



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14701/2017

THE IMMIGRATION ACTS

Heard at North Shields  
On 10 August 2018

Decision & Reasons Promulgated  
On 23 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

MAM JARJU BRUNTON  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Liew of Immigration Advice Centre Ltd

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hands promulgated on 6 March 2018, which dismissed the Appellant's appeal against the respondent's decision to refuse to grant leave to remain.

### Background

3. The Appellant was born on 16 June 1986 and is a national of Gambia. On 27 October 2017 the Secretary of State refused the Appellant's application for leave to remain on article 8 ECHR grounds.

### The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Hands ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 4 April 2018 Judge Lever gave permission to appeal stating inter alia

"The Judge had noted that this was a narrow issue as to whether the appellant had at the date of application past a language test to A2 standard. It is arguable that the failure of the respondent to return the appellant's passport in a timely manner in order for the test to be taken is something the Judge should have considered. Further as this was an appeal under A8 the circumstances at the date of hearing was relevant and it is arguable the Judge relied too heavily on the fact that the appellant had not passed the test at the date of application."

### The Hearing

5. For the appellant, Ms Liew moved the grounds of appeal and explained that at the date of application the appellant had been unable to take an English language test because the respondent held her passport. The appellant has made repeated requests for return of her passport, and has been ignored by the respondent. At the date of hearing the appellant was able to produce a satisfactory English language test. Ms Liew told me that the Judge was wrong to focus solely on the date of application, and should have taken the respondent's conduct into account.

6. For the respondent Mr Diwnycz told me that in 2014 the same appellant had an appeal to the Upper Tribunal on the same point, and in 2014 he had personally apologised to the appellant because her passport had not been returned to her. He told me that the grounds of appeal had considerable force because the respondent had ignored requests for the return of the passport at a time when the appellant had section 3C leave. Mr Diwnycz said that the respondent's conduct prevented him from resisting the appeal.

7. Both parties' agents asked me to set the decision aside and substitute my own decision allowing the appeal. Both parties' agents agreed that at today's date the appellant meets the substantive requirements of appendix FM.

## Analysis

8. The Judge was correct to focus on the date of application when considering appendix FM of the immigration rules. At [29] the Judge finds that the appellant could return to Gambia and make an application for entry clearance from there. At [29] & [30] the Judge appears to apply a threshold before considering article 8 ECHR grounds of appeal, and finds that, because there are no exceptional circumstances, the respondent's decision is not disproportionate.

9. In R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children. However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

10. The Judge's decision contains a material error of law. I set it aside. I am however able to substitute my own decision.

11. The appellant entered the UK on 17 October 2014 as the spouse of a British citizen with leave to remain until 15 June 2017. On 15 June 2017 the appellant applied for further leave to remain as the wife of the same British citizen. The respondent decided that the appellant meets the suitability requirements of appendix FM. The respondent accepts that the appellant now meets all of the eligibility requirements, but at the date of application the appellant could not produce an English language test certificate in speaking and listening at a minimum level A2.

12. The focus in the appeal before me was firmly on the respondent's decision to retain the appellant's passport. The appellant has successfully passed an English language test. Parties' agents agree that at today's date the appellant meets the substantive requirements of appendix FM.

13. The respondent accepts that the appellant is in a genuine and subsisting relationship with her British citizen husband. Article 8 family life is therefore established.

Article 8 ECHR

14. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "*what has now become the established method of analysis can therefore continue to be followed...*". In Agyarko [2017] UKSC 11, Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

15. I have to determine the following separate questions:

- (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
- (ii) If so, has the right to respect for this been interfered with
- (iii) If so, was the interference in accordance with the law
- (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
- (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

16. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

17. The fact that the appellant can meet the requirements of the immigration rules, & that the appellant's ability of the English language exceeds what is required by the immigration rules, both indicate that the public in interest in immigration control does not carry greater weight than the appellant's article 8 family life.

18. The respondent says that the immigration rules are a complete code governing the proportionality exercise. Applying the respondent's own code, the appellant meets the requirements, so that the public interest in immigration control is satisfied and the appellants exclusion is not necessary,

19. On the facts as I find them to be, the appellant's ability in the English language exceeds the level required by the immigration rules (The appellant produces an

English Language certificate at level B1). The difference between the appellant and the respondent is so narrow that the respondent's decision is rigid and harsh. As it is a harsh decision turning on a technical point, and as the appellant meets the substantive requirements of the immigration rules. The respondent's decision must be a disproportionate interference with article 8 family life (which the respondent accepts exists)

20. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

21. This appeal succeeds on article 8 ECHR (family life) grounds.

Decision

22. The decision of the First-tier Tribunal promulgated on 6 March 2018 is tainted by material errors of law and is set aside.

23. I substitute my own decision

24. The appeal is allowed on article 8 ECHR grounds.

A handwritten signature in black ink, appearing to read 'Paul Doyle', written in a cursive style.

Signed  
Deputy Upper Tribunal Judge Doyle

Date 15 August 2018