Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03399/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 July 2019	**On 19 August 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

AYESHA SHEIK HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar, Counsel, instructed by Direct Access
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Carroll ("the judge"), promulgated on 8 March 2019, by which she dismissed the Appellant's appeal against the Respondent's decision of 15 January 2018, which in turn had refused the Appellant's human rights claim. The human rights claim had essentially been made on the basis of claimed ten years' continuous lawful residence in the United Kingdom, acquired on the basis of a number of grants of limited leave to remain. The Appellant, who at the time of the claim had one child

but at the date of the hearing before the judge had two, also relied on her family life in the United Kingdom.

2. In refusing the human rights claim, the Respondent asserted that the Appellant had spent a significant amount of time outside of the United Kingdom, there being a total of 966 days away, including two periods of in excess of 180 days. In light of this it was said that paragraph 276B(i)(a) of the Immigration Rules was not satisfied. The claim was then considered under Article 8 in its wider context. It was said that this could not assist the Appellant.

The judge's decision

3. The judge replicated the table of alleged absent days which had been set out in the reasons for refusal letter. She then went on to address certain periods relating to the longer periods of alleged absence from the United Kingdom and whether there were any compelling or compassionate circumstances relating to these absences. In essence, the judge did not find aspects of the Appellant's evidence to be credible. She found that there had not been adequate explanations for a number of the absences and that as a result of this the Appellant could not satisfy the requirements of paragraph 276B(i)(a). The judge concluded that no other aspects of the Rules could be met. In assessing Article 8 outside the context of the Rules the judge acknowledged the existence of the Appellant's then two children, but concluded that there were no exceptional or compelling circumstances in the case.

The Appellant's case

4. The grounds of appeal essentially attack the judge's consideration of the evidence relating to the absences. There is a specific ground relating to the assessment of the children's best interests but at the hearing before me Mr Gajjar, in my view quite properly, did not seek to pursue this.

5. Mr Gajjar relied on the grounds, in particular 1 to 6. The thrust of his submissions was that the judge had failed to consider and/or make findings on and/or provide reasons in respect of material aspects of the Appellant's evidence relating to the longest of the absences from the United Kingdom. He submitted that in light of these errors the judge's conclusion that the Appellant had been out of the United Kingdom for in excess of 540 days without there being any compelling or compassionate circumstances relating to these absences was wrong, and that the total number would have fallen below the figure of 540 days if she had properly addressed the Appellant's evidence. Therefore, he submitted that the errors alleged are material.

The Respondent's case

6. Ms Cunha submitted that there are no errors. The judge was of the view that the Appellant's evidence was inconsistent and evasive. Relevant aspects of that evidence had been specifically dealt with thereafter. Ms Cunha also submitted that even if there were errors and one was to discount the absences relating to those, the total number of absences from the United Kingdom would remain in excess of 540 days and therefore the errors would not be material.

Decision on error of law

7. I conclude that there are material errors of law in the judge's decision.

8. The first issue relates to the issue of a miscarriage suffered by the Appellant in 2013. There was evidence from a medical professional before the judge which purported to confirm that a miscarriage had in fact occurred, that the Appellant has suffered from a depressive episode as a result, and had received cognitive behavioural therapy whilst abroad for a period of time. In addressing this issue at paragraph 27 of her decision, the judge finds that there was no explanation for the failure to supply this evidence with the human rights claim, or indeed with the notice of appeal. This criticism may have been well-founded but what it does not do is address the substance of the evidence or make any findings of fact in respect thereof, or indeed to provide any reasons as to why the evidence was rejected if that were the case. In my view, this error is, when seen in light of other matters to which I will refer below, material because it goes to an explanation for a relatively significant period of absence from the United Kingdom. Beyond that, the reason for that aspect of the absence would potentially be capable of amounting to a compelling or compassionate circumstance. In addition, if the period relating to the miscarriage itself and subsequent treatment for mental health problems were taken into account, it would, as it were, knock off a relatively significant number of days from the total figure of absences.

9. The next issue which the judge has not adequately addressed relates to the Appellant's hospitalisation following a road traffic accident in June 2013. She was admitted to hospital and then spent a period of time recovering from this. A medical professional only deemed her fit to fly again in September 2013. This evidence also represented a fairly significant period of time which was capable of amounting to a compelling or compassionate circumstance in the Appellant's case.

10. The judge states in paragraph 25 that it was "unclear" as to what the Appellant was doing in May 2013. The difficulty with this statement is that it appears to fail to address evidence that was before her relating to delays in the Appellant's ability to change her name. It may be that if this

evidence had been addressed it would have been rejected: the point is that it was not dealt with.

11. Paragraph 24 relates to the Appellant's claim that a passport had been taken away by her family members and this had caused part of her inability to return to the United Kingdom. The judge appears to reject this evidence on the basis that the Appellant was "clearly able to travel to and attend her own wedding on 14 February 2012".

12. The Appellant's evidence, as contained in her witness statement, asserted that her passport had been taken away and that she had been effectively under house arrest by family members. In due course she had been able to escape and was thereafter able to marry her husband on the stated date. On the Appellant's case it was not a question of being freely able to travel, but of her taking positive action in difficult circumstances in order to achieve the outcome. It is not clear from paragraph 24 that the judge considered the specific evidence put forward or provided an adequate reason for rejecting this evidence. Ms Cunha submitted that a judge is entitled to reject evidence where it is inherently implausible. That may in principle be the case. However, the judge herself has not said that this aspect of the Appellant's evidence was inherently implausible and on the face of the witness statement I can see no basis upon which such a label could be attached to this particular aspect of the case.

13. At the outset of the judge's findings she stated that the evidence was characterised by evasiveness and that there were significant inconsistencies. There is some merit in the grounds of challenge which suggest that this particular observation is unreasoned. However, even treating it as a preamble as to what follows, it is the substance of the findings and reasons given in support thereof which is of importance. A general observation at the outset cannot of itself cure any deficiencies in what follows.

14. At the hearing itself, and with the best efforts of the two representatives, there was an attempt to recalculate the total number of absences from the United Kingdom on the basis that a number of the errors were made out. This did not prove a straightforward task. The errors that I have identified do remove from the equation what in my view are a very significant number of the absent days, at least in respect of whether appropriately compassionate circumstances existed in relation to them. A further point is that the judge herself appears to have reduced the number of applicable days in respect of the lengthy period out of the country in 2010/2011. At paragraph 21 the judge indicates that the absence of a good explanation from the Appellant only started running from 7 March 2011 and not from the figure initially given by the Respondent of 26 November 2010. To that extent the judge herself was reducing the total.

15. Bringing all of the above together, I conclude that the errors are material because it is, at least on my view of the figures, more likely than not that the total number of unexplained absences from the United Kingdom would

be less than 540 and that there would be no single absence of more than six months. To that extent, if the errors had not been committed the Appellant could (I need put it no higher) have met Rule 276B which in turn would have in effect been dipositive of the Article 8 claim (see for example TZ Pakistan [2018] EWCA Civ 1109).

16. It is therefore appropriate to set the judge's decision aside.

Disposal

17. In my view this is a case which needs to be remitted to the First-tier Tribunal, having regard to paragraph 7.2 of the Practice Statement. As I trust is clear from what I have already said in my decision, there are relatively complex matters relating to findings of fact on various periods of absence from the United Kingdom. There would also need to be further findings of fact in respect of the Appellant's two children. Although the current change in circumstances has played no part in the error of law decision, I do note that there are pending applications for both the children in respect of registration as British citizens. This is an issue which may need to be considered by the First-tier Tribunal subject to any possible issue of it amounting to a "new matter". That is something that the First-tier Tribunal will need to keep under review and receive information on from the parties.

18. No anonymity direction is made.

Notice of Decision

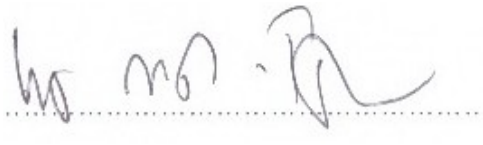
The decision of the First-tier Tribunal contains errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. **This appeal is remitted to the First-tier Tribunal for a complete re-hearing with no preserved findings;**

2. **The remitted hearing shall not be conducted by First-tier Tribunal Judge Carroll.**

Signed  Date: 12 August 2019

Upper Tribunal Judge Norton-Taylor