



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15139/2013
OA/15140/2013
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THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 06 March 2015

Determination Promulgated
On 09 March 2015

Before
The President, The Hon. Mr Justice McCloskey

Between

ENTRY CLEARANCE OFFICER OF DELHI, INDIA

Appellant

and

TASHI TSOMO, NAMDOL TENZIN AND ZOMPA TENZIN

Respondents

Representation:

Appellant: Mr K Hibbs, Senior Home Office Presenting Officer
Respondents: Mr A Seelhoff of A Seelhoff Solicitors

DECISION

INTRODUCTION

1. The Entry Clearance Officer of Delhi, India (hereinafter the "ECO") appeals, with permission, against the determination of the First-tier Tribunal (the "FtT"). The family unit involved in this appeal consists of father (the sponsor), mother, son (aged

19 years) and daughter (aged 17 years). All family members are nationals of Tibet. The father has been present in the United Kingdom since 2005 and was granted so-called "legacy" indefinite leave to remain in 2010. The other three family members fled Tibet in February 2011 and have resided in India, undocumented and without authorisation, ever since.

2. By three linked decisions dated 25 July 2013, the ECO refused the applications of the mother and the two children (the Respondents to this appeal) for entry clearance under Appendix FM of the Immigration Rules. In the case of the mother, the ECO pronounced five reasons for the refusal: the absence of a "free from active pulmonary tuberculosis" [TB] certificate; an assessment that there is no genuine and subsisting relationship between the mother and the sponsor and that they did not intend to live together permanently in the United Kingdom, based mainly on the absence of a marriage certificate; a failure to satisfy the minimum income requirement; the non-possession of an English language competence certificate; and the absence of a valid travel document. The two reasons for refusal provided in the cases of the two children were non-compliance with the minimum income requirement and the lack of a valid travel document.
3. The Respondents appealed, successfully, to the FtT. Their appeals were allowed under Article 8 ECHR. In allowing the appeals, the FtT identified the central issue as that of proportionality and expressed its conclusion in the following terms, in [31]:

"Having considered this case carefully, I find that the circumstances taken together have the cumulative effect of making a decision to refuse entry clearance disproportionate because of the very difficult situation that the Appellants face collectively. Separation of this family has already caused significant hardship. The first Appellant is separated from the second and third Appellants and they are all separated from the sponsor who has been recovering from significant injuries without the assistance of his family. In light of the fact that the first Appellant has no settled status in India and is illiterate, I accept that her situation is exceptional. There is no realistic chance that she will meet the English language requirements which are too onerous for someone in her situation. I make the same finding for different reasons in relation to the sponsor's ability to reach the financial threshold. In my view the need for family reunification in the circumstances of this case places the United Kingdom in breach of her obligations under Article 8 of the ECHR because of the serious and compelling circumstances which I have set out in detail above."

While the appeals were allowed under Article 8 ECHR, they were dismissed under the Immigration Rules. There is no cross appeal by the Respondents against the latter aspect of the FtT's decision.

4. The Secretary of State's grounds of appeal raise four issues. I shall address these *seriatim*. First, it is contended that an error of law was committed by reason of the FtT's failure to consider the possibility that the sponsor could relocate to India where

family life could be re-established. True it is that there is no express mention of this issue in the determination. However, I am satisfied that this does not constitute an error of law. It has at all times been common case that the Respondents have no formal status in the alien country in which they have been residing during recent years and their description as “stateless” is uncontested. It is also undisputed that the sponsor, a national of Tibet, has no legal entitlement to reside in India and there was no evidence whatsoever about either his prospects of securing entry authorisation or the prospects of all four family members remaining together there thereafter. Furthermore, there was explicit written evidence before the FtT about the very difficult conditions endured by refugees and stateless persons in India. I consider that this ground of appeal has no merit accordingly.

5. The second ground of appeal contends that the impugned decisions of the ECO do not entail an interference with the right to respect for family life enjoyed by the four persons concerned given their *de facto* separation during the past nine years. The reason given by the Judge for finding an interference is that the impugned decisions have “prevented reunification of the family as a unit”: see [28]. This is an entirely valid reason, consonant with the Article 8 ECHR jurisprudence. The second ground of appeal has no merit in consequence.
6. The third ground of appeal focuses on the Judge’s assessment of the sponsor’s capacity to work and his ability to satisfy the relevant financial requirements or to qualify for one of the exceptions. The Judge stated, in [30]:

“I have gone on to consider the financial circumstances. The Respondent chose not to do a thorough examination of the sponsor’s finances. However, the sponsor is unable to work because of injuries sustained in a road traffic accident ...

*There was a significant body of evidence setting out the effects of the road traffic accident ... the sponsor was referred to the brain injury rehabilitation service in September 2011. The solicitors acting for him have recovered £30,000 in compensation. The sponsor continues to suffer memory loss and headaches. **This brings the sponsor within one of the exceptions to the financial requirements as he has sustained a serious injury during a road traffic accident, which has affected his ability to work.** In this case the burden on the State will be reduced because there is a financial cushion in place which will mean that the family are not wholly dependent on the state.”*

I have highlighted the key passage which, duly analysed, has two elements. I would further highlight an earlier statement in the same paragraph that the sponsor:

“..... is unable to work because of injuries sustained in a road traffic accident.”

It was argued on behalf of the ECO that the Judge, in these passages, has committed the error of making an unsustainable finding that the sponsor is permanently unable

to work and failing to measure such incapacity. I consider this contention to have no substance. Having examined the medical evidence, I am satisfied that the Judge made no error in the assessment that the sponsor's injuries, which were on any showing serious, rendered him incapable of working. However, the Judge has stated nowhere that this incapacity will endure permanently. This, in my view, is clear when the paragraph is considered as a whole, in conjunction with the medical evidence and particularly in the words "*has affected his ability to work*". Accordingly, I find no error of law in the respect advanced.

7. The second criticism of the Judge's treatment of this discrete issue was that the sponsor qualified for one of the exemptions to the financial requirements specified in the Immigration Rules. It is probable that, in this discrete respect, the Judge had in mind paragraph E-ECP3.3 of Appendix FM of the Immigration Rules which, read in conjunction with paragraph E-ECP2.10(c), contains a list of exemptions to the need to satisfy the specified financial requirements. These exemptions arise where the sponsor is in receipt of, *inter alia*, disability living allowance. The complaint about this aspect of the FtT's determination is that there is no evidence that the sponsor has been in receipt of this benefit at any time. The riposte on behalf of the Respondents is that the sponsor does not qualify for this benefit on account of the capital available to him from his compensation.
8. The net result is that the Judge did indeed err in law on this discrete issue. I shall consider this issue further *infra*.
9. The fourth, and final, ground of appeal contends that the FtT erred in law in its treatment of the ability of the mother (the first Respondent) to satisfy the English language requirement and the assessment that she qualified for an exemption. Paragraph E-ECP4.2 of Appendix Rule provides in material part:

"The applicant is exempt from the English language requirement if at the date of application

(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK."

The Judge, having received evidence from the sponsor that his wife was never educated and is illiterate, made the following findings in [30]:

"The first Appellant will not be able to meet the English language requirements. She is illiterate and has no status in India. She survives by working for her keep I consider [her] situation to be on all fours with that of a refugee or of an IDP. In my view her circumstances are exceptional."

In the same passage the Judge rehearsed, correctly, the exceptional circumstances dispensation in the Rules.

10. The argument advanced on behalf of the ECO is that the Judge erred in law by virtue of the decision in R (Chapti) - v - Secretary of State for the Home Department [2011] EWHC 3370 (Admin). I am unable to accept this argument. In Chapti the Applicants challenged the amended paragraph 281 of the Immigration Rules on the ground that the newly introduced English language competence requirement which it enshrined, as amended, was incompatible with Articles 8 and 12 ECHR. The challenge was dismissed by the Administrative Court. The ECO's argument rested on [111] of the judgment, where Beatson J stated:

"An applicant who is illiterate or semi-literate is clearly likely to need more time to achieve the required standard. If he or she cannot do so, the question will be whether he or she qualifies under the 'exceptional compassionate circumstances exception'. If the Defendant does not show flexibility in such cases, she may find that an individual decision requiring such a person to take the test is, on the particular facts, incompatible with the Article 8 rights of that person or his or her spouse."

This assessment is repeated in the Judge's omnibus conclusions, in [148](d). In [114] the Judge added:

"It is neither possible nor necessary for an exception based on exceptional compassionate circumstances to seek to predict and set out with any precision when it might apply, because the circumstances of individual cases vary widely and a range of circumstances may need to be considered together."

I refer also to [115]. I am satisfied that there is nothing in the decision in Chapti which warrants the assessment that the FtT fell into error in finding that the first Respondent will be unable to satisfy the English language competence requirement of the Rules and qualifies for the "exceptional circumstances" dispensation in consequence. There was sufficient evidence to rationally justify this assessment and conclusion and it was not based on any material error of fact or the intrusion of any improper consideration or any misconstruction of the Rule. I dismiss this ground of appeal accordingly.

10. The remaining issue which requires to be addressed is whether the single error which I have found in the decision of the FtT, in [8] above, is material. This error was made in the context of the Tribunal's identification of a series of factors which, cumulatively, gave rise to the conclusion that the impugned decisions of the ECO constituted a disproportionate interference with the Article 8 family life rights of all four persons concerned. I have reviewed the documentary evidence presented to the Judge, in the form of a considerable bundle, together with those aspects of the evidence which are highlighted in the determination. I have also considered the series of unimpeachable findings made by the Judge. These relate to a substantial number of factors giving rise to her disproportionality conclusion: the subsisting nature of the marriage; the enduring relationship between sponsor and first

Respondent; the separation of the children (the second and third Respondents) from their mother (the first Respondent) to further their education; the mother's inability to provide for the children; the separation of the children from both of their parents; the stateless status of the three Respondents; the mother's illiteracy; her survival by working for her keep; the analogy with that of a refugee or an IDP; the good education in English which the children have received during the past two years; the sponsor's financial resources; his injuries and consequent disability; his separation from his family when recovering from serious injury; the availability of the TB certificates; and, finally, the pressing need for family reunification. In my judgment, considering the written evidence and the determination as a whole, the Judge's erroneous statement that the sponsor qualified for one of the exceptions to the financial requirements prescribed by the Immigration Rules is not material. The equation impelling the Judge to make a conclusion of disproportionality contained a large number of facts and factors. Furthermore, this factor did not feature in the Judge's omnibus assessment in [30]. Following a careful review, I am satisfied that if the error in question had been avoided the outcome would have been no different. The Judge, in my view, would have found a disproportionate interference with the Convention right engaged in any event. Thus this error is not material..

ORDER

11. For the reasons elaborated above, I conclude that three of the four grounds of appeal have no substance, while the remaining ground demonstrates an error which I consider to be immaterial. Thus I dismiss the appeal and affirm the decision of the FtT.

Semard McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 06 March 2015