



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04150/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14th August 2018

Decision & Reasons Promulgated
On 28th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

ROBERT KING WASTERFALL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Georget, Counsel
For the Respondent: Mr S Kotas, Senior Presenting Officer

DECISION AND REASONS

1. This a resumed hearing following an error of law decision and reasons given by me, promulgated on 19th June 2018, which is to be read in conjunction with this further decision and reasons. In that decision I found that there was a discrete error of law made by the First-tier Tribunal in respect of its assessment of the requirements of Appendix FM-SE in respect of the Appellant's ability to meet the financial requirements based upon the evidence that was before the First-tier Tribunal. The appeal was set down for remaking before me in respect of that discrete issue.
2. At the start of the hearing there was a further issue raised by the parties, namely whether the Appellant was able to meet the English language requirement in respect of Appendix FM paragraph E-ECP.4.1. and E-ECP.4.2.

3. On behalf of the Respondent, Mr Kotas accepted that the Appellant was able to meet the financial requirements set out in paragraph E-ECP.3.1 onwards and in that respect he did not resist the appeal on that basis. Having examined the Appellant's supplementary bundle for myself, in particular section B which numbers some 183 pages, I do find independently that the Appellant (by virtue of the letter from his partner's employer, payslips and the bank statements provided etc) is able to meet the requirements of Appendix FM-SE in respect of the financial requirements (the remaining requirements in respect of the relationship and the accommodation having already been satisfied pursuant to the documentary evidence previously before the First-tier Tribunal).
4. That leaves one simple question for me to decide in respect of the English language requirement. I heard submissions from both parties which I am grateful for. On behalf of the Respondent, Mr Kotas emphasised that albeit there was policy guidance issued by the Secretary of State which discussed exemptions (known confusingly as exceptional circumstances) to the ability to provide an English language certificate, the scenario faced by the Appellant was not one of them. Having examined the contents of Appendix FM-SE Immigration Directorate Instruction Section 1.21 (published April 2017) for myself, I can see from page 20 of the guidance that there are examples given (which do not purport to be a finite list of exceptional circumstances) which describe various scenarios whereby, in the Secretary of State's published view, a migrant can show that there is an exceptional circumstance which warrants an exemption being recognised for their ability to obtain and produce an English language certificate. Albeit there are several examples given, the last bullet point at the top of page 21 is the most relevant to the Appellant's predicament which states as follows:

"Examples of situations in which, subject to the necessary supporting evidence, the decisionmaker might conclude that there were exceptional circumstances, might include where the applicant:

...

- Is a long-term resident of the country in which the applicant faces very severe practical or logistical difficulties, which cannot reasonably be overcome, in accessing the learning resources required to acquire English language speaking and listening skills at CEFR Level A1."

5. Examining that example, it is plain that the Secretary of State had in mind that if a long term resident of a third country was unable, through very severe "practical or logistical difficulties", to access the learning resources required to acquire an English language skill to the sufficient level that would be an exceptional circumstance.
6. Comparatively, here the Appellant is not facing those difficulties in a third country but is facing those very severe practical or logistical difficulties in the United Kingdom. I note, in the Appellant's favour, that he is not facing those difficulties in accessing the "learning resources" to facilitate his ability to acquire an English language speaking and listening skill but is simply facing difficulties in obtaining his test result. With that in mind I note the Appellant's evidence he has presented before

the Upper Tribunal which includes pertinently an email from the British Council (dated 10th July 2018) which shows that the Appellant did in fact manage to sit a relevant IELTS Life Skills test at London Metropolitan University on 30th June this year but was told by the British Council via that email that the test had been 'invalidated' and a report would not be issued because the Appellant was unable to produce his 'original passport'. The British Council highlighted that only an original ID document would be accepted and albeit Mr Kotas suggested that the Secretary of State might be able to provide a 'certified copy' of the Appellant's Zimbabwean passport given that the British Council and London Metropolitan University's terms and conditions appear to be strict (as the host examination and invigilating bodies respectively). Thus, it appears to me that even if the Appellant were to try and obtain a certified copy from the Secretary of State there is no guarantee that he would be able to obtain the certificate without production of the original passport.

7. Mr Kotas placed extreme reliance upon one sentence in particular in the guidance which reads that "it will be extremely rare for exceptional circumstances to apply where the applicant is in the UK", in respect of showing that there are exceptional circumstances that would justify an exemption to the English language requirement. Notwithstanding that bald assertion stated in the guidance, albeit the Appellant is in the United Kingdom, in my view this is an extremely rare situation whereby the Appellant faces an exceptional circumstance namely that he is unable to obtain the English language certificate owing to "very severe, practical or logistical difficulties", namely that the Secretary of State has retained his passport following his application and given her strict policy on retaining valuable documents so as to not hinder any future or potential steps she may need to take in securing removal of a migrant, the Secretary of State will invariably retain that document until either he comes to remove the migrant or the migrant vouches that they will voluntarily return to their country of nationality and therefore requires their passport back for that stated purpose. Thus, unless the Appellant were to request his passport solely for return to Zimbabwe, it does not appear that there is any way in which he could get the original passport back and therefore have no plausible opportunity of obtaining his English language test certificate (having already sat the test).
8. Although I appreciate that there is no way one could know what the outcome would be of the test the Appellant has sat, having heard the Appellant speaking exemplary English in previous hearings, and given the contents of the First-tier Tribunal's decision which I have upheld almost in its entirety whereby the First-tier Judge heard evidence from the Appellant in English and stated in terms that there would be no difficulty in the Appellant obtaining an English language certificate in his view, I find that I share that provisional view given that the Appellant has produced before the Upper Tribunal a copy of his Zimbabwean General Certificate of Education at Ordinary Level from November 2000 which shows that he sat for an English language and English literature module at St Francis Xavier's College in Kutama and achieved A grades in both modules. The Appellant has also produced before the Upper Tribunal a further General Certificate of Education from November 2003 that shows that the Appellant completed his A levels of Biology, Chemistry and Maths at Hillcrest College in the English medium and those A levels and the exam was invigilated and awarded by the University of Cambridge local exam syndicate

which speaks highly of his historic English language ability since the years 2000 and 2003 onwards. Notwithstanding the oral evidence in English heard by the First-tier Tribunal, owing to that historical ability in English language also, in my view, if the Appellant were able to extract the certificate from the British Council or London Metropolitan University I accept Mr Georget's confident submission that the certificate would show that he meets the entry level of English at CEFR level A1, which is the most basic form of English language exam that can be sat by a third country national.

9. Having made those findings in respect of the Appellant's ability to meet Appendix FM and Appendix FM-SE in its entirety, save for the mere production of the English language certificate alongside the preserved findings of the First-tier Tribunal as they are contained in paragraph 1 to 51 of the First-tier Tribunal's decision which I reiterate has been preserved in its entirety (save for the third sentence of paragraph 51 and the entirety of paragraph 52), I do find that the Appellant is able to meet the Immigration Rules for entry clearance as a partner save for this technical omission.
10. With that in mind I do take into account the ratio of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 ("*Chikwamba*"), in which the House of Lords stated that applications or appeals by overstayers who claimed they could hypothetically meet the Rules for entry clearance as a partner were of relevance to the public interest in the then stated policy of enforcing their removal so as to ensure they have secured entry clearance via the proper means. Pursuant to the recent decision of the Supreme Court in *R, (on the application of Agyarko and Ikuga) v Secretary of State for the Home Department* [2017] UKSC 11 ("*Agyarko and Ikuga*") which confirms that if an applicant, even if residing in the UK unlawfully was otherwise said to be granted leave to enter, at least if an application were made from outside the UK, there might be no public interest in his removal as illustrated by the decision in *Chikwamba*. Given that ratio, albeit that the Appellant is an overstayer, this would not stand to fall against him in his hypothetical entry clearance application as he is able to meet the Rules for entry clearance despite the technical inability to produce an English language certificate at present which I have found is a matter which is worthy of an exemption given the logistical practical difficulties he faces in the United Kingdom in the rare circumstance where his passport has been retained by the Secretary of State, and given that he has also produced evidence which satisfies the Respondent that he is able to demonstrate his partner is earning over the financial threshold of £18,600 against the specified evidence under the Immigration Rules, I find that the public interest in the Appellant's removal is nominal (or non-existent) taking the Secretary of State's case at its very highest given that the Appellant meets the Rules for entry clearance. In that light I make the following further findings in respect of Article 8 ECHR.
11. As stated by the First-tier Tribunal, the Appellant's family life is engaged by virtue of his relationship with his partner and the decision to remove him plainly has consequences of gravity to engage Article 8 and is more than a technical interference. In respect of the third limb of the *Razgar* questions the decision is in accordance with the law given that the Secretary of State has considered the application on the basis made. Turning to the fourth limb of *Razgar* in terms of whether it is necessary in the

public interest for the Appellant to be removed in respect of firm and fair immigration control in my view the public interest must be given no weight or, at its highest, nominal weight, given that it is merely the Appellant's inability to produce his English language certificate to demonstrate he meets the English language requirement which is all that could be held against him, notwithstanding the fact that in my view he qualifies for an exemption from the English language requirement given that he faces very severe practical and logistical difficulties in producing that certificate (not in actually taking the test, which he has managed to do, and not in terms of acquiring the ability to meet the English language requirement in terms of his learning and taking the test, which he has also already managed to do). Consequently the public interest should be given discrete and nuanced weight by virtue of the *Chikwamba* ratio stated above and the Appellant's ability to meet the hypothetical Rules for entry clearance (see *Patel v Secretary of State for the Home Department* [2017] UKSC 72 at [56] and also see *TZ (Pakistan) and PG (India) v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [30]).

12. Taking into account the nuanced public interest by virtue of my assessment of the immigration rules, alongside the public interest as stated under Section 117B of the Nationality, Immigration and Asylum Act 2002 in a statutory form (as I am bound to consider) on the one hand, and taking the Appellant's ability to meet the immigration rules for entry clearance notwithstanding his status, in my view the scales are tipped in favour of the Appellant's family life outweighing the public interest in his removal given that he meets the Rules for hypothetical entry clearance as a partner and there is no or nominal public interest in securing his removal against the *Chikwamba* ratio.
13. Consequently, the decision to remove him is disproportionate.

Notice of Decision

14. The appeal is allowed on the basis that the decision is disproportionate in light of the above reasons, particularly given the *Chikwamba* ratio and the Appellant's ability to qualify for hypothetical entry clearance as the partner of a qualifying person.
15. No anonymity direction is made.

Signed

Date: 17 August 2018

Deputy Upper Tribunal Judge Saini