



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/09822/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 May 2015

Decision and Reasons Promulgated  
On 15 May 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Narem Marcano Jimenez  
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

**Representation:**

For the appellant: Not represented

For the respondent: Mr D Clark, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant, Narem Marcano Jimenez, date of birth 28.5.84, is a citizen of Venezuela.
2. This is her appeal against the determination of First-tier Tribunal Judge Roopnarine-Davies promulgated 27.2.15, dismissing on all grounds the appellant's appeal against the decision of the Secretary of State, dated 29.10.14, to refuse her asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 9.2.15.

3. First-tier Tribunal Judge Garratt granted permission to appeal on 26.3.15.
4. Thus the matter came before me on 13.5.15 as an appeal in the Upper Tribunal.

### **Error of Law**

5. For the reasons set out below, I find no material error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Roopnarine-Davies should be set aside.
6. The case is unusual. As her asylum claim was made, the appellant asserted that she had a well-founded fear of persecution on grounds of her conversion to Islam in December 2010. She claims to have been verbally abused and physically assaulted as a result of her faith and believes that if she is returned to Venezuela, she will be killed. She claims that unknown people, and for unknown reasons, have been asking her family about her whereabouts. Nevertheless, because internal relocation is open to the appellant and sufficiency of protection is available for Muslim converts in Venezuela, her asylum and humanitarian protection claims were rejected. The human rights, private and family life, claim was also rejected, the Secretary of State considering that the marriage was one of convenience and that in any event the appellant could not meet the requirements of Appendix FM in relation to family life with a partner, or paragraph 276ADE in relation to private life. The Secretary of State also found that medical treatment for her condition was available in Venezuela and that her removal would not be disproportionate.
7. In the refusal decision, the Secretary of State accepted that the appellant was a Muslim convert and that she had been assaulted and verbally abused because of her faith. However, Judge Roopnarine-Davies went behind those concessions to find at §15 of the decision that the claim to be a Muslim convert has been fabricated, and at §18 that the appellant did not suffer verbal abuse or was assaulted in Venezuela.
8. However, at the First-tier Tribunal appeal hearing, the asylum claim was withdrawn by the appellant's representative, accepting that there was sufficiency of protection in Venezuela. Neither was the humanitarian protection claim pursued. Nevertheless, the appellant gave oral evidence, essentially reiterating the factual basis of her asylum claim. It follows that the judge was faced with a contradiction between the withdrawal of the asylum claim and the evidence of the appellant insisting that she was at risk. In the circumstances, it was open to the judge to go behind the concessions made by the Secretary of State in the refusal decision. The First-tier Tribunal was faced with an entirely different situation to that prevailing when the asylum and other claims were considered by the Secretary of State.
9. In his submissions, Mr Clark referred me to SSHD v Maheshwaran [2002] EWCA Civ 173, the Court of Appeal considered as too broadly drawn the submission that that if the Secretary of State does not challenge an assertion of fact made by a claimant and the (judge) does not raise with the claimant doubts about the veracity of the assertion, the judge is bound to accept the assertion as proved, if not to do so may be material to his determination (decision). The Court of Appeal accepted that

to fail to put to a party a point which is decided against him can be grossly unfair and lead to injustice. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the Tribunal indicates that it is minded to take that course. The present case is rather different. Here the appellant abandoned both the asylum and humanitarian protection claims and pursued only the Article 8 private and family life claim. For the appellant then to pursue in oral evidence a case which was inconsistent with that course of action put the issue fairly before the judge to consider and resolve what she made of the appellant's factual account. It would have been obvious to all concerned that the appellant's oral evidence was at odds with the decision to abandon the asylum and humanitarian protection claim. In the circumstances, on the facts of this case, there was no material error of law in going behind the concession.

10. In any event, the findings in dispute were not material to the outcome of the appeal, as both the asylum and humanitarian protection claims were effectively abandoned. The only material issue remaining was whether it was proportionate to require the appellant to leave the UK to make an Appendix FM application as a spouse from Venezuela. To that end, the judge was entitled to make findings as to whether the appellant met the requirements of either Appendix FM or paragraph 276ADE and to consider whether there were exceptional circumstances in the appellant's case, compelling features inadequately addressed in the Rules so as to render the removal decision unjustifiably harsh. Clearly, in order to answer that question the judge had to consider whether the circumstances claimed to prevail in Venezuela rendered the appellant's case exceptional. The judge went on to conclude that the appellant's evidence was not truthful and her account of her relationship fabricated.
11. In passing, I should mention that in her submissions to me, Ms Jimenez sought to adduce some further evidence. I explained that at this 'error of law' stage I could only consider evidence that was before the First-tier Tribunal at the time of the decision. She took particular issue with the inconsistencies set out in §17 of the decision, especially the finding that she and her husband had lived together prior to marriage. She claimed that they had married on 17.1.14 but the Islamic marriage ceremony certificate produced to the Tribunal stated that the marriage was 'solemnised' at the Darussalam Cultural Centre on 19.2.14. She now wished to produce to me a different certification that was not before the First-tier Tribunal, stating that the marriage in fact took place on 17.1.14. She stated that the certificate which was before the First-tier Tribunal was dated the date of her request, not the date of the marriage. However, it remains the case that on the evidence before the First-tier Tribunal the earliest evidence of marriage was 19.2.14. In the circumstances, regardless of what further evidence the appellant may now have on that issue, the findings of the judge on this issue were open to her on the available evidence and for which cogent reasons have been given.
12. The appellant's representative at the First-tier Tribunal appeal hearing accepted that she did not meet the requirements of Appendix FM. No reliance was placed on private life and it was not suggested that she met paragraph 276ADE.

13. Despite reaching the view that the marriage was one of convenience and not genuine, the judge took the appellant's case on Article 8 at its highest, as is clear from §21 of the decision. The judge went on to consider family life outside the Rules on the basis of Article 8 ECHR, and found that there was nothing to prevent the appellant from returning to Venezuela to make application for entry from there, consistent with the Immigration Rules and thus that the removal decision was proportionate. Those are sustainable findings supported by the evidence and findings of the judge and for which cogent reasoning has been provided. There was no specific appeal against those findings; in essence, the grounds assert that going behind the concessions of the Secretary of State unfairly infected the judge's approach to Article 8. I do not accept that contention. The issue as to whether it was proportionate for the appellant to make her application from Venezuela is not dependent on the asylum and humanitarian protection findings, though the safety of the appellant was highly relevant to the issue of proportionality. It follows that there is no merit in any appeal against the decision of the Tribunal in respect of human rights.
14. Further, the recent Court of Appeal case of Agyarko & others v SSHD [2015] EWCA Civ 440, considered the situation of illegal overstayers who commenced a relationship or married a British citizen in circumstances of known precariousness of the kind referred to in R (Nagre) v SSHD [2013] EWHC 720(Admin), dismissing the appeals of both appellants whose applications for leave to remain outside the Rules were refused by the Secretary of State and subsequent appeals dismissed. That the appellant cannot meet the requirements of the Rules is a highly relevant factor. Further the Tribunal is required to have regard in any proportionality assessment to the public interest factors of section 117B of the 2002 Act, including that immigration control is deemed to be in the public interest and that little weight should be accorded to a relationship developed whilst the appellant is unlawfully present in the UK, being an overstayer. There are no children to consider in this case. The appellant established her claimed family life with knowledge that she had no right to be in the UK and thus it was precarious in the relevant sense. At held at §28 of Agyarko, in those circumstances it is only if her case is exceptional for some reason that she will be able to establish a violation of Article 8. As found by the First-tier Tribunal there were no such exceptional or compelling circumstances insufficiently recognised in the Immigration Rules so as to justify granting leave to remain outside the Rules on the basis of Article 8 ECHR family life, because otherwise the decision to remove would be either disproportionate or unjustifiably harsh.

### **Conclusions:**

15. In the circumstances, for the reasons stated, there is no merit in the grounds of appeal. Even if there were errors of law in the judge going behind the concessions of the Secretary of State, they were not material to the remaining issue in the appeal as to whether it was disproportionate to the appellant's Article 8 family rights to require her to leave the UK and make such application as she considers necessary for entry clearance.

16. I thus find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated 15 July 2015**

### **Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

**Fee Award**                      **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated 15 July 2015**