



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/00184/2017  
IA/00185/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 June 2018

Decision & Reasons Promulgated  
On 3 July 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUMIT KATYAL

First Respondent

NIDHI NIDHI

Second Respondent

(anonymity direction not made)

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondents: Mr I Khan, Counsel instructed by Haque & Housmann Solicitors

**DECISION AND REASONS**

1. The Secretary of State has permission to challenge a decision of the First-tier Tribunal allowing on human rights grounds the appeals of the respondents (hereinafter "the claimants") against the decision of the respondent on 19 June 2017 refusing them leave to remain in the United Kingdom. The second claimant is the wife of the first claimant and her case depends on his.
2. The applications that led to the decisions complained of were made in April 2013 when there was a combined application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system and for a biometric

residence permit. The applications were varied on 17 November 2014 and refused on 19 December 2014. However the refusal was the subject of an appeal and although the appeal was dismissed in the First-tier Tribunal the Upper Tribunal allowed the appeal to the limited extent that the applications were sent back to the Secretary of State to be decided again. This was done and they were refused on 19 June 2017.

3. The core problem in this case is that the first claimant has not been able to produce a certificate of his competence in the English language because various examination centres will not permit him to sit or, in the case of one, will not release the examination result, because he cannot produce his passport.
4. He knows he cannot produce his passport. It is in the care of the Secretary of State who refuses to release it.
5. The First-tier Tribunal Judge described this as a “Catch 22” situation. The Judge says at paragraph 17(a) of the Decision and Reasons that the Secretary of State informed the first claimant that he did not need the passport but the first claimant found that in practice, notwithstanding the Secretary of State’s assurances, he did need his passport. The Judge said that the first claimant had been told:

“... that he can take the language test with a covering letter and certified copy of his passport and that SELT providers had been told to allow this. He has found that not to be the case. He reverts to the [Secretary of State] presenting her with the facts and she says that he is wrong and that he can take the language test with a covering letter and certified copy of his passport and his SELT providers had been told to allow this.”

6. The judge found the first respondent to be a credible witness.
7. The judge then concluded, unsurprisingly, that the Secretary of State was entitled to find that the claimants cannot succeed under the Rules but was very critical of the cursory consideration of the claim on human rights grounds which also required proper regard for the best interests of the child of the claimants who was born in the United Kingdom in 2013.
8. The judge gave detailed explanations for his decision. At paragraph 20 the judge says:

“The respondent cannot dispute that a family life exists which encompasses the appellants and their daughter. The quality and character of it is that of a normal couple who have come to the UK for the discrete purpose of obtaining qualifications for the first [claimant] which he would then use in India once his studies are completed. The [claimants] have a precarious immigration status (in the sense that they are reliant on the [Secretary of State] acceding to their applications to renew their visas). They are Indian nationals. Their daughter was born in and they have lived as a family in the UK. There is nothing exceptional or unusual about their situation save for the manner in which the [Secretary of State] has decided to paint the first [claimant] into a corner with how she has handled his applications. Removal would cause possibly emotional and certainly lifestyle upheaval but this is part and parcel of the life that they have had here – they have needed from time to time to have their permission to stay here renewed. Their stay has never been more than temporary based on the [Secretary of State] grants of leave to remain. Their private lives have been built up at a time when their status was precarious and I am directed to attach less weight to it by statute. However, I bear in mind that the actions of the [Secretary of State] have adversely impacted on the [claimants’] claims – after all he did apply for visas on time throughout and his intention was

always clear: to qualify and return to India. Until recently the [Secretary of State] was accommodating in her dealings with him.”

9. The judge then noted that it would be open to the claimants to return to India and make an application to return and although the judge’s finding is not entirely clear the implication is, unsurprisingly, that the child’s best interests are to stay with her parents wherever they happen to be. However the Judge says at paragraph 23:

“... then the [Secretary of State’s] decision – I am satisfied – amounts to a disproportionate interference with the Article 8 rights of the [claimants]. The public interest in the control of immigration is – I am satisfied – outweighed by the Article 8 rights of the [claimants]. I understand that she is proposing to remove the [claimants]. I am satisfied that there are compelling circumstances resulting in unjustifiably harsh consequences that outweigh the public interest in maintaining effective immigration control.”

10. In short, the judge decided to allow the appeal on Article 8 grounds and found the significant factor that made removal disproportionate was the Secretary of State’s conduct that made it impossible for the claimant to comply with the Rules.

11. The Secretary of State’s grounds are fairly short. They complain that the First-tier Tribunal erred in its assessment of proportionality and:

“The [Secretary of State] cannot understand why the reasons given by the FtT at paragraph 23 would tip the balance in the [claimants’] favour and outweigh the public interest.”

12. The grounds then go on to say that the decision appears to arise primarily from the findings about the English language test and the implied finding that the Secretary of State has breached her common law duty fairness by withholding the passports. The grounds then assert:

“It is respectfully submitted that for the reasons given in the refusal letter and by the Presenting Officer the [Secretary of State] has not erred. It has provided the [claimant] with a certified copy of his passport, instructions on how and where to book a test and given ample time for this. It is submitted that the [claimant] has not correctly followed those instructions and therefore failed to provide the [Secretary of State] with a test certificate.”

13. In short, according to the Secretary of State, it is the claimant’s fault that he has not been able to produce a certificate and there is nothing disproportionate in the decision to refuse leave.

14. I consider first the finding that the decision interferes with the claimants’ “private and family life”. I find it regrettable that both the grounds and the First-tier Tribunal refer to private life in terms of the claimant’s right to pursue his education. It really is important to remember the terms of Article 8 of the European Convention on Human Rights. Article 8(1) provides:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

15. Private life is not to be considered disjunctively from family life. Rather “private and family life” is one entity that is ejusdem generis with “home” and also with “correspondence”. Article 8(1) is about a public authority not interfering with a person going about his private business unless that interference is lawful, necessary and proportionate. The words rendered in English as “private and family life” are

sometimes described as “physical and moral integrity”. It is not, I find, helpful to limit their meanings to the things that people do. It is much more about the things that people are.

16. The threshold for interference coming within the scope of Article 8(1) is low (see, for example, AG (Eritrea) v SSHD [2007] EWCA Civ 801, Sedley L. J.) Although each case must be considered on its own facts it is likely that most immigration decisions involving people within the United Kingdom touch on their “private and family life”. In a sense the Rules exist precisely for that purpose, that is to control in a lawful and considered way an alien’s wish to remain within the United Kingdom. It must also be emphasised that a right under Article 8 is a qualified right and in many, I suspect the vast majority, of decisions made under the Immigration Rules are not only an interference but they are a lawful and proportionate interference with the private and family life of an applicant.
17. There is no error in the judge’s finding that the decision to refuse leave to remain interfered with the private and family life of the claimants.
18. Contrary to the contention in the grounds it is plain from the decision why the judge found the decision to be disproportionate. It is disproportionate, the judge found, because the failure to comply with the Rules is a direct consequence of the Secretary of State’s insistence on keeping control of the claimant’s passport.
19. It seems the Secretary of State goes some way to feeling the weight of that finding. The grounds assert that the judge was wrong to conclude that the claimant was unable to pass the exam because he did not have a passport. The grounds assert that the Secretary of State had provided an alternative route that the claim could take.
20. The difficulty with that is it is a point well appreciated by the judge. As indicated above at paragraph 17(a) the First-tier Tribunal Judge expressly acknowledges that this is the Secretary of State’s case but then says of the claimant that he “has found that not to be the case”.
21. In other words the judge has understood the Secretary of State’s case and listened to the evidence from a witness he found to be truthful and concluded that whatever the Secretary of State’s intentions may be the alternative remedy does not work and in the circumstances has allowed the appeal.
22. I see no error in this. Decisions on proportionality grounds are very fact-specific. The judge has considered Section 117 of the Nationality, Immigration and Asylum Act 2002 under Part V in its amended form. The Judge has identified factors that point in favour and against the appeal being allowed on human rights grounds. He has been persuaded that when there are no aggravating features here other than the claimant’s failure to prove competence in the English language, which the judge finds, is, notwithstanding the Secretary of State’s assurances to the contrary, a direct consequence of the Secretary of State’s own intransigent behaviour, that the decision is disproportionate.
23. I have reflected carefully on that and on Ms Everett’s submissions but I can find no error in that finding. The judge’s reasons are perfectly clear. The judge has made findings of fact that the Secretary of State does not like but that is not necessarily an

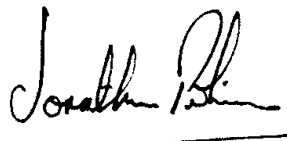
error of law and nothing here persuades me that an error of law has occurred. However it must be emphasised that this finding of the First-tier Tribunal does not mean that applicants cannot take a language test if the Secretary of State retains the applicant's passport or that an applicant who says that he cannot take a test without a passport will be believed. The First-tier Tribunal Judge who heard the evidence in this case reached a permissible decision on that evidence. It is not a finding that has general application.

24. In any event I fear that this is in some way something of a Pyrrhic victory for the claimants. The decision does not oblige the Secretary of State to allow the claimant leave to remain as a student and, apparently, will not allow the first claimant to have his passport and so possibly satisfy the Rules. This is not an outcome the helps anyone.
25. I am not making any directions. I do however observe that it might be helpful all round if both parties show some goodwill and interest in resolving this difficulty. If there is a further application for leave to remain that requires a certificate of competence in the English language, then both the claimant and the Secretary of State should be very careful to show why the claimant could or could not get a test result without possessing his passport. Arguments bases on what should or might reasonably expect to happen are unlikely to impress anyone.
26. Be that as it may, the Secretary of State's grounds do not persuade me that there is any error of law in the First-tier Tribunal's decision and I dismiss these appeals.

Decision

The Secretary of State's appeals are dismissed.

Signed



Jonathan Perkins, Upper Tribunal Judge

Dated: 29 June 2018