



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/14272/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3 November 2015**

**Decision & Reasons Promulgated
On 6 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

ENTRY CLEARANCE OFFICER - TIRANA

Appellant

and

H D

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the respondent: None

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Griffith ("the FTTJ") promulgated on 29 July 2015, in which she allowed the respondent's (hereinafter called the claimant) appeal against the refusal of his application for entry clearance as a spouse under the Immigration Rules and Article 8 of the European Convention on Human Rights.
2. Given my references in this decision to the sponsor's fertility and medical

conditions, an anonymity order is appropriate.

Background

3. The claimant is the husband of the sponsor who is British. The claimant's application for entry clearance was refused by the appellant (hereinafter called the Entry Clearance Officer (ECO)) for various reasons including the fact that the claimant had not provided an appropriate English language test certificate; he did not qualify under Appendix FM of the Immigration Rules for entry clearance as a spouse. Consideration was given to the claimant's Article 8 rights but the ECO considered there were no exceptional circumstances.
4. The FTTJ dismissed the appeal under the Immigration Rules because the claimant had not provided a test certificate but she allowed it on human rights grounds. The ECO was granted permission to appeal to this Tribunal because it was arguable the FTTJ had failed to consider s117B(1) of the Nationality, Immigration and Asylum Act 2002, there being no mention in her decision of the fact that the claimant had entered the UK without leave; it was also arguable that the FTTJ had placed too much weight on the claimant's ability to speak English and his financial position rather than considering these points to be neutral. Thus the matter comes before me.

The Hearing

5. The claimant was not represented at the hearing before me. I explained the proceedings to the sponsor, who attended the hearing. She confirmed that she understood and I endeavoured to ensure that she addressed the relevant issues during the course of the hearing. She participated fully in the hearing.
6. Following the oral submissions of Mr Kotas, for the ECO, and those of the sponsor, I indicated that I would find there had been a material error of law in relation to the FTTJ's decision on the human rights claim. With the agreement of the parties I heard the oral evidence of the sponsor and she was cross-examined by Mr Kotas. At the end of the hearing I heard the oral submissions of Mr Kotas and the sponsor on the human rights claim. I summarised my understanding of the appellant's case and the sponsor confirmed that this was correct.

Submissions on Error of Law

7. Mr Kotas, for the ECO, submitted that the FTTJ had given little consideration to the public interest factors listed in s117B, the most glaring omission being s117B(4) namely that little weight should be given to private life or a relationship with a qualifying partner that has been established while the person was in the UK unlawfully, as was the case here. This was, he submitted a fundamental flaw in the FTTJ's reasoning and rendered the decision unsound. He also submitted that, following **AM (S 117B) Malawi [2015] UKUT 0260 (IAC)**, the claimant could not

obtain a right to entry clearance merely because he spoke English. He submitted that the FTTJ had not expressly indicated that the claimant's English language skills should be treated as a neutral factor. More importantly, he said that there was no express recognition of immigration control as a public interest consideration. He submitted that the FTTJ had applied the wrong test; her approach to proportionality was flawed.

8. The sponsor made no specific comments on Mr Kotas' submissions but indicated she had understood them. Implicitly, she opposed the submissions that there was an error of law.

Discussion

9. The sponsor told me the claimant acknowledged he had failed to provide an appropriate English language test certificate in support of his application (albeit he believed, at the time, that he had done so). The decision of the FTTJ to dismiss the appeal under the Immigration Rules must therefore stand. There is no error of law in that regard.
10. It was appropriate for the FTTJ to go on to consider the appeal in accordance with the Article 8 jurisprudence.
11. The FTTJ noted that the claimant failed to meet only one criteria in the Immigration Rules, namely to provide an appropriate English language test certificate. She found that the claimant spoke English. In paragraph 19 of her decision, she considered she was "entitled to take into account as weighing in the [claimant's] favour his ability to comply with all other requirements of the relevant Rules". She also took into account, whilst noting the medical evidence was thin, that the sponsor's IVF treatment had reached a stage where it could not proceed further in the absence of the claimant. Whilst the FTTJ refers in paragraph 21 to sections 117A and B, at no stage in her reasoning does she refer to the criteria in s117B(4) which are as follows:

“(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.”

The absence of consideration of this section is a material error of law: the FTTJ gave considerable weight to the couple's relationship and particularly their intention to engage in IVF treatment to start a family. Had she not done so, the outcome of the appeal might have been different. Whilst the FTTJ refers to "Section117A" in passing, she fails to take into account in her assessment the maintenance of effective immigration control. This failure is a material error of law. For these reasons, the FTTJ's assessment of the proportionality of the interference with the claimant's protected rights is flawed.

12. I therefore set aside the decision of the FTTJ on the human rights claim. I now remake that decision and bear in mind the evidence before the FTTJ and the oral evidence of the sponsor before me. I make the following findings in that regard.
13. The claimant entered the UK unlawfully and has never had leave to remain here. He embarked on his relationship with the sponsor in that knowledge and being aware that he could be removed at any time. The sponsor told me she knew from the outset of their relationship that he had no immigration status in the UK; she encouraged him to rectify this. Whilst it is to the claimant's credit that, having been refused leave to remain by the Secretary of State, he returned to his home country to make an application for entry clearance, nonetheless, s117B(4) requires me to give little weight to the claimant's private life in the UK or to his relationship with the sponsor, albeit she is British and resides here.
14. I take into account that, apart from his failure to provide an appropriate English language test certificate, the appellant has demonstrated that he fulfils the criteria in Appendix FM for the grant of entry clearance. I also note that he communicates in English with his wife and find he would be able to provide an appropriate certificate in a short period of time. The sponsor told me that they had not thought to make another application with the appropriate certificate, rather than pursuing an appeal.
15. There is no evidence that the claimant has worked in the UK or that he was financially independent when he was here. However, there is evidence that work would be available for him on his arrival. The sponsor is working as a care manager and currently supporting the claimant in his own country.
16. I bear in mind the sponsor's and claimant's intention to undergo IVF treatment but give this little weight, notwithstanding its importance to them, because the sponsor told me that such treatment is available in the claimant's home country. Furthermore, I must bear in mind the provisions of s117B(4).
17. The maintenance of effective immigration controls is in the public interest. The claimant is capable of fulfilling the criteria in the Immigration Rules but there is no good reason why he should circumvent those Rules. I bear in mind that the absence of the claimant from the UK is hampering the sponsor's ability to undergo IVF immediately, but there is no medical evidence to suggest that a further short delay, whilst the claimant submits a fresh application with the required supporting evidence, would impact negatively on the prospects of successful treatment. I realise a fresh application will entail additional expense for the sponsor and claimant but she is now supporting him in his home country in any event.
18. Having considered the evidence in the round, I find that the degree of interference with the claimant's and sponsor's protected Article 8 rights is

justified and proportionate to the public interest in maintaining effective immigration control.

Decision

- 19. The making of the decision of the First-tier Tribunal did involve a material error of law, as set out above.
- 20. I do not set aside the decision of the First-tier Tribunal to dismiss the appeal under the Immigration Rules. That decision stands.
- 21. I set aside the decision of the First-tier Tribunal to allow the appeal on human rights grounds and remake it, dismissing the appeal.

Signed

Date

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The FTTJ did not make a fee award and, the appeal having been dismissed there can be no fee award now.

Signed

Date

Deputy Upper Tribunal Judge A M Black