



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/04084/2017**

Appeal Numbers:

HU/04087/2017

HU/04091/2017

THE IMMIGRATION ACTS

**Heard at Field House
Promulgated
On 4 October 2018**

**Decision & Reasons
On 11 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) CATHERINE [G]

(2) IVY [G]

(3) [A G]

(NO ANONYMITY DIRECTION)

Respondents

Representation:

For the Appellant: Mr A I Corban, Solicitor (Corban Solicitors)

For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant (The Secretary of State for the Home Department) appealed with permission granted by First-tier Tribunal Judge Kelly on

13 August 2018 against the determination of First-tier Tribunal Judge Zahed who had allowed the Respondents' linked entry clearance appeals on Article 8 ECHR grounds. The decision and reasons was promulgated on 23 May 2018.

2. The Respondents, mother and daughters, are nationals of Kenya, born respectively on 9 May 1968, 18 December 1998 and 11 May 2005. They had sought entry clearance to join their husband and father, their sponsor. The Entry Clearance Officer ruled that the Appellants had failed to provide their TB certificates and evidence of relationship and that the First Appellant had failed to provide her English language test certificate. The Entry Clearance Officer considered that the First Appellant's impending operation was not an exceptional circumstance which prevented her from sitting the required English language test.
3. The judge found that the Respondents did not meet the Immigration Rules at the date of the decisions. He also found that the First Respondent's medical condition (an impending procedure) was not an exceptional circumstance which exempted her from the English language requirement: see [19] of the decision and reasons. The judge went on to find that the Entry Clearance Officer should have permitted the First Respondent to take the English language test after her operation. There was urgency as the Second Respondent was about to turn 18. The judge found that the marriage was genuine and that the family relationships were as claimed. There was strong family life. The TB certificates and English language certificate had been produced after the applications were made and had not been in existence as at the date of the applications: see [18] of the decision and reasons. The judge found that the proportionality balance favoured the Respondents, as the Second Respondent would not be able to apply again. Thus he allowed the human rights appeals.
6. Permission to appeal was granted because it was arguable that the judge had treated Article 8 ECHR as a general dispensing power to cure failure to comply with the requirements of the Immigration Rules, and had failed to consider why family life could not be enjoyed in Kenya.

Submissions

7. Mr Lindsay for the Appellant submitted that the decision and reasons could not stand. The judge had found as a fact that the Immigration Rules had not been met and that there were no exceptional circumstances. He had no jurisdiction to find that the Entry Clearance Officer should have extended time for submission of the test

certificates. There was no reasoning to support the assertion that the Article 8 ECHR decision was disproportionate, as the family were living together in Kenya. The decision should be set aside.

8. Mr Corban for the Respondents served a rule 24 notice on the day of the hearing, on which he relied. He submitted that the judge had found exceptional circumstances and so had been entitled to allow the appeal.

Material error of law finding

9. The tribunal finds that there were a number of material errors of law in the decision and reasons, such that it must be set aside. The judge appears to have intended to find that the Immigration Rules were not met as at the date of the *applications*, not the decisions, although that is not what he said at [19] of the decision and reasons. It is plain from the evidence that the Immigration Rules were not met as at the date of the applications. The judge further found that there were no exceptional circumstances which exempted the First Respondent from submitting an English language test certificate. The judge's further findings under Article 8 ECHR conflict with those findings and make little sense. They fail to explain his decision.
10. It had nothing to do with the Entry Clearance Officer that the Respondents chose to submit their entry clearance applications just before the Second Respondent turned 18. In any event, that did not, as the judge suggested at [25] of the decision and reasons, prevent her from making another entry clearance application to join her father. The Second Respondent simply had to make the entry clearance application under a different, albeit more stringent, Immigration Rule.
11. The First-tier Tribunal has no supervisory role over Entry Clearance Officers and the exercise of their discretion. The judge's finding at [20] of his decision and reasons that the Entry Clearance Officer should have approached the entry clearance applications in a different way was without jurisdiction. The requirements of the Immigration Rules are clearly set out and apply to all. It was for the Respondents to assemble their supporting documents in good time. The judge specifically found that the First the Respondent's medical condition was not an exceptional circumstance, so his criticism of the Entry Clearance Officer is not easy to understand.
12. As to the judge's proportionality analysis, this lacked rigour. The judge failed to consider that the Respondents' decision to live

separately from the sponsor was on the evidence a matter of choice. No evidence was advanced to show that the sponsor could not live with the Respondents in Kenya. In that way the best interests of the third Respondent to live with both of her parents (as found by the judge) would have been met. The Entry Clearance Officer's decision did not affect the status quo. These facts were not considered by the judge, sufficiently or at all, and his reasoning was defective.

13. The decision and reasons must accordingly be set aside. The tribunal has considered whether the decision can be remade in the Upper Tribunal. While that might be possible, this is perhaps a borderline case because of the nature of the errors of law, and to do so might deprive the Respondents of the advantage of a First-tier Tribunal hearing. It is not entirely clear from the decision and reasons whether the judge intended to find that there were exceptional circumstances or not. Certainly he was sympathetic to their situation. The tribunal concludes that a full First-tier Tribunal rehearing should be made available to the Respondents. They should, however, consider their position with great care as it may be that they will be better advised to make fresh entry clearance applications, ensuring that they are properly prepared and accompanied by all of the specified evidence listed in the Immigration Rules. In that event, the Respondents should apply to withdraw the present appeals.

DECISION

The appeal is allowed

The making of the previous decision involve the making of a material error on a point of law. The decision is set aside, to be reheard in the First-tier Tribunal by any judge except First-tier Tribunal Judge Zahed

Signed
Deputy Upper Tribunal Judge Manuell

Dated 4 October 2018