



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/12030/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1 May 2014  
Oral determination given following the hearing

Determination Promulgated  
On 18 June 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MRS FOZIA MIRE COSOBLE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Bild, Solicitor of Camden Community Law Centre  
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a Somali national who was born on 4 April 1987. She appeals against a decision of First-tier Tribunal Judge Walters which was promulgated on 2 October 2013 following a hearing at Taylor House on 12 September 2013.

2. I shall summarise the history of this application briefly. The appellant is married to a Mr Iyow who was also originally a Somali citizen but who was granted refugee status in the UK in 2001 and was subsequently granted British citizenship. The couple were married in 2004 by proxy in Somalia and the marriage was registered with the Swedish authorities in 2009. It seems that the appellant was granted a refugee status of some sort in Sweden in that she was granted indefinite leave to remain having originally fled Somalia and claimed asylum in Sweden.
3. The couple met in 2005 and there are now four children of the marriage. The children are aged respectively 7, 5 and 3, and there is also a baby who has recently been born in November 2013. Because the appellant's husband was a British citizen who was being educated in the UK he could not go to live with the appellant in Sweden. She was not entitled to live in the UK and so the appellant's husband would visit her in Sweden when he could and sometimes she would visit him in London. She found this very difficult and so after having her third child in 2011 she came to this country originally as a visitor but then remained without leave thereafter. The three oldest children are nationals of Sweden and they have a right to continue living in this country with their father. The youngest, who was born last year, is a British citizen having been born to a British citizen.
4. The current position with regard to the appellant's husband is that he has an income of around £26,000 a year and is currently completing at the same time an MSc in a specialised form of engineering which will be completed relatively soon.
5. The appellant made an application for a residence card under the 2006 Immigration (European Economic Area) Regulations but this was refused by the respondent. It appears that the application might have been founded on the rights of her children who were exercising treaty rights in this country although this is not entirely clear from the papers. It is certainly the case that she was not entitled to any derivative rights by reason of her husband's presence in this country because her husband is a British citizen and therefore is not in this country exercising treaty rights.
6. It is not suggested on behalf of the appellant that in fact she is entitled to a residence card. The appellant appealed against the decision of the respondent not to issue a residence card (at that time it was not accepted that she was not entitled to a residence card) and included in her grounds of appeal were grounds that she was entitled to remain in this country pursuant to her rights under Article 8.
7. Her appeal was as noted above heard before First-tier Tribunal Judge Walters sitting at Taylor House on 12 September 2013 but he dismissed her appeal under the 2006 Regulations (and it is not now suggested that he was wrong so to do). However, with regard to the Article 8 claim Judge Walters read out that part of the refusal letter dealing with Article 8 which is incorporated into his determination at paragraph 24 as follows:

“Page 4 of the refusal letter deals with Article 8. It reads, in part:

‘Consideration has been given to your family or private life established in the UK under Article 8 of the ECHR. ... If you wish the UKBA to consider an application on this basis you must make a separate charged application using the appropriate specified application form (FLR (M)) for the five year partner route or FLR(O) for the five year parent or ten year partner or parent route, or FLR(O) for the ten year private life route. ... Since you have not made a valid application for Article 8 consideration, consideration has not been given as to whether your removal from the UK would breach Article 8 of the ECHR. Additionally, it is pointed out that a decision not to issue a residence card/permanent residence card does not require you to leave the United Kingdom if you can otherwise demonstrate that you have a right to reside under the Regulations.’”

As explained in the determination, what was meant by this was that the respondent would wish to levy a considerably higher fee before she considered an Article 8 application and that was why Article 8 was not considered in any detail by the respondent.

8. Judge Walters found at paragraph 26 as follows:

“I accept, of course, that there is no requirement on the appellant to leave the UK and therefore the first question raised in *Razgar* [2004] UKHL 27 cannot apply which is:

‘(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or family life?’”

9. For this reason he continued at paragraph 27 as follows:

“27. I therefore did not find that I had a valid Article 8 appeal before me and that, in order to bring such an appeal before a Tribunal, the appellant would have to make one of the applications suggested by the respondent quoted above.”

10. The appellant appealed against this decision and permission to appeal was initially refused by First-tier Tribunal Judge Pirotta on 15 January 2014 who agreed with Judge Walters that because there had been no removal directions Article 8 was not engaged. The appellant renewed her application for permission to appeal to the Upper Tribunal and eventually on 20 February 2014 permission to appeal was granted by Upper Tribunal Judge Grubb who when setting out his reasons for granting permission to appeal stated as follows:

“... ”

2. The judge concluded that there was not ‘a valid Article 8 appeal’ before him and so did not consider the appellant’s Article 8 rights which would appear to be engaged on the evidence before him. That was an arguable

error of law. To the extent it was necessary, as the notice of decision made clear, the appellant was told that 'she should now make arrangements to leave'. In any event, it does not appear necessary in order to require a consideration of Article 8 in an appeal that the immigration decision entails removal: see *JM (Liberia)* ... [2006] EWCA Civ 1402 - an appeal against a decision refusing to vary leave. ..."

11. I heard submissions with regard to whether or not the First-tier Tribunal had erred in law by refusing to consider the appellant's claim under Article 8 and in my judgment it is clear that this was an error of law. I give my reasons for so finding. This was an application made pursuant to the 2006 EEA Regulations and the appeal was against a refusal to grant a residence card pursuant to those Regulations. The appeal rights in respect against an EEA decision pursuant to these Regulations are set out at Regulation 26, and at Regulation 26(7) it is provided as follows:

"The provisions of or made under the 2002 Act [that is the Nationality, Immigration and Asylum Act 2002] referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that Schedule."

By Schedule 1 it is provided as follows:

- "1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations ... as if it were an appeal against an immigration decision under Section 82(1) of that Act."

Although there are certain exceptions, one of the provisions which is included is Section 84(1)(g) of that Act which provides as follows:

**"84 Grounds of appeal**

- (1) An appeal under Section 82(1) against an immigration decision must be brought on one or more of the following grounds -

...

- (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights. ..."

12. It is not suggested on behalf of the respondent that (as noted by Judge Grubb when giving his reasons for granting permission to appeal) the principles as set out by the Court of Appeal in *JM (Liberia)* would not apply and it is accordingly clear in this case that having included an Article 8 claim in her grounds of appeal the appellant was entitled to have this properly considered by Judge Walters and that Judge

Walters' failure so to consider her claim under Article 8 was an error of law. It follows that insofar as her claim under Article 8 is concerned I must remake the decision. I record that on behalf of the respondent Mr Jarvis accepted that Judge Walters' failure to consider the Article 8 claim was an error of law.

13. Having found an error of law, with the agreement of both parties I have then gone on to remake the decision.

### **The Hearing**

14. I must at the outset express my gratitude to the representatives of both parties for the clear, concise but nonetheless thorough manner in which the interests both of the appellant and of the respondent were represented. On behalf of the appellant Mr Bild relied in part on a skeleton argument which he had produced for the purposes of the hearing. On behalf of the respondent Mr Jarvis ensured that every argument which could properly be put on behalf of the respondent was put and that there was no danger of the appellant's appeal being allowed by reason of his failure to address the Tribunal to the matters set out within the Immigration Rules as they now apply.
15. The appellant relied upon a bundle of documents which had been prepared for this hearing in anticipation that the Tribunal would go on to remake the decision without any further adjournment should an error of law be found which bundle included witness statements from both the appellant and her husband which had been before the First-tier Tribunal. For the reasons which follow I did hear some further evidence given by the appellant although this was merely to satisfy myself as to her ability to speak English as this was a factor which was raised during argument by Mr Jarvis.
16. On behalf of the respondent Mr Jarvis did not seek to challenge any of the evidence contained within this bundle of documents and so for the purposes of this hearing I accept that everything set out within these documents is genuine and accurate and indeed there is no basis upon which I could do otherwise.
17. I heard submissions on behalf of both parties which as I have already indicated were extremely thorough and dealt with every aspect of this appeal. I attempted to record everything which was said to me contemporaneously and as my notes are contained within the Record of Proceedings I will not set out below every word which was said during the course of the hearing but shall refer only to such of the submissions as are necessary for the purposes of this determination. I have, however, taken account of everything which was said to me during the hearing as well as to all the documents contained within the file whether or not any specific part of the submissions or the documents is referred to specifically below. I shall summarise briefly first of all the submissions which were made on behalf of the respondent by Mr Jarvis, who quite properly felt it his duty to address me as to what he considered the respondent's policy was with regard to applications or appeals under Article 8 because he submitted the provisions now contained within the Rules were "very broad and very generous".

18. There was some discussion as to whether or not this claim fell to be considered under Appendix EX.1 but it was eventually agreed between all parties that this was a claim where one should have regard to the provisions of E-LTRP.2.1. contained within Appendix FM of the Rules and which provides as follows:

**“Immigration status requirements**

E-LTRP.2.1. The applicant must not be in the UK -

- (a) as a visitor;
- (b) with valid leave granted for a period of six months or less, unless that leave is as a fiancé(e) or proposed civil partner, or
- (c) on temporary admission.

E-LTRP.2.2. The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies.”

Mr Jarvis agreed that as this appellant was technically in the UK in breach of immigration laws (because she had overstayed the leave that had been granted to her) pursuant to E-LTRP.2.2. the Tribunal should have regard when considering this appeal under Article 8 to the provisions of paragraph EX.1.

19. Essentially the position that Mr Jarvis on behalf of the respondent asked the Tribunal to adopt was that there was nothing disproportionate about requiring this appellant to leave the country. It was conceded (and I will deal with this below) that the financial requirements which would be necessary under FM-SE had technically not been met and it was said that the English language requirement had not been met either. The effect of the Rules was that this was an expression of the respondent’s very broad and very generous policy and that the court should give great weight to the need to maintain a fair and consistent system of immigration control.
20. I apologise to Mr Jarvis if I have summarised his case in too little detail but as is clear from the Record of Proceedings he did take the Tribunal to all the relevant passages contained within the Rules. Essentially it was Mr Jarvis’ case that the appellant had had considerable experience of living in Sweden, three of her children had been born there and been brought up there without her husband and that although the baby was a British citizen this was not in itself a trump card and using the words used by Mr Justice Sales in *Gulshan* it would not be “unjustifiably harsh” to require this appellant, who was not entitled to remain here under the Immigration Rules or under the EEA Regulations, to go back to Sweden from where she came. It would not be difficult for the whole family to go with her bearing in mind that the Tribunal could take judicial notice of the fact that English is widely spoken in Sweden.
21. With regard to the failure of the appellant to provide any certificate showing that she had the level of English which would be required were she to make an application to

be here as a spouse under the Immigration Rules I considered it appropriate (when considering what weight should be given to this factor if any) to ask her some questions myself to ascertain whether or not this was a point to which any weight should be attached. Mr Jarvis did not object to my taking such a course and it was entirely apparent that the appellant is fluent in English and that her standard of English is excellent. It is certainly very much higher than the standard which would be required in order to enable her to satisfy the English language requirement within the Rules. She clearly speaks very good English indeed.

22. On behalf of the appellant Mr Bild essentially submitted that it would not be reasonable to require any of this family to relocate to Sweden which realistically is the only place they could now go. The appellant's husband had come to this country in 2001, had immediately been granted refugee status and thereafter became a British citizen. Although the appellant had not produced the documentary evidence which would be required were she to have made an application to be allowed to remain under the Rules this was because it was accepted from the outset that such an application could not succeed for the technical reason that her immigration status was that she was here without leave. Accordingly it was known that she would have to rely on the provisions contained within EX.1 which effectively exempts her with regard to the technical requirements under the Rules (that is to produce documents in a specified form) and also from the English language requirements.
23. However, insofar as these were matters which were relevant when this Tribunal considered proportionality there was evidence of the appellant's husband's income contained within the wage slips within the bundle and as noted by the Tribunal it was also clear that the appellant spoke very good English. It had not been contested on behalf of the respondent that the appellant met the substantive requirements, that this was not a near-miss case (and it is accepted there is no longer such a category in any event) but the fact is that the appellant's husband support his family with no recourse to public funds and the appellant speaks good English. This is relevant when considering proportionality or whether or not a decision to remove the appellant (which carries an implication if this family is to remain together that the whole family would be removed) is reasonable.
24. So the question this Tribunal has to consider is whether or not it would be reasonable for the family to live now in Sweden. Three of the children are EEA nationals who are integrated in schooling in the UK aged respectively 7, 5 and 3. They have friends here. These three children are Swedish but entitled to reside in this country, the other family members being the appellant's husband and a baby are British and have a right of abode and while it is correct that the British citizenship of the baby is not a trump card nonetheless there would have to be a powerful countervailing force here and beyond the fact that this appellant is technically here without leave there has been no other criminality and there is nothing to outweigh the very important consideration to be given to the rights of the British child in particular and in addition the right of the EU children to integrate into the host state that they are now in. It was submitted that all this is relevant when this Tribunal considers reasonableness under EX.1.

25. It should also be noted in this regard that as is confirmed within the bundle at page 29 the appellant's husband is currently in the final stages of completing his MSc in telecommunication engineering. The expected end date is 31 August 2014. It would not be a simple matter to transfer the skills that he has acquired and that he is using in his current job should he be obliged to move to Sweden.

## Discussion

26. In my judgment this is a very easy decision to make because I do not consider the factors competing one way or the other to be finely balanced at all. On the one hand there is the perfectly legitimate need to enforce and apply a consistent and fair system of immigration control. This is recognised within the new Rules and indeed it is recognised in established jurisprudence. However, the new Rules also recognise (especially if as Mr Jarvis maintains they are intended to provide a broad and generous basis upon which deserving appellants should be allowed to remain even though they are not entitled otherwise to remain under the Rules) that a person should not be required to leave the UK where the consequences would, weighing up the competing factors together, be "unjustifiably harsh". In my judgement, on any view of this case it would be "unjustifiably harsh" to require this appellant to leave this country now either with or without her family. Although exceptionality is a prediction and not a test I consider that the circumstances disclosed in this appeal can properly be said to be exceptional.
27. I also consider that on the basis of the evidence which has been put before me the reasons why this appellant should be allowed to remain in this country are very compelling indeed. I will summarise them very briefly, because they have already been identified above.
28. This is a case which exposes an anomaly contained within the interplay between the EEA Regulations and the Immigration Rules because the appellant's husband who is a British citizen would be entitled to live with his entire family in Sweden (because if he went to work in Sweden his wife would be entitled to be with him as the dependent wife of an EU citizen exercising treaty rights in another EU country) but under the Rules there is no equivalent right for his wife to remain in this country. However, notwithstanding this anomaly, the reasons why this appeal should be allowed are in any event overwhelming.
29. The appellant's husband is clearly entirely settled in this country now. He has been here, having been granted refugee status, for over thirteen years, is fully integrated into British society and there would obviously be considerable upheaval were he now to be obliged to leave his current job where he is earning a good income (from the papers it is clear that this is around £26,000 a year) on which he is able to maintain his wife and four children.
30. There is no reason in principle other than the desire to enforce compliance with technical requirements why the appellant could be said not to satisfy the substantive



requirements under the Rules. Her husband earns enough to maintain the entire family (this is not disputed) and although she does not have a piece of paper to say so she is clearly integrated into this society to the extent that she speaks what is almost perfect English. The three oldest children are integrated into British society to the extent that they are at school here and have friends here. The baby, who is a British citizen, is entitled to a right of abode in this country.

31. Although I was not referred to either the decision of the House of Lords in *Chikwamba* or the subsequent decision of the Court of Appeal in *Hayat* I must have these decisions in mind, in particular the observations in the Court of Appeal in *Hayat* that if an applicant such as this appellant, especially in cases involving young children, is to be required to leave this country with a view to making an application to return as a spouse, a good reason must be given. That is not to say that there will necessarily not be such a reason, because in many cases there will. In this case, however, I am firmly of the view that there would not.
32. For the reasons I have given, I consider that this is one of those cases which can be said fairly to be exceptional and where the reasons for allowing this appeal can be said to be very compelling. I am entirely satisfied on the evidence which I have considered that were the appellant now to go to Sweden and make an application from there to return under the provisions of the Immigration Rules there is no reason why that application should not succeed. In those circumstances, following the guidance given in *Chikwamba* and *Hayat*, it is entirely disproportionate to require her to do so merely so that it can be said that the i's are dotted and the t's are crossed with regard to the technical requirements under the Rules. For these reasons the appellant's appeal must be allowed and I shall so find.

### Decision.

**I set aside the decision of the First-tier Tribunal as containing a material error of law and in substitute the following decision:**

**The appellant's appeal is dismissed under the EEA Regulations 2006.**

**The appellant's appeal is allowed on human rights grounds, Article 8.**

Signed:

Date: 16 June 2014

Upper Tribunal Judge Craig