



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/48105/2013

THE IMMIGRATION ACTS

Heard at Glasgow

**Determination
Promulgated**

On 18 July 2014

On 10 September 2014

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS**

Between

MRS ILISHWA ISAAC

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Singh, EMLC

For the Respondent: Mrs M O'Brien, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Fox dismissing an appeal against refusal to vary leave to remain as a spouse.
- 2) According to the application for permission to appeal, at the hearing before the First-tier Tribunal the judge did not allow the appellant's husband to give oral evidence because he had not provided a witness statement in accordance with the relevant Practice Direction. This assertion was supported by a statement from Mr Olawale, the solicitor who appeared on

behalf of the appellant before the First-tier Tribunal. At the start of the hearing we informed Mr Olawale that he would not be able to represent the appellant before the Upper Tribunal as he would be regarded as a witness for the purpose of this hearing. Accordingly, following an adjournment, Mr Olawale arranged for his colleague, Mr Gurcharanjeet Singh, to represent the appellant.

- 3) The appellant is a national of Syria and was born on 6 November 1970. She was given leave until 27 September 2013 as the spouse of Mr Yonan Simon. He is an Iraqi national who is now a British citizen. The couple were married in 2000 and lived in Syria for 6 months or more around that time. Mr Simon came to the UK in 2002. The appellant came to join him in July 2011. It appears that the reason her application for further leave could not succeed under the Immigration Rules was because she did not meet the English language requirement. She sought in her appeal to rely on the Human Rights Convention. She argued that to return her to Syria would breach Articles 2 and 3 and that to remove her from the UK would be a disproportionate interference with her family life under Article 8.
- 4) The Judge of the First-tier Tribunal accepted that the removal of the appellant to Syria would be a breach of Articles 2 and 3. The judge of the First-tier Tribunal was of the view at the time of the hearing in February 2014 that the appellant and her husband would be able to carry on their family life in Iraq. There were no insurmountable obstacles to the carrying on of family or private life elsewhere. The refusal decision was not disproportionate under Article 8.
- 5) At paragraph 9 of his determination the Judge of the First-tier Tribunal recorded that the appellant's husband did not attend the hearing to give evidence. It was also recorded that the appellant's bundle did not contain a statement from the appellant's husband. It was recorded that the appellant's representative acknowledged the absence of the appellant's husband and was given an opportunity to apply for an adjournment but stated on behalf of his client that he wished to proceed.
- 6) This account in the determination is contradicted by the statement supplied by Mr Olawale in support of the application for permission to appeal. In his statement he records that he sought the permission of the First-tier Tribunal for the appellant's husband to give oral evidence on the day of the hearing although there was no witness statement included in the appellant's bundle. The respondent objected. Mr Olawale states that he tried to explain that the evidence of the appellant's husband was material to the just determination of the appeal. He agreed to proceed with the hearing when the judge sustained the objection of the respondent in respect of the failure of the appellant to comply with the Practice Direction.
- 7) Mr Olawale further contended in his statement that he had submitted that the appellant's husband was a former asylum seeker from Iraq and, taken

together with the appellant's Syrian national, the only country where they could enjoy family life was the UK.

- 8) At the hearing before us the attention of the parties was drawn to the Record of Proceedings prepared by the Judge of the First-tier Tribunal. According to this the appellant had attempted to call her husband as a witness. There had been an objection and the judge had refused to allow her husband to give evidence.
- 9) On behalf of the respondent, Mrs O'Brien stated that it was her understanding that no adjournment had been sought before the Judge of the First-tier Tribunal. In her view the proper course would have been for the Presenting Officer to have sought an adjournment so as to have proper notice of the evidence the witness was to give. The judge should either have adjourned the appeal or excluded the evidence.
- 10) So far as the substantive appeal was concerned, Mrs O'Brien submitted that the respondent's position was that it was reasonable for the couple to carry on family life elsewhere.
- 11) We expressed our view that the Judge of the First-tier Tribunal had erred in law by refusing to allow the appellant's husband to give evidence or to adjourn for the purpose of a witness statement being provided by him. It was then put to the parties that having regard to the length of time the appellant and her husband, in particular, had been in the UK and having regard to current conditions in Syria and Iraq, there appeared to be insurmountable obstacles to the family life of the appellant and her partner continuing outside the UK. No further submissions were made.

Decision

- 12) The Judge of the First-tier Tribunal was clearly mistaken in his determination in recording that the appellant's husband was absent without any explanation. In the interests of fairness the proper course for him to have taken at the hearing was either to adjourn the appeal for a witness statement to be taken from the appellant's husband or, if this was not appropriate, to give proper reasons for not allowing the appellant's husband to give oral evidence. The failure by the Judge of the First-tier Tribunal to follow this course was unfair and amounted to an error of law on the basis of which the decision must be set aside.
- 13) In terms of paragraph EX.1.(b) of Appendix FM, where the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen and there are insurmountable obstacles to family life with that partner continuing outside the UK then not all of the eligibility requirements for leave to remain as a partner require to be satisfied. In particular the appellant would not have to show that she satisfied E-LTRP.4.1, which is the English language requirement on the basis of which the refusal decision was made in the current appeal.

- 14) The appellant is Syrian. Although she still has some family members in Syria, having regard to the internal conflict in that country we are satisfied that this conflict constitutes an insurmountable obstacle to the couple carrying on family life in Syria.
- 15) The appellant's husband came to the UK from Iraq around 12 years ago. He has been in the UK since then and is now a British citizen. Having regard to the current conflict and uncertainty in Iraq, we are satisfied that there are insurmountable obstacles to family life being carried on in Iraq. We therefore conclude that paragraph EX.1(b) applies to the appellant and she need not satisfy all the eligibility requirements in Appendix FM, including E-LTRP.4.1. There is no suggestion that she does not meet the suitability requirements. Accordingly her appeal ought to succeed under Appendix FM.

Conclusions

- 16) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
- 17) We set aside the decision.
- 18) We re-make the decision in the appeal by allowing it.

Anonymity

- 19) The First-tier Tribunal did not make an order or direction for anonymity. No submission has been made to us for an order to be made and we do not perceive any requirement for such an order.

Signed

Date

Upper Tribunal Judge Deans

Fee Award

Note: This is not part of the determination

In the light of our decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award. We make no fee award for the following reasons. The application as originally presented to the respondent did not succeed because the English language requirement was not satisfied. At that time the situation in Iraq was different from the current situation and it was not apparent that there were insurmountable obstacles to family life being carried on in Iraq. We also take into account the failure by the appellant to provide before the First-tier Tribunal a witness statement for her husband in accordance with directions made.

Signed

Date

Upper Tribunal Judge Deans