IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004326

First-tier Tribunal No:
HU/61404/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 February 2025

Before

UPPER TRIBUNAL JUDGE REEDS
DEPUTY UPPER TRIBUNAL JUDGE MOXON

Between

OS
(ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Broachwalla, Counsel instructed on behalf of OS
For the Respondent: Mr Diwnycz, Senior Presenting Officer

Heard at Phoenix House (Bradford) on 13 January 2025

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, OS and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the OS, likely to lead members of the public to identify the OS or members of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Entry Clearance Officer ("ECO") appeals with permission against the decision of the First-tier Tribunal Judge Greer (the "FtTJ"), dated 16th August 2024, in which the FtTJ allowed OS's appeal against the Entry Clearance Officer's decision to refuse his application for entry clearance to the United Kingdom.

2. Although the appellant in these proceedings is the Entry Clearance Officer, for convenience we will refer to the ECO as the respondent and to the appellant before the FtT as "the appellant," thus reflecting their positions before the First-tier Tribunal.

3. At an earlier stage in the proceedings, Upper Tribunal Judge Ruddick made an anonymity order having been satisfied that it was appropriate to make such an order because the interests of the appellant's minor child outweighed the public interest in open justice. Neither party made any submissions during the hearing for such an order to be discharged. The anonymity order is detailed above.

The background:

4. The appellant, OS is 44 years of age and a Jamaican national. He met his partner, ("P"), when she was 15 and he was 23. They married and have a child together, aged nine. P and the child live in the United Kingdom.

5. OS made a series of unsuccessful applications for entry clearance to the United Kingdom, stating each time that he has a criminal conviction from the United States of America. That conviction relates to a sexual offence against a child under the age of 16, for which he was sentenced to three years custody in the US in 2009, before being deported to Jamaica.

6. He made a further application on 19th April 2023, in which he did not initially disclose his criminal conviction until an interview with an Entry Clearance Officer.

7. The application was refused by the ECO on 1st September 2023 on the basis that OS did not satisfy the suitability requirements within Appendix FM to the Immigration Rules in light of his criminal conviction and his failure to disclose the conviction within the application.

8. The appeal was heard on 16th August 2024, at the outset of which the SSHD's presenting officer made a concession that the failure to disclose the conviction upon OS's application form did not make his entry clearance to the United Kingdom undesirable (see paragraph 11 of the FtTJ's decision). It was maintained, however, that the conviction was such that the OS's exclusion from the United Kingdom was conducive to the public good.

9. The FtTJ allowed the appeal within a determination dated 18th August 2024. His reasoning is set out below:

> "12….Consideration of the application of S-EC.1.5 involves an assessment of matters that goes beyond simply looking at the past and includes taking into account the appellant's circumstances as a whole. The fact of the 2009 conviction is not, in my view, a sufficiently weighty factor so as to render exclusion of the Appellant conducive to the public good. Other provisions of the immigration rules deal with the case where a person has been convicted of an offence (e.g. S-EC.1.4(a)-(c)), and the appellant's circumstances do not fall within any of these provisions. This is because over 10 years have passed since the end of the Appellant's sentence. The fact of the Appellant's conviction is not, by itself, sufficient to exclude him under S-EC.1.5.
>
> 13. I have considered the likelihood of the Appellant committing further offences in the UK. I was initially concerned about the Appellant's sexual attraction to children and the risk that this might pose to children in the United Kingdom if he is allowed to come to this country. The appellant was convicted of a sexual offence against a child under the age of 16 in 2008 when he was then 25 years of age. This was 2 years after he commenced his relationship with [P] when she was a 15-year-old girl on a family holiday with her parents. He was a 23-year-old man at the tune. Plainly, this Appellant has been sexually attracted to children and has pursued relationships with children in the past.
>
> 14. Although it was argued on his behalf that the Appellant is a reformed character, and no longer a risk to children, he has at various times sought to downplay the significance of his sexual offending against a child. At one stage

he told the Respondent that no sex was involved in his offending…During his interview with the Entry Clearance Officer, he told the Respondent that his conviction arose from him attending a party with a child…At the hearing, [P's] evidence was that the Appellant had sexual intercourse with his victim. The Appellant's counsel said in his submissions that [P] was mistaken in her belief that the Appellant had sexual intercourse with his victim and that the Appellant's offending involved oral sex with a child, rather than penetrative sex. Either alternative is more severe than the scenario presented to the Entry Clearance Officer at any time prior to the hearing before me. The Appellant's attempts to downplay his sexual involvement with children and his lack of candour about the nature of his offending in my view raise doubts over whether he has truly addressed his sexual attraction to children.

15. There are however also other factors to be taken into account. There is no evidential basis to conclude that the Appellant continues to pursue sexual relationships with children. The fact is that the single offence for which the appellant has been convicted took place over 12 years ago, and that there have been no subsequent convictions or offences of a similar type. This leads me to conclude that the risk of the appellant reoffending in a similar manner is negligible. [The Home Office Presenting Officer] did not directly submit otherwise. There is substantial evidence that the Appellant has appropriate, adult relationships, and has done for some time. The Appellant is now 41-years old. The Respondent specifically accepts that the Appellant is in a genuine and subsisting relationship with [P], who is now 34-years-old. That the Appellant is in a genuine and subsisting relationship with an adult suggests that he is now primarily sexually attracted to adults rather than children. There is no suggestion that the Appellant's relationship with his daughter is anything other than an appropriate parental relationship.

16. ….

17. Looking at the Appellant's circumstances as a whole and having taken full account of all the matters identified above including the Appellant's criminal behaviour and his history of pursuing sexual relationships with children, I conclude that it would not be conducive to the public good to exclude him from the UK. I find that his conduct (including the conviction which does not fall within S-EC.1.14.) character and associations do not make it undesirable to grant him entry clearance. I therefore conclude that the appellant's (sic) does

> not fall foul of the Suitability requirements of Appendix FM of the Immigration Rules, it not being asserted that he falls foul of any requirements set out in S-EC.1.1 to S-EC.3.2, save for S-EC.1.5, which I have rejected."

10. Between paragraphs 18-20, the FtTJ addressed Article 8 of the ECHR. He found that the appellant and his partner plainly shared a family life together, that they had a genuine and subsisting marriage, were in daily contact and that they physically met each other when the circumstances permitted. He further found that the ECO's decision was an interference with that family life and the opportunity for the appellant to "undertake full martial relations" with his spouse. The FtTJ identified that the issue in substance was whether the decision to refuse entry clearance was disproportionate. He took onto account the public interest considerations under S117B of the 2002 Act and that what he found to be of "most significance" was the respondent's view that "in any given case the public interest is identified through the Immigration Rules". In this respect he observed that it has been accepted on behalf of the ECO that the appellant met the eligibility requirements relating to entry clearance and that he had found that the appellant had not fallen foul of the suitability requirements.

11. At paragraph 20, the FtTJ concluded that refusal of entry clearance would be a disproportionate breach of OS's family life:

> "There is nothing in the facts of this case, over and above those matters which require consideration under the Rules, which leads to me to conclude that the public interest lies in refusing entry clearance – despite the requirements of the Rules having been fulfilled. For this reason, I conclude on the basis of the information and evidence I have been presented with, that the ECO's decision is not proportionate and that refusing entry clearance breaches Article 8 ECHR."

The hearing before the Upper Tribunal:

12. By application, dated 23rd August 2024, the ECO argued that the FtTJ had erred in its assessment of the suitability requirements of the Rules and its proportionality assessment under Article 8 ECHR. Permission to appeal was granted by FtTJ Judge Parkes.

13. At the hearing before the Upper Tribunal, the ECO was represented by Mr Diwnycz, Senior Presenting Officer and Mr Broachwalla of Counsel who had represented the appellant before the FtTJ, on behalf of the appellant. We considered all of the papers within the Upper Tribunal bundle totalling 450 pages, together with a skeleton argument provided by Mr Broachwalla.

14. Mr Diwnycz confirmed that he relied upon the written grounds of challenge and that he did not seek to advance any further oral submissions.

15. Mr Broachwalla relied upon his skeleton argument and provide the following oral submissions: he stated that there had been no ground of appeal pursued that the FtTJ's decision was perverse. Instead, the respondent had argued that he had misapplied the law but the determination of the FtTJ identified the relevant law and applied it correctly by assessing whether refusal of entry clearance, in all of the circumstances, was conducive to the public good.

16. At the conclusion of the submissions, we reserved our decision.

The law

17. The appeal is brought on the sole ground available which is that the respondent's decision is unlawful under section 6 of the Human Rights Act 1998 (see section 84(2) Nationality Immigration and Asylum Act 2002 (the 2002 Act)).

18. Section 6 Human Rights Act 1998 requires the respondent's decisions to be compatible with a person's Convention rights. The appellant's case is that the decisions are not compatible with the right to respect for the family life he has with his spouse and child which arises by virtue of Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms (the Convention).

19. Article 8(1) of the Convention provides for the right to respect for a person's private and family life. Article 8(2) provides that this right must not be interfered with by a public authority "except as is in accordance with the law and is necessary in a democratic society in the interests of national

security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

20. Once Article 8(1) is engaged it falls to the respondent to justify the proposed interference. The state has a "margin of appreciation" when considering whether a fair balance has been struck when assessing whether an interference with family life complies with Article 8(2). The Immigration Rules reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. It follows therefore that where Article 8(1) is engaged and the requirements Immigration Rules are met then interference with the private and family life cannot be justified under Article 8(2) of the Convention (TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [34]).

21. If the requirements of the Immigration Rules have not been met, then to produce a decision that complies with the Article 8 Convention right to respect for an individual's family life, it is necessary to undertake an overarching assessment to determine whether in all the circumstances the interference with the appellant's family life that refusal of his application involves, is proportionate. Where an overarching proportionality assessment is required, it is for the appellant to establish that the strength of his private and family life outweighs the public interest in maintaining effective immigration control. When undertaking that proportionality assessment regard must be had to the specific factors set out in section 117B of the 2002 Act. It is also necessary to ensure that the decision has regard to the need to safeguard and promote the welfare of any child involved (see CAO v SSHD (Northern Ireland) [2024] UKSC 32 [63]).

22. As long ago as ECO Dhaka v Shamim Box [2002] UKIAT 002212 the Tribunal held, applying Strasbourg jurisprudence, that there is a positive obligation upon the signatory state to facilitate family reunification. The focus, in entry cases, is that obligation to 'show respect for' a family life. More recent authorities remind us that although the jurisdiction of the Human Rights Convention is primarily territorial, family life is unitary in

nature. The consequence of that is that the interference with the family life is an interference with the rights of all those within the ambit of the family whose rights are engaged: see SSHD v Abbas [2017] EWCA Civ 1393, Al-Hassan (Article 8 - entry clearance - KF (Syria) [2024] UKUT 234 (IAC). It is, further, perhaps evident from the existence of the appeal right that, as a matter of law, decisions to refuse entry clearance are capable of interfering with family life.

23. The entry clearance suitability requirements are detailed in section S-EC of Appendix FM to the Immigration Rules, which state:

> "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.
>
> S-EC.1.6……."

Discussion:

24. Dealing with ground 1, the grounds of appeal argue that the FtTJ made findings that were "at odds" with the conclusion that the OS's conviction, of itself, is not sufficient exclude him under S-EC.1.5. The SSHD highlighted the following findings:

> "[OS] has been sexually attracted to children and has pursued relationships with children in the past" (paragraph 13)
>
> "The Appellant's attempts to downplay his sexual involvement with children and his lack of candour about the nature of his offending in my view raises doubts over whether he has truly addressed his sexual attraction to children" (paragraph 14).

25. We reject that submission. The FtTJ's determination must be considered holistically, which includes the findings at paragraph 15, above, in which the FtTJ assessed that the risk of "re-offending in a similar manner is negligible".

26. The grounds argue that the FTT misdirected itself in interpreting S-EC.1.5 and the SSHD relies upon the contents of paragraph 12, in which the FTT stated that the "…fact of the Appellant's conviction is not, by itself, sufficient to exclude him under S-EC.1.5."

27. S-EC.1.4 provides that exclusion of a person from the United Kingdom is conducive to the public good where the person has be convicted of an offence for which they were sentenced to a period of at least 4 years; or 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 has 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.1.4 does not afford the decision maker discretion and so, if one of the three scenarios listed is present, it follows that an application for entry clearance will be refused on suitability grounds.

28. The FtTJ was correct to identify, at paragraph 12, that OS's conviction does not fall within any of those three scenarios as his sentence was between 12 months and 4 years custody and a period of 10 years has elapsed since the end of the sentence.

29. The FtTJ was further correct to consider S-EC.1.5. The observation made by the FtTJ that the "…conviction is not, by itself, sufficient to exclude him under S-EC.1.5" cannot properly be read as to indicate that the FtTJ believed that there must be something over and above the conviction to make exclusion conducive to the public good. The FtTJ was instead differentiating between S-EC.1.5, which necessitates an assessment of undesirability, and therefore affords the decision maker a discretion, against S-EC.1.4, which has no such test of undesirability and therefore no allowance for discretion. The FTT identified this in paragraph 12 of its determination, as detailed above. Mr Diwnycz, in his submissions conceded that the FtTJ was entitled to exercise his discretion but submitted that the ECO's case was that his discretion should have been exercised differently.

30. It is evident from the determination, when read as a whole, that the FtTJ understood that the conviction could result in exclusion, but that there must be a wider consideration of desirability / undesirability, the assessment of which the FtTJ undertook between paragraphs 13-15 of the determination, as outlined above.

31. It is further argued on behalf of the respondent that the fact that over 10 years has elapsed since the end of the custodial sentence; the fact that OS has not re-offended; and the maintenance of OS's relationship with his partner and child are "..neutral factors given the severity of the offence and the need to protect children and keep them safe from harm from sexual offenders" (see paragraph 5 of the grounds). We would accept that those factors do not assist in determining the seriousness of the offence for which OS was convicted. However, they are not "neutral" features when considering the assessment of the undesirability of OS's entry clearance to the United Kingdom and are features that could properly be taken into account in the exercise of discretion afforded within S-EC.1.5 that is denied in S-EC.1.4.

32. At paragraph 6 of the grounds, it is argued that the FtTJ's assessment of risk as "negligible" is subjective. That is correct, but any assessment of risk is likely to be subjective and, in any event, the FTT gave adequate reasons for its conclusion, as detailed within paragraphs 12-15 of the determination.

33. At paragraph 7 of the grounds, it is further argued that "..there is no bar that would outweigh the potential risk of allowing children to be harmed in this manner and the SSHD is entitled to find that the appellant's entry to the UK is not conducive, and the judge has erred in misapplying the rules". The ground was not explained any further during the submissions. There are three points being made in that argument. The first: "there is no bar that would outweigh the potential risk of allowing children to be harmed in this manner" ignores the fact that the FtTJ had assessed risk of harm as negligible. Further, it is an incorrect interpretation of the Rules given that decision makers have a discretion unless the conviction falls within the scenarios within S-EC.1.4. For those reasons, the third point, that the FtTJ had misapplied the Rules, is misconceived as he had a discretion which he exercised, having fully acknowledged the legal test. The second point, that "..the SSHD is entitled to find that the appellant's entry to the UK is not conducive" is quite correct. The ECO was entitled to exercise its discretion in the way he did when refusing OS's application for entry clearance. However, the FtTJ was not required to assess the lawfulness or reasonableness or the SSHD's refusal decision but was required to assess the application upon consideration of the legal tests and upon exercise of its own discretion applying the factual matrix as found. Whilst Mr Diwnycz submitted that discretion should have been exercised differently, it has not been identified what factors relevant to such an exercise the FtTJ failed to take into account or assess. We agree with the submission made by Mr Broachwalla that the grounds seek to reargue the respondent's case and that the FtTJ provided sufficient reasoning for his decision having undertaken a careful assessment of the risk of re-offending, the length of time since the original conduct, his behaviour and the nature of the conviction itself.

34. We remind ourselves that we can only interfere with a decision of the FtTJ if satisfied that a material error of law is shown in the First-tier Tribunal Judge's decision. What we cannot do is to allow the appeal merely because we disagree with the FtTJ's decision, even if we consider that the decision of the First-tier Tribunal was generous and even if we would not have made that decision ourselves. An evaluation of the facts is often a matter of

degree upon which different judges can legitimately differ. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the FtTJ's treatment of the question to be decided. Other judges would no doubt have upheld the ECO's refusal decision, but it was open to the FtTJ to allow the appeal, and it did so in this case upon a correct interpretation of the law. It is not the role of the Upper Tribunal to substitute its own view in the absence of an error of law and we have been particularly careful in this case to remind ourselves of the judgment of Baroness Hale at paragraph 30 of *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49:

> "[The decisions of expert tribunals] should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirection's simply because they might have reached a different conclusion on the facts or expressed themselves differently."

35. Dealing with ground 2, it is argued that the FtTJ had failed to properly balance all the relevant factors in the consideration of proportionality and erred in law by failing to address and apply the test in Razgar and as such misdirected himself in law when applying Article 8 of the ECHR. In his submissions, Mr Diwnycz conceded that if ground 1 of the appeal was to fail, ground 2 must similarly fail.

36. In his analysis the FtTJ concluded that OS satisfied the requirements within Appendix FM to the Immigration Rules for entry clearance to the United Kingdom. For the reasons set out above, that assessment was not vitiated by error of law. The FtTJ was therefore correct to conclude that, upon the Rules being satisfied, refusal of entry clearance would be a disproportionate breach of OS's family life with his partner and child. That conclusion is consistent with the authority in *TZ (Pakistan) and another v SSHD* [2018] EWCA, in which it was held, at paragraph 34:

> "…where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

37. For those reasons the decision of the FtTJ did not involve the making of an error on a point of law. The decision of the FtTJ to allow the appeal shall stand.

Notice of Decision

The decision of the FtTJ did not involve the making of an error on a point of law. The decision of the FtTJ to allow the appeal shall stand.

DUTJ Moxon
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 6th February 2025