Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32663/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 February 2016	**On 27 May 2016**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAYSAM AL BITAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Appeared in person without legal representation

DECISION AND REASONS

1. I will hereafter refer to the parties as they were before the First-tier Judge, i.e. Mrs Al Bitar will be referred to as the appellant and the Secretary of State as the respondent.

2. The appellant appealed to a Judge of the First-tier Tribunal against a decision of the respondent dated 7 August 2014 refusing to vary her leave to remain in the United Kingdom.

3. The appellant had met her husband in 2012 when they were studying in Brighton. They married in November 2013 and wished to remain together here. Her husband is an Iranian born British citizen who came to the United Kingdom in 2004 and was recognised as a refugee. The application was refused on the basis that her husband's income did not meet the required threshold of £18,600.

4. The Judge concluded that the appeal could not succeed under the Immigration Rules, but allowed it under Article 8 outside the Rules. The Judge noted that a proportionality evaluation called for a balancing assessment of a range of factors rather than being a hunt for insurmountable obstacles. The Judge noted that by the date of hearing the appellant's husband appeared to be above the required earnings limit, the bank statements were in healthy credit, the appellant spoke English well, she said that she had no relatives in Jordan, in her application form she had referred to grandparents and aunts, but the Judge had not asked about them at the hearing and there was also evidence that the couple had undergone tests for infertility and hoped to start fertility treatment. Investigations had revealed that her husband suffered from a condition which required surgery. There were significant health risks in this regard. The Judge concluded that in light of the couple's ability to support themselves financially, their English language skills, concerns that it would run contrary to tradition for the appellant to live alone in Jordan, her good immigration history, the time that had lapsed since the application was made including periods of delay not of her making, well-known volatility and security issues in the Middle East currently and her husband's medical condition the refusal was a disproportionate interference with the right to respect for family and private life.

5. The respondent sought and was granted permission to appeal against this decision on the basis that the necessary threshold had not been crossed and that the circumstances could not properly be described as exceptional, and there had been a failure to factor in matters which were not in the appellant's favour.

6. As noted above, the appellant was unrepresented at the hearing. I explained to her the difficulties she might face in trying to argue that there was no error of law in the decision bearing in mind that she is not a lawyer, and that Mr Avery would be arguing that there was an error of law. Nevertheless she was keen to proceed and so, having checked that she had all the necessary paperwork and that her English language skills were good enough for her to proceed in English, the hearing went ahead.

7. In his submissions Mr Avery argued that the Judge had failed to consider whether there were compelling or exceptional evidence or circumstances to justify a consideration outside the Rules at all, citing the decision of the Court of Appeal in SS

(Congo) [2015] EWCA Civ 387. The Judge had gone straight into assessing the situation under Article 8 outside the Rules. The Judge had failed to identify exceptional or compelling circumstances or why he should depart from the framework of the Rules which although they were not a complete code contained the general conditions. He had noted that the appellant could apply for entry clearance from outside the United Kingdom. He had not asked the appellant about the relatives to whom she had referred on the form. The fact that there was no clear time estimate as to how long an entry clearance application in Jordan would take was not really material. Exceptional circumstances could not be found on those facts. The maintenance of immigration control had been ignored as a relevant factor at paragraph 34. There was no mention of section 117 of the 2002 Act. The Judge had failed to adopt a proper structured approach. If the Tribunal agreed then the appeal should be dismissed as the appellant had the alternative of making an entry clearance application.

8. In her submissions the appellant said her situation was still the same in that she could not go back to Jordan as she had no family there. They were in the United Arab Emirates. She could not live by herself in Jordan away from her husband as tradition did not allow that and also she was now 33 weeks pregnant and had been unwell with complications, having to go to hospital every week. She could not travel at the moment. She wanted to be with her husband who gave her full support. Also she belonged to her husband after marriage and therefore could not go to Abu Dhabi as previously she could have a visa dependent on her father prior to her marriage but according to the Rules in the UAE she could not have a residence visa any longer dependent on her father so she could not go there. Also if she went to Jordan with the baby the baby could not have any rights there to Jordanian ID. It would be like being a foreigner there. She would love to have family and private life with her husband and child who had the right to live with her parents. There was good care in the United Kingdom and the child would be born in hospital here. She herself had been suffering from diabetes during pregnancy and there was a risk of the baby suffering from hypoglycaemia after she was born. She argued that these amounted to exceptional circumstances and that the Judge's decision was therefore incorrect. Not letting her remain had affected her in so many ways in life and she had experienced a lot of stress and they were not able to live normally like married people. Also she was a pharmacy graduate but could not work because her passport was with the Home Office and she was losing more and more time in her practice year by year and she loved her job and wanted to be productive and help society.

9. Mr Avery had no points to make by way of reply.

10. I reserved my determination.

11. In SS (Congo) it was said at paragraph 40 that the appropriate general formulation for cases where a person is applying for leave to enter the United Kingdom is where they can show that compelling circumstances exist which are not sufficiently recognised under the new Rules to require the grant of such leave and that this

formulation was aligned to that proposed earlier in Nagre in relation to the general position in respect of the new Rules for leave to remain, (i.e. as in this case) adopted by the Court of Appeal in Haleemudeen. It was noted by the Court of Appeal that this was a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of an application of Article 8 in the usual run of cases.

12. Following on from this, it is also the case that it is necessary for a Judge to effect a proper balancing exercise in determining proportionality, and I see force in the point made by Mr Avery that the assessment in this regard is essentially one-sided. The point was made at paragraph 2 of the grounds that the appellant came to the United Kingdom for a specific circumstance, namely to study and her anticipated residence was therefore a short term one. No doubt all the factors referred to by the Judge at paragraph 34 are relevant factors, but I consider that the Judge erred in law in concluding that they amounted to compelling circumstances such as to require the grant of leave in this case.

13. As a consequence I find the Judge erred in law. However although I note Mr Avery's submission that the appeal can be determined immediately, I think it is necessary for there to be factored into an evaluation of proportionality the fact that the appellant is now pregnant, and has explained in greater detail than I think was done previously the reasons why she says she cannot return to Jordan, cannot go and live with her family in the UAE and the problems that her child would experience in gaining any kind of status in Jordan in any event. There also requires to be clarified the issue of any further relatives of the appellant in Jordan. The Judge did not take up the point made in her application form that she has grandparents and aunts there. That is a matter that needs to be explored further also. Accordingly I have concluded that the appropriate course of action in this case is for the appeal to be heard in the First-tier Tribunal and I direct that it be heard at Hatton Cross by a judge other than Judge R Sullivan.

No anonymity direction is made.

Signed Date 27 May 2016

Upper Tribunal Judge Allen