned, the judge's finding that the appellant had not acted deceptively by entering through Dublin was by any measure a generous assessment of what happened. I have sympathy with Mr Wain's view that the appellant must have known what he was doing. I do not follow Ms Tobin's point (accepted by the judge) that the appellant was used to entering without a visa because Brazilians are not visa nationals. Not being subject to a requirement to obtain a visa in advance of travel does not exempt a visa national from seeking leave to enter the United Kingdom at the border and the appellant must have known that. Mr Wain did not go so far as to suggest the judge had been irrational in finding the appellant somehow believed that being granted leave to enter the Republic of Ireland meant he was at liberty to enter the United Kingdom. The judge was entitled to reach a view having heard the oral evidence of the appellant. This cannot correctly be characterised as a mistake of fact having a material impact on the judge's conclusions.

33. In sum, the judge's findings on suitability do not contain material errors of law and therefore cannot be said to have infected his proportionality assessment.

34. Mr Wain's point about the appellant's reliance on the mistake by his representatives in failing to disclose his convictions has no merit. It was open to the judge to accept the appellant's oral evidence without confirmation from the representatives that they had made a mistake. The judge's reasoning that the appellant would have had nothing to gain by seeking to conceal his criminal convictions is sustainable.

35. Paragraph EC-P.1.1.(a) of Appendix FM states as follows:

> "**Section EC-P: Entry clearance as a partner**
>
> EC-P.1.1. The requirements to be met for entry clearance as a partner are that-
>
> (a) The applicant must be outside the UK; …"

36. The facts are that the appellant was outside the United Kingdom when he made his application. He was also outside the United Kingdom at the date of decision. He had been in the United Kingdom for a period between his application and the decision and he was in the United Kingdom at the time of the appeal. It is far from clear that the argument was made to the judge that the appellant's presence in the United Kingdom meant that the rules were not met. However, the judge set out the rule in his decision and said at [64] that the appellant had been outside the United Kingdom at the date of application. In that paragraph the judge summarises the case in terms of the four sub-paragraphs in EC-P.1.1.

37. The rule is an unsurprising provision in the context that it is a basic requirement for an application for entry clearance that an applicant be outside the United Kingdom. Were it otherwise, then the applicant should apply for leave to remain at the Home Office.

38. The rules should be construed according to their ordinary meaning Mahad v ECO [2009] UKSC 16. Unless the rules prescribe a particular period which must be considered, as with the financial requirements, the general rule is that the tribunal considers the facts as at the date of hearing. Mr Wain's point is a simple one: the appellant was not outside the United Kingdom at the date of hearing and therefore he did not met the requirements of the rule. Obviously, this is a circumstance which arose after the date of decision so was not raised in the notice of decision.

39. Mr Wain sought support for his arguments from dicta in Begum which state that circumstances might subsequently come to light which justify the application of another provision of the rules to deny entry.

40. The case of Begum considered the circumstances in which the financial rules were no longer met by the date of hearing, although they had been at the date of decision. The Upper Tribunal discussed the meaning of the particular rules in play in that appeal. It pointed out that paragraph 27 of the rules provides that an "application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision …". However, the financial rules in play in that case were "framed in such a way as to fix the relevant financial requirements at the date of application". Therefore, paragraph 27 did not mean the respondent could refuse an application on the basis that employment had ceased after the date of application. The Upper Tribunal then discussed the application of the rule in a human rights appeal.

41. The passage I suspect Mr Wain relied upon was the following, which is summarised in headnote (3):

> "36. There may, of course, be situations in which, even though a person shows on appeal that they meet the requirement of a particular rule, which the respondent wrongly concluded that person did not meet, and which led the respondent to refuse the application, circumstances have, nevertheless, come to light that mean the respondent can legitimately invoke some other provision of the Rules, in order to deny entry. For example, it may subsequently appear that deception has been employed or that the applicant has behaved in such a way that public policy requires their exclusion. One can also envisage an extreme case where, whether or not the Rules make express provision for it, the true position is such that the very purpose of Article 8 would be subverted by allowing entry. Such a situation would, in our view, arise where, in an entry clearance case involving marriage, cogent evidence emerges to show that the applicant has undergone a forced marriage and that it would be contrary to her human rights if she were to be admitted in order to live with her husband in the United Kingdom. In this regard, it is important to bear in mind the general purpose of Appendix FM, which is to give effect to Article 8 considerations."

42. I do not consider this assists Mr Wain. What Begum shows is that new facts coming to light after the decision might, under certain circumstances, be taken into account so as to justify refusal even though the appellant could show the rules which underpinned the original decision were in fact met.

43. I do not consider this appeal is an analogous situation. I interpret the rule as simply signposting the route to follow: in this case, entry clearance from abroad. The appellant made a valid application for entry clearance while he was in Brazil. The eligibility and suitability requirements were the rules dealing with the substance of the application and decision and, as Begum itself shows, the time at which they have to be met can vary. Moreover, it is possible to think of circumstances in which a person has appealed a refusal of entry clearance and is subsequently granted lawful entry to the United Kingdom on some other basis, perhaps in order to give evidence at their appeal. If Mr Wain were correct, that person would effectively abandon the appeal by doing so.

44. There is provision in the law for the statutory abandonment of appeals brought within the United Kingdom where the appellant leaves before the appeal has been finally determined (see section 92(8) of the Nationality, Immigration and Asylum Act 2002). However, there is no provision applying abandonment to appeals brought from outside the United Kingdom, which must be taken to be deliberate. I do not think paragraph EC-P.1.1.(a) should be construed in that way.

45. Mr Wain said the judge's error also lay in relying on the fact the rules were met as establishing the decision was disproportionate because the public interest was reduced. However, this is not what the judge did. I accept there other examples of loose expression, such as, at the end of the [64] where the judge states the appellant's appeal "succeeds under

the Immigration Rules". He then starts [65] by stating he has considered article 8 "[i]n addition to considering the appeal under the Immigration Rules". There are later references to the appellant's "removal".

46. However, the paragraphs which follow [65] show that the judge did conduct a proportionality balancing exercise of all the relevant factors and he expressly gave weight to the public interest in maintaining immigration controls which was increased by the appellant's "repeated breaches of immigration law" (see, in particular, [70]). The judge identified the best interests of the children affected by the decision and gave them weight as a primary consideration. He weighed all the factors and reached a rational conclusion. There is no material error in the judge' approach.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not involve the making of an error of law and shall stand.

Signed: N Froom

Deputy Upper Tribunal Judge Froom Dated: 22 March 2024