IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000491
First-tier Tribunal No: HU/52810/2022)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 September 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Mrs. Mary Evon Smith **Appellant**
(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer **Respondent**

Representation:

For the Appellant: Mr S Vokes, of Counsel, instructed by M & K Solicitors.
For the Respondent: Ms. S Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 25 July 2023

DECISION AND REASONS

1. By a "Decision and Reasons" (signed on 11 May 2023 and served on the parties on 26 June 2023) (the "EOL Decision"), I set aside the decision of Judge of the First-tier Tribunal Young-Harry (hereafter the "judge") who, in a decision following a hearing on 7 December 2022, dismissed the appeal of the appellant, a national of the United States of America (USA) born on 30 September 1975, on human rights grounds (Article 8 ECHR) against a decision of the respondent of 5 April 2022 to refuse her application of 3 August 2021 for entry clearance as the spouse of Mr Nigel Smith, a British citizen (hereafter the sponsor") under Appendix FM of the Immigration Rules.

2. Terms defined in the EOL Decision have the same meaning in this decision.

3. The appeal was listed before me on 25 July 2023 for the decision on the appellant's appeal against the respondent's decision to be re-made.

(A) The respondent's decision and the judge's decision

4. The decision letter states:

> "Suitability
>
> **Under paragraph EC.P.1.1.(c), your application falls for refusal on grounds of suitability under Section S-EC of Appendix FM.**
>
> I note that you were convicted of an offence on 15 September 1997 in the United States of America and you have declared this on your application form and provided documentation relating to this offence. Whilst I note that you have previously been granted Leave to Enter the United Kingdom I am satisfied that you have done so through deception. Home Office records show that you were stopped at London Heathrow Airport Terminal 2 and that you were interviewed by an Immigration Officer on 12/10/2019. **Within your interview you gave details of your conviction but I am satisfied that you gave misleading information consequently understating your victim and circumstances surrounding the offence.**
>
> I further note that you declared your sponsor as a "good friend" and your sponsor also referred to you as "extremely good friends". On several occasions throughout the interview you both confirmed that you were "just friends" and that you "game a lot online". I note that your marriage certificate shows that you were married on 28/09/2019, 13 days prior to your interview. It is unclear why you both stated you were just friends when you had entered into marriage 13 days earlier.
>
> I have considered the circumstances of your application, but **in light of the nature of your conviction and your character and conduct, I consider it undesirable to issue you an entry clearance** and I am not prepared to exercise discretion in your favour. …
>
> **I therefore refuse your application under paragraph EC.-P.1.1.(c) of Appendix FM of the Immigration Rules. (S-EC.1.5)"**
>
> (My emphasis)

5. Section EC-P and S-EC provide:

> 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;
> (b) the applicant must have made a valid application for entry clearance as a partner;
> **(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance;** and
> (d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.
>
> Section S-EC: Suitability-entry clearance
>
> S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply.
>
> S-EC.1.2. The Secretary of State has personally directed that the exclusion of the applicant from the UK is conducive to the public good.
>
> S-EC.1.3. The applicant is currently the subject of a deportation order.
>
> S-EC.1.4. The exclusion of the applicant from the UK is conducive to the public good because they have:

(a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or

(b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or

(c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.

S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.

(My emphasis)

6. As can be seen, the decision letter made two allegations. First, that the appellant had failed to disclose the full details of her 1997 criminal conviction during her interview in October 2019 (hereafter the "first allegation"). Second, that she and the sponsor had lied about the status of their relationship during their interviews in October 2019 (hereafter the "second allegation").

7. The first allegation concerned the appellant's conviction on 15 September 1997 in the USA of an offence of first degree sexual assault of a child (para 3 of her witness statement). The second allegation concerned the fact that she and the sponsor, when interviewed on 12 October 2019, had said that they were friends when in fact they were married on 28 September 2019.

8. During the course of the submissions of Mr Vokes and after the sponsor had given oral evidence and Ms Lecointe had made her submissions, I asked whether the respondent's decision was based on the appellant not satisfying the suitability requirement or on the appellant's exclusion being conducive to the public good. Ms Lecointe informed me that it was the former as opposed to the latter, following which both representatives asked me to read their submissions on the exclusion issue as submissions on the suitability requirement.

9. However, I subsequently sent the parties a "Note and Directions" signed and served on 26 July 2023, in which I set out the relevant parts of the decision letter and informed the parties that it was my preliminary view that the decision letter in fact stated that the appellant did not meet the requirement in EC.-P.1.1(c) of Appendix FM and the suitability requirement in S-EC *because* her exclusion was conducive to the public good pursuant to S-EC.1.5. I directed that any objections, with reasons, to my preliminary view were to be received by the Upper Tribunal no later than the timescale specified in the Directions. That timescale expired on 4 August 2023.

10. On Friday 1 September 2023, I was informed by the administrative staff of the Upper Tribunal that no correspondence had been received from the parties in response to my "Note and Directions".

11. It follows that it is accepted that the decision letter stated that the appellant's exclusion was conducive to the public good and that she did not meet the suitability requirement because her exclusion was conducive to the public good.

12. The judge found that the respondent had not established the first allegation but that the second allegation was established. The judge also found that the appellant's exclusion was conducive to the public good due to her conduct and character.

(B) The EOL Decision

13. As stated at para 40 of the EOL Decision, the grounds did not challenge the judge's finding that the respondent had established the second allegation. Nor did they challenge the judge's finding that the appellant's exclusion was conducive to the public good due to her conduct and character.

14. In the EOL Decision, I concluded (para 33) that, in conducting the balancing exercise at para 18 of her decision, the judge had erred by failing to take into account the following factors and weigh them against the state's interests:

    (i) Notwithstanding the fact that the appellant and the sponsor had lied during their interviews in October 2019, the appellant complied with the terms of her visit visa in October 2019 and left the United Kingdom after staying in the United Kingdom for 161 days. She did not (as Mr Vokes submitted) make an in-country application for leave to remain as a spouse after gaining entry in October 2019.

    (ii) In all of her five visits prior to October 2019, the appellant had abided by the requirements of the Immigration Rules.

    (iii) In relation to the application that was the subject of the decision under appeal, the appellant satisfied all the requirements for entry clearance except for the suitability requirement.

15. At para 34 of the EOL Decision, I stated that I was satisfied that the judge's failure to take into account the above factors in the appellant's favour was material to the outcome and that I could not say that they could not have made a difference to the outcome. At para 35 of the EOL Decision, I stated that I was therefore satisfied that the judge had materially erred in law in reaching her decision on the proportionality balancing exercise in her consideration of the appellant's Article 8 claim.

16. Para 41 of the EOL Decision therefore limited the ambit of the re-making of the decision on the appellant's appeal as follows:

> 41. The re-making of the decision on the appellant's appeal is therefore limited to proportionality in relation to the appellant's Article 8 claim. Although I do not have any summary of sponsor's oral evidence before the judge and therefore the sponsor may have to give oral evidence again (if so advised), the issue is limited to proportionality. For the reasons given at para 40 above, the judge's finding that the respondent had established the second allegation but not the first allegation and her finding that the appellant's exclusion was conducive to the public good due to her conduct and character stand."

17. I pause here to correct a typographical error in the EOL Decision. It is clear, from the context of the reasoning at paras 23-33 of the EOL Decision, that the first line of para 33 of the EOL Decision incorrectly states that *"…ground 3 was established in part, …".* This should read: *"…ground 2 was established in part,…"*.

(C) The resumed hearing

18. At the commencement of the hearing, I informed the parties that, if the judge's finding that the appellant's exclusion was conducive to the public good were to stand, I would be unduly constrained in my assessment of the balancing exercise in relation to Article 8. I informed the parties that my preliminary view was that I should reach my own decision on that issue notwithstanding that the judge's finding that the appellant's exclusion was conducive to the public good had not been challenged and

notwithstanding that I had stated in the EOL Decision that that finding should stand. Ms Lecointe agreed that I should proceed to decide the issue for myself.

(i) The sponsor's oral evidence

19. Having adopted his witness statements dated 30 November 2022 and 6 July 2023, the sponsor was cross-examined at length. In summary, he said that he was in almost daily contact with the appellant by text and sometimes by audio or facial communication. The last time he saw the appellant was in March 2020 at Heathrow Airport. He has not visited her since then because, initially, airports were closing due the Covid-19 pandemic and later on, he did not have 'a timeline' where he knew he would be free to visit the USA.

20. Asked whether he had discussed with the appellant what would happen if this appeal were unsuccessful, the sponsor said that he has been advised that, if this appeal were unsuccessful, it would be very difficult for the appellant to obtain a visit visa to visit the United Kingdom. Accordingly, they could only see each other in person if he were to visit the USA. He and the appellant would endeavour to keep the relationship active but he was unsure how successful that would be in the long term.

21. The sponsor and the appellant have not looked at the possibility of the sponsor living in the USA as a practical one because he has responsibilities for his 90-year old mother and his age would preclude him from being able to find suitable employment in the USA. The current job market in the USA is worse than in the United Kingdom.

22. The sponsor was aware of the appellant's previous conviction before they were married. He was aware of the consequences of the conviction. The circumstances imposed upon her were very restrictive. She was not able to participate in her son's school activities whilst he was growing up. The restrictions applied to her attendance at any school gathering of minors. The restrictions no longer applied once her son attained the age of 18 years on 12 December 2021. The sponsor did not know whether the restrictions were time limited or permanent but he said they ceased to apply to the appellant's son when he reached the age of 18 years. He said that this was not a subject that has come up for discussion. Asked whether he was aware of the appellant being obliged to attend any form of rehabilitation or whether she was being monitored, the sponsor said: "*Not to my knowledge*".

23. The sponsor and the appellant began discussing marriage in around 2010. Asked who advised him and the appellant to say that they were just good friends at their interview, the sponsor said that he sought advice based on an advertisement on the internet. He did not have the man's name. It was someone who claimed to be a solicitor. He saw this person just once. He did not pay him because it was a free consultation. The sponsor saw the man in person. Asked where he went to attend the appointment, he said it was "*somewhere in Luton*". Asked to be more specific and whether it was, for example, in the centre of Luton, the sponsor said "*His office was in that part of Luton that I don't know very well. This was over 4 years ago".* The sponsor said he lives in Wigmore on the very outskirts of Luton. He has lived there for 10 years. He does not particularly like the place. He moves around using his GPS. Other than that, he stays out of Luton. He only lives in Luton because it is a reasonably priced place in which to live and was close to his work. He works at Lister Hospital in Stevenage.

24. Ms Lecointe put to the sponsor that he had not given an answer on being asked the simple question, where he had seen the solicitor or representative. She put to him that his evidence was that he has lived in Luton for 10 years and that he moves around Luton by GPS which, she put to him, involves giving the GPS device some input. Asked whether there was a reason why he had not tried to retrieve any information to assist the court on this issue which had been raised previously, the sponsor said that he no longer has the telephone that he was using at the time. It has been 3 years since he had that telephone. There are many parts of Luton that he has not visited and many parts that he has driven through whilst following directions to somewhere else. He remembers that it was a part of Luton that had restrictive parking. He was not sure where the central part of Luton is but the man's office was "*fairly close to the centre*".

25. The sponsor said that, when he met the man who gave him the advice to lie at the interview, he told him about the appellant's previous conviction and was given advice about a number of matters, several of which turned out subsequently to be incorrect. He deeply regrets contacting the man. For example, the man told him about the documentation that the appellant would need in terms of the suitability of the accommodation available to the appellant but did not inform him that the documentation would only be valid for a period of 28 days after it was obtained. The advice of the man was given in February 2019 but it was not until immediately before his trip to the USA in September 2019 that he realised that the advice about the documentation was incorrect.

26. The sponsor did not make any complaint to any regulatory body about the advice that he had been given by the man. It was advertised as a free 30-minute consultation. He put it down to the advice being commensurate with what he had paid for it.

27. The sponsor said that the appellant lives with her mother. She also has some aunts and uncles and two or three cousins. Asked how she is supported, he said that she is currently living with her mother. She is not financially supported by her mother. The appellant receives a fixed income which, in the United Kingdom, would be disability benefit.

28. I asked the sponsor some questions. Asked how he had found the solicitor or representative, whether it was online or some other means, he said that "*it was either online or in an advertisement in a local newspaper*". I asked him why he could not remember, he said: "*It has been a very stressful four years. The initial contact was in February 2019. I could do very little to set things in motion in 2019*". Asked what attempts he had made to find out who this person was, he said that he has driven to "*the appropriate area"* to see if he could recognise anywhere, a name from a business but nothing looks familiar. Asked how he contacted the person, he said that there was a phone number for a free consultation. He made an appointment.

29. Asked when he and the appellant decided to get married, the sponsor said that they were engaged in 2010. The plans for the actual marriage came later, over a period of time. Asked again, he said that sometime within a year of getting engaged, the arrangements were over a period of time. Asked again, he said that the appellant felt that there was a lack of commitment on his part and that, at that point, no timescale was set for getting married although it was discussed. I then asked him the question again, saying that he was being asked a simple question. He then said that they did not have any serious discussion about marriage until after his divorce was finalised in 2016. When the question was repeated, he said that the plans to get married started

soon after his divorce was finalised which was on 15 February in the year 2015 or the year 2016.

30. Asked to explain his earlier evidence that he did not have a timescale within which he knew he could visit the appellant, the sponsor said that, between 2019 and 2020, the appellant was booked on a flight back to the USA from the United Kingdom. This was just after the outbreak of Covid-19 and President Trump was closing down airports. After she left the United Kingdom, travel to the USA was available at various times. I asked the sponsor whether he has visited the appellant during the period of more or less one year over which international travel has re-opened. He said that he has not visited her. He has not known about his availability. When she initially made the entry clearance application, it was stated on the form or the website that the appellant would have 28 days from the grant of entry clearance to travel to the United Kingdom. The application was made in August 2021. He needed a 4-week lead time to make the necessary arrangements to go to the USA. They decided that it was not worth the risk for him to travel because they had paid for an expedited decision to be made. However, it took 7 months to receive the decision on the application. After the refusal decision was received, he instructed a barrister for the appeal in the First-tier Tribunal. That barrister became non-contactable. It was due to a chance communication with his M.P. that he found out in October 2022 about the hearing of the appeal in December 2022. Since then, he has been waiting for a decision in order to get on with his life.

31. The sponsor said that his mother lives in Hersham in Surrey, about 50 miles away. Depending on the traffic, that is either a 45-minute or a 3-hour drive away. His mother lives with her 92-year old partner. The sponsor visits his mother regularly. If he was unable to visit her for an extended period of time, he believes that it would have a detrimental impact upon her healthwise. He orders her shopping for her online. He is the nominated executor of her will and he holds the details of her pre-paid funeral plan. He has a sister who has not been in contact with his mother for several years.

32. In re-examination, the sponsor was asked to explain the offence that the appellant had committed. He said that she had had sexual intercourse with a minor, a 14-year old. This happened 26 years ago. At the time, the appellant was 20 years old.

33. The sponsor said that the appellant is on fixed income, the equivalent of disability benefit in the United Kingdom, because she has type II diabetes and had to give up work because she was unable to balance a job with keeping her glucose levels under control. She relies on insulin injections to keep her glucose levels under control.

34. Asked whether he could take his annual leave in one block, the sponsor said that he works for the NHS in a specialised team. In the NHS, there is a policy that imposes a maximum of 3 weeks that can be taken as annual leave in one block except in very special circumstances. There is also a rule in place which requires annual leave to be split over the four quarters of the year. He believes he is now entitled to 27 or 29 days of annual leave. He was asked to explain whether he was saying that, in relation to the NHS unit in which he is working, he is obliged to split his annual leave over the year. The sponsor said that the policy of the Trust is that the annual leave must be split across the four quarters. However, his manager is prepared to bend that rule but any continuous leave exceeding 3 weeks must be authorised by permission being given from “higher up”.

35. The sponsor said that he is a specialist technician in the NHS. He works on dialysis and water treatment in the hospital. Dialysis requires ultra pure water. He is also responsible "*to a certain extent*" for some of the I.T systems that are used in the dialysis department.

(ii) Submissions

36. In deciding whether the appellant's excision is conducive to the public good, Ms Lecointe asked me to take into account that there is still no clear picture about whether the appellant is being monitored by the authorities in the USA, whether she is permanently on a sex register or for a limited period and, if so, for how long. There is no information about the broader steps, if any, taken by the authorities in the USA to protect children in the appellant's local area or wider in the USA, other than in relation to the appellant's son who has turned 18. There is no evidence as to whether any licence conditions apply. There is no evidence from probationary services or the like; for example, on whether the appellant has a propensity to re-offend. She submitted that it is not good enough to say that the offence was committed when the appellant was 20 years old. She submitted that there was a strong reason to exclude the appellant for the protection of the public. She also asked me to take into account the appellant's behaviour in misleading the immigration authorities with a lie when asked at her interview about the relationship with the sponsor. The appellant's willingness to mislead the interviewer in order to secure entry into United Kingdom was the relevant issue, as opposed to whether the lie had had any effect on immigration control.

37. With regard to the sponsor's evidence to the effect that the lie told by him and the appellant was an innocent lie on basis of advice that he had received, Ms Lecointe asked me to note that, on the sponsor's evidence, the advice was given by a faceless person whose identity is not known. The sponsor did not even know how he found this person, whether online or in a newspaper.

38. In considering the sponsor's evidence that he was only allowed to take 3 weeks' annual leave at a time, she asked me to bear in mind this is the same person who had said that he could not remember which area he was in when he met the man who had given him the incorrect advice or how he found the man; yet, the evidence is that he is in a specialised job with responsibility. She asked me not to accept his evidence as truthful. If he was prepared to lie previously, he is prepared to lie again.

39. Ms Lecointe asked me to find that there is no evidence to support the sponsor's assertion that he would not be able to find work in the USA or that he would not be financially supported by, for example, family members of the appellant or the appellant herself.

40. On the question of proportionality and in relation to the fact that the appellant had previously been granted entry clearance as a visitor on six occasions even though the respondent was aware of her previous conviction, Ms Lecointe submitted that the consideration of whether the respondent should grant a visit visa in order for an applicant to visit the United Kingdom for a short amount of time is less grave than whether the respondent should grant entry clearance as a spouse to enable an individual to settle permanently in the United Kingdom. The latter would mean that the individual would be joining the society here. An individual's circumstances are not scrutinised in the same manner if he/she is coming to visit the United Kingdom for a short period as opposed to living permanently in the United Kingdom.

41. Ms Lecointe asked me to take into account the gravity of the offence in making the decision on proportionality and the lack of evidence as to the likelihood of the appellant re-offending.

42. In any event, the sponsor has the option to join the appellant in the USA. The sponsor's evidence is that his mother lives 45 minutes to 1 hour away from him. Ms Lecointe asked me to take into account the fact that the sponsor was someone who was prepared to lie. She therefore asked me not to attach great weight to his evidence. Ms Lecointe submitted that there is nothing to prevent the sponsor from joining the appellant in the USA and that he is capable of getting a job there, given that he has a good job here. Just as he has been able to visit the appellant in the past, he can visit his relatives in the United Kingdom. There is no evidence that there is no one to visit his mother or to do her online shopping. The sponsor did not say that there was no one who could do his mother's shopping online if he were not here to do it.

43. Ms Lecointe submitted that these considerations do not outweigh the state's interests in refusing entry clearance. The decision would not prevent the sponsor and the appellant from continuing their relationship.

44. Mr Vokes relied upon his skeleton argument. He reminded me that the appellant had entered and exited the United Kingdom as a visitor six times, having disclosed details of her conviction. This was an accepted fact. Since U.S. citizens are not visa nationals, they are less likely to be interviewed at random. However, the appellant was interviewed on every visit, as the sponsor had stated at para 6 of his witness statement dated 30 November 2022. Mr Vokes submitted that it is implicit in the finding of the judge that the first allegation had not been established by the respondent, that the appellant had disclosed details of her conviction to the respondent.

45. Mr Vokes submitted that the decision letter was based on the appellant's failure to disclose her conviction and not on the fact that she had a previous conviction. However, the judge had found against the respondent on that issue. Mr Vokes submitted that the decision letter did not take the point that the appellant's exclusion was conducive to the public good.

46. Mr Vokes submitted that no point was taken in the decision letter that exclusion was conducive to the public good on the basis of her conviction. If the respondent was concerned about the appellant's propensity to re-offend or the need to protect the public, it is very odd (in his submission) that the respondent's position on exclusion is now based on one offence. In his submission, this is a radical change of position from the past which could not be justified having regard to the circumstances as a whole, just because the appellant was now making a spouse application.

47. Although it is the case that the appellant's entry on previous occasions was as a visitor whereas the application that the subject of the decision appealed against was an application to settle in the United Kingdom permanently, Mr Vokes submitted that the fact was that she had entered the United Kingdom as a visitor six times previously.

48. Mr Vokes submitted that credibility is a 'two-way street'. The sponsor had openly given as many details as possible about the appellant's conviction. He has indeed provided ammunition for the respondent's case. It therefore 'grated' if one accepts his

evidence in that regard and yet find that he is not telling the truth about other matters. Mr Vokes asked me to evaluate the sponsor's evidence as a whole. He submitted that the sponsor's responsible position at work does not necessarily transfer over to the mundane circumstances of life. He is at home with computers and technology and what he does for a living. The fact that he does not know his way around Luton where he lives does not necessarily mean that he is not telling the truth about the man who he said had advised him and the appellant to lie about the status of their relationship.

49. On the question of proportionality, Mr Vokes relied on his skeleton argument dated 4 July 2023. Essentially, the incident of lying was not for the purpose of obtaining a benefit in terms of obtaining residence in the United Kingdom. On the occasion of her entry to the United Kingdom as a visitor when she was in fact married to the sponsor, the appellant did not remain in the United Kingdom and make an in-country application for leave to remain as a spouse. She has always complied with the Immigration Rules and did so on that occasion. It has been 3 ½ years since they lived together. They have been separated since 14 Feb 2020.

50. The sponsor has given reasons why he cannot live in USA. On his evidence as to the prospects of marriage continuing if the appeal failed, this is the 'last chance saloon' for the relationship because he is not quite sure what will happen given his responsible employment. It is to the benefit of the public interest if he continues to work in the NHS in his specialised profession. He has explained why he could only go to the USA for a short period of time. The public interest is variable, in Article 8 cases. People's personal circumstances vary so much. In the instant case, immigration control is being preserved by the parties' own actions. Mr Vokes therefore submitted that less weight should be given to the public interest in the proportionality exercise. If I were to find that the appellant's exclusion is conducive to the public good, there would be a 10-year ban on the appellant being able to enter the United Kingdom. The decision is unjustifiably harsh because the respondent's position in terms of immigration control has not been affected because the actions of the appellant and the sponsor have always been within the Immigration Rules. This has to be weighed against the potential and actual damage to family life.

51. I reserved my decision.

(D) ASSESSMENT

52. I make it clear at the outset that I have taken into account all of the material before me, whether in written form or by way of oral evidence or submissions, even if not specifically referred to in my decision.

53. Given that there is no right of appeal against a decision made under the Immigration Rules, the appellant's claim under Article 8 falls to be considered outside the Immigration Rules.

54. Nevertheless, it is necessary to consider whether the appellant meets the criteria under the Immigration Rules because this is relevant to an assessment of proportionality when her Article 8 claim is considered.

55. The fact that an individual does not satisfy any relevant provision for the grant of leave to remain or entry clearance is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control, although that is not

determinative, in the same way as the fact that the individual satisfies the requirements for entry clearance or leave to remain under the Immigration Rules diminishes the weight to be attached to the public interest in maintaining immigration control but is not determinative.

56. In this case, as explained above, the respondent contends that the appellant's exclusion is conducive to the public good. In the instant case, the factual issue I have to decide in this regard is whether the appellant's exclusion is conducive to the public good *"because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance".* If I find that her exclusion is conducive to the public good, then she will not satisfy the suitability requirement in S-EC. In turn, that will mean that she does not satisfy Section EC-P.1.1.(c). This will be relevant in deciding her Article 8 claim. Likewise, if I decide in her favour that the respondent has not established that her exclusion is conducive to the public good, this will be relevant in deciding proportionality, as will the fact that she otherwise satisfies the requirements for entry clearance as a spouse.

57. The burden of proof is on the respondent to show that the appellant's exclusion is conducive to the public good to the standard of the balance of probabilities.

58. When considering the appellant's rights under Article 8, I take into account the human rights of the sponsor who will plainly be affected if this appeal fails. Indeed, it is his presence in the United Kingdom that enables the appellant's Article 8 claim to be considered notwithstanding that she is outside the territory of the United Kingdom.

59. Para 17 of the judgment of Lord Bingham in R (Razgar) v SSHD (2004) UKHL 27 explains the five-step approach in deciding claims under Article 8. The burden is upon the appellant to establish family and/or private life rights that engage the Article. The burden of proof in establishing any facts relied upon by the appellant to establish her Article 8 claim is on her and the standard is the balance of probabilities.

60. If the issue of proportionality is reached, the burden is on the respondent to show that any interference resulting from the refusal would nevertheless be proportionate, although the appellant is nevertheless expected to put before the Tribunal evidence which is within her realm of knowledge, such as, for example, evidence of any compelling circumstances if relied upon.

61. In considering the issue of proportionality, I follow the "*balance sheet*" approach suggested by the Supreme Court in the case of Hesham Ali v SSHD [2016] UKSC 60, as far as is possible. I say "*as far as is possible*" because there are points for and against the appellant and/or for and against the public interest on certain issues.

62. Section 117B(1)-(5) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") provide as follows:

> **"117B** *Article 8: public interest considerations applicable in all cases*
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

63. I turn to consider credibility and whether the appellant's exclusion is conducive to the public good.

Credibility

64. The appellant has admitted that she lied at her interview about the status of her relationship with the sponsor. In her witness statement dated 30 November 2022, she did not explain why she lied at her interview. The only explanation that the Tribunal has been given is an explanation by the sponsor in his witness statements as well as in oral evidence. I did not find the sponsor credible, for reasons which I now give.

65. I have set out the sponsor's oral evidence in detail above. It will be obvious from paras 23 and 24 above that he was repeatedly asked questions about the man he said had given him and the appellant incorrect advice to lie at their interviews. I found that he repeatedly avoided giving clear answers. I formed the clear impression that he was trying not to tie himself down to any specific detail in his answers. If he had been telling the truth, he would not have needed to employ that tactic.

66. Furthermore, I found it wholly incredible that he has lived in Luton for 10 years and yet said that he was not sure where the centre of Luton was. I also found it wholly incredible that, if he was not sure where the centre of Luton was, he was able to say "*but the man's office is fairly close to the centre*" (para 24 above).

67. When I asked the sponsor (para 28 above) whether he found the man online or by some other means, he said that "*it was either online or in an advertisement in a local newspaper*". When I asked him why he could not remember, he said: "*It has been a very stressful four years. The initial contact was in February 2019. I could do very little to set things in motion in 2019*". Given the importance of the fact that he and the appellant had lied at their interviews about their status and the fact that the explanation given for doing so was under scrutiny at the hearing before the judge on 7 December 2022 because he was questioned about this at that hearing, I do not accept that he is unable to remember whether he found the man online or via an advertisement in a local newspaper.

68. The sponsor was asked at the hearing whether the appellant was subject to any restrictions due to her previous conviction (para 22 above). He did not know whether the restrictions were time limited or whether they were a permanent restriction. He could only say that the restrictions ceased to apply to the appellant's son when he

reached the age of 18 years. He said that this was not a subject that has come up for discussion. Asked whether he was aware of the appellant being obliged to attend any form of rehabilitation or whether she was being monitored, the sponsor said: "*Not to my knowledge*". I did not find the sponsor's lack of knowledge on this issue at all credible, given its importance to the appellant being permitted to enter the United Kingdom.

69. The sponsor was similarly evasive when I asked him when he and the appellant decided to get married (para 29 above). He had to be repeatedly asked before he descended into detail.

70. On the whole of the evidence, I reject the evidence that the appellant and the sponsor had acted upon advice from a solicitor or representative when they decided to lie at their interviews about the status of their relationship. I find that the sponsor did not see any representative or solicitor who gave him advice to lie. I find that this is a fiction that he has created in order to explain away his and the appellant's decision to lie at their interviews. I find that it is for that reason and that reason alone that he has not made any complaint to any regulatory body. I find that the appellant and the sponsor made their own decision to be deceitful and to lie to the Immigration Officer when asked about the status of their relationship at their interviews.

71. On the whole of the evidence, I find that the sponsor and the appellant lied at their interviews in October 2019 in order for the appellant to gain entry to the United Kingdom on that occasion because they feared that, if they revealed the truth about her relationship with the sponsor, she would not be permitted entry notwithstanding that she had previously been granted entry clearance as a visitor. I find that they were themselves aware that the appellant's criminal conviction could lead the respondent to refuse her application for permanent settlement as a spouse notwithstanding that she had been granted entry clearance as a visitor on several previous occasions.

72. Given the short period between their marriage on 28 September 2019 and their interviews on 12 October 2019, it is inconceivable that they were not also aware of this possibility at the time of their marriage. Yet they decided to proceed with their marriage, taking the chance that they might be unable to live together in the United Kingdom as a married couple.

73. The suggestion by the sponsor that he believed that there would be a detrimental impact on the health of his mother if he were to leave the United Kingdom was not particularised in any way and not supported by any evidence. Finally, he did not say that there would be no one who could do his mother's online shopping.

74. The sponsor's evidence that he would not be able to obtain a job in the USA is not supported by any evidence. It has not been suggested that he or the appellant have made any enquiries in this regard at all. In view of my assessment of his general credibility, I am not prepared to accept his unsupported evidence that he would not be able to obtain employment in the USA. He is a British citizen, now aged 65 years old. However, even assuming that he was born in the United Kingdom and has lived in the United Kingdom all of his life, it simply has not been shown that it would be unreasonable to expect him to live in the USA in order to enjoy family life with the appellant.

The suitability requirement and the exclusion issue

75. Mr Vokes submitted that the fact of the appellant's previous conviction was not the reason for the respondent's decision to conclude that she did not meet the suitability requirement and that her exclusion was conducive to the public good. He submitted that it was the fact that she had lied at her interview about the status of her relationship with the sponsor that was relied upon by the respondent.

76. I do not accept the submissions of Mr Vokes in this regard. I have quoted the decision letter at para 4 above. It states, inter alia:

> "… Within your interview you gave details of your conviction but I am satisfied that you gave misleading information consequently understating your victim and circumstances surrounding the offence.
>
> … I have considered the circumstances of your application, **but in light of the nature of your conviction** and your character and conduct, I consider it undesirable to issue you an entry clearance and I am not prepared to exercise discretion in your favour."…
>
> (My emphasis)

77. Accordingly, whilst it is correct that the first allegation was that the appellant had not disclosed the full details of her 1997 conviction, it is clear from the words that I have emboldened in the quote above that the respondent's decision that the appellant's exclusion was conducive to the public good was made not only on the basis of her failure to disclose the full details of the criminal conviction but also on the basis of the *nature* of the criminal conviction.

78. In any event, I am making my own decision on whether the appellant's exclusion is conducive to the public good.

79. According to para 3 of the appellant's witness statement, she was convicted of first degree sexual assault of a child on 15 September 1997 in the USA. It is relevant to take into account that this is a serious offence. The sponsor said that the appellant had had sex with a 14-year old child. This is incorrect because the appellant said at her interview (question 19) that she committed the offence against a 17-year old who she had met through online gaming. Sexual offences against children are (rightly) repugnant to society.

80. At the time of her conviction, the appellant was then aged almost 22 years, not 20 years as the sponsor said in oral evidence.

81. The appellant said in her witness statement that she has not re-offended since. Whether or not I accept that evidence depends upon her credibility. She did not give oral evidence and therefore her evidence was not tested under cross-examination. She is someone who has lied to the respondent in the past. Furthermore, I take into account that she was still on the sex register in the USA as at the date of her witness statement (30 November 2022) (para 3 of that witness statement) notwithstanding that the conviction took place over 25 years previously. I therefore find, on the balance of probabilities, that she is still on the sex register at the present time and that this fact is a measure of the risk she continues to present of re-offending. In the absence of any report from, for example, the equivalent in the USA of a probation officer, I am not prepared to find that the risk of re-offending is low. I find that she

presents a continuing risk of re-offending which, whilst not low, I am unable to quantify due to the gaps in the evidence; specifically, the absence of such a report and the gaps in the sponsor's evidence about the restrictions which may currently apply (see para 22 above). I give such weight as I consider appropriate to her risk of re-offending, in all of these circumstances.

82. I take into account the fact that both the appellant and the sponsor lied at their interviews on the occasion of the appellant's last arrival in the United Kingdom as a visitor, in October 2019. I take into account my assessment and findings above; for example, that the sponsor's evidence that he received incorrect advice from a representative or solicitor is untrue and a fiction he has created to explain away his and the appellant's decision to lie to the Immigration Officer at their interviews; that they made their own decision to be deceitful and to lie to the Immigration Officer when asked about the status of their relationship at their interviews; and that they proceeded to enter into their marriage in the knowledge that they might be unable to live in the United Kingdom as a married couple because they were aware that it was possible that the respondent could refuse an application by the appellant to settle in the United Kingdom due to her criminal conviction (paras 71-72 above).

83. The appellant complied with the terms of her leave to enter on the occasion of her visit in October 2019. In that sense, therefore, the appellant's lie did not impact upon the interests of the state in immigration control. However, it cannot be said there was no impact at all on the interests of the state in immigration control. The respondent is entitled to expect individuals to give truthful answers at interview on matters that are material or potentially material to the decision that falls to be made by the Immigration Officer/decision-maker in question. The appellant and the sponsor were asked what their relationship was to each other. The appellant said: "*We game a lot… He comes to visit me too… We are just friends" and the sponsor said: "extremely good friends"*. A question that is designed to elicit whether two individuals are merely friends or related to each other by marriage or in some other way is plainly potentially material to a decision on whether entry to the United Kingdom should be permitted. In my judgment, it is relevant to take into account the fact that both lied to hide their true status from the interviewing officer, in reaching my finding as to whether the appellant's exclusion is conducive to the public good because of her character or *"for other reasons"* making it undesirable for her to be granted entry clearance.

84. In other words, I agree with Ms Lecointe that it is relevant to take into account their willingness to mislead the interviewer in order for the appellant to secure entry which reduces the weight I give to the fact that she nevertheless did not breach the terms of her visit visa and did not make an in-country application for leave as a spouse, choosing instead to return to the USA to make an entry clearance application.

85. I take into account the fact that the appellant was granted entry clearance on six occasions notwithstanding that the respondent was aware of her previous conviction. That is relevant because it casts light on the respondent's view about the desirability or otherwise of her presence in the United Kingdom, albeit in the context of her presence for a limited period as a visitor. Ms Lecointe did not suggest otherwise.

86. It is also relevant to take into account that the appellant complied with the requirements of the Immigration Rules on the occasion of each of her visits to the United Kingdom.

87. It is nevertheless also relevant to take into account that the application that is the subject of the decision that is being appealed against in this appeal is an application for the appellant to be permitted to settle in the United Kingdom whereas entry clearance was granted to her on six occasions for the purpose of visiting the United Kingdom for a temporary period, as Ms Lecointe submitted. I give such weight as I consider appropriate to this fact.

88. On the whole of the evidence and giving such weight as I consider appropriate to each factor, I find that the respondent has established, on the balance of probabilities, that the appellant's exclusion is conducive to the public good because of her character, pursuant to S-EC.1.5 of Appendix FM, for the reasons given above. She therefore does not satisfy the suitability requirement in Section EC-P.1.1.(c) of Appendix FM for a grant of entry clearance as a spouse, although she otherwise satisfies the relevant requirements. Even if the appellant's risk of re-offending is low, I still find that her exclusion is conducive to the public good, for the remainder of my reasons above.

89. Mr Vokes asked me to take into account the fact that a finding that the appellant's exclusion is conducive to the public good would result in a 10-year ban. In view of the fact that there would be a 10-year ban, I have taken extra care in my assessment of the evidence in reaching my finding on this issue. However, the fact that there would be a ten-year ban is not itself a relevant factor in considering whether her exclusion is conducive to the public good.

Article 8

90. Turning to the five-step approach explained in Razgar, the judge accepted that the appellant and the sponsor enjoy family life together (para 9). As I said in the EOL Decision, that finding stands.

91. I have considered the evidence the sponsor gave in explaining why he had not visited the appellant in the period since the decision. In effect, the explanation is that he has not known about his availability because he has been waiting, initially for a decision, then for the hearings to take place. He also said, in re-examination that he needs a lead-time of 4 weeks to organise a holiday and that he can only take a maximum of three continuous weeks of annual leave at a time. Even with these constraints, he could have visited the appellant, in my judgement, in the period that has lapsed since the appellant's appeal was lodged. He could have informed the First-tier Tribunal and subsequently the Upper Tribunal that he was planning to go abroad in order to visit the appellant and ask the Tribunal to take that into account in listing the appeal.

92. The sponsor said that he was in almost daily contact with the appellant by text and sometimes by audio or facial communication. His evidence is not supported by any evidence of the regularity of the telephone calls and text messages or the content of the text messages. Even if it is the case that they are in contact on an almost daily basis, the lack of evidence of the content of their text messages, taken together with the fact that neither have said anything about the nature of their relationship with each other means that I am unable to reach a finding that their family life is strong.

93. Furthermore, the fact that the sponsor was unable to say whether there were any restrictions that still applied to the appellant is evidence that detracts from the strength of the relationship. If their family life were a strong one, he would know about

such an important matter especially following the refusal of the appellant's application for entry clearance.

94. In his witness statement dated 6 July 2023, the sponsor said that the appellant has made many life-long friends in the United Kingdom. However, the appellant said nothing about any private life ties that she may have in the United Kingdom in her witness statement.

95. The weight that I give to the family life between the appellant and the sponsor and any private life ties that the appellant may have in the United Kingdom is reduced, for the reasons given at paras 91-94 above.

96. The level of interference required in order to satisfy the second of the five-step approach explained in Razgar is not a high one. In any event, it is not disputed that the respondent's decision to refuse entry clearance to the appellant would interfere with the family life being enjoyed between the appellant and the sponsor. Likewise, it is not disputed that the respondent's decision is in accordance with the law and that it pursues the legitimate aim of maintaining immigration control.

97. The question in the instant appeal is therefore whether the decision to refuse entry clearance is disproportionate.

98. In relation to proportionality, the factors against the appellant are the following:

    (i) One factor against the appellant is the fact that she does not satisfy the suitability requirement and therefore she does not satisfy the requirements for entry clearance under the Immigration Rules as a spouse. Section 117B(1) of the 2002 Act therefore applies. The weight to be given to the public interest is not a fixity. Therefore, in deciding the weight to be given to section 117B(1), it is relevant to take into account the reason why the appellant does not satisfy the requirement of the Immigration Rules, i.e. that her exclusion is conducive to the public good, and the reasons I have given above, both for an against the appellant in reaching that finding. In all of the circumstances, the public interest in the appellant's exclusion is very weighty indeed. Even if her risk of re-offending of low, the public interest in the appellant's exclusion is still weighty.

    (ii) It is plain that the sponsor was fully aware of the appellant's criminal conviction when their relationship began and when they were married. I take into account my findings above, including my findings at paras 71-74 upon which I place weight.

99. The following factors are in the appellant's favour:

    (i) The appellant and the sponsor enjoy family life together and have been married since 28 September 2019. I give weight to the fact that the respondent has found that their relationship is genuine and subsisting. However, the weight I give to their family life is reduced, for the reasons given at paras 91-94 above.

    (ii) I take into account the submission of Mr Vokes' that the sponsor's evidence shows that this appeal is '*the last chance saloon'* for the relationship between the appellant and the sponsor. I also take into account, as Mr Vokes submitted in his skeleton argument dated 4 July 2023, that the appellant and the sponsor have been separated since their marriage in September 2019. However, the

weight that I give this factor is significantly reduced for the reasons given at paras 71-72 and para 74 above.

(iii) In his witness statement dated 6 July 2023, the sponsor said that the appellant has made many life-long friends in the United Kingdom. However, as stated at para 94 above, the appellant said nothing about any private life ties that she may have in the United Kingdom in her witness statement. In any event, any private life ties that the appellant has formed in the United Kingdom were clearly formed at a time when her immigration status was precarious and therefore I give little weight to this factor, pursuant to s.117(B)(4) of the 2002 Act.

(iv) I take into account the sponsor's evidence that he visits his 90-year old mother and that, if he is unable to visit her for an extended period of time, he believes that it would have a detrimental impact upon her health-wise. However, he has not supported this by any medical evidence. My adverse assessment of his credibility reduces the weight I give to his unsupported oral evidence. There is no evidence before me that arrangements could not be made for his mother's shopping to be done online by someone else and/or whether her 92-year old partner has any family who could assist or who could hold or share the details of his mother's funeral plan. There is no evidence that the sponsor would not be able to carry out his duties as the nominated executor of his mother's estate from the USA combined, if necessary, with a visit to the United Kingdom. In all of the circumstances, I find that these circumstances, that the sponsor relied upon, are not such that I am prepared to give them much weight at all, although, as I have said, they are factors that go in the appellant's favour.

100. Mr Vokes asked me to take into account the fact that a finding that the appellant's exclusion is conducive to the public good would result in a 10-year ban. I have not take that finding into account in reaching my finding whether the appellant's exclusion is conducive to the public good (para 89 above). However, I do take it into account in carrying out the balancing exercise in relation to proportionality. The fact that there would be a ten-year ban from the United Kingdom is plainly something that would affect the sponsor and the appellant for a significant period. However, it has not been shown that the sponsor would be unable to live in the USA with the appellant.

101. The appellant satisfies the other requirements of Appendix FM for the grant of entry clearance. This means that the respondent has decided that the appellant can be adequately maintained and accommodated and also that she is able to speak English or is exempt from satisfying the English language test requirement. However, the fact that s.117B(2) and s.117(B)(3) do not apply against the appellant is a neutral factor (Rhuppiah [2018] UKSC 58).

102. I am not prepared to accept the sponsor's unsupported evidence that he would be unable to obtain employment in the USA, for the reasons given above.

103. Mr Vokes relied upon the fact that it is to the benefit of the public interest if the sponsor continues to work in the NHS in his specialised profession. I was not addressed on the decision of Lane J, the then President, in Thakrar (Cart JR, Art 8, Value to Community) [2018] UKUT 00336. Head-notes (2)-(4) read:

> "(2) Before concluding that submissions regarding the positive contribution made by an individual fall to be taken into account, for the purposes of Article 8(2) of the ECHR, as diminishing the importance to be given to immigration controls, a judge must be satisfied that the contribution is very significant. In practice, this is likely to arise only where the matter is one

over which there can be no real disagreement. One touchstone for determining this is to ask whether the removal of the person concerned would lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.

(3) The fact that a person makes a substantial contribution to the United Kingdom economy cannot, without more, constitute a factor that diminishes the importance to be given to immigration controls, when determining the Article 8 position of that person or a member of his or her family.

(4) If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be significantly damaged."

104. Whilst the observations of the President plainly concern the contribution of someone facing removal, the reasoning applies equally to the contribution made by a sponsor of a person being excluded. It also applies equally in the instant case where the submission is that it is to the benefit of the public interest if the sponsor continues to work in the NHS in his specialised profession. The fact is that the primary responsibility for ensuring that the NHS is properly staffed by doctors, nurses, consultants, specialised technicians and the other professionals that are required for the NHS to function rests with the executive. Head-note (4) applies equally in the instant case. For all of these reasons, I give minimal weight to the fact that the sponsor is a specialist technician doing what is plainly an important job in the NHS.

105. On the whole of the evidence and having given such weight as I consider appropriate to each factor for and against the appellant and taking into account the fact that the decision also interferes with the sponsor's rights under Article 8, I am satisfied that the state's interests in effective immigration control decision is a weighty consideration which far outweighs the weight to be given to the factors in favour of the appellant. I am satisfied that the decision would not result in unjustifiably harsh consequences for the appellant and/or the sponsor such as to render the decision disproportionate.

106. I make it clear that, even if I had found that the risk of the appellant re-offending was low or very low, I would still have found that the decision was not disproportionate, for the remainder of the reasons I have given above. In addition, even if the family life enjoyed between the appellant and the sponsor is strong and the risk of re-offending is low, I would still have found that the decision is not disproportionate, such is the combined weight of the remaining factors against the appellant in the proportionality balancing exercise.

107. The appellant's Article 8 claim therefore fails.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of law sufficient to require it to be set aside. The decision was set aside.

I re-make the decision on the appellant's appeal against the respondent's decision by dismissing her appeal on human rights grounds.

Signed
Upper Tribunal Judge Gill Date: 11 September 2023

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**