



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/08842/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 16 April 2018**

**Decision &  
Promulgated**

**On 25 April 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MRS JUSTINA AMPONG  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms A Oji, Counsel, instructed by Amethyst Chambers

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge James (the judge), promulgated on 16 October 2017, in which he dismissed the Appellant's appeal against the Respondent's decision of 31 July 2017, which in turn refused her human rights claim.
2. The Appellant was and is married to Mr Ampong, a British citizen. The Appellant initially arrived in the United Kingdom with entry clearance as his spouse with leave running until 18 June 2017. Prior to the expiry of that leave she made an application for an extension of her leave. In refusing that application the Respondent relied on a single ground, namely

the Appellant's failure to have provided an English language test certificate in accordance with E-LTRP.4.1A of Appendix FM to the Immigration Rules. The Appellant elected to have her appeal decided without an oral hearing, a course of action which was not objected to by the Respondent. Thus the matter came before the judge on 2 October 2017.

### **The judge's decision**

3. There are essentially two important aspects of the judge's decision for the purposes of the appeal before me. First, he did not have before him any bundle of evidence from the Appellant as at the time of the writing of his decision on 12 October 2017. The absence of such evidence is noted at [12] to [15] of the decision. Second, the judge was of the belief that the Respondent had returned the Appellant's passport to her in July 2017, thus affording her an opportunity to sit a relevant English language test prior to a decision being made on her appeal. The Appellant's failure to have apparently either arranged, sat or passed an English test was relevant and counted against the Article 8 claim. The absence of any bundle of evidence was also deemed to undermine the claim. Ultimately, the judge concluded that the Respondent's decision was proportionate and the appeal was dismissed.

### **The grounds of appeal and grant of permission**

4. The grounds assert that a bundle of evidence had in fact been sent to and received by the Tribunal. It is said that the bundle was received on 2 October 2017, the day on which the judge considered the appeal (although this decision was written up and finalised some ten days later). In addition, the grounds assert that the judge was wrong to have believed that the Appellant had had her passport returned to her by the Respondent. It was her husband who had had his passport sent back to him: the Appellant's passport remained with the Respondent at all material times. Finally, it is said that the judge erred in respect of the Article 8 assessment in light of the first two matters.
5. Permission to appeal was granted by First-tier Tribunal Judge Mailer on 12 February 2018. He noted the absence of proof that the bundle of evidence had in fact been received by the Tribunal, as claimed. He noted the importance of the Appellant submitting such evidence before or at the time of a hearing in the Upper Tribunal.

### **The hearing before me**

6. The Appellant's solicitors had submitted a bundle under Rule 15(2A) of the Upper Tribunal Procedure Rules. The bundle was received at Field House the day before the hearing. Mr Tufan had a copy. Without objection from him I admitted this bundle in evidence. It contains, amongst other items, proof that the bundle of evidence relied on before the First-tier Tribunal had in fact been received at the Glasgow Hearing Centre on 2 October 2017 (pages 174-175). Page 168 is a letter from the Respondent to the Appellant confirming that her passport would not be returned to her.

7. Ms Oji submitted that there had been procedural unfairness, as the Appellant's bundle had not been put before the judge at the time he made his decision. In addition, the judge had made a factual error in assuming that the Appellant had had her passport when she had not. It was submitted that these errors were material because a full and accurately correct assessment of Article 8 had not been carried out.
8. Mr Tufan raised some doubts as to whether the errors would be material but ultimately indicated that they may be in all the circumstances.

### **Decision on error of law**

9. I am satisfied that there are material errors of law in the judge's decision.
10. First, although the Respondent's letter at 168 of the bundle post-dates the judge's decision, it is quite clearly the case that the Appellant's passport has in fact remained with the Respondent at all material times. I am unclear as to whether there was specific documentary evidence before the judge as to when or in what form the Appellant had requested return of her passport, but I am satisfied that there was no evidence to show that her passport had in fact gone back to *her*. It may well be the case that the judge simply made a mistake, perhaps believing that the passport being returned by the Respondent was that of the Appellant rather than her husband. In any event, there is an error of fact. In combination with other matters, it is material because the judge has clearly held against the Appellant the perceived fact that she had her passport and yet had taken no action in respect of the English language test. As it turns out, the Appellant had not ever had her passport and so could not have undertaken the relevant test.
11. Second, the evidence now before me does show that a bundle submitted by the Appellant was received at the Glasgow Hearing Centre on 2 October 2017. I note from the IA35 form sent out to the parties that the deadline provided for any evidence to be submitted by the Appellant was 2 October 2017 so, although the Appellant left it very late in the day, the bundle of evidence had been provided within the deadline. It then appears to be the case that this bundle was not put before the judge prior to him signing off the decision on 12 October. I do not criticise the judge for this. As seems to have happened in other cases, administrative problems do occur leading to procedural unfairness. In this case there was evidence contained in that bundle which was relevant to the overall Article 8 assessment. That is not to say that it would necessarily have led to a successful claim, but nor can it properly be said that the Appellant's case was always bound to fail.
12. I did express to Ms Oji that I have some concerns as to the prospects of this case succeeding at the end of the day. It is an undisputed fact that the Appellant has not undertaken a relevant English language test. Strictly speaking, she was and is unable to satisfy the English language requirement under Appendix FM. This in turn would make it harder for her to succeed under Article 8. However, the retention of her passport by the

Respondent is something that needs to be considered as part of an overall assessment. So too is the evidence contained in the bundle. In light of the above I set the judge's decision aside.

### **Disposal**

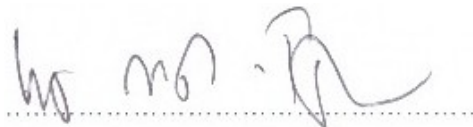
13. Both representatives were agreed that if there were material errors of law the appeal should be remitted to the First-tier Tribunal. In light of paragraph 7.2 of the Practice Statement and the particular circumstances of this case I agree. There has been procedural unfairness and an error of fact, both of which have led to an incomplete assessment of the Appellant's case. As discussed at the hearing, the appeal should be re-decided after an oral hearing.
14. I set out directions to the First-tier Tribunal, below.

### **Notice of Decision**

**The decision of the First-tier Tribunal contained material errors of law and I set it aside.**

**I remit this appeal to the First-tier Tribunal.**

No anonymity direction is made.



Signed

Date: 23 April 2018

Deputy Upper Tribunal Judge Norton-Taylor