



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04689/2016

THE IMMIGRATION ACTS

Heard at Field House
On 7th June 2018

Decision & Reasons Promulgated
On 22nd June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR RICHARD FRANCIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chohan of Counsel
For the Respondent: Mr Tarlow

DECISION AND REASONS

Introduction

1. The Appellant, born on 21st February 1966, is a citizen of India. The Appellant had initially entered the United Kingdom on 19th May 2006. After grants of leave he made application on 16th December 2015 for leave to remain as a spouse. That application was refused by the Respondent.
2. The Appellant appealed that decision and his appeal was heard by Judge of the First-tier Tribunal Butler sitting at Birmingham on 14th June 2017. The judge had dismissed the Appellant's appeal. Application for permission to appeal was made and that permission to appeal was initially refused by Judge of the First-tier Tribunal Grant on 20th December 2017. That application was renewed and permission to appeal was

granted by Deputy Upper Tribunal Judge Chapman on 4th March 2018. It was said that the First-tier Judge arguably contained a material error of law in the assessment of proportionality in respect of the Appellant and his family.

3. The Respondent opposed that appeal in a response letter dated 5th April 2018. Directions were issued for the Upper Tribunal first to consider whether an error of law had been made by the First-tier Tribunal and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Appellant

4. Mr Chohan relied upon the Grounds of Appeal. It was submitted that the sole issue under the Immigration Rules was the lack of an English language test having been taken by the Appellant. It was submitted the Respondent had not issued the Appellant's passport in time to allow him to take that test, and since the decision of the First-tier Tribunal a test had been passed and that certificate was provided to myself and Mr Tarlow.

Submissions on Behalf of the Respondent

5. Mr Tarlow referred me to the Rule 24 response from the Home Office. It was submitted no error of law had been made by the judge. It was conceded that there was now a certificate of English language before the Tribunal and he said that he would minute that a test certificate had been seen and should therefore be taken into account if no error of law was found and further application was made by the Appellant.
6. I now provide my decision with reasons.

Decision and Reasons

7. In the grant of permission Judge Chapman stated that the First-tier Tribunal Judge's decision arguably contained material errors of law in the assessment of proportionality.
8. The original Grounds of Appeal had asserted that the judge had erred in his assessment of the Appellant's ability to meet the requirements of the five year rule, and erred in assessment of Article 8 outside of the Rules, and the decision was inconsistent with the judgments in **Hesham Ali [2016]** and **Agyarko [2017]**.
9. The Appellant had entered the UK in 2006 and had been granted temporary leave on different occasions and for different reasons until December 2015. He was married to his spouse who was settled in the UK and worked as a staff nurse. They had two adult children. Refusal under Appendix FM of the Immigration Rules had been on the basis that:
 - (a) There was insufficient evidence that his spouse met the income threshold;
 - (b) There was no evidence of an English language test having been passed.

10. In respect of Appendix EX.1 it was noted that his children were adults and there were not insurmountable obstacles in his spouse and he continuing family life outside of the UK. He did not meet the requirements at paragraph 276ADE(1) nor were there considered to be any exceptional circumstances warranting a consideration of Article 8 outside of the Rules.
11. The judge had set out the evidence and submissions in this case. It seems clear that that evidence and the submissions on behalf of the Appellant focused on two key issues, namely:
 - (a) The insurmountable obstacles that could face the couple in continuing family life if returned to India (Appendix FM EX.1).
 - (b) The adult son's epilepsy and the assistance the Appellant provided to his son, that being therefore an exceptional or compelling circumstance to look at the case and deal accordingly with it under Article 8 outside of the Rules.
12. In relation to the Grounds of Appeal and the grant of permission the following points are relevant.
13. Firstly as noted by the judge at paragraph 51 it was conceded the Appellant did not meet the requirements of the five year partner route. The judge had then considered whether the Appellant met the requirements of the relevant Immigration Rules that remained, namely EX.1. He carefully considered the evidence and made findings of fact for which he provided clear reasons. He reminded himself carefully of the definition and interpretation of "insurmountable obstacles" at paragraphs 53 to 55. He applied his findings of fact to the question of insurmountable obstacles and found applying the Home Office IDIs and relevant case law that there were not such insurmountable obstacles. That was a reasoned decision disclosing no error of law.
14. On the question of whether there were exceptional or compelling circumstances present to warrant grant of leave under Article 8 outside of the Rules, the judge had reminded himself at paragraph 56 of the decision in Agyarko [2017] UKSC 11, which also referred to the earlier case of MF (Nigeria) [2013] EWCA Civ 1192. The judge had correctly noted the Appellant's status was precarious, when referring himself to paragraph 54 of Agyarko. He had also noted the quotation from MF (Nigeria) approved in Agyarko which said "the scales are heavily weighted in deportation and something very compelling (which will be exceptional) is required to outweigh the public interest in removal".
15. Having found the Appellant did not come within Article 8 inside the Rules, he had therefore looked at what was submitted to be the compelling or exceptional circumstance that would make consideration outside of the Rules relevant, in that removal would outweigh the public interest. He had in this respect considered the medical condition of the Appellant's adult son and its ramifications at paragraphs 63 to 69.
16. Again he had made findings of fact for which clear reasons had been provided and he found that circumstances were such that no exceptional or compelling circumstances

existed. He was entitled to reach that conclusion and it disclosed no error of law. He had for the sake of completeness at paragraph 71 indicated that if he was wrong on the argument of exceptional circumstances applying, then on an examination of the same facts he found that removal was proportionate.

17. The only other issue which in reality is what is now central to the oral submissions, relates to the reaffirmation of the **Chikwamba** principle following **Agyarko** [2017]. The judge had specifically referred to this principle at paragraph 61 and was clearly aware of that which had been said in **Agyarko**. He noted that the financial requirements were satisfied, and to that extent did not uphold the Respondent's refusal on this particular issue. He clearly found that sufficient evidence had been provided to demonstrate that the Appellant's spouse had an income above the threshold level. He noted however that the Appellant had not passed an English language test, a mandatory requirement for grant of entry clearance under the Immigration Rules. Accordingly the judge had correctly concluded that the **Chikwamba** principle as restated in **Agyarko** did not apply because it could not be said, as in paragraph 51 of **Agyarko**, that the Appellant "was certain to be granted leave to enter, and therefore there might be no public interest in removal".
18. In summary therefore and on the evidence available before him the judge dealt with this case in a clear and methodical manner and his decisions disclose no material error of law and are in line with case law.
19. However, as noted at the hearing before me, postdecision, the Appellant has now been able to obtain from the Home Office a copy or original of his passport such that that has enabled him to take part in an English language test to the required standards. That certificate was seen by myself and Mr Tarlow the Presenting Officer. Had that test been taken and passed by the Appellant before his First-tier Tribunal appeal hearing, it is entirely possible when looking at paragraphs 57 and 61 of the judge's decision that the judge may well have allowed the appeal on the basis of the reasoning in paragraph 51 of **Agyarko** that restated the **Chikwamba** principle.
20. If the Appellant now seeks to make a fresh application, or reapply, now that he has that test result, then the decision of the First-tier Tribunal Judge together with this decision should be considered by the Respondent. I further note two matters. Firstly Mr Tarlow, the Presenting Officer, stated his intention to minute the fact that the test certificate had been seen and a test had been taken and passed. Secondly it may well be, having regard to paragraph 30, that the Appellant could not take the language test earlier as he did not have his passport which had been retained by the Home Office.
21. In summary there was no material error of law made by the judge in the First-tier Tribunal. However, given the Appellant has now passed the English language test it is entirely possible indeed probable and consistent with paragraph 51 of **Agyarko** that had that test been passed at the time of hearing the judge may well have allowed the appeal. It further follows that the passing of that test means that the evidence would suggest the Appellant meets the requirements of the Immigration Rules.

Decision

22. There was no material error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed 

Date 19/6/18

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed 

Date 19/6/18

Deputy Upper Tribunal Judge Lever