



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

Appeal Number: OA/09985/2013

THE IMMIGRATION ACTS

Heard at Field House

On 6 August 2014

Determination

Promulgated

On 12 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

PETRU GUGLEA

Appellant

and

ENTRY CLEARANCE OFFICER - WARSAW

Respondent

Representation:

For the Appellant: No representation

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Moldova and his date of birth is 30 March 1981. He made an application for entry clearance as a partner under Appendix FM. His application was refused in a decision of 4 October 2013 by the Entry Clearance Officer in Warsaw on the basis that the appellant did not meet the English language requirements of the Rules. The

appellant appealed against the decision of the Entry Clearance Officer on the basis that he spoke English to a satisfactory standard and there was no English language test centre in Moldova and he was unable to travel outside Moldova because his passport was with the British Embassy there. It was asserted by the appellant that a test centre is now in Moldova and he is booked on a course in June 2013. His wife, the sponsor, was 36 weeks' pregnant.

2. The Entry Clearance Review Manager maintained the decision of the Entry Clearance Officer because the appellant could have requested the return of his passport in order to travel outside Moldova in order to take the test.

The Decision Before the First-tier Tribunal

3. The appellant's appeal was allowed under the Immigration Rules by Judge of the First-tier Tribunal Canavan in a decision that was promulgated on 25 April 2014. The appeal was determined on the papers at the request of the appellant. The judge made findings at paragraphs 6 to 8 as follows:

"6. The appellant has provided a perfectly reasonable explanation for not being able to provide an approved English language test certificate with the application. No issue was taken with his claim that an approved test provider was not available in Moldova at the time. Although the appellant had not formally claimed an exemption in the application form it seems clear that the circumstances were such that they might engage paragraph E-ECP.4.2(c) of Appendix FM. The paragraph provides for an exemption where there are exceptional circumstances that prevent the applicant from being able to meet the requirement prior to entry to the UK. Paragraph 5.7 of the Immigration Directorate Instructions (Chapter 8: Section FM 1.21 - Partners and Parents, English Language Requirement) states that *"applicants who are nationals of a country with no test centre and who have made an application for entry clearance/leave to enter from that country will be exempt from the requirement."*

7. I find that it would be unreasonable and disproportionate to expect an applicant to have to travel outside their home country in order to obtain an English language test certificate from an approved UKBA provider. This is likely to be the reason why the guidance states that an applicant would be exempt from the requirement in such circumstances. The respondent failed to consider whether the appellant came within one of the exceptions contained in the immigration rules. The respondent also failed to consider whether to exercise discretion in view of the fact that it seems to have been accepted that the appellant was in a genuine and subsisting relationship with a British citizen and that he was applying to join his wife and child in the UK. I am satisfied that the circumstances pertaining at the date of the

decision could properly be described as exceptional if there were no facilities for the appellant to obtain an approved English language test in his home country at the date when he made the application. For these reasons I conclude that the appellant met the requirements of paragraph E-ECP.4.2(c) of Appendix FM.

8. I conclude that the decision was not in accordance with the law and the immigration rules.”

The Grounds and Oral Submissions

4. The respondent made an application for leave to appeal which was granted by Judge of the First-tier Tribunal Caruthers in a decision of 10 June 2014. The Secretary of State argued in the grounds of appeal that the policy requires the appellant makes his application from his country of nationality (which there is no test centre). The appellant in this case is a citizen of Moldova and he made his application in Warsaw where there is a test centre. In any event, the appellant could have requested the return of his passport or he could have made a fresh application.
5. At the hearing before me the sponsor, Mrs Violeta Guglea attended with her employer, Mr David Sunderland. Mr Tufan made oral submissions during which he conceded that the appellant had in fact made his application online in Moldova. When I pointed out to Mr Tufan that it appeared to me that the facts of the case fall squarely with the policy (a copy of which Mr Tufan produced) he said that he could not disagree with that. The relevant part of the policy (July 2012 Immigration Directorate Instructions Chapter 8, Section FM 1.21) reads as follows:

“Applicants who are nationals of a country with no test centre and who have made an application for entry clearance/leave to enter from that country will be exempt from the requirement. This exemption does not apply to applicants applying in country for leave to remain, as test centres and facilities to learn English are readily available in the UK.”

6. At the hearing before me Mr Sunderland expressed concern about the conduct of the Secretary of State during the proceedings but, as I explained to him, the purpose of the hearing before me was confined to whether or not the judge materially erred.

Conclusions

7. There is no material error of law. I have had regard to the case of **AG & Others (policies; executive discretions; Tribunal’s powers) Kosovo [2007] UK00082** and specifically at paragraph 50 which reads as follows:

“For ourselves we have little doubt that: contrary to the submissions on behalf of the Secretary of State for the Home Department before us – there are cases in which a finding that a decision is ‘not in accordance with the law’ on the ground of failure to apply a policy should lead to a substantive decision in the claimant’s favour, with a direction that leave be granted. There will be no need to base such a decision on human rights grounds, because it is demanded by the more detailed provisions of the 2002 Act. But the cases in question are unusual. They are those in which (1) the claimant proves the precise terms of the policy, which (2) creates a presumption, on the facts of his case, in favour of granting leave, and (3) there is either nothing at all to displace the presumption, or nothing that, under the terms of the policy, falls for consideration. If all those factors apply to the case, the appeal should be allowed, with a direction as indicated.”

8. In my view the decision-maker did not exercise the discretion vested in him and the decision is not in accordance with the law and it is appropriate for the Tribunal to require a decision-maker to complete his task by reaching a lawful decision on the outstanding application along the lines set out in **SSHD & Abdi [1996] Imm AR 148**. However, the judge in my view did not err in allowing the appeal outright because there was obviously no doubt in her mind that the appellant would benefit from the policy (it is similarly clear to me that he does) and on that basis it was open to her to allow the appeal substantively. I accept that this is an unusual course of action to take but, having had regard to **AG & Others**, it is one that was open to the judge on the facts in this appeal.
9. The final decision of the judge was expressed as allowing the appeal under the rules (see [9]). However, it is clear to me that she meant to allow it substantively because it was not in accordance with the law. She allowed the appeal under section 86 (3) (a) of the 2002 Act. I take the unusual step of making a direction pursuant to Section 87 of the 2002 Act that the Entry Clearance Officer gives effect to the decision and grant entry clearance to the appellant.

Signed Joanna McWilliam

Date 8 August 2014

Deputy Upper Tribunal Judge McWilliam