



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03325/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 25th June 2018

Decision & Reasons Promulgated
On 10th July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

GOFUR ULLAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER- NEW DELHI

Respondent

Representation:

For the Appellant: Mr N Vaughn, Solicitor
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Burma/Myanmar born 1st January 1988. He appeals with permission, the decision of the First-tier Tribunal (Judge Bradshaw) dismissing his appeal against the Entry Clearance Officer's ("the ECO") decision of 19th May 2016 refusing him entry clearance as the husband of Fatema Parvin ("the Sponsor").
2. The Sponsor, who is also a national of Burma/Myanmar, was granted refugee status under the Gateway Protection Programme. She and her family had been living in Bangladesh in a refugee camp. She entered the United Kingdom on 5th February 2009 with her parents and five siblings. Prior to leaving for the United Kingdom, she married the Appellant in an Islamic ceremony on 5th January 2009. He was also living

in a refugee camp in Bangladesh. After the marriage the Appellant and Sponsor lived together with his parents until she left for the UK a month later.

3. The ECO refused the application because he was not satisfied on the following points:
 - (i) the Appellant and Sponsor had entered into a genuine subsisting marriage;
 - (ii) the marriage was contracted pre-refugee flight; and
 - (iii) the Appellant had failed to meet the requirements of the Immigration Rules for entry, in that no valid TB certificate had been produced.
4. When the appeal, which is brought under section 82 of Nationality Immigration and Asylum Act 2002, came before FtTJ Bradshaw, she accepted that the Appellant and Sponsor are in a genuine and subsisting marriage and accepted that the marriage had been contracted pre-flight. She dismissed the appeal however, on one ground, saying at [36] the following:

"I am satisfied on balance that the appellant and the sponsor are married, that the relationship is genuine and subsisting and that they intend to live together permanently and to that extent the appellant satisfies the Rules. However, his application cannot succeed under the Rules because he has not produced a TB certificate and he must."

5. The FtTJ then went on to consider Article 8 family life. She noted that the Sponsor had visited her husband in the refugee camp and that they now had two children. She made a finding that there was nothing compelling to show that family life could not be enjoyed by the Sponsor continuing her visits to the refugee camp as she had in the past and further that the Appellant could make a renewed application "when he has the TB certificate arranged." She dismissed the appeal.

Onward Appeal

6. The Appellant was granted permission to appeal and for the purposes of this hearing I set out below the relevant parts of the grant of permission as this fully encompasses the issues before me.
 2. ... The grounds of appeal allege that the Judge erred in law in her finding that the Appellant "must" produce a TB certificate. The Appellant will not be able to obtain a TB certificate because he has no passport. The Judge failed to take into account the Respondent's guidance in relation to applications made without TB certificates, and her guidance regarding compassionate grounds for issuing entry clearance. In relation to Article 8, the Judge's finding that there was nothing compelling or exceptional was challenged as she had failed to subjectively assess the Appellant's situation in accordance with the immigration rules.

3. I have carefully considered the decision. At [36] the Judge states that the Appellant has not provided a TB certificate "and he must". There is no reference to the circumstances of the Appellant, the fact that he has no passport and that a passport is required to get a TB certificate which meets the Respondent's requirements. While it does not appear that the Respondent's guidance relating to applications made without TB certificates was placed before the Judge, the Sponsor in her witness statement asks the Tribunal to accept that the Appellant should be exempt from having to provide a certificate, and TB screening information is included in the bundle. It is an arguable error that the Judge has not given reasons for why she has found that the Appellant is not exempt. It is also arguable that she has not taken the Appellant's situation fully into account when finding that the Appellant's circumstances are not exceptional or compelling, given that the Appellant will not be able to get a TB certificate which meets the Respondent's requirements as he is not entitled to a passport. The Judge has failed to give reasons for her finding that he will be able to make a fresh application "when he has the TB certificate arranged" [38] given the evidence that he will not be able to obtain such a certificate."
7. Thus the matter comes before me initially as an error of law hearing to decide whether the decision must be set aside and remade.

Error of law / UT Hearing

8. Before me, Mr Diwnycz appeared for the ECO and Mr Vaughn for the Appellant. At the outset of the proceedings, Mr Diwnycz said that having read the FtTJ's decision and seen the grant of permission, he accepted that he could not seek to defend the FtTJ's decision. He said, firstly, that he acknowledged that there was no evidence to show that the ECO had had any regard to the Operational Guidance in force where an applicant for entry clearance may not be able to produce a TB certificate. The Operational Guidance enabled the ECO to exercise discretion on compassionate grounds in such cases. Following on from this, it was clear that the FtTJ was in error to say as she did at [36] the application could not succeed because the Appellant has not produced a TB certificate and "he must".
9. Mr Diwnycz, with his usual fairness, said that on this basis the decision showed that the judge had not turned her mind to whether there were compelling and exceptional circumstances about the Appellant's case, such as to show that the ECO's decision amounted to a disproportionate interference with both the Appellant's and Sponsor's Article 8 ECHR rights.
10. Following an enquiry from me, Mr Diwnycz confirmed that the evidence surrounding the TB certificate was the only point in issue. There was no issue taken on the evidence concerning the timing of the marriage itself. In other words he was satisfied that the judge's findings were adequate to show that the marriage was a pre-flight one.

11. Following Mr Diwnycz's helpful submissions, I found that I did not need to call upon Mr Vaughn to address me. Both parties were satisfied that I was in a position to remake the FtTJ's decision by substituting my own decision.
12. I am satisfied that the decision of the FtTJ contains material error of law for the reasons helpfully outlined by Mr Diwnycz in his submissions above. I therefore set aside the FtTJ's decision, preserving the findings that the Sponsor and Appellant are in a genuine and subsisting marriage and that the marriage was contracted prior to the Sponsor's flight.
13. I find that there is no evidence to show that the ECO has given appropriate consideration to the Operational Guidance in force concerning the Appellant's circumstances and the reason why he sought an exemption from the requirement to provide a TB certificate. This means that the ECO did not exercise a discretion open to him.
14. It follows from this that the FtTJ also failed to factor this point into her consideration. The sponsor in her witness statement sets out the reason why the Appellant seeks an exemption to the production of a TB certificate. I am satisfied that a proper consideration of that evidence leads to the conclusion that the situation of this Appellant, a refugee living in a camp outside his own country with no passport issued from his own country and no entitlement to one from the Bangladeshi authorities, amounts to compassionate circumstances. This then leads me to the conclusion that the Appellant in substance satisfies the Rules to the extent that when weighing matters in the balance, the decision to refuse him entry amounts to a disproportionate interference with his and his Sponsor's Article 8 rights. I find the interference cannot be justified for the purposes of maintaining effective immigration control.
15. Accordingly for the foregoing reasons the Appellant's appeal to the Upper Tribunal is allowed. The decision is re-made allowing the Appellant's appeal against the ECO's decision to refuse him entry clearance.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 23rd May 2017 is set aside for material error. I substitute the following decision. The Appellant's appeal against the Entry Clearance Officer's refusal to grant him entry clearance is allowed on human rights grounds.

No anonymity direction is made.

Signed

C E Roberts

Date

07 July 2018

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed C E Roberts Date 07 July 2018

Deputy Upper Tribunal Judge Roberts