IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006563
First-tier Tribunal Nos:
HU/50182/2022
LH/00306/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 June 2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

KHADIJA KHALID EL-ANEZI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Appiah, Counsel, instructed by Direct Public Access
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 16 October 2023

DECISION AND REASONS

1. This is an appeal by an undocumented Bidoon currently living in Iraq against a decision of the respondent refusing her entry clearance for the purposes of family reunion as the wife of a refugee. The appeal has previously been determined unsatisfactorily. I had found an error of law and set aside the decision of the First-tier Tribunal and directed the case be heard again before me. The reasons for finding an error of law are attached hereto. I have corrected a small number of typing errors which I had allowed to go in the version that was previously sent to the parties and for that carelessness I apologise.

2. The appeal is brought on human rights grounds. It is for the appellant to prove on the balance of probabilities the facts necessary to establish her case and then for me to evaluate the claim and determine if any interference to her private and family life or the private and family life of those in the United Kingdom who want to be reunited with her arises from the decision and if it does, if it is justified and proportionate.

3. I regret too my delay in promulgating this decision. I receive a draft from the typist on 20 October 2023 but neglected to perfect it.

4. I say at this stage that this is an appeal that will be allowed and I intend to set out my reasons below.

5. Although the appeal has to be considered on human rights grounds I cannot imagine any circumstances in this case where it would succeed on human rights grounds other than the very important one that the appellant satisfies the requirements of the Rules and therefore (ordinarily) there can be no question of the refusal of entry clearance being justified on proportionality grounds.

6. The Entry Clearance Officer refused the application with regard to most of paragraph 352A of HC 395 but the real problem was that the respondent did not accept that there was a subsisting marriage. I accept that as a matter of law it is not sufficient for the purposes of this Rule for there to have been a marriage and for there to still be the legal shell. There needs to be a subsisting relationship. The respondent's reasons for finding there was not such a relationship were essentially very skimpy evidence of an ongoing relationship since the appellant's husband left her and their children to make a life for himself in the United Kingdom.

7. This is a convenient point to mention that the children were successful eventually in their appeals before the First-tier Tribunal and have subsequently joined their father in the United Kingdom and indeed were present at the hearing room at Field House but did not take any part in proceedings or stay in the hearing room when evidence was given.

8. There is not a great deal of evidence before me that was not before the First-tier Tribunal. There is some further evidence of interaction in the form of WhatsApp or similar social media but it is not compelling.

9. However there are other parts of the case that are important. It was the appellant's husband's case when he claimed asylum in the United Kingdom that he was a married man and that they had married before leaving Kuwait. His story, at the very least, has the advantage of consistency.

10. He gave evidence before me with the assistance of an interpreter. He appeared a rather tense witness who did not engage readily with the questions asked but he was at all times courteous and it would be quite wrong to draw any adverse inferences from his quiet demeanour. The fact is that by adopting his statement and answering questions he confirmed that he wants his wife to join him in the United Kingdom and to help look after their two children. I have no reason to doubt that he is doing other than a competent job as a single parent father but he was very clear in his evidence that he sees the father's role and the mother's role as different and he wants the mother to be there.

11. He was cross-examined but said nothing that in any way damaged or discredited his case.

12. He confirmed that he had returned to see his family in Iraq and that when he had done that the person accommodating his wife, who was a family friend, altered his personal arrangements so that the appellant and her husband could share a bedroom. This is a clear indication that their relationship is subsisting.

13. There were not many photographs but there were photographs of the appellant and her husband together. He said that most of the contact with his wife was by telephone supplemented later by WhatsApp when that became possible.

14. There was a statement from the appellant. Clearly this could only be given limited value because it was not subject to cross-examination but she said what needed to be said.

15. There is not a great deal of evidence of the continuing relationship between the appellant and her husband after they parted. It is *possible* that this is because the relationship came to an end and they are now involved in an elaborate ruse for the appellant to get into the United Kingdom by pretending, dishonestly, that their relationship is subsisting.

16. However, I have to look at what is probable and certain things are quite clear. The difficulties facing Bidoons in Kuwait are very well-known and it is unsurprising that a person would take an opportunity to leave Kuwait and establish himself in another country where that could be achieved and the appellant's husband has done that. He has made it plain from the earliest opportunity that he is a married man. When it became practicable, he encouraged his wife and children to join him.

17. I accept that he has returned to Iraq to spend time with them and he has given some money for their support out of his modest means. It may be that I have not been told the whole truth but it may be that he is just not very demonstrative. Some people are not. He has clearly gone to some effort to get his children to be with him and to encourage his wife to be with him. The most likely reason for this is that he wants to resume their life together. The evidence is not compelling but I find it is probable that this is a genuine relationship. The marriage may have suffered a little because they were apart but it was separation that they wanted not because they were ill at ease with each other but because they wanted to build a new life and now that opportunity has come. The alternative explanations are improbable and I reject them.

18. It follows that I am satisfied on the point that matters. The appellant's husband and his wife have a subsisting marriage and satisfy the Rules. It was accepted sometime ago that the auxiliary requirement of medical evidence has been satisfied. There is no basis for refusing the case on human rights grounds. The public policy considerations are set out in the Immigration Rules which broadly are supportive of the families of refugees joining them in the United Kingdom. The children are here and the mother should come too.

Notice of Decision

19. I allow the appeal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 June 2024

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Between

EL-ANEZI KHADIJA KHALID
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Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Appiah, Counsel, instructed by DPA Solicitors
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 13 July 2023

REASONS FOR FINDING ERROR OF LAW

1. The appellant is a Bidoon. She was born in 1985. With her children, a daughter born in 2013 and so now 10 years old and a son born in 2016 and so now 7 years old, they appealed against the decision of the Entry Clearance Officer refusing them entry clearance as the family members of a refugee present in the United Kingdom. The First-tier Tribunal allowed the appeals of the present appellant's children and those decisions, as far as I know, are not the subject of any challenge. However, the judge dismissed this appellant's appeal.

2. At paragraph 30 of the Decision and Reasons the First-tier Tribunal Judge refers to the children being aged 13 and 16. This disagrees with the age shown in the Respondent's decision, the DNA reports and the TB report which are consistent with each other. I am satisfied that judge attributed the wrong age to this appellant's children.

3. Permission to appeal was given by the First-tier Tribunal. The judge granting permission was particularly concerned that the judge had not conducted a

holistic Article 8 balancing exercise and particularly had not had regard for the interests of her children.

4. In order to understand this decision I must look very carefully at what the First-tier Tribunal actually did.

5. The judge began by considering the respondent's reasons for refusal. The respondent was concerned that the appellant (then described as the first appellant) had produced little evidence to show that she was in fact married to her purported husband. The only evidence of living together as part of a family unit was four photographs and only one of those showed the first appellant and her sponsor together. Further, although at the time of making the application it was her case that her sponsor had been in the United Kingdom for three and a half years, the only evidence of any interaction during that time was one money transfer receipt in September 2020.

6. Additionally, the first appellant had not provided "TB certificates" to show that the appellants were in good health. They were not provided with the applications as they should have been and when the appellant replied, late, to a request for the additional evidence she provided a supporting statement from the sponsor, evidence that she had attempted to organise an appointment to obtain a TB certificate and copies of the money transfer receipt. As far as I can see the TB certificate was never produced with the application as it should have been and that is one of the reasons the application was refused.

7. The judge accepted that the appellant's husband was born in Kuwait in 1983 and left Kuwait in December 2018.

8. The sponsor gave evidence before the First-tier Tribunal Judge who had no reason to doubt his claim to be unable to produce the marriage certificate because he is an "undocumented Bidoon".

9. In his asylum interview when he was asked to give the names of all three appellants he answered satisfactorily and asserted his claim to have married the first appellant on 1 May 2012. It was the appellants' case that they left Kuwait in January 2019 for Iraq where they applied for family reunion in July 2021. Covid pandemic travel restrictions prevented them leaving Kuwait sooner than they did.

10. The appellant, her children and their sponsor took DNA tests and the results showed that the purported children were in fact the children of the sponsor and the appellant. Further, the judge accepted that the sponsor visited the appellants in Iraq. The sponsor went to Iraq in February 2020 and stayed until September 2020. It was the sponsor's case he had visited the UN to assist with the applications and had sent money since arriving in the United Kingdom but confirmed he had done that on only three or four occasions. He produced evidence of money transfer of just over £1,000 in September 2020 and almost £200 in March 2022. Money said to be transferred for the appellants' benefit was not sent directly to them.

11. The sponsor lived in a single bedroom flat in the United Kingdom and was supported with Universal Credit and housing benefit and income from his work as a carer. The judge noted that evidence "purporting to be social media discussions between the sponsor and the appellants had been provided" but it was in Arabic and had not been translated and the judge declined to admit it into evidence in the absence of a translation (see paragraph 18 of the Decision and Reason).

12. The judge noted there were only four photographs and only one of those showed the sponsor and first appellant. He was asked why he had not produced more photographs and he said that he had given the DNA tests results which he thought were more important. The judge then directed himself on the requirements of the Rule and the relevant cases.

13. The Respondent confirmed that the DNA test results satisfied the relationship requirement in the rules and that TB test results had been produced that satisfied the health certificate requirements.

14. The respondent relied on the refusal letter and drew attention to the paucity of evidence about the state of the marriage. Particularly, only four photographs had been produced and only one showed the sponsor and appellant together. There were only three money transfers since the sponsor came to the United Kingdom in 2018. This, the judge found, did not show a subsisting relationship.

15. It was the appellant's case that the sponsor and first appellant were living together before the sponsor left for the United Kingdom. In his asylum interview the sponsor gave details of his family in Kuwait and identified the appellant and his children. His evidence in support of his asylum claim was believed and the DNA evidence had proved beyond doubt that he was the father of his purported children and his wife was their mother.

16. The judge accepted that the sponsor and [first] appellant were the parents of the other appellants and the children were living as part of the family unit when the sponsor left Kuwait. The judge found that they satisfied the requirements of paragraph 352D of the Immigration Rules and that refusing their application breached their rights under Article 8 of the European Convention on Human Rights and allowed the appeal in respect of them. The judge said the appeal was allowed "so that they can be reunited with the Sponsor".

17. However, he was not persuaded that there was a subsisting relationship between the appellant and sponsor. Paragraph 32 is important. The judge said:

> "Whilst I accept that the [First] Appellant and the Sponsor married before the Sponsor came to the United Kingdom, regrettably, I do not accept that the [First] Appellant has established that the marriages is subsisting. Very little evidence has been provided of communication between the parties and it is most unfortunate that the evidence that was provided is in an Arabic and cannot be considered. Had it been translated into English, it is possible that this could have been founded upon as of a continuing relationship. Furthermore, there is little evidence of ongoing financial support provided by the Sponsor. Very few money transfer receipts have been produced to the Tribunal. The photographic evidence of the relationship is minimal. The Sponsor last saw the Appellants in Iraq nearly 2 years ago. That is historic evidence, which, in itself, is insufficient to establish that the relationship with the [first] Appellant is subsisting. I do not accept that the [First] Appellant meets the requirements of paragraph 352A of the Immigration Rules. In the absence of establishing that the marriage is subsisting, it cannot be said that the [Sponsor] has established that he has family life with the [First] Appellant thereby engaging Article 8 ECHR. The [First] Appellant will need to submit a fresh application for entry clearance with the necessary supporting documentation".

18. There are two grounds of appeal. Ground 1 contends that the evidence does not support the finding of fact. I have to say that I find the judge's decision rather surprising. It seems that the sponsor claimed asylum soon after arrival in

the United Kingdom and talked about his wife and children. His claims about the children seem to be well founded and certainly the fact of the children being related to him and his wife is supported by scientific evidence of a very persuasive kind. The sponsor's circumstances are modest. He is drawing significant benefits in the United Kingdom. I make it plain that there is no suggestion he is not taking anything other than that to which he is entitled and he is working but he is short of money. It is unremarkable that there has not been evidence of frequent financial transfers. I take Counsel's point in the grounds of appeal that £1,226 was sent after the sponsor had returned from Iraq but there was nothing that I can see which would have indicated how long it would have lasted the sponsor's wife. The big problem here is there was no evidence of a continuing relationship. Given that we live in an age of electronic communication in which most people seem to have fairly ready access to the internet, it is, perhaps, surprising that there is not more evidence of a subsisting relationship.

19. I find that the judge erred in excluding the evidence in Arabic and then seemingly giving no weight to the oral evidence that there was communication between the appellant and her husband. Clearly the judge cannot treat untranslated evidence in a language other than English (or perhaps, in very particular circumstances, Welsh) as admissible but just as telephone cards can support oral evidence of there being telephone calls, I see no reason why even untranslated correspondence cannot be used to support oral evidence that there has been correspondence and, in a case as finely balanced as this, that might have been enough.

20. For the reasons given above, I find that ground 1 is, just, made out.

21. Ground 2 contends that the Article 8 balancing exercise was inadequate. It says the judge ought to address the effect of the decision with regard to the best interests of the children. Counsel refers to the Home Office policy for family reunion for refugees and notes the instruction:

> "Where an applicant does not meet the requirements of the Rules for entry clearance or leave to remain, caseworkers must, in every case, consider the family life (as a partner or parent) private life and exceptional circumstances guidance to consider whether there are compassionate factors which may warrant a grant of leave outside the Immigration Rules".

22. The problem with this is the judge has allowed the appeals of the children. They do satisfy the Rules and the judge found that sufficient reason in itself to allow their appeals on human rights grounds. There are no clear findings on the circumstances they face in Iraq and although it is easy to think of them living in modest or difficult circumstances that might not be the case. Further, the fact they have permission to come to the United Kingdom does not require them to come to the United Kingdom. They do not have to leave their mother. They can remain there together.

23. The judge was not helped by the lack of detail in the evidence but he should, at the very least, have made a clear finding about the best interests of the children and that could have illuminated the article 8 balancing exercise.

24. The First-tier Tribunal erred in law. I set aside its decision.

25. There has to be a rehearing of the appeal.

a The following points are established and will remain so unless necessarily displaced by further evidence:

b The appellant and her sponsor are married to each other, they are undocumented Bidoons and they are the parents of children identified in the First-tier Tribunal's Decision and Reasons.
c The sponsor has visited the appellant Iraq and has made some financial contributions to support them.
d The appellant will want to consider serving further evidence. A detailed statement of her and their children's circumstance in Iraq may helpful as would better evidence of any communication between the appellant and her sponsor.
e The renewed will be listed on the first open date after 24 August 2023 before me if reasonably practicable.
f Any application to adduce further evidence should be place before me if reasonably practicable and if I am to preside and the continuance hearing. The parties must notify the Tribunal forthwith if an interpreter is needed to assist any witness.

Notice of Decision

26. For all these reasons I find that the First-tier Tribunal erred in law. I set aside its decision and I direct that the appeal be heard at a resumed hearing in the Upper Tribunal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber
24 July 2023