



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/30857/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 9<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 21<sup>st</sup> September 2018

Before

MRS JUSTICE MOULDER  
SITTING AS AN UPPER TRIBUNAL JUDGE  
DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL

Between

GULALA MOHAMMAD KARIM  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K McCarthy Counsel, instructed by Quality Solicitors (AZ Law)  
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Iraq of Kurdish origin. She came to the UK in January 2002 with entry clearance as a spouse. She was accompanied by two children CK and AK, who she claimed were her own. She was granted indefinite leave to remain (ILR). However, following allegations made in 2007 by these children of domestic abuse, she admitted that the man she came to join was not her husband but her brother and that they were not parents but aunt and uncle of the two children. In light of this admission the respondent revoked her ILR and in July 2008 served her with form IS151A.

Subsequently she was refused an EEA residence card in December 2013. On 19 March 2015 she applied for leave to remain on the basis of her relationship with her husband, RY who is also from Iraq. She had married RY in December 2003 in an Islamic marriage and had been living together as husband and wife for over eleven years. On 2 September 2015 the respondent refused her application. The respondent stated in her refusal letter that she could not succeed under the Immigration Rules. In more detail, it was stated:

- (1) that she could not qualify under the partner route because she fell foul of the suitability requirements, by virtue of having obtained a settlement visa by deception at the British Embassy in Tehran in December 2001 and that “[i]t is therefore considered that your presence in the UK is undesirable and you fail to meet S-LTR 1.6 and Appendix FM;”
- (2) that she could not succeed under the parent route as there was no evidence to suggest she had children in the UK;
- (3) that she could not meet the private life route requirements because of falling foul of the suitability requirement set out in paragraph 276ADE(1)(i) and in addition could not meet any of the substantive requirements of this Rule, as set out in paragraph 276ADE(i), (iii), (iv), (v) and (vi). As regards paragraph 276ADE(i) and (vi) the respondent stated that she was not satisfied there were any significant obstacles to her integration.

2. The suitability requirement referred to in paragraph 276ADE is set out at S.LTR1.11 and 1.6.

S-LTR 1.1. states that:

“the applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR 1.2 to 1.7 apply.”

S-LTR 1.6 states that:

“the presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5), character, conduct associations or other reasons make it undesirable to allow them to remain in the UK.”

3. The respondent’s decision went on to conclude that the appellant also failed to show she could succeed on Article 8 grounds outside the Rules, as the evidence indicated she and her partner (who both had medical conditions) would be able to access medical facilities in Iraq. Nor had her husband produced medical evidence of his medical conditions or established that they were life-threatening.
4. The appellant’s appeal came before Judge Keith of the First-tier Tribunal (FtT) who in a decision sent on 12 October 2017 dismissed it. The judge accepted that the

appellant was in a genuine and subsisting relationship with Mr RY and had an established family life with him. The judge found that the circumstances surrounding the appellant's actions in deceiving the respondent to gain entry clearance told heavily against her; that she had never worked in the UK even when she had ILR; that whilst the medical evidence relating to Mr RY confirmed a list of complex chronic medical conditions and whilst the medical report from Dr Ibrahim and the DWP assessment (confirming he was on the lower rates for personal care and high mobility rate for the same benefit) suggested he would be incapable of supporting himself, the recent evidence showing he visited Iraq for three to four weeks in or around April 2017 indicated he was able to care for himself and develop coping strategies to do so; that Mr RY's claims to have found when visiting Iraq that there were no medical facilities for him to access were unreliable as he had not made serious attempts to enquire for himself; that Mr RY would be able to access financial support in Iraq at least until the appellant could find work; that the appellant would be able to gain entry to the KRI and also obtain a CSID card; and that the appellant as a university graduate in agricultural engineering would be able to find work notwithstanding her own limited health problems. At paragraphs 69-73 the judge set out his "conclusions" as follows (the reference to an unreported case will be explained later):

- "69. In terms of the Appellant's family life in the United Kingdom with her husband and considering the Immigration Rules, I considered that the Appellant would have failed to meet the suitability requirements under Section S-ILR.1.6 as her presence is not conducive to the public good. The facts of her case were not comparable to the unreported case on which she sought to rely, where in that case the party was prevailed on by her spouse; volunteered her deception, which was not in any event central to that application. In the Appellant's case, she pressured her brother into participating in the deceit. She did not volunteer her deception, which was only discovered in the most serious circumstances, when her own niece and nephew reported her to the police for her actions in burning them - circumstances which apparently did not result in her criminal prosecution because her niece and nephew were unwilling to press charges.
70. There are not insurmountable obstacles to the Appellant's return and continuation of her relationship with her husband in Iraq and she would be able to integrate into Iraq on her return, noting the ability of her husband to travel unaided with ease; the access to financial support and friends; and the fact that she would be returning to the relative safety of her home town. I do not find that her anxiety would prevent her from doing so, or that she has a genuine fear of violence as a result of a family feud.
71. While the Appellant has established a family life in the United Kingdom and her return would significantly interfere with that so as to engage Article 8, considering Section 117B of the 2002 Act, in assessing whether the Respondent's decision was proportionate, little weight should be established to the Appellant's family life when she established it by presence in the United Kingdom unlawfully and when Mr Y was aware of

the deceit in question. Her nephew is also so aware, and is, in any event, an adult with leave in his own right to remain in the United Kingdom and working. In contrast, the Appellant is a burden on the taxpayer in the sense that she lives off her husband's state-benefits and accommodation and has never worked, even prior to the discovery that her leave to remain was unlawfully obtained. Weighed in favour of refusing leave to remain was the maintenance of effective immigration rules, which the Appellant had quite deliberately flouted.

72. With regard to the Appellant's mental health in the context of her private life, once again that private life was developed when her immigration status was precarious for the purposes of Section 117B(5) of the 2002 Act. I also considered that her condition was related to the current uncertainty, which would soon be resolved and that the medical intervention to date with regard to the Appellant was relatively limited.
73. I concluded that the Respondent's decision to refuse leave to remain was proportionate both in respect of the Appellant's family and private life."

5. The appellant's grounds of appeal targeted two main aspects of the judge's approach. The first concerned his approach to the suitability requirements which was said to be contrary to the respondent's policy entitled "Appendix FM 1.0 Family Life (as a Partner or Parent) 5 year routes", August 2017 which stated, inter alia, that "[i]t is possible for an applicant to meet the suitability requirements even where there is some criminality" and also contrary to the evaluation made by UTJ Bruce in an unreported case Hafiza Bibi v ECO OA/15109/2013. Having referred to the respondent's guidance entitled "General grounds of refusal of checks (which gives a number of examples of conduct not conducive to the public good) UTJ Bruce stated at paragraph 28 of this case that:

"this admittedly non-exhaustive list of examples does not include a previous reliance on a false document and that the kind of conduct required to properly invoke the provision appears to be at the extreme end of the spectrum of misconduct"

and added that Section 2 of 5 (headed "Considering Entry Clearance") categorises false representations within the category of "adverse behaviour" (defined as using deception, false representation, fraud, forgery, non-disclosure of material facts or failure to cooperate) and demarcating that from the category of "non-conducive behaviour" which covers matters such as national security. This ground also complains that the judge failed to take account of the appellant's evidence as regards her motive for entering the UK on a false basis, namely that "she was caring for her niece and nephew in extremely difficult circumstances in Iran and wanted to bring them to safety."

6. The second main target of the grounds was the judge's treatment of paragraph 276ADE of the Rules which was said to be flawed because it failed to take into account

the country expert report of Professor Joffe and the country evidence before it regarding the very difficult socio-economic and humanitarian situation in Iraq. In his report Professor Joffe stated that a Kurd from the KAR can only return there if he or she is “pre-cleared” which requires the Kurdish authorities being satisfied that the persons concerned were (a) Kurdish and (b) had previously been resident in the KAR “although it is by no means clear what this process actually involves”. Since the appellant said she had no Iraqi documentation, the grounds stated that the FtT should have considered whether this lack would pose “very significant obstacles to her integration back into Iraq.”

7. In the context of the test laid down in paragraph 276ADE of “very significant obstacles”, it was also argued that the judge had applied the wrong test since he treated it as “insurmountable obstacles” test which is a separate test set out under EX.1(b) of Appendix FM.
8. The grounds also submitted that the judge’s errors in respect of the Immigration Rules necessarily compromised his treatment of the appellant’s Article 8 circumstances outside the Rules.
9. The grounds also alleged that in not giving the appellant an opportunity to respond to documentary evidence served by the Presenting Officer on the morning of the hearing, the judge acted in a procedurally unfair way. However, this ground was not pursued by Ms McCarthy before us and in any event the document in question (the travel document issued to the appellant by the British Embassy in Tehran) appears to have been included in the respondent’s bundle prepared for the FtT anyway, the only difference being that the one produced by the Presenting Officer highlighted the passport number contained in the numerical data included at the end of this same document. Hence this was not new evidence capable of taking the appellant by surprise. Nor in any event was there any objection to its production raised by Counsel for the appellant.
10. We are grateful to the written and oral submissions we received from Ms McCarthy and Mr Kotas. Ms McCarthy’s submissions amplified the written grounds. Mr Kotas’s submission and his Rule 24 response canvassed that citation of UTJ Bruce’s unreported decision did not comply with paragraphs 11.2 – 11.3 of the Practice Directions Immigration and Asylum Chamber of the First-tier Tribunal and Upper Tribunal and in any event the judge had regard to the decision and found the facts to be very different. The appellant’s challenge to the judge’s findings on suitability were no more than disagreement with the lawful and reasonable findings of the judge on this issue.
11. As regards the challenge raised in the grounds to the judge’s treatment of paragraph 276ADE, Mr Kotas submitted that it was clear from the Court of Appeal guidance (in **Kamara** [2016] EWCA Civ 813) on “integration” that the issue of feasibility of return was outwith the scope of this provision; the appeal had not raised protection issues and the appeal was limited to Article 8. Further, the judge’s finding dealt with the feasibility of return issue in its entirety.

## Our Analysis

12. It is convenient to deal first with the challenge made in the grounds to the judge's treatment of paragraph 276ADE. We consider the challenge fails to identify any error of law.
13. It is true that the judge wrongly referred to the test set out in paragraphs 276ADE as being "insurmountable obstacles" (see first sentence of paragraph 70). We are also prepared to accept for the purposes of this appeal that "very significant obstacles to integration" is a less demanding test than "insurmountable obstacles". However, the findings made by the judge in the remainder of this paragraph were clearly material to the issue of "very significant obstacles" and identify a number of failures indicating that there would not be such obstacles: the ability of her husband to travel back to Sulaymaniyah unaided with ease; their access to financial support and friends; and the fact that she would be returning to the relative safety of her home town. It was entirely open to the judge to make those findings on the evidence before him, just as it was open to him at paragraph 68 to find unreliable the evidence she produced to support her claim she would be at risk of violence as a result of a family feud. Whether or not a slip of the tongue (as may be the case), the incorrect reference to "insurmountable obstacles" did not lead the judge to disregard the considerations relevant to the assessment of paragraph 276ADE.
14. Nor do we consider there is any force in the submission that the judge erred in failing to have regard to the country evidence concerning violence and poor socio-economic conditions in Iraq. Nothing in that evidence indicated that there was any significant levels of violence in the KAR. Furthermore, on the finding of the judge, whatever might be the socio-economic circumstances of the generality of persons in the KAR, the judge found that she and her husband would have financial and organisational support from family and/or friends. At paragraph 65 the judge concluded that her husband would have financial support available from the friend who had assisted him during his visit and at paragraph 66 the judge stated:
  - "66. With regard to the Appellant, I find that just as her husband was able to travel safely to Suleimaniyah without any difficulty, there was no evidence to suggest that the Appellant would face such difficulty. While there is a difference that Mr Yahia has a British passport while the Appellant has an Iranian one endorsed with a British visa (which she did not provide to this Tribunal) it is reasonable to conclude that the Appellant's Iraqi birth location would have been included on her passport and that with the financial and organisational support of her husband, as well as local friends in Suleimaniyah, she would be able to obtain both leave to enter the Kurdish Regional Government area of Iraq, but also be able to obtain a CSID card which is vital for accessing government benefits when returning to Iraq."
15. As regard Professor Joffe's report, it is evident from his own account of the pre-clearance procedure that the appellant would have no difficulty in establishing that she was (1) Kurdish and (2) had lived in the KAR previously. Professor Joffe's report

does say that he was “not aware of any such procedure that is actually in operation”, but equally his report did not assert that such a procedure did not actually exist and the particulars on which the judge’s assessment of the appellant depended – that she would be able to get a CSID “with the financial and organisational support of her husband, as well as local friends in Sulaiymania” were not addressed by Professor Joffe’s report. We would add that the judge’s assessment of the appellant’s specific ability to obtain a CSID was entirely in accord with the Tribunal’s country guidance in Iraq as confirmed in modified form by the Court of Appeal in AA (Iraq) [2017] EWCA Civ 944 at C9 and C10.

16. We are sceptical of Mr Kotas’ submission that assessment of the feasibility of return is outwith the scope of paragraph 276ADE. There is nothing in the wording of paragraph 276ADE to suggest that “very significant obstacles” is to be construed as precluding difficulties in obtaining clearance to return to a country or area of a country or in obtaining documentation necessary for social and economic survival. Certainly there may be cases where the failure of an applicant pursuing a claim based on family and private life grounds to make a specific protection claim reflects negatively on the former, but once a decision maker has to address the paragraph 276ADE requirements, his or her assessment must take into account all relevant facts including feasibility of return. However, we do not need to reach a definitive view on this matter for the reason that the judge’s treatment of paragraph 276ADE at paragraph 70 must be read together with paragraphs 66 where he concludes the appellant would be able to return.
17. We turn then to the appellant’s first ground which assails the judge’s treatment of the suitability requirements. Here we do discern legal error.
18. Mr Kotas’s objection regarding the judge’s citation of the unreported case is misplaced because, irrespective of whether the judge adhered strictly to the Practice Directions, he had cited it. Furthermore PD 11.3 states that “...the Tribunal will not exclude good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination.” That is important in respect of UTJ Bruce’s determination because it contained not simply her evaluation of the general “conducive to the public good” ground of refusal, but quoted from the Home Office policy, so that it was relevant as a source as well as for evaluation. Furthermore, we are not aware that the main propositions made in it by UTJ Bruce are to be found in any reported Tribunal case or higher court authority. In any event, whether by reference to UTJ Bruce’s determination or by direct reference to the reasoning therein, it was both appropriate and fair for the FtT judge to address the underlying argument that her deception was not within the scope of the suitability ground applied by the respondent against the appellant. It was not therefore (as argued by Mr Kotas) a question of whether the judge was obliged to attach weight to an unreported decision.
19. Objection to the FtT judge’s citation of UTJ Bruce’s determination does not overcome the fundamental difficulty with the judge’s treatment of the suitability issue. Having cited the case and made clear at paragraph 48 his awareness of the reasoning within it (the judge recorded the submission of appellant’s Counsel as being that the

respondent's own guidance did not demonstrate that deception did not make her presence not conducive to the public good), it was incumbent on the judge to address it. He failed to do so. All he did in paragraph 70 was to state that "[t]he facts of her case were not comparable to the unreported case on which she sought to rely" and to say in terms that the deception was particularly serious. That analysis did not engage with the underlying legal point being advanced which was that deception was not the type of conduct covered by the "not conducive to the public good" ground. Whether or not that argument on analysis is legally correct is not a matter we need to seek to decide here. The judge's error resided in not engaging with it at all. In our judgment this error of omission constitutes an error of law.

20. However, we are not entitled to conclude that the judge was wrong to dismiss the appeal unless satisfied this error was material. We find it was not. Even if the judge had concluded that the suitability requirement was met, the appellant was still required to show that she satisfied the substantive requirements of the Immigration Rules or that there were compelling circumstances outside the Rules warranting a grant of leave. In the appellant's grounds the only challenge made as regards the judge's treatment of the substantive requirements of the Rules is to the judge's treatment of paragraphs 276ADE and we have already found that treatment to be both lawful and reasonable. There is no suggestion that in his assessment of "very significant obstacles" the judge placed any reliance on the appellant's lack of suitability. It was not because of anything to do with her character and conduct that the judge concluded she and her husband could return to Iraq without any significant difficulties.
21. As regards the judge's assessment that the appellant could not succeed outside the Rules, it must first of all be borne in mind that by virtue of failing to meet the requirements of the Rules there was also a significant public interest to be weighed against the appellant: see **Hesham Ali** [2016] UKSC 60. Secondly, the grounds failed to mount any effective challenge to the judge's proportionality assessment at paragraph 71. Whether or not the judge had found the suitability ground of refusal did not apply, it remained that the appellant had not met the Rules and had an adverse immigration history relating to her manner of entry. Regardless of her motives, he had been in the UK unlawfully since 2008 and her private life with her partner was established and maintained when she had wrongly obtained entry clearance and when leave was revoked. She had no lawful basis to stay. Taking a different view about the suitability requirement would have made no difference to the outcome of the appeal.
22. For the above reasons we conclude that although the judge erred in his treatment of the suitability issue this was not a material error and the decision to dismiss the appellant's appeal was both lawful and reasonable.



No anonymity direction is made.

Signed

Date: 9 July 2018

A handwritten signature in black ink that reads "H H Storey". The letters are written in a cursive, slightly slanted style.

Dr H H Storey  
Judge of the Upper Tribunal