



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35964/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice Belfast
On 26 October 2015

Determination Promulgated
On 22 December 2015

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAZIN COBAN

Respondent

Representation:

For the Appellant: Ms M O'Brien, Home Office Presenting Officer
For the Respondent: Ms M Gavin, solicitor

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.
2. Thus, the appellant is a citizen of Turkey born on 2 July 1978. On 4 June 2013 he made an application for leave to remain as a spouse. That application was refused in a decision dated 15 August 2013.
3. The appellant's appeal against that decision came before First-tier Tribunal Judge Mozolowski on 29 January 2015 whereby the appeal was dismissed under the Immigration Rules but allowed on human rights grounds, the judge stating that a period of leave for nine months would be appropriate.

4. Permission to appeal against the First-tier judge's decision having been granted, the appeal came before me.
5. The respondent refused the application for leave to remain as a spouse with reference to paragraph 284(ix)(a) on the basis that the appellant had not supplied an English language test certificate in accordance with the Rules, and had not provided evidence to support the claim that he has a physical or mental condition that would prevent him from meeting that requirement. The respondent went on to consider, and refuse, the application with reference to the Article 8 Immigration Rules.
6. In her determination the First-tier Tribunal Judge noted that the appellant had been diagnosed at school in Turkey as having dyslexia. He had finished school and worked as a chef in a Turkish hotel where he met the sponsor who was on holiday at the time that their relationship developed.
7. He had attempted on four occasions to sit the Life in the UK test in 2009 and failed on each occasion. He arrived in the UK in 2005 with a valid spouse visa and has been granted extensions of leave since that time. He now works as a chef in Northern Ireland, earning about £13,000 per annum. He and the sponsor, his spouse, have no children.
8. The judge referred to a further issue raised at the hearing before her to the effect that the appellant, as well as suffering from dyslexia, has "mental health issues" and mild cognitive impairment, suggesting that it was impossible for him to sit an English language test. Thus, it was argued that he fell within an exception to the requirement of providing a speaking and listening test certificate in terms of paragraph 284(ix)(a)(ii), having a mental condition which would prevent him from meeting that particular requirement.
9. At [11] of the determination the judge said that the appellant had not provided to the respondent with his application form any indication of the problems which it is said would result in him falling within one of the exceptions to the English language requirement. Accordingly, she concluded that it was not surprising that the appellant's application was refused on the basis of the information put before the respondent.
10. After considering further evidence put before her, in conjunction with the submissions made on behalf of the parties, she concluded at [17] that the appellant had not shown that he falls within any of the exceptions which would prevent him meeting the English language requirement. She gave detailed reasons for coming to that view. This included consideration of an educational psychologist's report. She referred to the appellant's heavy drinking as a significant problem in terms of his apparent anxiety and overall difficulties.
11. In considering the Immigration Rules in terms of Article 8, the judge concluded that the appellant did not meet the private life requirements of the Rules. She also concluded that with reference to EX.1 it had not been demonstrated that there were insurmountable obstacles to family life between the appellant and his wife

continuing in Turkey. Again, there was a comprehensive review and assessment of the evidence on that issue.

12. With reference to Article 8 proper, she accepted that the appellant and the sponsor were in a genuine and subsisting relationship, and had been together for over 10 years. She accepted at [34] that the appellant “has a degree of mental illness in the form of anxiety and depression”. However, she concluded that this appeared to be at the lower end of the spectrum. She did however, accept that the appellant “may possibly” have cognitive deficits or low IQ.
13. She observed that the appellant’s status in the UK had always been lawful and that he has tried at all times not to be a burden on the state.
14. After again considering various features of the evidence put before her, she found at [39] that the appellant’s dyslexia would not necessarily prevent him from sitting an English language test in speaking and listening. She referred to the appellant having family in Turkey who appeared to be supportive, although he had made ties within the community in Northern Ireland, and not just within the Turkish community.
15. She also noted at [39] that the appellant is not able to meet the requirements of the Rules, although the consequences of returning to Turkey and “splitting up a genuine relationship” must also be taken into account [43]. She referred to what was described as a suicide attempt by the appellant.

16. At [45] she stated as follows:

“I also take into account the misunderstanding that there appears to have arisen about the Appellant’s inability to take an English language test due to dyslexia and note that the application was made by the Appellant without the benefit of legal advice. I therefore consider that the Appellant should be allowed to remain further in the United Kingdom on Article 8 grounds for a period of 9 months from the date of promulgation of this decision to allow the Appellant time to prepare more fully for a further spouse visa and deal with the issue of the English language test far more fully, either by sitting the test or claiming an exemption backed up with good medical grounds and clear reports. The present medical evidence that is currently before me is patchy and, as I have indicated can only be relied upon to a limited degree. However it cannot be ignored about his visa status (sic). With his mental illness, the Appellant has only limited tolerance for uncertainty as shown in the one vague suicide attempt.”

17. In the next paragraph she stated that the respondent’s decision:

“would cause the United Kingdom to be in breach of the law or its obligations under the Human Rights Convention to a limited extent and [I] consider that a period of 9 months leave would be appropriate.”

18. She thus dismissed the appeal under the Immigration Rules but allowed it on human rights grounds “for a period of 9 months” [48].

Grounds and Submissions

19. Prior to the hearing there was an indication that the appellant had now taken and passed an English language test. At the hearing both parties indicated that they were aware that that was the case. Ms O'Brien pointed out that there was no cross appeal on behalf of the appellant in terms of the dismissal of the appeal under the Immigration Rules.
20. The grounds of appeal before the Upper Tribunal on behalf of respondent point out that the appellant had already attempted the English language test on four previous occasions and failed. Having found that there were no insurmountable obstacles to family life continuing in Turkey, allowing the appeal under Article 8 proper to give the appellant a fifth chance to sit his English language test was an error of law, it is argued.
21. I raised with the parties the issue of the new English language test certificate provided by the appellant and whether in the circumstances, if it was an acceptable English language test, the respondent would withdraw the decision under appeal. Ms O'Brien took instructions and indicated that there was some difficulty in terms of whether the certificate now provided is acceptable. The preliminary view was that it was not an acceptable English language test certificate under the Rules.
22. Ms Gavin pointed out that such a certificate, being a Pearson certificate, had long been accepted and such certificates had been submitted by other applicants in the past. However, she did not have evidence that it was on the relevant approved list.
23. After a further opportunity for the respondent to take instructions it was confirmed on behalf of the respondent that the test certificate provided by the appellant is not currently on the transitional list or on any future list which comes into force from 5 November 2015. Accordingly, the certificate is not valid in terms of its meeting the terms of the Rules it was said.
24. The test certificate provided was an Edexcel ESOL Skills for Life test in speaking and listening – Entry 3, dated March 2015. The test is apparently administered or overseen by Pearson.
25. Ms Gavin submitted that she had contacted the organisation where the appellant had taken the test and the director of that organisation had sent her an email from Pearson stating that the ESOL test was still valid until November 2015. Ms Gavin indicated that she had some concerns about whether it was possible on the day of the hearing to check the validity of the test and establish whether it was acceptable or not.
26. More widely in submissions, Ms O'Brien submitted that having concluded that the appellant is not able to meet the requirements of the Rules in terms of EX.1, it was irrational and perverse for her to go on to allow the appeal under Article 8. Here the judge had evidently used Article 8 to dispense with the Rules. She had failed to take into account her own finding that family life could be enjoyed elsewhere.

27. Ms Gavin suggested that the failed attempts by the appellant in taking a test related to the Life in the UK test as is clear from [8], [13] and [19]. He had not in fact taken an English language test previously at all. It was submitted that there were good grounds for the judge to allow the appeal under Article 8 proper.
28. The judge took into account the difficulties that there would be in the appellant returning to Turkey. The judge took into account the length of time the appellant had lived in the UK. His integration was constrained by the English language test issue, but he had now passed a test. The judge took into account all the circumstances and her decision that the appellant should be granted leave for nine months to pass the test was appropriate.

My assessment

29. At the conclusion of the hearing I reserved my decision. I also gave directions designed to allow a further opportunity for the test certificate provided by the appellant to be checked to see whether it was an approved test for the purposes of paragraph 284 of the Immigration Rules.
30. In a response from the respondent, the position provisionally taken at the hearing was confirmed, namely that the test certificate offered is not acceptable proof of competence "as it does not appear on the list of transitional SELT in Appendix O". It is further indicated in the letter from the respondent that the certificate proffered would not have been acceptable as at the date of application in June 2013.
31. No further information has been provided on behalf of the appellant as to the validity of the latest English language test dated March 2015 in terms of its meeting the requirements of the Rules.
32. The appellant is not able to meet the requirements of the Rules in terms of paragraph 284(ix)(a) with reference to the English language requirement. The judge concluded that he had not established that his physical or mental condition would prevent him from meeting the requirement. She did not conclude, nor does it appear to have been argued, that there were exceptional compassionate circumstances that would prevent him from meeting the requirement under subparagraph (iii).
33. In considering EX.1 she concluded that the appellant could not meet those requirements, concluding that there were no insurmountable obstacles to family life continuing in Turkey.
34. However, at [43] she stated that "the consequences of returning back to Turkey and splitting up a genuine relationship must also be taken into account", with reference to Article 8 proper. However, on the basis that she had already concluded that there were no insurmountable obstacles to family life continuing in Turkey, there would be no question of their relationship being severed. Similarly, the conclusion at [44] that "a complete refusal of the Appellant (sic) with the likelihood of his remaining in Turkey permanently must be taken into account which must also take into account his mental illness" is also inconsistent with what was concluded about there being no insurmountable obstacles to family life continuing in Turkey.

35. The justification for allowing the appeal under Article 8 appears to have been to allow the appellant "time to prepare more fully for a further spouse visa and deal with the issue of the English language test far more fully, either by sitting the test or claiming an exemption backed up with good medical grounds and clear reports". This was combined with what the judge said about the appellant's "visa status" and his mental illness, the appellant only having a limited tolerance for uncertainty as shown in the one "vague" suicide attempt.
36. However, the fact of the matter is that the appellant was not able to meet the requirements of the Article 8 Rules. The judge concluded that there were no insurmountable obstacles to family life continuing in Turkey. It is trite that Article 8 does not give a right to choose where family life is to be exercised.
37. In addition, the conclusion at [46] that the respondent's decision would cause the United Kingdom "to be in breach of the law or its obligations under the Human Rights Convention" is inexplicable in terms of its reference to the decision being "in breach of the law". It is not clear what the judge meant by this.
38. The conclusion that the decision would breach the UK's obligations under the Convention "to a limited extent" does not, with respect to the judge, make sense in the context of this appeal. The decision either would or would not be in breach of the Convention.
39. I am satisfied that in allowing the appeal under Article 8 the First-tier Judge erred in law. The appellant was not able to meet the requirements of the Article 8 Rules and the judge found that there were no insurmountable obstacles to their continuing family life in Turkey. The conclusion that the appeal should be allowed under Article 8 "to a limited extent" is in itself irrational and inconsistent with her own conclusions. The analysis under the Rules could not on the facts of this appeal have yielded a different outcome under Article 8. Accordingly, I set the decision aside.
40. The re-making of the decision relates only to Article 8 proper. Although the appellant has taken an English language test and passed, in March 2015, that is not a test that complies with the requirements of the Rules in terms of it being from an approved provider. No evidence has been submitted on behalf of the appellant to suggest that it is, and there have been no submissions to contradict the respondent's contention that it is not a qualifying test. In any event, there has been no appeal on behalf of the appellant in terms of the appeal having been dismissed under the Rules.
41. The fact that the appellant is still not able to meet the requirements of the Rules is plainly pertinent to the re-making of the decision under Article 8.
42. In the light of the judge's factual conclusions, I am satisfied that the respondent has established that the decision is a proportionate one in all the circumstances. Accordingly, the appeal under Article 8 of the ECHR is dismissed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside. I re-make the decision by dismissing the appeal, both under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek

16/12/15