



IAC-AH-KRL-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/23915/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 6 April 2016**

**Decision &  
Promulgated**

**On 28 April 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**K H**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Ms Wilocks-Briscoe, Home Office Presenting Officer

For the Respondent: Mr Jesurum, Counsel for Makka Solicitors Limited, London

**DECISION AND REASONS**

1. The Appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellant is a citizen of Morocco born on [ ] 1987. She appealed against the decision of the Respondent dated 14 May 2014 refusing to grant her discretionary leave to remain in the United Kingdom under Article 8 outside the Rules. The appeal was heard before First-tier Tribunal Judge Morris on 10 February 2015 and was dismissed in a decision promulgated on 26 February 2015, under the Rules and on human rights

grounds. Permission to appeal to the Upper Tribunal was granted and Deputy Upper Tribunal Judge McCarthy found that there was a material error of law in the First-tier Tribunal's decision and remitted the appeal to be heard by any First-tier Tribunal Judge other than Judge Morris. The remitted appeal was limited to consideration of the proportionality assessment necessary under Article 8 of ECHR. The appeal was heard by Judge of the First-tier Tribunal Thanki on 25 August 2015. He allowed the appeal in relation to Article 8 of ECHR, in a decision promulgated on 16 September 2015.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Hollingworth on 4 February 2016. The permission states that an arguable error of law has arisen in the context of the scope of the judge's analysis of the failure to meet the Immigration Rules and the weight to be attached thereto, in the context of the carrying out of the overall proportionality exercise.
4. There is a Rule 24 response on file dated 14 March 2016. This refers to the First-tier Tribunal Judge describing the Appellant's and her husband's situation as unusual and exceptional. The response states that the Judge explains why he finds this and he is clearly mindful of public interest in the maintenance of effective immigration control.

### **The Hearing**

5. The Presenting Officer submitted that when the First-tier Tribunal Judge considered Article 8 he gave insufficient weight to the fact that the terms of the Immigration Rules could not be satisfied. She submitted that the judge did not give weight to public interest which he was required to do as the terms of the Immigration Rules had not been satisfied.
6. I was referred to the case of **SS Congo and Others [2015] EWCA Civ 387** which refers to the considerable weight which has to be placed on public interest. I was referred in particular to paragraphs 87 and 88 of the First-tier Tribunal Judge's decision in which reference is made to Section 117B(1). The Presenting Officer submitted that consideration under Section 117B is not limited to the factors referred to in the decision.
7. The Presenting Officer submitted that the application fails under the Rules because the financial requirements cannot be satisfied. She submitted therefore that the Appellant cannot maintain herself without recourse to public funds. She submitted that the judge should have identified this and given considerable weight to this issue. She submitted that the Appellant conceded that the terms of the Rules could not be satisfied not only based on the financial situation. I asked what other terms of the Immigration Rules could not be satisfied and I was told that the terms of Appendix FM and paragraph 267ADE could not be satisfied. She submitted that there are no insurmountable obstacles to the Appellant going back to Morocco and that the Appellant has ties to Morocco.

8. The Presenting Officer submitted that when the balancing exercise is dealt with and proportionality assessed, the fact that the Rules cannot be satisfied has not been given sufficient weight by the judge and because of this his decision is skewed when Article 8 outside the Rules is considered. She submitted that had the judge dealt with this in a different way there could have been a different outcome.
9. Counsel for the Appellant made his submissions, referring to the case of **AJ Angola [2014] EWCA Civ 1636** and **MF Nigeria [2013] EWCA Civ 1192**. He submitted that these are the root authorities and the later decisions flow from them.
10. He submitted that when it is stated that when decisions are made they should be made through the lens of the Rules, this refers to deportation cases in which the Rules are a complete code. He submitted that public interest has to be taken into account in these cases but in non-deportation cases such as this one the terms of the Rules do not cover all aspects.
11. Counsel submitted that this case turns on its own facts and it is an error if proportionality is not properly assessed. He submitted that in this case family life should be given considerable weight. The case law makes it clear that there can be family life between parents and adult children.
12. Counsel submitted that the Appellant got leave to enter as a spouse expecting this to lead to her settlement in the United Kingdom. He submitted that precariousness cannot be given as much weight as in many cases because of the basis on which the Appellant came to the United Kingdom. She has always been lawfully in the United Kingdom.
13. Counsel referred me to the lawfulness of the Rules themselves. I was referred to paragraph 33 of **SS Congo** which states that compelling circumstances need to be identified to support a claim for a grant of leave to remain outside the Rules. **SS Congo** states that this is not as strict a test of exceptionality as the requirement of “very compelling reasons” referred to in **MF Nigeria**, in the context of the Rules applicable to foreign criminals. He submitted that public interest has to be weighed against the Appellant’s and her husband’s human rights and he submitted that the judge has dealt with compelling circumstances and found that they weigh in the Appellant’s favour. He submitted that exceptionality embodies public interest and the judge dealt with exceptionality and found that this Appellant’s claim is exceptional, mainly because of her husband’s family in the United Kingdom. I was asked to give weight to the Rule 24 response on file.
14. I was asked to consider the procedural history in this case and the fact that there is only one element to this decision, which is proportionality. He submitted that the judge has used the correct approach when dealing with proportionality. The test the judge has applied is one of exceptionality and I was referred to paragraph 89 of the First-tier Tribunal’s decision. He submitted that the judge has applied an elevated test. Strict

exceptionality is not required but the judge has found that the case should succeed based on strict exceptionality.

15. Counsel referred me to the Strasbourg approach to this type of case and submitted that the relevant consideration is whether it can be shown that there are insurmountable obstacles to the Appellant returning to her own country and if there are not, is there exceptionality?. He submitted that paragraph 33 of **SS Congo** should be followed and that compelling circumstances is a formulation which is not as strict as a test of exceptionality or a requirement of very compelling reasons. At paragraph 89 of the decision the judge finds there to be exceptionality.
16. Counsel submitted that the judge has directed himself appropriately, has found the claim to be exceptional and I was asked to find that this is not too generous a view based on the facts. He submitted that there is no challenge to the findings of fact, no challenge to what the judge has taken into account and no challenge to his conclusion on to the weight to be given to public interest when weighed against the Sponsor's family life with his adult children and his one minor child. He submitted that what the Respondent is suggesting is that the matters the judge took into account should be considered again but there is no binding authority for that approach. The Judge's decision has been adequately reasoned.
17. The Presenting Officer submitted that the case of **SS Congo** has to be read in full. She submitted that the Immigration Rules are a complete code and I was referred to paragraphs 51 to 53 of **SS Congo which refer to the evidence rules and state that compelling circumstances would have to apply to justify a grant of leave to remain where the evidence rules are not complied with.** She submitted that at paragraph 53 it is stated that these Rules ensure that everyone applying for leave to remain is treated equally and fairly in relation to the evidential requirements they must satisfy and she submitted that that is not how the judge has dealt with this case. She referred to paragraph 56 of **SS Congo** and submitted that the near miss situation is irrelevant to the balancing exercise required under Article 8. She submitted that as the terms of the Rules cannot be satisfied this has to be taken into account as a factor in the proportionality assessment and that sufficient weight has not been given by the judge to relevant factors in this case. She submitted that the Tribunal has not followed the proper approach and the Respondent believes that the judge has failed to apply the terms of **SS Congo** properly.
18. She submitted that there are not different levels of precariousness. This Appellant came to the United Kingdom and knew that she could not stay unless she was granted. She submitted that her stay has always been precarious.
19. The Presenting Officer submitted that public interest has not been adequately considered. Sufficient weight has not been given to this as the terms of the Rules cannot be satisfied.

20. Counsel for the Appellant referred me to the case of **Dube UKUT 00090 (IAC)** and submitted that the terms of **SS Congo** have been properly considered and in certain circumstances “near miss” has to be taken into account. I was referred to paragraph 56 of **SS Congo**.
21. The Presenting Officer submitted that the way the judge has dealt with Section 117B is deficient. Public interest has not been fully addressed. The judge states that he has considered it but as the terms of Appendix FM of the Immigration Rules cannot be satisfied public interest should be given more weight than the weight accorded to it by the judge.

### **Decision and Reasons**

22. First-tier Tribunal Judge Thanki dealt with the procedural history of the appeal and then made his observations. There has been no dispute about the facts of the case. The judge has dealt with these thoroughly.
23. At paragraph 61 of the first-tier decision the judge states “There are occasions when the economic wellbeing of the country meant that it could be necessary on occasions to prevent a person from living in the UK even when married”. The judge makes it clear that he is aware that the maintenance requirements of the Rules under paragraph 287(v) cannot be satisfied.
24. He finds that because of the facts of this case the terms of the Rules do not cover the situation and so he goes on to deal with Article 8 outside the Rules and the case of **Razgar [2004] UKHL 27**. He deals with the Sponsor’s relationship with his adult children and his minor child and the part the Appellant plays in this. He finds that the situation is exceptional. He takes into account the maintenance of effective immigration control in the context of the public interest at paragraph 87. He is aware that only proportionality is being dealt with in the remitted hearing. He has taken into account not only the appellant’s human rights but also her husband’s and his family’s human rights in the proportionality assessment.
25. The judge does not refer specifically to the said case of **SS Congo** but I find that he has followed its terms. In proportionality assessments, if there is a “near miss” situation this should be taken into account when proportionality is assessed and if an appellant can show that there are individual interests at stake covered by Article 8, which give rise to a strong claim that compelling circumstances may exist to justify the grant of leave to remain outside the Rules, the fact that their case is also a “near miss” case can also tip the balance under Article 8 in their favour. At paragraph 81 of the decision he refers to the Appellant’s situation as unusual. At paragraph 85 he refers to the Appellant, because she came to

the United Kingdom as a spouse, having a legitimate expectation of being able to settle here and at paragraph 89 he refers to the situation being exceptional.

26. Judge Thanki followed the directions in the decision of Deputy Upper Tribunal Judge McCarthy, considered public interest and the maintenance of effective immigration control, considered the fact that the maintenance requirements and the Immigration Rules cannot be satisfied but because he finds the case to be unusual and exceptional he grants discretionary leave.
27. The judge has given adequate reasons for finding this case to be exceptional and has carried out a proper balancing exercise.
28. I find that there is no material error of law in the First-tier Tribunal's decision.

### **Notice of Decision**

29. There is no material error of law in the decision of First-tier Tribunal Judge Thanki, promulgated on 16 September 2015. This decision must stand.
30. Anonymity has been directed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray