**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-005690**
**First-tier Tribunal No:**
**HU/50325/2020**
**IA/02419/2020**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 30 April 2023**

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**
**DEPUTY UPPER TRIBUNAL JUDGE HARIA**

**Between**

**FATIMA AIT OUBAHLI**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Hawkin of Counsel, instructed by Kreston Law Ltd
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

**Heard at Field House on 27 March 2023**

**DECISION AND REASONS**

1. The appellant is a national of Morocco born on 03 June 1980. She appeals with permission of the Upper Tribunal against a decision of Judge of the First - tier Tribunal Thorne ("the Judge") dismissing her appeal against the decision of the respondent dated 10 June 2020 refusing her application for leave to remain in the United Kingdom ("UK") on the basis of her family life with her husband Mr Hassan Kurt ("The sponsor") a British Citizen.

**Anonymity**

2. No anonymity direction was made by the First-tier Tribunal. There was no application before us for such a direction. Having considered the facts of the appeals including the circumstances of the appellant, we see no reason for making a such direction.

## Background

3. The appellant claimed to have entered the UK on 26 May 2019 on a visit visa valid until 5th November 2019.

4. The appellant applied in time on the 15th January 2020 for leave to remain on the basis of her family and private life in the UK. This application was refused by the respondent on the 10th of June 2020.

5. The appellant appealed against the refusal on the basis of her relationship with her husband.

## Refusal decision

6. The respondent in the decision dated the 10th June 2020 which was reconsidered in a respondent's review accepted the relationship is genuine and subsisting having considered the appellant's application under the 10 year partner route of Appendix FM refused the application on the basis of the immigration status requirements ( E- LTRP 2.1) as the appellant was in the UK with leave as a visitor at the time of the application and so EX.1 does not apply.

7. The respondent was not satisfied that there are any very significant obstacles to the appellant returning to Morocco under paragraph 276ADE(1) (vi).

8. The respondent acknowledged the sponsor's health conditions including his diagnosis of sarcoma (muscular cancer) but maintained there are no exceptional circumstances to warrant a grant of leave for the appellant.

## First-tier Tribunal decision

9. Ms Cleghorn of counsel appeared for the appellant at the First-tier Tribunal hearing. The Judge heard oral evidence from the appellant with the assistance of an interpreter in the Arabic language, and the sponsor with the assistance of an interpreter in the Turkish language.

10. The Judge accepted the appellant enjoys a family life with the sponsor and has a private life in the UK.

11. The Judge records that the appellant on her own account cannot meet the eligibility immigration status requirement as she entered the UK as a visitor.

12. The Judge dismissed the appeal under Article 8 having found there is inadequate evidence of very significant obstacle to integrations under the

Immigration Rules (276ADE(1) (vi) ) and no exceptional circumstances or other factors on a consideration of Article 8 outside the Immigration Rules.

13. The appellant appealed to the Upper Tribunal.

## Permission to appeal

14. The grounds seeking permission to appeal were drafted by trial counsel. The grounds make general criticisms of the structure of the Judge's decision and assert the Judge erred by considering the appeal outside the Immigration Rules before considering the appeal under the Immigration Rules. The grounds also assert that the proportionality assessment is deficient.

15. Permission to appeal was refused by First - tier Tribunal Judge I D Boyes on 24 November 2022.

16. The appellant renewed the application for permission to appeal on 24 November 2022. The renewed grounds, which were also settled by Ms Cleghorn of counsel, can be summarised as follows:

    a. A flawed approach to the Immigration Rules by embarking immediately on to a proportionality exercise as being determinative of an assessment of the appellant's case under the Immigration Rules, and

    b. A flawed proportionality assessment which is largely reflective of the considerations under 117B without any consideration of the unique facts of the case.

17. Permission was granted on 20 January 2023 by Upper Tribunal Judge Lane on the following basis:

> "Whilst the renewed grounds do not explain why the outcome of the appeal would have been different had the judge considered Article 8 ECHR and the Immigration Rules in a different order (Ground 1), it is arguable that in the 'balancing exercise' paragraph of the decision [38] the judge has not considered all the relevant circumstances, in particular those circumstances which favoured the appellant. Permission is granted on all grounds."

## Rule 24 response

18. In her rule 24 response dated 14 February 2023 the respondent opposed the appeal on the basis that the Judge took the correct approach to assessing Article 8, first considering whether the Immigration Rules are met and if they are not, asking whether anything outside the Rules would render the removal disproportionate.

## Upper Tribunal hearing

19. Mr Hawkin who appeared for the appellant adopted the renewed grounds and elaborated on the grounds submitting that the Judge put the cart before the horse resulting in a skewed decision which is extremely short on actual analysis.

20. He submitted that much of the proportionality assessment is a generic recitation of points with little or no consideration of the difficulties the sponsor would face in continuing family life in Morocco given that he is a British Citizen who has lived in the UK since 1994, some 28/29 years and has some close family in the UK.

21. Mr Hawkin explained that the sponsor has two daughters in the UK although it is accepted he does not have contact with one daughter. He stated that the sponsor has had very recent radiotherapy and surgery for cancer which has resulted in him being unable to work and having mobility issues. Mr Hawkin accepted that the sponsor's medical condition has stabilised but he pointed out that it has had a reverberating effect on the sponsor such that he cannot go to a country where he has never lived and put himself in the hands of medics in that country. Mr Hawkin stated that the language is an obstacle to integration for the sponsor as he speaks Turkish, English and Kurdish. It is not an issue for the appellant who speaks Moroccan Arabic and English. Mr Hawkin pointed out that in the time between the application being submitted and it being decided there has been a deepening of the appellant's ties to the UK.

22. Ms Ahmed opposed the appeal. In relation to ground one, she accepted that the Judge had considered proportionality before the rules but submitted that that correct order of consideration could not have changed the outcome.

23. Ms Ahmed pointed out that when the appellant made her application, her status was a visitor and so the exception in paragraph EX.1 does not apply. (Mr Hawkin accepted this point in light of Sabir (Appendix FM-EX1 not free standing) (Pakistan) [2014] UKUT 63 (IAC), although he reserved his position on the correctness of that decision in the event that the appeal went further.) It had been addressed at paragraph 6(iii) of the respondent's review.

24. In relation to ground two, Ms Ahmed submitted that these arguments are a disagreement with the findings. Ms Ahmed submitted that the arguments that are now made should have been made at the First - tier Tribunal. Ms Ahmed submitted there was a limited skeleton argument before the First-tier Tribunal with no submission on insurmountable obstacles. Ms Ahmed stated the decision should be read as a whole. She pointed out there was no up to date medical evidence, the latest evidence being from 2019 when the appeal was heard in 2022.

25. In relation to the sponsor's length of stay in the UK, Ms Ahmed submitted the threshold is high and it is only one factor. She submitted that it was

open to the appellant and sponsor to continue their family life outside the UK and she relied on Agyarko –v- SSHD [2017] UKSC 11.

26. Ms Ahmed acknowledged the appellant is not an overstayer as she made an in- time application so she would have the benefit of 3C leave. MS Ahmed submitted that the appellant's stay in the UK is precarious although she accepted this is not fatal to the appellant's claim.

27. In relation to the language difficulties, Ms Ahmed submitted that there is no mention of this in the witness statements or the skeleton argument and the appellant did not advance such an argument at the First - tier Tribunal.

28. As to the sponsor's daughters, Ms Ahmed referred to paragraph 17 of the decision where the Judge summarises the evidence but does not make any findings. Ms Ahmed submitted that although there are no explicit findings in relation to the daughters the Judge clearly had their position in mind. Ms Ahmed submitted the issue is one of materiality given that no family court proceedings have been instigated.

29. At the end of the hearing we announced our decision and we give our reasons below.

## Decision on error of law

30. We appreciate that judicial restraint should be exercised when examining the reasons for the decision given by a First-tier Tribunal Judge and that we should not assume too readily that the Judge misdirected himself just because not every step in his reasoning is fully set out. This is the guidance given by the Court of Appeal at paragraph [77] of KM v SSHD [2021] EWCA Civ 693.

31. What matters is whether the judge has demonstrably applied the correct approach and it should be assumed that a judge in a specialist jurisdiction such as this understands the law unless the contrary is shown. With respect to the Judge, we cannot make such an assumption in this case.

32. We accept Mr Hawkin's submission that the Judge on this occasion embarks "…immediately on a proportionality assessment (Article 8 outside of the Rules) as being immediately determinative of an assessment of the Appellant's case under the Immigration Rules."

33. The analysis which appears in [22]-[50] of this decision appears to conflate the analysis under the Immigration Rules and that which should have taken place outside the Rules under Article 8 ECHR. Generally, it is appropriate for a judge to begin with consideration of the Immigration Rules because a favourable conclusion under the Immigration Rules is dispositive of the appeal and a negative conclusion in that regard requires a further consideration of the appeal under Article 8 ECHR: TZ (Pakistan) v SSHD [2018] EWCA Civ 1109; [2018] Imm AR 1301 refers.

34. The error in the Judge's approach is clear when he states [40]

> "'In coming to the conclusion that there is inadequate evidence to establish on the balance of probabilities that there are insurmountable obstacles to A and S continuing their family life outside the UK, I take into account the matters outlined above in the proportionality assessment."

35. We accept Mr Hawkin's submission that this is the wrong approach as the factors in a proportionality assessment differ from those under an "insurmountable obstacles" assessment. In addition, the Judge does not appear to have appreciated that in this case the appellant could not avail herself of the exceptions under EX.1 as she was in the UK as a visitor at the time of her application. The analysis undertaken at [39]-[44] of the Judge's decision is seemingly in conflict with the earlier statement at [23].

36. Insofar as the Judge did turn his mind to the Immigration Rules, his analysis is confused and almost entirely lacking in reasons. The Judge states that he considers the appellant's private life "through the prism of 276ADE" and concludes there are no exceptional circumstances and is inadequate evidence to establish that there are very significant obstacle to the appellant integrating into Morocco. Although an appellant who is able to demonstrate there are very significant obstacles to integration in the country of origin would meet the requirements under 276ADE(1), there is no requirement to show any exceptional circumstances.

37. The analysis of Article 8 ECHR is confused and unstructured. There is no need in every case to follow the full step by step analysis recommended by Lord Bingham in R (Razgar) v SSHD [2004] 2 AC 368. Nor is it a requirement that judges adopt a 'balance sheet' analysis of proportionality, despite the repeated judicial encouragement of such an approach. The Judge was aware of the sponsor's health issues as he refers to it [16 & 18] and the Judge finds that "..there is no adequate up to date medical evidence to establish he cannot travel to or live in Morocco if he wishes..."[ 38(vii)].

38. However, the Judge failed to undertake a wider assessment of the sponsor's circumstances as required upon a consideration of Article 8 such as his British Citizenship, his entitlement to state benefits in the UK, the length of time he has lived in the UK, the longer term impact of his cancer and whether he accepted that the appellant and sponsor have a family life with the sponsor's daughters. There is little or no consideration of the difficulties the Sponsor would face in continuing family life in Morocco. Although the appellant and the sponsor gave evidence using different interpreters, the Judge failed to consider any linguistic difficulties the Sponsor may experience in relocating to Morocco. Although we accept Ms Ahmed's submission that the appellant was unable – as a visitor – to have recourse to paragraph EX1 of Appendix FM of the Immigration Rules, it was still incumbent upon the Judge to consider the obstacles to family life continuing in Morocco, since that is a necessary ingredient in any proportionality assessment: Konstatinov v The Netherlands (app No: 16351/03); [2007] ECHR 336, at [48]. Insofar as the Judge recognised that

this was a component in the proportionality assessment, he failed to consider all of the obstacles to relocation holistically and as a whole.

39. It is by no means clear to us what factors were said to militate for and against the appellant in the assessment of proportionality. The findings at [38(i), (ii), (v)] are generic, the findings at [38 (iv) and (vi)] are incorrect on the evidence that was before the Judge. There was evidence before the judge which showed (or at least was said to show) that the appellant was financially independent, as that term was construed in Rhuppiah v SSHD [2018] UKSC 58. It is not clear to us why the judge stated that the appellant had built up her family life in the UK at a time when she had 'no leave to be in the UK'. The appellant entered as a visitor and her application for leave to remain was in time, and attracted the protection of section 3C of the Immigration Act 1971, as a result of which she has always had leave to enter. That might well have militated against the appellant, but the factual premise on which the judge concluded that it did was clearly wrong.

40. We accept Mr Hawkin's submission that the Judge's findings are largely a recitation of legal principles and references to the statutory public interest factors Part 5A of the Nationality, Immigration and Asylum Act 2002 without an adequate assessment of the particular factors relied upon by the appellant.

41. We conclude that the Judge failed to engage with this appeal in a meaningful way and that the proper course is to set aside that decision in full and remit the appeal to be heard afresh by a judge other than Judge Thorne. We are mindful of the Court of Appeal case of AEB v SSHD [2022] EWCA Civ 1512, albeit that we have not found that there was a procedural error in this appeal. Paragraph 7.2 of the Practice Statement contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, as there has been a failure properly to consider the totality of the evidence, and having regard to the overriding objective, we find that it is appropriate to remit this case to the First-tier Tribunal.

## Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors of law. We set the decision aside. No findings are preserved. The appeal is remitted to the First-tier Tribunal to be heard de novo by a Judge other than Judge Thorne. No anonymity direction is made

N Haria

Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

**14 April 2023**