



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02349/2018

THE IMMIGRATION ACTS

Heard at Field House
Heard on 23 January 2019

Decision & Reasons Promulgated
On 12 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MOHAMMED ADEEL
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 31 July 1992. He appeals against a decision on the papers of Judge of the First-tier Tribunal Bart-Stewart sitting at Taylor House. In that decision the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 13 December 2017. The Respondent's decision was to refuse to grant the Appellant entry clearance as the spouse of Aisha Hamayoun, a British citizen ("the sponsor").

2. The Respondent refused the application because he did not consider that the Appellant could meet the English language requirements of Appendix FM contained at section E-ECP.4.1 and 4.2. The Appellant had produced an IELTS certificate as evidence that he could meet the English language requirement, but this was for a test which was not listed in Appendix O to the immigration rules and could not therefore be used for applications made under Appendix FM since April 2015. The Respondent was not satisfied that the Appellant had passed an English language test with a provider approved by UK visas. The Appellant did not hold any relevant qualifications and was not a national of a majority English speaking country. There were no exceptional circumstances in this case which would render refusal a breach of Article 8 of the European Convention on Human Rights. The decision would not result in unjustifiably harsh consequences for the Appellant or his family. There was no evidence of any exceptional circumstances in the case.

The Appellant's Case

3. The Appellant appealed against this decision arguing that the certificate he had produced was for a test listed in Appendix O and there was no such requirement in the immigration rules as relied upon by the Respondent. The Appellant had passed an English language test at a minimum of level 1 of the Common European Framework of Reference (CEFR) for languages with a provider approved by the Respondent. The test provider was consortium PK 602 and the certificate was awarded by Cambridge English. The language assessment was to CEFR level B2 including marks of listening (6) and speaking (6). The Appellant had also provided confirmation of his test booking which showed that he had booked and paid for a test and had been issued with the certificate.
4. Exhibited to the Appellant's notice of appeal was a confirmation letter from IELTS dated 6 January 2018 confirming that the Appellant was to take his test at the Best Western hotel in Islamabad on 11 January 2018. This correspondence thus post-dated the Respondent's decision to refuse entry clearance. The Appellant's grounds of appeal referred to the Appellant booking a new test to sit on 12 January 2017 which appears to have been a misprint. The Appellant also argued that there were exceptional circumstances in this case. He and the sponsor had been married for almost two years and had made every effort to start a family life. The sponsor needed to undergo treatment to her eyes and needed urgent care and support from the appellant.

The Decision at First Instance

5. The Appellant's appeal against the Respondent's decision on form IAFT-6 was dated 9 January 2018. The credit card details provided were declined initially by the Tribunal's card service provider and no fee was received. The Appellant and his solicitors were sent a notice on form IA 202 requiring payment of a fee of £80 for the appeal to proceed. It appears that this £80 was subsequently paid and a notice that the matter was to be determined on the papers on or after 8 August 2018 was sent out to the Appellant and his solicitors on 12 June 2018.

6. On 17 and 31 July 2018 the Appellant's solicitors wrote to the Tribunal to request an oral hearing, but it does not appear that the balance of the monies due for an oral hearing (£60) was paid and the Tribunal did not action that request. The Appellant's appeal came on the papers before Judge Bart-Stewart who promulgated her decision on 4 September 2018. She noted that despite directions neither the Respondent nor the Appellant had filed supporting evidence for the appeal. What she had before her were the grounds of appeal filed by the appellant's solicitors with photocopy supporting documents.
7. At [6] of her determination she noted that the grounds of appeal suggested that the Appellant did not provide the specified evidence required and it was not in fact available at the date of application as he had only booked but not yet taken his test. The Respondent was under no obligation to request further evidence which did not fall under the evidential flexibility policy. At [7] she stated that a copy of the certificate that was submitted with the application was not in the documents before her. The guidance which was in fact attached to the grounds of appeal, showed that for tests taken on or after 6 April 2015 no document was required as the scores were verified using an IELTS SELT consortium online system using a unique reference number which needed to be stated on the application form. The Appellant therefore failed to meet all of the eligibility requirements for a grant of entry clearance under the immigration rules.
8. At [8] the Judge dealt with the Article 8 claim stating that at the time that the Appellant and sponsor married they would have been aware that there was no guarantee that entry clearance would be granted. It was trite law that there was no obligation on the state to respect the wishes of a married couple to establish family life in that territory. If the Appellant had since passed an English language test in the approved manner it was open for him to make a fresh application for entry clearance. The decision under appeal was not a disproportionate interference with the right to respect for family or private life. She dismissed the appeal.

The Onward Appeal

9. The Appellant appealed against this decision arguing that there had been procedural unfairness because he had requested an oral hearing, but the case had been dealt with on the papers. Further, the review of the Entry Clearance Manager (ECM) was not conducted properly and he pointed to an error in the date of the review which suggested that it had taken place before the appeal had been lodged. The grounds reiterated what was said before regarding the adequacy of the certificate and that the Appellant had booked a test.
10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 5 December 2018. In granting permission to appeal he wrote that it was arguable that unfairness had arisen given that the decision was on the papers but before it was promulgated the representatives had sought in writing for an oral hearing to take place.

The Hearing Before Me

11. In consequence of the grant of permission the matter came before me to determine whether there was a material error of law in the decision of the First-tier Tribunal. There was no attendance on behalf of the Appellant either by the sponsor or any legal representative. There was no explanation for such absence. I was satisfied that notice of the hearing had been sent by first class post to the Appellant at the address of the sponsor and to his solicitors and that that correspondence had not been returned undelivered by the Post Office. No application for an adjournment had been received by the Tribunal, no decision had been made granting an adjournment and there was therefore no good reason given for the absence of any representation on the appellant's behalf.
12. I proceeded with the hearing and heard brief submissions from the Presenting Officer. He argued that it was baffling that the Appellant had requested an oral hearing, yet no further evidence was forthcoming. The Judge at first instance had been quite correct in her statement of the rules. Since April 2015 the Respondent no longer accepted certificates with applications for entry clearance. The reason was to reduce the risk of fraudulent applications. The procedure now was that a reference number should be given on the application form which could then be checked by the Respondent. That unique reference number would be given by the certifying body. The failure to give a certificate number on the application form meant that the Appellant had not complied with the evidential rules set out in Appendix FM-SE. As the application for entry clearance was submitted in 2017 it came within the post April 2015 regime. Any test taken by the Appellant subsequent to the decision would be irrelevant for the purposes of this appeal.

Findings

13. There are three core issues in this appeal. The first is whether there was procedural unfairness in the Judge determining this matter on the papers when the Appellant had requested (but not paid for) an oral hearing. The 2nd issue is whether the Appellant could satisfy the English language requirements by providing a certificate, a copy of which was in the file. The 3rd issue is whether the Judge had made a material error of law in her determination of the Article 8 claim.
14. The copy certificate in the file was dated 16 June 2017 and was in the form of a test report showing an overall band score of 5.5 and a CEF at level B2. In the bottom right-hand corner was a test report form number which was difficult to decipher from the photocopy. This copy had been supplied by fax by the solicitors with their letter 17 July 2018 requesting an oral hearing. I assume that this is the certificate that was referred to by the Respondent. The certificate was rejected because it was no longer acceptable evidence. It is not clear whether the test report form number on the bottom right-hand corner of the certificate is the number that needed to go in the application form for entry clearance. For whatever reason that number was not put into the application by the Appellant.

15. Question 85 on the application form for entry clearance asked: "how did you meet the English language requirement?" The Appellant replied by stating "IELTS 16 June 2017". This was insufficient for the Respondents purposes as it did not comply with the requirements of Appendix O. It was therefore open to the Respondent to refuse the application on that basis. Appendix O did apply to the Appellant and even if the Appellant was correct that the tester was an approved one and did issue the Appellant with an English language test certificate, he still needed to provide the appropriate reference number on his application form. There was no obligation in those circumstances on the Respondent to assume that the number on the certificate supplied could be utilised as the appropriate reference number. The post in Islamabad is a very busy one and receives a very large number of applications. It is not the obligation of the post to redraft application forms so that they comply with the Immigration Rules.
16. It is also fair to point out that no further evidence was supplied to indicate what the Article 8 claim might consist of that would mean that it amounted to compelling reasons why it should be allowed outside the Immigration Rules. Not only was nothing provided to Judge Bart-Stewart but nothing further was provided to me in relation to the onward appeal. There was no error of law in Judge Bart-Stewart's treatment of the Article 8 claim. She correctly pointed out there was no right for the Appellant and sponsor to choose where to enjoy their married life, they would have to satisfy the requirements.
17. Permission to appeal was granted because of a concern that the matter had been dealt with on the papers despite the Appellant's request for an oral hearing. Where there is procedural unfairness an Appellant may be entitled to have the decision against him set aside. There are however certain difficulties with the Appellant's argument in this case that he has been the victim of procedural unfairness. Firstly, no extra evidence was supplied by the Appellant to the Tribunal apart from the copy certificate and the submissions which I have summarised above. In particular there was no further evidence to support the Article 8 claim. Secondly, there was no attendance before me on the Appellant's behalf to clarify or explain any of the points raised in the course of these proceedings.
18. The Appellant had not completed his application form correctly, he had not complied with the requirements of Appendix FM-SE or Appendix O. Contrary to what was said in the grounds of appeal, Appendix O was very much in force and did apply in this case. The evidence of taking another test after the date of decision was irrelevant to the issues which the Judge had to decide. There was no error of law in her rejection of that evidence.
19. No explanation was given to me for the absence from the hearing of the Appellant's representatives or the sponsor. Whilst it was an error for the Judge not to consider the application for the appeal to be heard orally rather than to determine it on the papers, it was not in my view a material error of law. It was not inevitable that the Judge would have granted the application to deal with the matter orally as no explanation was offered why the Appellant had changed his mind from wanting a

paper appeal to an oral appeal. No further evidence was forthcoming from the Appellant either dealing with the English language requirement or more generally with Article 8. It is difficult to see what prejudice the Appellant suffered from having the matter dealt with by the Judge on the papers as it is not at all clear what would have been said on the Appellant's behalf if his request for an oral hearing had been granted. This was an appeal without merit.

20. The Appellant did not satisfy the Immigration Rules because he had not completed his application form correctly. He has not supplied any evidence to show why the Article 8 claim was so compelling it should be allowed outside the Rules. There was for example no statement from either the Appellant or the sponsor about the marriage. The Judge was entitled to dismiss the appeal before her and I dismiss the onward appeal before me. I agree with the comments of the First-tier Tribunal Judge that the Appellant's remedy is to make a fresh application for entry clearance with the proper documentation this time.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 4 February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 4 February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge