



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

Appeal Number: IA/49215/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2016

**Decision & Reasons Promulgated
On 10 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KAMRUL ISLAM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Mr T Shah, solicitor, from Taj solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-

tier Tribunal Judge Traynor, promulgated on 5 August 2015, which allowed the Appellant's appeal.

Background

3. The Appellant was born on 5 August 1982 and is a national of Bangladesh. On 25 November 2014 the respondent refused the appellant's application for leave to remain in the UK as the spouse of a person present and settled in the UK, and gave directions for the appellant's removal from the UK under s.10 of the Immigration and Asylum Act 1999.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Traynor ("the Judge") allowed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 2 December 2015 Judge Hollingworth gave permission to appeal stating *inter alia*

"3. An arguable error of law has occurred. At paragraph 26 the Judge has stated that the respondent had failed to adduce any evidence whatsoever to substantiate the allegation contained in paragraph 15 of the refusal letter. It is clear, therefore, that the available necessary evidence was not in fact in front of the Judge.

4. In the circumstances an arguable error of law has occurred in that the case could not be fairly determined. The Judge did not have all necessary documents before him."

The hearing

6. (a) Mr Avery, for the respondent, told me that because the appellant's immigration history included an uncertainty about an English language test certificate produced to support an earlier application (which led to a grant of leave to remain as a student), the appellant could not fulfil the suitability requirements of appendix FM of the rules. He told me that the respondent was unrepresented at the hearing in this case, and that the Judge confirmed, at [8] of the decision, that he had all of the necessary documents to consider the appeal in the respondent's absence.

(b) Mr Avery argued that what the Judge says at [8] is starkly contradicted at [26] where the Judge finds that the respondent does not lead sufficient evidence to substantiate an allegation made against the appellant. He argued that the Judge made a material error of fact and a material misdirection in law because the Judge did not adjourn the case for evidence to be produced to support the Secretary of State's position in relation to English language certificates from ETS.

(c) Mr Avery moved the third ground of appeal & told me that the Judge's assessment of the appellant's partner's medical condition placed undue reliance on the medical evidence produced and did not consider the availability of treatment in Bangladesh. He told me that at [27] the Judge misinterprets the

requirements of appendix FM and so falls into a material error of law. He told me that at [29] the Judge incorrectly interpreted the financial requirements imposed on recipients of disability living allowance. He asked me to set the decision aside and to dismiss the appeal.

7. (a) Mr Shah, for the appellant told me that the decision does not contain any errors of law, material or otherwise. He told me that the decision is a well-reasoned decision containing findings of fact which led the Judge to a conclusion which was well within the range of conclusions reasonably open to the Judge. He reminded me that no application had been made by either party for an adjournment, and that the respondent had specifically asked the Judge to deal with the case on the basis of the documentary evidence available. He told me that the reasons for refusal letter refused to say that the appellant's English language test results were based on fraud. Instead the respondent's position is simply that questions could be raised about the authenticity of the ETS English language test certificate earlier relied on by the appellant. He relied on the case of R (on the application of Gazi) v SSHD (ETS-JR) [2015] UKUT 00327.

(b) Mr Shah told me that the Judge carefully assessed the appellant's credibility before finding that he could rely on the appellant's evidence. The Judge then found that the appellant and sponsor were enjoy a true and subsisting relationship, and placed reliance of comprehensive medical evidence, which indicated that the sponsor requires blood transfusions every three weeks, before finding that there are insurmountable obstacles which prevent the sponsor from joining the appellant in Bangladesh.

Analysis

8. The respondent compares [8] and [26] of the decision and argues that the Judge should have adjourned this case for production of further evidence. Rule 4(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "*must seek to give effect to*" when exercising any power under the Rules. The overriding objective is to deal with cases fairly and justly. This is defined as including "(a) *dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues*".

9. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that if a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the

question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, the question for the Upper Tribunal is not whether the First-tier acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?

10. What the respondent cannot avoid is that not only did the respondent not make an application to adjourn, the respondent specifically asked that the case be determined on the available evidence. That is what the Judge did. The respondent had lodged the usual PF1 bundle and declared that it was on that evidence that the respondent was content to rely. It was therefore open to the Judge to make what he could of that evidence and, if he felt it was necessary, set out his criticisms of that evidence. It is not for the Judge to set off on his own enquiries to assist one party in pleading their case. There is no merit in the first ground of appeal.

11. The first part of the respondent's decision is that the appellant cannot satisfy the suitability requirements found in S-LTR 2.2. The respondent sets out the appellant's history of applications for leave to remain as a student. The Judge deals with that aspect of the decision that [25] & [26]. He relies on RP (proof of forgery) Nigeria [2006] UKAIT 00086 and AA (Nigeria) v SSHD [2010] EWCA Civ 773.

12. In R (on the application of Gazi) v SSHD (ETS-JR) [2015] UKUT 00327 the tribunal considered the Respondent's generic evidence in ETS cases. At paragraph 35 (of that decision) the tribunal found that the evidence had the hallmarks of care, thoroughness, underlying expertise and sufficient reliability such as to warrant an assessment that an applicant's TOEIC had been procured by deception. However, the tribunal did not state that the generic evidence was infallible and, indeed, at paragraph 14 the tribunal suggested that all cases involving ETS certificates would be "*unavoidably fact sensitive*". The tribunal said that "*Each litigant will put forward his or her individual disputed assertions, agreed facts, considerations and circumstances*", which must be assessed alongside the generic evidence submitted on the respondent's behalf. It follows that the tribunal in Gazi did not suggest that the generic evidence would be determinative in all cases. The implication is that where a judge simply rejects the generic evidence in ETS cases that is arguably an error of law, but where a judge makes a rounded assessment of all the evidence, as required by Gazi, and concludes that overall the evidence is insufficient to show that deception has been practised then there is no arguable error of law. The Tribunal is entitled to take the appellant's ability to speak English as a factor. The tribunal in Gazi specifically acknowledged at paragraph 40 that this might be relevant.

13. It has always been the appellant's position that his English-language test certificate is genuine. The respondent has not produced the generic evidence referred to both in Gazi and in the grounds of appeal either to the First-tier or for the purposes of this appeal, nor has the respondent produced the decision of 6 May 2014 which did not carry a right of appeal. In this matter the burden of proof rests with the respondent so that the Judge's finding that the burden of

proof is not discharged is not a material error of law. It is, in fact, an accurate reflection of the evidence upon which the respondent asked the Judge to decide the case.

14. In any event the respondent's reliance on S-LTR2.2 is flawed because, even if the appellant's English-language certificate had been fraudulently obtained, it is not a document submitted in relation to the application. It is a document which was submitted in 2012 in relation to a separate application.

15. The respondent argues that the Judge's finding at [30] that there are insurmountable obstacles to the pursuit of family life in Bangladesh is flawed because it is based on medical evidence and not on country background reports.

16. At [30] the Judge quotes at length from a report from the appellant's consultant haematologist. It is beyond dispute that the appellant suffers from a lifelong illness and requires blood transfusion once every three weeks. The consultant haematologist says that if the sponsor "... were to go to Bangladesh to receive treatment the outcome would be disastrous...". That is pretty clear and unchallenged evidence from a reliable source. At [31] the Judge balances the evidence from the consultant haematologist against the information provided by the respondent from the country of origin information service use of the Home Office. The Judge carefully sets out his reasons for preferring the evidence from the consultant haematologist.

17. It is clear from the terms of the decision that the Judge had to decide which source of evidence he preferred. There is a conflict between the evidence from the consultant haematologist and the evidence from the country of information service unit. It is *pars judicis* to resolve conflicts of evidence. It is not an error of law to prefer one source of evidence of another provided adequate reasons for finding one source of evidence more reliable than another are given. At [31] the Judge does just that.

18. At [31] the Judge acknowledges that there is a conflict in the evidence, and sets out in clear, concise and unambiguous terms his reasons for preferring the evidence of the consultant haematologist. It is not an error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Disagreement with an Immigration Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law.

19. Finally it is argued the Judge did not have grounds to consider article 8 ECHR out-with the rules. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in*

MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ".

20. At [34] the Judge concedes that consideration of article 8 ECHR outside the rules "... *May not be strictly necessary*", but he then goes on to clearly identify & define the compelling circumstances which may not be recognised under the rules – so that article 8 ECHR requires consideration. The Judge then sets out in summary form at [34] and [35] the factors which he finds to be compelling considerations. At [36] he considers section 117 of the 2002 act

21. There is no criticism of the actual proportionality exercise carried out by the Judge. The respondent's challenge is an assertion that the Judge has gone too far, that there are no compelling reasons to consider article 8 ECHR out-with the rules.

22. There is no merit in that ground of appeal because the Judge clearly identifies the correct test in law. The Judge correctly identifies that only compelling circumstances are the catalyst for the consideration of a freestanding article 8 ECHR claim. The Judge then considers the relevant factors on the facts as he finds find them to be. The Judge considers the impact of the facts as he finds them to be, and finds that the appellant establishes compelling circumstances which justify consideration of article 8 ECHR.

23. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

24. The Judge carefully considered each strand of evidence placed before him. He carefully records the submissions that were made and then, after correctly directing himself in law, makes reasoned findings of fact before reaching conclusions which were manifestly open to the Judge to reach.

25. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

26. No errors of law have been established. The Judge's decision stands.

DECISION

27. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed

Date 5 February 2016

Deputy Upper Tribunal Judge Doyle