



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/17945/2016

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre  
On: 19<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 13<sup>th</sup> September 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Sozan Faidhalla Darwesh  
(no anonymity direction made)

Appellant

And

Entry Clearance Officer, Amman

Respondent

For the Appellant: Mr K. Moksud, International Immigration Advisory Services  
For the Respondent: Mr C. Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iraq born on the 12<sup>th</sup> October 1972. She appeals with permission against the decision of the First-tier Tribunal (Judge Ennals) to dismiss her human rights appeal.
2. The Appellant seeks leave to enter the United Kingdom as the spouse of a person present and settled here. Her husband and sponsor Mr Jafar Abdoullahi is a British citizen. The Appellant made her application on the 6<sup>th</sup> March 2016. In accordance with the provisions of Appendix FM-SE her husband submitted a

number of financial documents in support of his assertion that he was at that time earning £21,240 per annum. The Entry Clearance Officer refused to grant entry clearance on the 23<sup>rd</sup> June 2016. The ECO did not accept that the Sponsor was employed as claimed. Some of the documents were missing, and verification checks with the HMRC had shown that Mr Abdoullahi had earned significantly less in the same role in the previous year, thus casting doubt on his claimed employment. The ECO further notes that the letter confirming the Sponsor's employment contained "many spelling mistakes".

3. The appeal came before the First-tier Tribunal on the 29<sup>th</sup> September 2017. By its written decision of the 10<sup>th</sup> October 2017 the Tribunal found as follows:

- i) The ECO was wrong to state that the Sponsor's payslips for November 2015 and February 2016 were missing. They were in the ECO's own bundle;
- ii) The ECO was wrong to state that the Sponsor's bank statements for November 2015 and February 2016 were missing. They were in the ECO's own bundle;
- iii) The ECO was wrong to draw negative inference from the disparity in earnings between the year 14/15 and the year 15/16. The HMRC record showed the Sponsor to have earned, in the year April 2014-April 2015, only £1770 from his employment with Foodline Cash and Carry, but this was because he had only started the job in February 2015;
- iv) The letter containing the spelling mistakes had not been produced. The Sponsor had however produced a letter from his employer's accountant confirming his employment and earnings;
- v) Despite some discrepancy in the evidence regarding when the Sponsor left Foodline Cash and Carry the Tribunal was satisfied on the balance of probabilities that the Sponsor had been employed there during the operative time, and that he had been earning the money claimed, namely £21, 240 per annum;
- vi) Since the Sponsor's earnings had been the only matter in issue it followed that the Appellant had demonstrated, on the balance of probabilities, that she met the requirements of the rule at the date of the Respondent's decision in June 2016.

4. Having made that finding the Tribunal went on to consider events since the decision was taken. Mr Abdoullahi had left his employment with Foodline Cash and Carry in April 2016. His tax records show that for the year that followed (16/17) he only worked intermittently. He had in total been unemployed for

approximately five months during that year. In the year from April 2017 he had, by the date of the appeal in September, earned only £1337.93. The Sponsor had given evidence at the hearing that he had recently obtained a well-paid driving job but the Tribunal expressed great concern about that, given that the file contained a letter from Dr Tim Gray, Consultant Cardiologist at the Fairfield General Hospital, indicating that he had been compelled to write to DVLA informing them that the Sponsor is not well enough to drive. From this the Tribunal concludes:

“It is clear that while the appellant may have met the financial requirements in June 2016, he certainly would not have done in September 2017, and is not in a position to safely continue his current driving job, however well paid that might be”.

5. Turning to consider Article 8 the Tribunal weighs a number of factors in the balance (to which I return below) before dismissing the appeal on the grounds that the refusal is not a disproportionate interference with the Appellant’s Article 8 rights.
6. The Appellant now appeals on the grounds that since she had shown herself to meet the requirements of the Rule at the date of decision, the appeal should have been allowed. Before me Mr Moksud refined that somewhat so that the ground split into two limbs:
  - a) Was the effect of the positive finding on Appendix FM determinative of the appeal;
  - b) If not did the Tribunal nevertheless err in failing to weigh that matter in the balance in the overall proportionality assessment?

### **Legal Framework**

7. Section 82 of the Nationality, Immigration and Asylum Act 2002 (as amended) provides that a person may appeal to the Tribunal where the Secretary of State has decided to refuse a human rights claim (emphasis added):

#### **82 Right of appeal to the Tribunal**

**(1) A person (“P”) may appeal to the Tribunal where –**

**(a)** the Secretary of State has decided to refuse a protection claim made by P,

**(b) the Secretary of State has decided to refuse a human rights claim made by P,**

**or**

**(c)** the Secretary of State has decided to revoke P’s protection status.

...

8. Section 84 explains on what grounds such an appeal is to be brought:

**84 Grounds of appeal**

...

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

....

9. Section 6 of the Human Rights Act 1998 provides

**6 Acts of public authorities.**

(1) **It is unlawful for a public authority to act in a way which is incompatible with a Convention right.**

10. Section 85 of the 2002 Act sets out what matters Tribunals may have regard to when assessing whether an act is unlawful under Section 6(1) HRA 1998:

**85 Matters to be considered**

(4) **On an appeal under s82(1) against a decision the Tribunal may consider any matter which [it] thinks relevant to the substance of the decision, including a matter arising after the date of the decision.**

11. Section 117B of the 2002 Act offers further assistance on the public interest factors that are relevant “matters to be considered” when assessing proportionality:

**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.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
  - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the United Kingdom.

12. The scheme is now therefore simple. A right of appeal arises against a decision to refuse a human rights claim; the appeal must be brought on the grounds that the decision is unlawful under the Human Rights Act 1998; in determining whether that ground is made out the Tribunal may consider any matter it thinks relevant to the substance of the decision, including matters arising after the date of the decision. Those must include the public interest factors set out in s117B.

13. It follows from the above that the First-tier Tribunal was unarguably correct to conclude that it was not bound by matters as they stood at the date of the ECO's decision in June 2016. The date for resolution of the Article 8 issues was the date of the hearing before the First-tier Tribunal. This much is made clear by s85(4), as well as the fact that s84 is couched in the present tense: "the decision **is** unlawful under section 6...". I therefore reject the first limb of the Appellant's appeal, namely the assertion that the findings on past compliance with Appendix FM should be determinative of her present human rights appeal.

### **Proportionality**

14. I am satisfied that there are two discrete errors in the First-tier Tribunal's reasoning on proportionality.

15. As I have noted above, the Tribunal accepted that the Appellant met the relevant requirements of Appendix FM at the date of decision. In June 2016 it was – applying the Tribunal's findings to the Respondent's position – a

disproportionate interference with her right to family life to exclude her from the United Kingdom. Implicit in that is an acceptance that her relationship with her husband was of sufficient quality and depth to engage Article 8 and compel entry clearance. It is therefore in my view anomalous that the First-tier Tribunal, in its assessment of proportionality, only attached little weight to the relationship, noting that it was of “fairly limited duration” and had been conducted exclusively in Iraq. There was no reason to diminish the weight to be attached to the relationship where, in the 15 months between decision and determination, it had in fact strengthened: at the date of the ECO’s decision the couple had been married only a few months and the Sponsor had only spent a matter of weeks with her after the wedding; by the date of the appeal they had been married for a further 15 months and the Sponsor had been to Iraq on “several” occasions to see her.

16. Having made its observations about ‘family life’ the Tribunal went on to say this [at §16]:

“.....At the time of making this decision it is clear that on financial grounds at least the balance weighs against the appellant being granted leave. So I have to go on to consider whether any other grounds exist, outside the provisions of the rules, that would justify a grant of leave. The appellant lives at home with her parents, and has always done so. It is clear that she does not have significant health problems, as made clear in the marriage certificate. The sponsor is a British citizen of Iraqi origin. He is in insecure employment, having had a period unemployed and on benefits. While he has some health problems, and is clearly not fit to drive, the evidence does not suggest that he has any specific needs in terms of health or social care that his wife would meet. I can see nothing in the circumstances of this case that would mean a refusal of leave would be a disproportionate interference in the right to family life of either the appellant or her sponsor”.

17. There is in that passage no weighing in the balance of of the Tribunal’s own finding regarding the ECO’s mistake. The fact that the Appellant was wrongly denied a visa in 2016 is in my view plainly relevant to the proportionality of the continuing decision to refuse. It is a factor that should have attracted at least *some* weight, particularly where there is some suggestion in the evidence – I put it no higher than that – that Mr Abdoullahi’s health difficulties are related to the ongoing strain of separation from his wife.
18. Satisfied as I am that the proportionality assessment was flawed for these reasons, I am unable to find these errors, even considered cumulatively, to be such that the decision should be set aside. That is because the core finding – that the couple currently fail to meet the minimum income requirement – was, as the First-tier Tribunal found, a matter of some considerable weight. I should add

that had there been before the First-tier Tribunal clear medical evidence connecting Mr Abdoullahi's heart issues to the "severe anxieties and depression" he speaks of in his witness statement, my decision would have been otherwise. In such circumstances the First-tier Tribunal would have been bound to place substantial weight on the ECO's mistake and the consequences thereof for this family. Absent such evidence the finding as to the position in June 2016 was not capable of outweighing the public interest.

### **Decisions**

19. The decision of the First-tier Tribunal is upheld.
20. There is no order for anonymity.

Upper Tribunal Judge Bruce  
20<sup>th</sup> August 2018