



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/16153/2014

THE IMMIGRATION ACTS

Heard at UT(IAC) Birmingham
On 17 February 2016

Determination Promulgated
On 14 April 2016

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

ENTRY CLEARANCE OFFICER - ABU DHABI

Appellant

and

MR BELAL ABDULQADER MOHAMMED FARHAN AL HELALI

Respondent

Representation:

For the Appellant: Mrs R Petterson, Senior Home Office Presenting Officer
For the Respondent: Ms L Kullar, Solicitor, of SH & CO Solicitors

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order

pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the ECO) appeals against the decision of the First-tier Tribunal (Judge Hussain) allowing the respondent's appeal against a decision taken on 26 October 2014 to refuse entry clearance as the married partner of the sponsor, Mrs Huda Ahamed Mohammed Salen who is a UK citizen. The respondent and sponsor have a daughter, born on 22 July 2014, who was conceived during the sponsor's last visit to Yemen.

Introduction

3. The respondent is a citizen of Yemen born in 1990. He applied for entry clearance on 29 July 2014 but that application was refused on the basis that the sponsor had supplied non-genuine documents in support of her employment with Kersten Management meaning that the financial requirements of Appendix FM were not met and because the TOEIC English language certificate provided by ETS was not obtained with a provider approved by UKBA. The application was further refused under Article 8 of the ECHR.

The Appeal

4. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Birmingham on 15 July 2015. He was represented by Mr O Shoker, Solicitor. The First-tier Tribunal found that the respondent did not meet the requirements of the Immigration Rules because he did not hold a valid English-language test as at the date of decision. The judge found that the sponsor did work for Kersten Management as claimed. The appeal was allowed under Article 8 on the basis that the family could not live together in Yemen due to the civil conflict there, there was family life between the parties, it was in the best interests of the daughter for the respondent to come to the UK and the respondent had never seen his daughter. The decision was not proportionate; although the English language test could be retaken the lengthy delays in making a new application for entry clearance were likely to prove significant in light of the daughter's age and the safety situation in Yemen.

The Appeal to the Upper Tribunal

5. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law because there were no exceptional circumstances and the outcome was not unjustifiably harsh. The respondent could simply take another English language test and make a fresh application for entry clearance. There was no adequate explanation why the respondent could not make a fresh application. Best interests of the child were paramount but were not the only interests and were subsidiary to the requirements of immigration control.
6. Permission to appeal was granted by First-tier Tribunal Judge Davies on 18 November 2015 on the basis that it was arguable that the judge had not given proper

consideration as to why the Article 8 claim outside the Rules was worthy of consideration and had identified no exceptional or unduly harsh circumstances.

7. Thus, the appeal came before me

Discussion

8. Mrs Petterson submitted that the judge used Article 8 as a general dispensing power based upon the best interests of the daughter and living in Yemen was not part of the decision. Page 32 of the respondent's bundle showed earnings of just £4699 for 2013-2014. There was a material error of law and the decision should be reversed.
9. Ms Kullar submitted that paragraphs 11 and 16 of the decision set out the facts in relation to the child. Paragraphs 53-55 of the Supreme Court decision in R (on the application of Bibi) v SSHD [2015] UKSC 68 were relevant because there are no language test centres in Yemen and the Foreign Office advice is for all UK citizens to leave Yemen. The judge referred to that advice. The respondent would otherwise have to obtain entry clearance in Cairo or Jordan. The daughter is a UK citizen.
10. Mrs Petterson submitted in response that Bibi did not strike down the English language rule. The judge made no findings about delay or any problems with making a further application. This application was made in September 2014 and was refused in October 2014. The ECM review took place in March 2015. There is no reason why a further properly documented application would take an inordinate time to be decided.
11. Ms Kullar then further submitted that the issue was whether the requirements of paragraph 39(iv) and 41 of SS Congo [2015] EWCA Civ 387 were met.
12. I have considered SS Congo. At paragraph 39, the interests of the child are a primary consideration i.e. an important factor and not the primary consideration. It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. At paragraph 40, the Rules maintain in general terms a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for leave to enter can be established outside the Rules. The appropriate general formulation for this category is that such cases will arise where an applicant for leave to remain can show that compelling circumstances exist which are not sufficiently recognised under the Rules to require the grant of such leave.
13. There is nothing in the First-tier decision that amounts to an analysis of potential compelling circumstances. The daughter is safe in the UK with the sponsor. The respondent is a citizen of Yemen and there are no findings of risk to him or any particular difficulty or delay in undertaking a new language test. I find that the failure to correctly apply the test in SS Congo is a material error of law.

14. There is no consideration of section 117B of the 2002 Act and that is a further material error of law under Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC). There is no evidence from the decision that the statutory considerations have been given full effect.
15. I have considered Bibi and accept that paragraph 101 could potentially assist the respondent if it was impossible, in any practical sense, to obtain access to a test centre. However, there is no evidence of that issue in this appeal. Further detailed findings of fact would be required to justify allowing the appeal on Bibi grounds.
16. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under Article 8 involved the making of an error of law and its decision cannot stand.

Decision

17. Ms Kullar invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. There are significant issues of fact which have not been resolved. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.
18. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed



Date 7 April 2016

Judge Archer

Deputy Judge of the Upper Tribunal