



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16436/2019

THE IMMIGRATION ACTS

Heard at Field House (via Skype)
On 4 March 2021

Decision & Reasons Promulgated
On 6 April 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

LIBAN AHMED EGAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:

For the Appellant: Ms Isherwood, Senior Presenting Officer

For the Respondent: Mr Balroop of counsel, instructed by Hattin Solicitors

DECISION AND REASONS

1. For many years, nationals of certain countries have been required, when applying for UK entry clearance, to demonstrate that they pose no risk of bringing Tuberculosis ("TB") into this country. This is the first case I have ever seen in which an applicant has fallen foul of that requirement, not only on application to the Entry Clearance Officer but also on appeal.
2. The appellant is a citizen of Djibouti who was born on 16 December 1980. He appeals, with permission granted by Upper Tribunal Judge Martin,

against a decision which was issued by First-tier Tribunal Judge Adio ("the judge") on 14 April 2020. The judge's decision was reached on the papers at the request of both parties. He dismissed the appellant's appeal against the respondent's refusal of his application for entry clearance as a spouse. The judge made various findings of fact in the appellant's favour. He accepted that there was a genuine and subsisting relationship between the appellant and the sponsor. He also accepted that she was earning a salary of more than £18,600 per annum and that the Financial Requirements of Appendix FM of the Immigration Rules were met. He also found, however, that the appellant had failed to provide a TB certificate; that he consequently fell foul of the suitability requirement in S-EC 1.6(d); and that his ongoing exclusion was a proportionate course for Article 8 ECHR purposes.

The Appeal to the Upper Tribunal

3. The grounds of appeal raise a single point, contending that the appellant was not required to produce a TB certificate because he lived in Egypt, which was not a country where TB screening is required by the UK. This point had been made in the grounds of appeal to the FtT and evidence had been adduced in support of it. The judge had failed to take this into account.
4. The respondent issued a short response to the grounds of appeal, contending that the evidence before the judge was insufficient to show that the appellant was exempt from the TB certificate requirement as he had provided untranslated copies of what was said to be a residence document for Egypt. He was in Egypt on a temporary basis in any event.
5. More detailed written submissions were made by the appellant's solicitors on 16 November 2020. The submission that the appellant was exempt from the TB screening requirement was developed. It was also submitted that the judge had conducted an incomplete or legally inadequate assessment of Article 8 ECHR.

Submissions

6. Mr Balroop submitted initially that the appellant was demonstrably in Egypt at the time that he made the application for entry clearance and that he was consequently not required to provide a TB certificate. At my request, Ms Isherwood clarified the stance of the Entry Clearance Officer as regards the construction of the Immigration Rules. She submitted that the appellant was required to establish on the balance of probabilities that he had not been in a country in which TB screening was required for at least six months.
7. I asked Mr Balroop whether he accepted that Ms Isherwood's construction of the Rules would operate as a more effective curb on the risk of TB being

brought into the UK. I suggested to him that his construction would enable a person from a country in which TB was rife to leave the country temporarily to make an entry clearance application, thereby avoiding the disease-prevention measures in the Rules. On reflection, Mr Balroop accepted that Ms Isherwood's construction of the Rules was correct and that what he was required to establish was indeed that the applicant had been in Egypt (and therefore had not been in Djibouti) for six months. He accepted that the respondent's policy was in line with the Immigration Rules in this regard.

8. The correct approach to the Immigration Rules having been agreed, Mr Balroop turned to the evidence which was said to discharge the burden on the appellant. In this respect, Mr Balroop was in difficulty. He had been instructed very recently and the papers provided to him gave no clear indication of what had or had not been before the judge.
9. I considered the contents of the Tribunal's file with Mr Balroop. I explained that it contained a short respondent's bundle and a bundle of documents which were appended to the notice of appeal to the First-tier Tribunal. The respondent's bundle contains copies of the application for entry clearance, dated 31 May 2019, and the notices of decision from the ECO and the Entry Clearance Manager, dated 27 August 2019 and 26 November 2019 respectively. It also contains a Foreign Residence Card from the Arab Republic of Egypt. That document was issued on 19 September 2020 and expired on 23 March 2020. The translation of the document gives an address in Giza as the appellant's address. I note that the appellant also stated in his application form that his residential address is in Giza. The Residence Category is said to be tourism, and the appellant confirmed in his online application form that he was not a permanent resident of Egypt. The appellant stated in his application form that he lived legally in Egypt and that his residence permit was to expire on 3 July 2019.
10. The Foreign Residence Card also appears in the bundle of documents which were appended to the notice of appeal. There are other documents in that bundle which bear primarily on the genuineness of the relationship and the sponsor's ability to satisfy the Financial Requirements of the Immigration Rules, although I note that a money remittance record from Dahabshiil shows that the appellant last received money in Somaliland from the sponsor in the UK on 15 January 2019 and the application form states that they lived together in Somaliland for 14 days ending on 3 May 2019. There were no other documents which bore on the appellant's stay in Egypt before the FtT.
11. Mr Balroop had been sent additional documents by his instructing solicitors. Since these did not appear in the file, and since Ms Isherwood had no objection, Mr Balroop sent them to the Upper Tribunal by email.

The first document is a flight ticket from Ethiopian Airways. The copy is very poor but it shows the appellant's name and a date of travel which appears to be 20 October 2018. The flight, number ET452, was from ADD to CAI, which I know to represent Addis Ababa and Cairo. The appellant was apparently in seat 23A for the journey. Beyond those details, it is very difficult to decipher any further information. Then there is another document which was issued by the Egyptian authorities. Much of it is in Arabic but it states in English that it is a 'Temporary Residence Permit for Touristic Purposes', with a period of stay given as '03/07/2019'.

12. Mr Balroop readily accepted that there was no proper basis for a submission that these documents had been before the FtT. He also accepted my observation that the date which appears at the top left hand corner of each of these documents (3/4/2021) rather militates in favour of a suggestion that they were copied (or photographed) on the day before the hearing.
13. In the circumstances, Mr Balroop accepted that he was not able to show that there was evidence before the FtT to show that the appellant had been resident in Egypt for six months. He did not develop any further submissions.
14. I was able to indicate that the appeal would be dismissed for reasons which would follow in writing.

Analysis

15. Paragraph A39 of the Immigration Rules has at all material times provided as follows:

Any person making an application for entry clearance to come to the UK for more than six months or as a fiancé(e) or proposed civil partner applying for leave to enter under Section EC-P: Entry clearance as a partner under Appendix FM, having been present in a country listed in Appendix T for more than six months immediately prior to their application, must present, at the time of application, a valid medical certificate issued by a medical practitioner approved by the Secretary of State for these purposes, as listed on the Gov.uk website, confirming that they have undergone screening for active pulmonary tuberculosis and that this tuberculosis is not present in the applicant.

16. Djibouti is a country listed in Appendix T of the Immigration Rules, as is Somalia. (Somaliland is obviously a part of Somalia, and not recognised as a country in its own right.) Egypt is not listed. On a page entitled 'Tuberculosis tests for visa applicants', the gov.uk website contains a link

to Appendix T and states that an applicant will not be required to have a TB test if, amongst other things:

you lived for at least 6 months in a country where TB screening is not required by the UK, and you've been away from that country for no more than 6 months.

17. The respondent's decision made reference to the relevant provisions of the Immigration Rules. The grounds of appeal to the FtT made reference to the respondent's policy. It was clearly submitted in the grounds that the appellant was in Egypt and that he was exempt from the requirement to undergo a TB test. It is not clear why the judge failed to deal with the assertion or the limited evidence which was adduced before him in support of it. Whatever the reason, it is apparent that the judge erred in law in concluding simply that the appellant had not produced a valid TB certificate; it was the appellant's case that he was not required to do so and the judge failed to address that argument.
18. As Mr Balroop came to recognise during the course of his realistic and measured submissions, however, it is impossible to see how this failure on the part of the judge could be said to have been material to the outcome of the appeal. I have taken some care to set out above the evidence which was and was not before the FtT. Even taking that evidence at its highest, it falls short by some margin of establishing that the appellant had 'lived for at least 6 months in a country where TB screening is not required'. Mr Balroop accepted that the respondent's policy accurately represented the test in the Immigration Rules in expressing it in that way. He was undoubtedly correct to do so, since the construction which he initially favoured would have create an undesirable and plainly unintended risk to public health for the reasons I canvassed with him during his submissions (my [7] above refers).
19. The evidence shows that the appellant was in Somaliland at the start of 2019. He lived with the appellant there in April and May and he collected money from Dahabshiil there in January that year. If he flew from Addis Ababa to Cairo in October 2018, as appears to be the case from the Ethiopian Airways ticket, he must have returned to Somaliland at a later stage in 2018 or in early 2018. He gave his address as Giza in his application for entry clearance in May 2019 and it is clear that he was permitted to be in Egypt for 'touristic purposes', firstly until July 2019 and then from 23 March 2020 to 19 September 2020. None of this evidence - even including the evidence which was not before the FtT - shows that the appellant has ever spent a continuous period of six months living in Egypt, whether before the decision of the ECO, the decision of the FtT or even the hearing before me. Permission to reside in a country does not establish residence pursuant to that permission, and it would be wrong to assume residence pursuant to that permission where, as here, the individual in question plainly travels in and out of the country as a tourist.

20. There was never any proper evidential foundation for the assertion that the appellant was exempt from the requirement to undergo a TB test. The appellant was not required by the Rules to show that he had been to Egypt, or that he was entitled to go there as a tourist. What was required was evidence that he had resided there for six months, and that evidence was absent before the FtT just as it is absent before me. The appellant could not have succeeded under the Immigration Rules.
21. The grounds of appeal made no challenge to the judge's consideration of Article 8 ECHR outside the Rules. In the further submissions which were settled by the appellant's solicitors in November 2020, there were separate submissions advanced on this basis. It was submitted, in summary, that the judge had failed to undertake an adequate proportionality assessment in light of the matters he had resolved in the appellant's favour and, secondly, that the judge had overlooked the best interests of the child.
22. No application was made to amend the grounds of appeal, whether in writing or by Mr Balroop. Mr Balroop in fact made no attempt to develop any submissions about Article 8 ECHR outside the Rules. He was correct to adopt that stance, for the following reasons.
23. Firstly, there is no proper basis to permit the amendment to the grounds of appeal. It appears that the appellant's solicitors merely decided to attempt to add an additional ground of appeal, without any attempt to explain why it had not been pleaded before. I note that their submissions also post-dated the respondent's reply to the grounds of appeal, thereby placing the respondent at a disadvantage in procedural terms.
24. Secondly, it is difficult to see how the dismissal of the appeal on Article 8 ECHR grounds did not follow inexorably from the conclusion that the appellant had failed to show that he was free of a dangerous, communicable, respiratory disease. I note that the papers were placed before the judge of the FtT on the first day of the first Covid-19 'lockdown', at which point the imperative of public health protection may not have been uppermost in his mind. With the benefit of all the wisdom gained during 2020, it is not easy to see what could be more important (and therefore more proportionate) than securing the health of the United Kingdom by excluding those who might be suffering from communicable diseases.
25. Thirdly, insofar as it is said that the judge overlooked the best interests of the child, there was no adequate evidence to show that the decision under appeal had any impact on the best interests of a child. The only mention of a child I have been able to find in the papers is at part 1.28 of the Appendix 2 form. The preceding question, "Does your sponsor have any children?" is answered in the affirmative but the name, nationality and date of birth of the child is left blank. At 1.28, it is said that the sponsor is

responsible financially for a child who was born on 18 November 2014. There is no further reference to this child, or to his parentage, in any of the other evidence.

26. In the circumstances, although he reached the conclusion by the wrong route, the judge was correct to conclude that the appellant could not meet the Immigration Rules. There was no application to vary the grounds to include a challenge to his Article 8 ECHR conclusions. Had there been any such variation, I would have rejected the ground of appeal for the reasons immediately above.
27. The appeal is accordingly dismissed.

Notice of Decision

No material error of law having been found in the FtT's decision; the appeal is dismissed.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 March 2021