



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

Appeal Number: HU/01591/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 1 August 2017

On 14 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MR OLUFEMI ADEMOLA ADENIRAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms M Owoynfa, Barrister, Victory Legal Services

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Ghani sitting at Sheldon Court in Birmingham on 10 November 2016) dismissing his appeal against the decision of an Entry Clearance Officer to refuse to grant him entry clearance as the spouse of a person present and settled here. The Judge found that the appellant was not exempt from the English language requirement in accordance with E-ECP.4.2 of Appendix

FM, and that his application had been rightly refused under the Rules as he had not passed an English test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for languages with a provider approved by the Secretary of State, as required by E-ECP.4.1 of Appendix FM. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant or his spouse requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 15 May 2017 First-tier Tribunal Judge Gibb gave detailed reasons for granting the appellant permission to appeal. He observed that the grounds were poorly drafted. They re-stated the case and failed to understand the need to identify legal points, effectively leaving the appellant in a position of not being represented. With this mind, and noting the vulnerability of the sponsor, he had read the determination with care. He said that two matters of concern appeared to merit further consideration as to whether there had been legal errors. The Judge continued:

4. In [17] the Judge referred to an assessment of the appellant's ability to study for the language test as post-dating the decision. Under the amended s82 and s85 of the 2002 Act, post 20-10-2014 all relevant evidence could be considered. [17] as a whole is unclear, but there is a concern that the Judge erred in law at [17] in excluding post-decision evidence (on this point it may be relevant that the determination has an OA reference on all but the first page). If the letter diagnosing dyslexia was rejected for other reasons, it is arguable that no reasons were given for doing so - this is particularly important because this would be the determinative issue following the positive findings as to the genuineness of the relationship.

5. The second arguable legal point concerns the consideration of Article 8 at [19]. There is no longer a compelling circumstances test following **Agyarko -v- Secretary of State [2017] UKSE 11**. The brief proportionality assessment omits any reference to the sponsor's vulnerability, and proceeds without reference to the dyslexia evidence (which returns to the first point). It is therefore arguable that the proportionality assessment was not conducted within the correct legal framework; and that it omitted relevant evidence.

The Rule 24 Response

3. On 8 June 2017 a member of the Specialist Appeals Team settled a detailed Rule 24 response opposing the appeal. In summary, the Judge of the First-tier Tribunal had directed himself appropriately. The Judge had not excluded the evidence submitted by the appellant with regard to the assessment of his intellectual ability. While the Judge noted that the report was post-decision, there was nothing to suggest directly or indirectly that it was excluded. This was supported by a further reading of the determination, which showed that the Judge took the report into account and found that the report did not show that the appellant was unable to take the test. The report said that he could take the test with the assistance of personalised tuition. So, the report was fully considered by the Judge, but found not to assist the appellant.

4. In terms of the Article 8 proportionality assessment, the appellant's circumstances were considered under the Rules; and, given that the appellant was unable to meet the requirements of the Rules, the evidence was insufficient to demonstrate that the requirement to make a further application once he had taken an English language test would be disproportionate. The decision maintained the *status quo* of the relationship of the appellant and the sponsor, and as such there was no interference.

The Hearing in the Upper Tribunal

5. At the hearing before me to determine whether an error of law was made out, Ms Owoynfa directed my attention to a bundle of documents which her firm had served on the Upper Tribunal on 17 July 2017. This bundle contained additional evidence relating to the appellant's ability to take the English language test that had not been put before the First-tier Tribunal. In a covering letter, dated 17 July 2017, she sought permission to adduce new evidence in accordance with Rule 15(2A) of the Upper Tribunal Procedure Rules. She submitted that the outcome of the hearing before the First-tier Tribunal was unfair as the result of a mistake of fact, and this constituted an error of law, following **E&R -v- Secretary of State for the Home Department [2004] EWCA Civ 49** and **MM (Unfairness; E&R) Sudan [2014] UKUT 00105 (IAC)**. She submitted that the new evidence was admissible in accordance with the principles laid down in **Ladd -v- Marshall [1954] EWCA Civ 1**.
6. With Ms Owoynfa's assistance, I reviewed (a) the relevant evidence that was put before the First-tier Tribunal, and (b) the new evidence that was now sought to be relied upon in support of a separate ground of appeal. Ms Owoynfa clarified that her primary case was that the Judge had erred in law in not finding that the applicant had a disability which prevented him from meeting the English language requirement, *on the evidence that was before him*. Her alternative case was that the matter was now put beyond doubt by the latest expert evidence, and so the Judge had made a mistake of fact about the appellant's ability to meet the requirement - and it was a mistake for which the appellant was not responsible.

Discussion

7. In his application for entry clearance as a spouse, the appellant represented that he was competent in the English language. He said that he had studied in the English language medium at both primary and secondary school for 12 years. He said that English language was also the mode of instruction when he was studying for a diploma in Electronics, a course of study which had lasted 6 years. So he could assure the Entry Clearance Officer of his proficiency in reading, writing and understanding the English language.
8. The date of refusal of the application was 27 May 2015. The Entry Clearance Officer noted that he had provide a diploma in Electronics, but

this was not an academic qualification recognised by NARIC UK, to be the equivalent to the standard of a Bachelors or Masters degree or PhD in the UK which was taught in English. So his application was refused under paragraph EC-P.1.1(d) of Appendix FM.

The evidence before the First-tier Tribunal

9. It was not until over a year later, while the appeal was still pending, that the appellant's legal representatives first intimated that there might be an issue as to the appellant's capacity to pass the test. They served a bundle of documents at the beginning of September 2016, with a covering letter in which they said that he had attended English classes with a view to satisfying the English language requirement, and he had been certified as not being able to pass the English language test. This was not because he was "*mentally sick*", but because he did not have access to "*education basics*" on time. They requested the Tribunal to waive the English language requirement, so as to allow the appellant to join his British wife in the UK. The documents served with the covering letter comprised a very brief letter from Dr Olowale dated 11 April 2016; an undated letter from Mrs Akande, the appellant's English language tutor; and a lengthy report by a Clinical Psychologist at the University of Ibadan who had carried out an assessment of the appellant on 29 June 2016.
10. Dr Olowale said that the appellant had been seen in their unit on 6 April 2016. Their assessment of him revealed that he had suffered from developmental dyslexia, and this had had a significant effect on his educational attainments.
11. Mrs Akande, Principal of St Kwary Comprehensive College, said that she had referred the appellant to the Counselling and Human Development Studies Department at the University of Ibadan for an expert assessment of his intellectual capabilities. She said that the appellant had been coached by her in preparation for his IELTS exams, for a period of 8 months. Although he had tried his best, he was not performing as expected.
12. The report of the Clinical Psychologist appears to have been a response to the referral from Mrs Akande. Her report indicates that the appellant was not in fact educated in the English language medium as he represented in the application form, but was taught in Yoruba. She states that he was brought up in a relatively poor socio-economic background which made it impossible for him to retake his O-level exams after an unsuccessful first attempt in 2004.
13. She summarises the results of the tests which he has undertaken, at page 5 of her report. He has a full scale IQ score of 69 which places him in the

extremely low range of ability. He demonstrates global cognitive difficulty across verbal and performance tasks. His language development and word knowledge ability is a significant weakness for him.

14. She is able to make a number of recommendations to help the appellant enhance his cognitive abilities. She says that he will require a high level of remedial support to achieve his full potential in terms of verbal expression, and he would benefit from personalised English language lessons in which the teacher moves at his pace and presents him with audio-visual teaching aids by which he might learn on his own. He would also benefit from an opportunity to interact with people and things in a more enriched or intellectually stimulating environment to enable him gradually to overcome his difficulty with language development and word knowledge.
15. Her conclusion is as follows:

Olufemi's performance in the WAIS-111 assessment has highlighted his significant cognitive difficulty in terms of both performance and verbal skills. His cognitive difficulties may negatively impact upon his self-confidence and self-esteem, especially as it affects his desire to relocate to the UK to be with his wife. Therefore, he will require a high level of support in order for him to learn new skills to offset his current cognitive deficits.

Whether Judge's assessment of the evidence was legally erroneous

16. The first arguable error of law identified by Judge Gibb relates to the Judge's treatment of the medical report of Dr Olowale dated 11 April 2016 and the Clinical Psychologist's report of June 2016.
17. As submitted in the Rule 24 response, although the Judge noted that these reports were post-decision, the Judge did not exclude them on that basis. He acknowledged that the letter of April 2016 referred to the appellant suffering from developmental dyslexia. However, he observed that the assessment by the Clinical Psychologist did not mention dyslexia.
18. The test which the appellant was required to pass was a test in speaking and listening, not in reading and writing. Moreover, the lengthy report from the Clinical Psychologist made no mention of the appellant suffering from dyslexia, as the Judge noted. Accordingly, it was open to the Judge to treat the brief medical report as not being sufficiently persuasive as to establish on the balance of probabilities that the appellant had a disability which prevented him from meeting the English language requirement.
19. It was also open for the Judge to reach a similar conclusion with regard to the report of the Clinical Psychologist. She did not, in terms, express the opinion that the appellant was unable to pass an English language test in speaking and listening at a minimum level of A1 CEFR, due to a mental disability. It was open to the Judge to interpret her report as stating that he would improve his ability to communicate in the English language medium if he had the benefit of personalised English lessons and interaction with other people speaking English. It was open to the Judge to conclude, as he did in paragraph [18], that there was no evidence to

suggest that the appellant “cannot take the test”.

20. In short, the Judge gave adequate reasons, in paragraphs [17]-[19] of his decision, for holding that, on the available evidence, the appellant had not shown that he had any disability which prevented him from passing an English language test in speaking and listening at a minimum of level A1 of the CEFR.

Whether Judge’s assessment of proportionality under Article 8 ECHR was legally erroneous

21. The Judge reasonably drew a distinction between the appellant having difficulty in passing the test, and having a disability which prevented him from doing so. It is this consideration which underpins the crucial finding in his Article 8 assessment that the appellant has to make an effort to pass the relevant test and then reapply to join the sponsor as her spouse.
22. The Judge’s reasoning under Article 8 was as follows in paragraph [19]:

Under Article 8 I have to assess whether the refusal would result in unjustifiably harsh consequences for the applicant or his family. The fact that a refusal may result in the continued separation of family members does not of itself constitute exceptional circumstances. Compelling circumstances would need to be identified. **(SS CONGO 2015 EWCA Civ 387)**. The appellant knew that he has to comply with the requirements of the relevant Immigration Rules. The relationship was therefore formed under conditions of known precariousness. Article 8 does not confer an automatic right of entry and imposes no general obligation of the state for facilitate the choice made by a married couple to reside in it. **(SS CONGO)**. Public interest in maintaining effective Immigration control is now enshrined in the statute. The parties have lived apart for some time. The sponsor has been visiting the appellant, which can no doubt continue. The appellant has to make effort in order to pass a relevant test and reapply to join the sponsor as her spouse. I find that having conducted a balancing exercise, the refusal to grant leave to enter is not disproportionate and there is therefore no breach of Article 8. In coming to this conclusion I have taken into account the step-by-step approach in the case of **RAZGAR**, and the test laid out in the case of **HUANG**.

23. The Judge recognised that the sponsor was sad and upset about the refusal decision: see paragraph [6]. He noted the evidence of the sponsor’s father that she had learning disabilities and was under the treatment of a Consultant Cardiologist: see paragraph [10]. He noted, at paragraph [14], that the sponsor’s mother was the sponsor’s sole carer, and the sponsor’s father had said in evidence that she missed her husband and cried at night. He expressly acknowledged her vulnerability at paragraph [16] of his decision. For the reasons given by him in paragraph [19], it was open to him to find that the refusal would nonetheless not result in unjustifiably harsh consequences for the appellant or the sponsor.

24. In **Agyarko**, the Court said (at paragraph 57): *“The critical issue will generally be whether, giving due weight to the strength of the public interest and the removal of a person in a case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.”* Although the Court is discussing expulsion, rather than exclusion, the analysis holds true for a case such as this, as is illuminated in the discussion of the application of the **Razgar** test in **Muse & Others v Entry Clearance Officer [2012] EWCA Civ 10**.
25. I do not consider that the Judge’ analysis is in conflict with the guidance given by the Supreme Court in **Agyarko**. The Supreme Court does not expressly disapprove **SS (Congo) [2015] EWCA Civ 387**. Mr Tarlow agrees with Judge Gibb that *“compelling circumstances”* as a threshold test has gone. However, the Judge did not deploy the test of compelling circumstances as a justification for not balancing the strength of the public interest in maintaining the refusal decision against the consequential impact upon private and family life. He conducted the proportionality assessment within the correct legal framework, and his assessment was adequately reasoned, having regard to his sustainable finding that the appellant was not prevented from meeting the English language requirement, and hence the interference was only temporary; and, in the meantime, the *status quo* was preserved, with family life being maintained through visits by the sponsor to Nigeria.

Whether the Judge made a mistake of fact for which the appellant is not responsible

26. The new evidence sought to be adduced to show that the Judge made a mistake of fact includes: (a) the same report of the Clinical Psychologist, apart from the substitution of a new conclusion; (b) a letter dated 30 October 2016 from Mrs Akande; (c) a further letter from Mrs Akande dated 13 February 2017 and (d) a letter dated 15 February 2017 from Femi David, Pastor at the Redeemed Christian Church of God in Newport, Gwent.
27. In the letter of 30 October 2016, Mrs Akande thanks the University for the report on the appellant’s cognitive status, and says that she wishes to express *“our increased concerns”* on his consistently poor performance in preparation for an IELTS test. She asks the Clinical Psychologist to confirm whether, based on her expert opinion, the appellant can pass the proposed examination.
28. In the report signed on 10 February 2017, the Clinical Psychologist substitutes the following conclusion for her original one:

Olufemi’s performance in the WAIS-111 assessment has highlighted a significant cognitive difficulty in terms of both performance and verbal skills. *Olufemi will not be able to pass his IELTS examination because of his cognitive difficulties* (my emphasis).

29. In her letter of 13 February 2017, Mrs Akande advises the appellant to withdraw from his English language tuition classes following “*the test result*” and advice received from the University of Ibadan.
30. In a letter dated 15 February 2017, the Pastor says that over the last 15 months, the sponsor’s emotional wellbeing appears to have worsened. She has on many occasions broken down and cried profusely in the middle of church services. According to her, this is because of her husband’s inability to reunite with her since the marriage. She now displays a high level of mental health problems, such as severe depression, mood swings and other challenging behaviours. He strongly believes it to be in the best interest of the sponsor to be reunited with her husband in the United Kingdom at the earliest possible time, so as to ameliorate her mental health needs and to enhance her overall wellbeing.
31. Ms Owoyinfra also reported that the sponsor was now pregnant, following a visit to Nigeria in May 2017.
32. In **MM (Unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** a Presidential panel gave the following guidance:
- (i) Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal to be set aside.
 - (ii) A successful appeal is not dependent on the demonstration of some failing on the part of the First-tier Tribunal. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered, with resulting unfairness (**E & R v Secretary of State for the Home Department [2004] EWCA Civ 49**).
33. The following passages in **MM** are particularly pertinent to the issue raised by Ms Owoyinfra:
19. Of unmistakable importance also, in the context of this appeal, is the decision of the Court of Appeal in E & R - v - Secretary of State for the Home Department [2004] EWCA Civ 49. As appears from the opening paragraph of the judgment of Carnwath LJ, one of the two central issues raised in this appeal concerned cases decided by the first instance Tribunal (in that instance, the Adjudicator) where it is demonstrated that –

‘... an important part of its reasoning was based on ignorance or mistake as to the facts’

Drawing particularly on the speech of Lord Slynn in R - v - Criminal Injuries Compensation Board, ex parte A [1999] 2 AC 330 (at pages 333 - 336), Carnwath LJ stated:

‘[63] In our view, the CICB case points to the way to a separate ground of review, based on the principle of fairness ... the unfairness arose from the combination of five factors:

 - (i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);

- (ii) The fact was 'established,' in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
- (iii) The Claimant could not fairly be held responsible for the error;
- (iv) Although there was no duty on the Board itself, or the police, to do the Claimant's work of proving her case, all the participants had shared interest in co-operating to achieve the correct result.
- (v) The mistaken impression played a material part in the reasoning.'

...

20. The principles relating to the impact upon proceedings of unfairness arising from error of fact were reconsidered by the Court of Appeal in R & ors (Iran) v SSHD in which decision the Court of Appeal conducted a detailed review of categories of error of law frequently encountered. Brooke LJ said the following:

'Part 6. Error of law: unfairness resulting from a mistake of fact

28. The next matter we must address relates to the circumstances in which an appellate body like the IAT, whose primary role during the relevant period was restricted to identifying and correcting errors of law, could entertain an argument to the effect that the outcome in the lower court was unfair as a result of a mistake of fact, and that this constituted an error of law which entitled it to interfere...

30. At para 64 Carnwath LJ said that there was a common feature of all these cases, even where the procedure was adversarial, in that the Secretary of State or the particular statutory authority had a shared interest with both the particular appellant and with any tribunal or other decision-maker that might be involved in the case in ensuring that decisions were taken on the best information and on the correct factual basis. At para 66 he identified asylum law as representing a statutory context in which the parties shared an interest in co-operating to achieve a correct result. He went on to suggest that the ordinary requirements for a finding of unfairness which amounted to an error of law were that:

- (i) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;
- (ii) it must be possible to categorise the relevant fact or evidence as 'established' in the sense that it was uncontentious and objectively verifiable;
- (iii) the appellant (or his advisors) must not have been responsible for the mistake;
- (iv) the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.'

...

32. The reference to the Ladd v Marshall principles is a reference to that part of the judgment of Denning LJ in [1954] 1 WLR 1489 when he said (at p 1491) that where there had been a trial or hearing on the merits, the decision of

the judge could only be overturned by resort to further evidence if it could be shown that:

- (1) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);
- (2) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive);
- (3) the new evidence was apparently credible although it need not be incontrovertible.

33. By way of a final summary of the position. Carnwarth LJ said in E and R at para 91 that an appeal on a question of law might now be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" and that the admission of new evidence on such an appeal was subject to Ladd v Marshall principles, which might be departed from in exceptional circumstances where the interests of justice required.'

34. In the light of the foregoing, I do not consider that the new evidence can be relied upon to assert that the Judge made a mistake of fact about the appellant's ability to meet the English language requirement; or that the appellant is not responsible for the alleged mistake of fact.
35. Dealing first with the expert evidence, it was open to the appellant or his legal representatives to obtain the expert evidence now sought to be relied upon *before* the hearing in the First-tier Tribunal, rather than *after* the hearing. Moreover, the latest report does not fulfil the requirement of being uncontentious evidence. The conclusion of the expert in the new report is controversial, precisely because she has substituted a different conclusion from the one previously expressed, without acknowledging the fact that she has changed her conclusion.
36. The sponsor was not pregnant at the time before the hearing before the First-tier Tribunal, and so there can be no procedural unfairness in the Judge not taking into account her subsequent pregnancy. Similarly, there is no procedural unfairness in the Judge not taking into account an asserted deterioration in the mental state of the sponsor, consequential upon her husband's inability to join her in the UK. Furthermore, since the deterioration in the sponsor's emotional wellbeing is said by the Pastor to have occurred over the past 15 months, I infer that the deterioration was apparent to the Pastor at the time of the hearing before the First-tier Tribunal. So his evidence does not meet the requirement of being new evidence that could not with reasonable diligence have been obtained for use at the hearing in the First-tier Tribunal.
37. For the above reasons, the new evidence sought to be relied upon by way of appeal for the Upper Tribunal does not show that an important part of the reasoning of the First-tier Tribunal was based upon a mistake as to existing facts, or that the decision of the First-tier Tribunal is unfair through "*misunderstanding or ignorance of an established and relevant*

fact".

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

Signed

Date 13 August 2017

Judge Monson

Deputy Upper Tribunal Judge