IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002924

First-tier Tribunal No: HU/58342/2022
LH/00371/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 August 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

MARIYAM MOHAMED SULEIMAN ABULGASEM
(No anonymity order made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Holmes of Counsel by CVP
For the Respondent: Mr Lindsay a Senior Home Office Presenting Officer by CVP

Heard at Phoenix House (Bradford) on 31 July 2024

DECISION AND REASONS

1. The Appellant was born on 1 January 1994. She is a citizen of Sudan. She appealed against the decision of the Respondent dated 20 December 2022, refusing her entry clearance under the refugee family reunion rules. She appeals against the decision of First-tier Tribunal Judge Curtis, promulgated on 22 May 2023, dismissing the appeal.

The First-tier Tribunal decision of 22 May 2023

2. The Judge found as fact that there is a family life between the Appellant and her husband. Being satisfied that the refusal to grant entry clearance amounted to an interference with that Article 8(1) right he proceeded to consider proportionality. He properly weighed in the balance the public interest considerations set out in Part 5A of the Nationality Immigration

and Asylum Act 2002. This included, under the heading of s117B(1), the fact that the Appellant had been found to have relied on false documents in her previous application. Although he accepted that the Appellant and Sponsor are in a genuine relationship, and that the effect of the decision was to impose a ten year ban on entry, the Judge did not accept that this in itself rendered the decision disproportionate. Nor was he satisfied that anything turned on the difference in treatment between the Appellant (the spouse of a refugee seeking family reunion) and spousal applicants under Appendix FM, who would not, in the same circumstances, be subject to an automatic ban:

> "61. As a matter of general principle, then, it does appear that applicants who have recourse to Appendix FM are in a more favourable position to those who do not, and who have to apply under Appendix Family Reunion (Protection) (or, under the now-deleted para. 352A – as this Appellant did). They are in a more favourable position because they are not automatically subject to an automatic ban on re-entry. That said, there is no reason to suppose that this is anything other than a distinction deliberately brought about by the Rules' draftsperson. That is, it seems to me that the Rules (which are effectively the Secretary of State for the Home Department's declaration of where the balance lies between the competing private and public interests) have been deliberately drafted so as to treat those who submit false documents in an application for family reunion with a refugee differently from those that submit such documents in an application under Appendix FM by imposing on the former a (10-year) entry ban but imposing no such entry ban on the latter."

Permission to appeal

3. Permission was granted for the Appellant to argue that the decision below is flawed for perversity, a failure to take material matters into account, and taking irrelevant factors into account.

4. In essence, Ground 1 is that the difference in treatment between the two classes of Spouse applicant, namely those of refugees and those who are not refuges, is either directly or indirectly discriminatory, and offends Article 14 of the European Convention on Human Rights (ECHR).

5. Ground 2 is that there are insurmountable obstacles to family life continuing abroad as the Sponsor is a refugee. This was not adequately considered in the proportionality balancing exercise.

6. Ground 3 is that the Sponsor's status as a refugee in the United Kingdom is a material matter of particular significance to any wider article 8 analysis and it is perverse that re-entry bans apply to family reunion provisions when refugees are forced to flee their country of origin and family reunion is a key aspect of the Refugee Convention.

7. Ground 4 is that the Judge erred in relation to the legislative history of the general grounds of refusal.

8. I will not repeat each submissions raised through the helpful skeleton arguments, many of which are repetitious in different forms, but will deal with them in the discussion.

The First-tier Tribunal decision of 22 May 2023

9. Judge Curtis made the following findings relevant to this hearing:

> "Article 8 Outside the Rules
> …49. Turning to necessity and proportionality… [t]he maintenance of effective immigration controls is in the public interest (s.117B(1)). It is in the public interest that persons who seek to enter the UK are able to speak English (s.117B(2)). There is little evidence that the Appellant speaks English.
> 50. It is also in the public interest that persons who seek to enter the UK are financially independent (s.117B(3)) … I am satisfied that he intends to support his wife in the UK…
> 52. There is a clear public interest in ensuring that the maintenance of a system of effective immigration controls is not undermined by those who would seek to deceive the Respondent by producing in support of an application documents that were not genuine. There is a clear public interest in imposing an entry ban on certain applicants who resort to those dishonest actions. If there were no such ban, an applicant who had been adjudged to have acted dishonestly, as here, could promptly reapply for entry clearance bearing no real consequence for those actions. It follows in my view that it is not a fortiori disproportionate for the Rules to provide for a 10-year entry ban, given the circumstances of the Appellant's (and sponsor's) conduct…
> 55. However, what the UT made clear in the preceding paragraph is that "there are clear, cogent policy reasons why an application tainted by dishonest representation etc should be refused…"
> 57. …Part 9 of the Rules (which effectively replaced para. 320) still provides for a 10-year exclusionary period for certain classes of applicant (which includes the Appellant) where deception has been used in an entry clearance application (see the entry (f) in the table in para. 9.8.7). I therefore take into account, when assessing the weight of the relevant public interest, the UT's expression of there being "cogent policy reasons" for why para. 320(7B) (and, it must surely follow, its successor in Part 9) would deal "in a graduated way, with the effect of [previous] dishonesty on future applications for entry clearance" [17]. That is, the previous dishonesty used in the Appellant's first application increases the weight of the public interest in maintaining effective immigration control…
> 60. However… Appendix FM appears not to provide for the refusal of an application thereunder where false documents were previously provided and there is no mention of the application of a re-entry ban in the context of applications made under that appendix. It appears, then, that if a person's application is refused under S-EC.2.1 there is nothing, as a matter of principle, stopping that person making a subsequent application (provided they ensure not to include the false documents previously provided). Para. 9.8.2 of Part 9 (which is potentially relevant to applications under Appendix FM) only applies where the application was made outside the relevant time period in para. 9.8.7. In this context, then, provided that an applicant under Appendix FM reapplied sooner than 10-years after the application for which false documents were provided, the decision maker could not refuse under Part 9.
> 61. As a matter of general principle, then, it does appear that applicants who have recourse to Appendix FM are in a more favourable position to those who do not, and who have to apply under Appendix Family Reunion (Protection) (or, under the now-deleted para. 352A – as this Appellant did). They are in a more favourable position because they are not automatically subject to an automatic ban on re-entry. That said, there is no reason to suppose that this is anything other than a distinction deliberately brought about by the Rules' draftsperson. That is, it seems to me that the Rules (which are effectively the Secretary of State for the Home Department's declaration of where the balance lies between the competing private and public interests) have been deliberately drafted so as to treat those who submit false documents in an application for family reunion with a refugee differently from those that submit such documents in an

application under Appendix FM by imposing on the former a (10-year) entry ban but imposing no such entry ban on the latter.

62. I do not accept … that that differential treatment has the automatic consequence of rendering the Respondent's refusal disproportionate…a proportionality assessment requires a fact-specific analysis and I have adopted the recommended balance sheet approach.

63. On the Appellant's side of the scales are the fact that I have found the relationship to be a genuine one which is currently subsisting. The Appellant and sponsor were married in 2011 and it was a relationship that was severed in 2015 because of the sponsor's flight from Sudan as a refugee. After several years in the UK the sponsor and the Appellant decided they wanted to be reunited. I do note that there are no children of the marriage, whose interests I would have been required to take account of.

64. Whilst noting that the UT have made clear that they were not finding that it would never be disproportionate to uphold a decision under para. 320(7A) (and, by logical extension, para. 9.8.1) I am satisfied, in the circumstances of this appeal, that the strength of the public interest in maintaining effective immigration controls is greater than the strength of the Appellant and the sponsor's family life. I do not accept that unjustifiably harsh consequences would be caused to any person by the Respondent's refusal. The interference by the Respondent with their right to respect for their family life is both necessary and proportionate to the legitimate aim of promoting the economic well-being of the UK through the maintenance of effective immigration controls.

65. Accordingly, the appeal must be dismissed because the Respondent's decision is not unlawful under section 6 of the Human Rights Act 1998."

Discussion

10. In assessing the Grounds, I acknowledge the need for appropriate restraint by interfering with the decision of the First-tier Tribunal Judge bearing in mind its task as a primary fact finder on the evidence before it and the allocation of weight to relevant factors and the overall evaluation of the appeal. Decisions are to be read sensibly and holistically; perfection might be an aspiration but not a necessity and there is no requirement of reasons for reasons. I am concerned with whether the Appellant can identify errors of law which could have had a material effect on the outcome and have been properly raised in these proceedings. I have carefully considered the helpful skeleton arguments and oral submissions, but will not repeat them separately.

11. Regarding Ground 1, I do not accept that the Judge materially erred in law for these reasons.

12. Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC) guides me to the view that:

> 1. Unless a point was one which was Robinson obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules.
> 2. A party that fails to identify an issue before the FtT is unlikely to have a good ground of appeal before the UT.

13. The grounds of appeal of 7 November 2022 to the Respondent's decision state that:

> "the decision is unlawful under section 6 of the Human Rights Act 1998."

14. The only reference to the ECHR in the skeleton argument of 5 January 2023 to the First-tier Tribunal was at [24]:

> "refusal of entry clearance to the Appellant is a clear breach of Article 8 of the ECHR as the Appellant meets all the requirements of the Immigration Rules."

15. There was no reference to Article 14 in either the grounds of appeal or the skeleton argument of 18 April 2023 to the First-tier Tribunal.

16. Article 14 of the ECRH was not therefore argued before Judge Curtis whereas it was in *Baio v Denmark (Application no. 3850/10)*:

> "28. On 18 July 2006, before the High Court of Eastern Denmark (Østre Landsret), the applicants instituted proceedings against the Ministry of Refugee, Immigration and Integration Affairs and relied on Article 8 of the Convention, alone and in conjunction with Article 14 of the Convention…"

17. *DH and Others (Application no. 34210/19)* promulgated on 25 July 2024 does not assist the Appellant as in that appeal the first instance court did have before it Article 14 specifically pleaded.

18. Likewise, I am not satisfied that the structure of questioning identified in *R (on the application of JP) v SSHD [2019] EWHC 3346 (Admin)* at [145] is of assistance in this appeal as Article 14 was pleaded as a ground of challenge in that appeal (see [90]):

> "The grounds of challenge in each claim are:
> …
> iii) the scheduling rule is incompatible with Article 14 of the ECHR."

19. Whilst Article 8 is a gateway to Article 14, that gateway was not approached before the Judge. The Judge therefore considered it within the correct context. It was not *Robinson* obvious as it was not argued by Counsel before the Judge. I bear in mind in that regard *Lata* as above and *Talpada, R (oao) v SSHD* [2018] EWCA Civ 841at [69]:

> Courts should … not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them.

20. The grounds in support of the application are not a bare statement in a way that is analogous to an order. That is because they are the focussed arguments that seek to explain to a Judge why another Judge may have arguably materially erred. It has to state sufficient to point out alleged errors. An order is the conclusion of arguments.

21. The grounds of appeal before the Judge were not therefore wide enough to encompass an Article 14 argument as they did not mention it, and the Judge did not materially err in not considering it.

22. The differential treatment issue was considered in the decision of the Judge at [62] within the Article 8 balancing exercise, that being the

framework within with the ground of appeal was brought and argued. It did not therefore deprive the appeal of any legal substance as it was considered within the Article 8 framework which was the legal basis of the appeal. The Judge was plainly aware that there is a difference in treatment between a Sponsor and applicant under Appendix FM, and a Sponsor and applicant under the family reunion rules as it was addressed in [58 to 62] within the proportionality balancing exercise. The Judge at [52] and [57] deals with justification of an entry ban for those who submit false documents. The issue was therefore proportionality which the Judge dealt with at [48 to 65] with the factors in her favour being identified at [63].

23. In addition a difference between the facts considered in *JP* and those in this appeal, is that the Immigration Rules are sufficiently flexible to allow all criteria relevant to Article 8 ECHR to be considered in each case. The measure impugned in *JP*, however, was by its nature not capable of being applied in that way as explained in [36] of *JP*:

> "The effect of the scheduling rule is that a victim of trafficking who is also an asylum seeker will not have their application for ECAT leave determined until their application for asylum has been granted and then a decision on refugee leave has been made. A victim of trafficking who is not an asylum seeker (and has not applied for any other form of status that could result in a grant of leave) will have their application for ECAT leave determined at the same time as they receive a positive conclusive grounds decision."

24. The Judge correctly self-directed at [64] that it would be open to the Tribunal to allow an appeal in a sufficiently compelling case, notwithstanding that the application had been held to fail under the general grounds of refusal. The Judge assessed the case lawfully, according to its merits. He lawfully determined the appeal at [62] to [65].

25. Regarding Ground 2, I am not satisfied that the Judge materially erred for these inter-related reasons.

26. The Judge was alive to the relevant facts – see for example para [63], where it is noted that the relationship 'was severed in 2015 because of the sponsor's flight from Sudan as a refugee'.

27. The Judge was entitled to find that the couple can continue to maintain their family life by way of visits to a country other than Sudan and modern means of communication. Family life takes many forms. It is not limited to a couple living together or being together all the time. Contrary to the oral submission of Mr Holmes, Mr Lindsay did not say that the couple can live in Ethiopia, merely that family life can continue there. That has always been the Respondent's position in that it can continue through visits and using modern means of communication in the same way it has for many years. There was therefore no insurmountable obstacle to family life continuing abroad, as the family life was simply a different one to that enjoyed by others.

28. Foreign law is a matter of fact, to be proved by expert evidence *(Hussein & Anor (Status of passports: foreign law) [2020] UKUT 250 (IAC)* at para (3) of the judicial headnote). No such evidence was provided to the Judge. He was therefore entitled to find that the Appellant had failed to show she would be unable to maintain family life outside the United Kingdom with her Sponsor.

29. As part of the assessment the Judge was guided by *Mumu (paragraph 320; Article 8; scope) Bangladesh [2012] UKUT 143 (IAC)* at [17] in that:

> *"there are clear, cogent policy reasons why an application tainted by dishonest representation etc should be refused. The same is true of paragraph 320(7B), which deals, in a graduated way, with the effect of such dishonesty on future applications for entry clearance. The fact that paragraph 320(7B) is subject to the exceptions set out in paragraph 320(7C) cannot rationally be used, in conjunction with Chikwamba, in order to destroy the efficacy of paragraph 320(7A)."*

30. The Judge applied the balancing exercise to the Article 8 proportionality assessment and in doing so noted the factors in favour of the Appellant for example at [63] and those that weighed against her including those within s117(B) of the Nationality, Immigration and Asylum Act 2002.

31. Regarding Ground 3, I am not satisfied that this adds anything to Ground 2 or that the Judge materially erred for these inter-related reasons. The Judge was plainly aware that the refusal decision affected both the Appellant and her Sponsor who was a party to the deception. His rights as a refugee did not add any additional weight to the Appellant's case. The right he had to a family life, and the type of family life he had, had not been interfered with by his status but by their deception. That was contingent on the assessment of whether the Immigration Rules were met in relation to the application that had been made and the proportionality of the Article 8 decision upon which the Judge made findings open to him on the evidence.

32. Regarding Ground 4, I am not satisfied that the Judge materially erred as the Judge was clear at [37] that consideration of Appendix Family Reunion (Protection) did not form part of the determination of the Appellant's appeal, and consequently the history of the changes to the Immigration Rules was irrelevant.

Notice of Decision

33. The Judge did not make a material error of law.

Laurence Saffer

Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

14 August 2024