



Upper Tribunal

(Immigration and Asylum Chambers)

Appeal Number: HU/02023/2017

THE IMMIGRATION ACTS

Heard at Liverpool CJC

Decision & Reasons Promulgated

On 26 July 2018

On 7 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

SAFIYO MUKTAR

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Patel counsel instructed by Binas Solicitors

For the Respondent: Mr C Bates Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

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 Appellant was born on 1 January 1997 and is a national of Somalia
3. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
4. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hillis promulgated on 8 December 2017 which dismissed the Appellant's appeal against the decision of the Respondent dated 14 December 2016 to refuse entry clearance as a spouse. The refusal was on the basis that that they had not established they were in a genuine and subsisting relationship and that Appellant had not produced evidence that she was exempt from the English Language requirements.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Hillis ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found that he accepted that they were in a genuine and subsisting relationship but he found that the medical evidence did not establish that she was entitled to an exemption from the English language requirements and there was no reason why they could not continue their family life in Kenya where the Appellant had refugee status.
6. Grounds of appeal were lodged arguing that the Judges assessment of the medical evidence was flawed and his assessment under Article 8 was flawed.
7. On 21 March 2018 First-tier Tribunal Judge Simpson gave permission.
8. At the hearing I heard submissions from Ms Patel on behalf of the Appellant that
 - (a) She relied on the grant of permission.
 - (b) The Judges treatment of the medical evidence was cursory and he failed to take into account the Doctors qualifications.
 - (c) There was a medical examination and the Appellant had a head injury.

- (d) The report was not vague and set out the reasons why the Appellant could not learn English.
 - (e) In relation to his assessment of proportionality the child and father were UK citizens and if the child was in the UK it would not be removed.
 - (f) The mother has only 5 years status in Kenya.
 - (g) These were exceptional circumstances where refusal would result in unjustifiably harsh consequences.
9. On behalf of the Respondent Mr Bates submitted that:
- (a) The fact that the Appellant had failed the English language test twice did not mean that she would fail the third time.
 - (b) The Doctor may be fully qualified but may still produce an inadequate report.
 - (c) The Judge was entitled to take account of the fact that the Appellant appeared to have given a history on which the Dr based his assessment rather than on medical records.
 - (d) He was entitled to find that a family life had been established while the parties lived outside the UK and that established while they were living together in the UK relying on SS (Congo) [2017] UKSC 10.
 - (e) The parties had indeed been apart for 2 years and it was their choice to pursue and appeal rather than obtain better evidence that they met the Rules: the public interest was not diminished by this.
 - (f) In relation to the assertion that the Appellant only had 5 years leave in Kenya it was improbable that she would have her refugee status rescinded and if granted status in the UK she would also be given 5 years leave.
 - (g) At the time of the decision to refuse, because the immigration rules were not met, there was insufficient basis to say that the consequences of refusal were unjustifiably harsh.
10. In reply Ms Patel on behalf of the Appellant submitted

- (a) This was a psychiatric report and psychiatry was a discipline based on a case history provided by the client and an assessment of that. The Judge failed to take that into account.
- (b) In relation to the suggestion that there was no evidence of a head trauma that may be because there were limited services in Somalia.
- (c) The child is 2 ½ years old and needs his mother.
- (d) The two failed attempts to pass the English Language test suggest that the Appellant had problems.

Legal Framework

11. The provision in issue in this appeal was Appendix FM E-ECP.4.2 which provides:

“E-ECP.4.2. The applicant is exempt from the English language requirement if at the date of application-

- (a) the applicant is aged 65 or over;*
- (b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or*
- (c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK.”*

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.
13. At the time of the appeal the basis of the Appellants appeal was that she met the requirements of E-ECP.4.2 and was thus exempted from the English Language requirement. In order to establish that the Appellant relied on an extremely brief report, less than 1 page in length, dated 19 September 2017 from Dr Omar J Aly whose letterhead states that he is a Senior Psychiatrist in Mombasa.
14. The contents of the report are addressed by the Judge at paragraphs 32-35 of his decision. The fact that the Doctor is qualified is not determinative of the weight that the Judge was required to give to his opinion as I agree with Mr Bates that

it is perfectly possible for a Doctor to provide a report that fails to address the facts in issue and therefore limit the weight to be given to it.

15. The Judge was required to assess whether the Appellant had met the evidential burden based on this report of establishing that the Appellant '*has a disability (physical or mental condition) which prevents the applicant from meeting the requirement*' and it was open to the Judge to find that the report failed to do this. The Judge identified a number of issues that he had with the report and these were findings that were open to him: the most obvious is that the report in fact contains no diagnosis (paragraph 32) and he was entitled to find that although the Doctor states that there is a possibility she has dyslexia he does not detail any tests, i.e. objective evidence, that were employed in reaching that conclusion and the same could be said for the Doctors assertion that she 'has had learning difficulties'. The Judge was entitled to find that the history on which the Doctor based his analysis appeared to have been given either by the Appellant or by her family, the Doctor fails to identify which, not on the basis of collateral information such as medical notes. It would have been open to the Judge to find that if the history was provided by the Appellant this would appear to be inconsistent with the claim that she had difficulty in expressing herself. The Judge was entitled to describe report as 'vague in its findings' because the failure to clearly identify the evidential basis for his conclusions justified that finding.
16. There is also no merit in the argument that simply failing the test is evidence of a 'problem' that would meet the requirements of the Rules. There is also no evidence of a head injury or any attempt to identify how that injury could have resulted in learning difficulties.
17. Against the background that the Appellant did not meet the requirements of the Rules the Judge went on to assess whether there were exceptional circumstances at 36-39 that justified a grant of leave albeit the Appellant did not meet the requirements of the Rules. Mr Bates is correct that pursuing an appeal in this way added to the separation Ms Patel complained of but that was their choice: it was open to them to obtain clearer evidence that addressed the requirements of the Rules. I am satisfied that the Judge adequately addresses all of the relevant issues in the case including the best interests of the child

(paragraph 36). It was open to Judge to note that the Appellant had refugee status in Kenya and there was no reason why they could not enjoy family life together there (paragraph 39) On the basis of the evidence before him his finding that there were no exceptional circumstances was reasonably open to him.

18. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): *“Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.”*
19. I was satisfied that the Judge’s determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

20. **I therefore found that no errors of law have been established and that the Judge’s determination should stand.**

DECISION

21. **The appeal is dismissed.**

Signed

Date 30.7.2018

Deputy Upper Tribunal Judge Birrell