



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17399/2016

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham
On 21st May 2018

Decision & Reasons Promulgated
On 5th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

HAWA KONTEH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Mr M Brookes of Counsel instructed by Syeds Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Meah of the First-tier Tribunal (the FTT) promulgated on 22nd September 2017.
2. The Appellant is a female Gambian citizen born 13th November 1989. She applied for entry clearance to enable her to join her Senegalese national spouse Abdulai Conteh (the Sponsor) in the United Kingdom. The application was made on 17th March 2016. The Sponsor has indefinite leave to remain in the UK, having previously been recognised as a refugee.

3. The application for entry clearance satisfied all but one of the requirements of the Immigration Rules. The reason given for refusal was that the Appellant had not produced a valid English language test certificate. The Appellant had produced with her application a certificate dated 11th January 2014 issued by City and Guilds. The reason for refusal was that the test provider was no longer acceptable to the Respondent, not being a provider listed within Appendix O to the Immigration Rules.
4. The Appellant appealed to the FTT and the appeal was heard on 14th September 2017 and dismissed. The Appellant had produced a further English language test certificate demonstrating that she had undertaken an IELTS English language examination on 28th July 2016 which she had passed at the required level of A1 CEFR.
5. Counsel acting on behalf of the Appellant accepted that the certificate did not meet the requirements of the Immigration Rules as the certificate was not supported by "confirmation on the online verification system operated by an approved English language test provider." The FTT found that the Immigration Rules were not satisfied as conceded by the Appellant's Counsel and did not find (at paragraph 17) that the appeal contained any exceptional compelling features which rendered it necessary to afford extensive consideration under the wider Article 8 jurisprudence. The FTT found the Sponsor to be a citizen of Gambia, and there was no evidence to show why the Sponsor could not relocate to Gambia. There was no reason why the Appellant and Sponsor could not continue to stay in touch using modern methods of communication until such time as the Appellant was able to meet the relevant requirements of the Immigration Rules for entry clearance. The FTT found that refusal of entry clearance was in all the circumstances proportionate.
6. Following dismissal of the appeal the Appellant was granted permission to appeal to the Upper Tribunal.

Error of Law

7. On 25th February 2018, Upper Tribunal Judge O'Connor heard submissions from both parties in relation to error of law and set aside the decision of the FTT. I set out below paragraphs 8-12 of Judge O'Connor's decision which contain the reasons for setting aside the FTT decision;
 8. Ms Norman asserted, and Ms Aboni accepted, that the First-tier Tribunal erred in its approach to the English language certificate obtained in July 2016, in its consideration outside the Rules. Although this certificate could not assist in demonstrating that the requirements of the Rules had been met, it was capable of demonstrating that the appellant could now speak the English language to the required standard. One needs to look no further than Section 117B(2) of the 2002 Act to understand the relevance of this. The First-tier Tribunal did not take proper cognisance of this and, consequently, failed to take account of a material matter.
 9. It was also asserted by Ms Norman, and again accepted by Ms Aboni, that the First-tier Tribunal erred in (i) directing itself that the sponsor is a national of Gambia and (ii) in concluding that the sponsor could move to the Gambia to live with the appellant absent having given the sponsor an opportunity to engage with such issue, it not having been raised by the ECO at any stage.

10. Despite accepting the existence of the aforementioned obvious errors in the First-tier Tribunal's decision, Ms Aboni submitted that the decision should not be set aside because such errors were not material to the outcome of the appeal. I disagree. The errors go to the heart of the First-tier Tribunal's decision-making process, and the factual matrix relied upon by the appellant is not such that there can only be one rational outcome to the Article 8 consideration.
 11. For these reasons, the decision of the First-tier Tribunal is accordingly set aside.
 12. The appeal could not be resolved on the day because Ms Aboni indicated that the Entry Clearance Officer now, for the first time, sought to rely upon the submission it would be reasonable to expect the sponsor to move to and live with the appellant in Gambia. In addition, the ECO wished to have an opportunity to verify the reliability of the July 2016 English language certificate. Given these circumstances I concluded that it was not prudent to remake the decision immediately and this task will now be undertaken by the Upper Tribunal on a future date. The scope of the remaking will not include any further consideration of whether the requirements of the Immigration Rules have been met, for the reasons I have set out above.
8. Judge O'Connor subsequently made a transfer order on 6th April 2018, so that the decision could be remade by a differently constituted Tribunal.

Remaking the Decision – Upper Tribunal Hearing 21st May 2018

9. At the commencement of the hearing I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. I had received the ECO bundle, the Appellant's bundle comprising 30 pages, a letter from the Home Office dated 16th March 2018 confirming that the English language test certificate submitted to the FTT is valid, a skeleton argument submitted on behalf of the Appellant dated 20th May 2018, and I received from Mr Brookes an additional bundle relied upon by the Appellant containing six pages. Mr Mills had received this additional bundle but had not received a copy of Judge O'Connor's decision which was provided to him.
10. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

11. The Sponsor was called to give oral evidence. There was no interpreter. The Sponsor could speak English although his English was limited. Mr Brookes indicated that he had been able to speak with the Sponsor in English and was content that the hearing could proceed without an interpreter. I satisfied myself that the Sponsor's English was adequate so that he could understand the proceedings in English and answer questions.

12. The Sponsor adopted as his evidence his witness statements dated 11th September 2017 and 26th February 2018. He confirmed his relationship with the Appellant, and that she was taught in English in Gambia. He stated that he and the Appellant have two children in Gambia, one of 9 years of age, and the other 18 months of age. The Sponsor confirmed that he came to the UK in 2003 and that he has indefinite leave to remain. He visits Gambia during holidays. He works as a grinder in a factory and would not be able to find similar employment in Gambia, and does not believe that he has any right to reside in Gambia.
13. The Sponsor confirmed that the Appellant lives in rented accommodation and that he pays the rent and financially supports her and the children. The last time the Sponsor visited Gambia was August 2017 and on that occasion, he stayed for one month.

The Oral Submissions

14. Mr Mills submitted that Judge O'Connor had made it clear that the Immigration Rules could not be satisfied and therefore the issue to be decided by the Tribunal related to Article 8 outside the Immigration Rules. It was contended that if the Appellant made a further application for entry clearance she would be successful, and that it would be reasonable for such an application to be made.
15. The question of whether it would be reasonable for the Sponsor to live in the Gambia was a matter for the Tribunal, but Mr Mills submitted that it was clear that the Sponsor had been visiting Gambia, and it had not been demonstrated that he would be unable to find employment there. I was asked to dismiss the appeal.
16. Mr Brookes relied upon his skeleton argument. Part of that argument was that Immigration Rules were in fact satisfied before the FTT. I indicated that a decision had been made by Judge O'Connor confirming that was not the case, and the issue before me related to Article 8 outside the Immigration Rules.
17. Mr Brookes pointed out that at the date of hearing the Appellant had demonstrated her ability to speak and understand English, and the Respondent had confirmed that the English language certificate is valid. Mr Brookes submitted that it could not be said with certainty that a future application for entry clearance would be granted, and it would be disproportionate to find that the Sponsor could leave the UK and live in Gambia, and disproportionate for the Appellant to have to make a fresh application for entry clearance. I was asked to allow the appeal on human rights grounds.
18. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

19. The refusal of entry clearance is deemed to be a refusal of a human rights claim, and therefore this is an appeal against refusal of a human rights claim. The Appellant relies upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). In deciding this appeal, I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali [2016] UKSC 16 and in so doing have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39-53.

20. The burden of proof lies on the Appellant to establish her personal circumstances and to establish that family life exists, and to show why the decision to refuse entry clearance interferes disproportionately in her family life rights. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.
21. The issue before me relates to Article 8 outside the Immigration Rules, Judge O'Connor having found at the earlier hearing that the Immigration Rules could not be satisfied.
22. I have therefore considered the guidance in Agyarko [2017] UKSC 11, and TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109, although those cases relate to applications for leave to remain, rather than entry clearance.
23. I find as a fact that the Appellant is a Gambian citizen, and the Sponsor is Senegalese. They married in Gambia. This has not been disputed and the marriage certificate has been produced. They have a child born in Gambia on 9th September 2016 and an extract of the birth certificate has been produced.
24. Before the Upper Tribunal, the Sponsor said that in addition to the child born in September 2016 he has another son in Gambia and the Appellant is the mother. The Appellant in her visa application disclosed that at the time of her application she had two children in Gambia, one born in December 2004, and one in 2009 although they would not be travelling to the UK with her and would be remaining with their grandparents. At the date of application the Appellant was pregnant with the child who is now 18 months old.
25. I find as a fact that the Sponsor entered the UK in February 2003 and was granted refugee status. His residence permit shows a grant of indefinite leave to remain on 19th March 2014, the permit being valid until 19th March 2024.
26. I find that Article 8 is engaged on the basis of family life between the Sponsor, Appellant and children. It is accepted that the Appellant has now produced a valid English language test certificate which now satisfies the requirements of the Immigration Rules.
27. In considering proportionality I must consider the best interests of children as a primary consideration. The Appellant and Sponsor appear to have decided that the best interests of the two eldest children would be to remain in Gambia and live with their grandparents. With reference to the youngest child, I find that his best interests would be served by being brought up by both parents.
28. When considering Article 8 and proportionality I must have regard to the considerations contained in section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration control is in the public interest. It is in the public interest that a person seeking to enter the UK can speak English and is financially independent. I do not find that the other provisions contained in section 117B are applicable in this case.

29. The Appellant has proved that she can speak English, and the financial requirements of the Immigration Rules are satisfied. These however are neutral factors in the balancing exercise.
30. I find that the test to be applied when considering Article 8 outside the Immigration Rules is summarised in paragraph 48 of Agyarko. It is explained that if an applicant or partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the insurmountable obstacles test would be met and leave would be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are exceptional circumstances.
31. In my view there would be unjustifiably harsh consequences if the only way that the Appellant and Sponsor could live together would be for the Sponsor to leave the UK and live in Gambia. He is not a Gambian citizen. He therefore would have no automatic right to live in Gambia. He has never lived in Gambia, although he has visited. The Sponsor has been in the UK since 2003, and has employment and accommodation. He financially supports the Appellant, because of the employment that he has in the UK. He works as a grinder in a factory. In view of the fact that the Appellant now appears to satisfy all the requirements of the Immigration Rules, I find it would be unjustifiably harsh for the Sponsor to have to leave the UK and attempt to live in Gambia.
32. However, I find that there is an alternative, which would not result in unjustifiably harsh consequences. The alternative would be for the Appellant to make a fresh application for entry clearance under the Immigration Rules, and to enclose with that application all the specified documentation, including the English language test certificate. If that is done, there would appear to be no reason why entry clearance should not be granted.
33. I do not consider that making a further application for entry clearance amounts to unjustifiably harsh consequences. There would be a further fee to pay, but it has not been demonstrated that this fee could not be paid or that payment of a further fee would be unjustifiably harsh. The initial application was refused because a specified English language test certificate was not produced with the application. There would be a further delay before entry clearance could be granted, so that the application can be processed. It has not been shown that there is a substantial delay in processing applications for entry clearance, or any delay. Therefore, submitting another application and waiting for the results, would not result in unjustifiably harsh consequences.
34. The representatives had different views in relation to a further application, Mr Mills submitting that it should be granted, and Mr Brookes submitting that it was speculative to say that it would be granted. I have considered the principles in Chikwamba v SSHD [2008] UKHL 40 referred to at paragraph 51 of Agyarko. In paragraph 51 guidance is given that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application

was made from outside the UK, then there might be no public interest in his or her removal. The case here is different, in that in Chikwamba it was envisaged that an individual would have to leave the UK, where they had been residing, and make an application from abroad. In this case because the application is for entry clearance, there would be no question of the Appellant having to leave the Sponsor behind in the UK. The Appellant would remain in Gambia and make a further application for entry clearance without any further disruption to family life. I therefore do not find that the Chikwamba principle assists the Appellant in this case.

35. If this was an application for leave to remain, made by an individual who had resided in the UK for a number of years, then the Chikwamba principle would be relevant, and if the Respondent's decision caused the separation of a family living together, that may amount to unjustifiably harsh consequences which would be disproportionate, but that is not the case here.
36. The requirements of the Immigration Rules should not be disregarded, and in my view it is in the public interest that the requirements of the Immigration Rules are satisfied. As I do not find that refusal of the application would result in unjustifiably harsh consequences so as to amount to exceptional circumstances, I conclude that refusal of the application does not breach Article 8, and the Respondent's decision is proportionate, and the appropriate course is for the Appellant to make a further application for entry clearance.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

The appeal is dismissed.

There has been no request made for anonymity and I see no need to make an anonymity direction.

Signed

Date 22nd May 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 22nd May 2018

Deputy Upper Tribunal Judge M A Hall