



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01765/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7 January 2019 & 15 May 2019

Decision & Reasons Promulgated
On 30 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

HAROLD [R]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Navaz (for Irvine Thanvi Natas Solicitors)

For the Respondent: Mr Tufan & Ms Cunha (Home Office Specialist Appeals Team)

DECISION AND REASONS

1. This is the appeal of Harold [R], a citizen of Colombia born 13 December 1965, against the decision of the First-tier Tribunal of 22 October 2018 dismissing his appeal, itself brought against the refusal (of 20 December 2017) of his human rights claim.

2. The application, made on 30 October 2017 and seeking further leave to remain with his British citizen partner [MR], was refused on the basis that the Appellant had not shown that he had passed an English language test at the relevant level. The Respondent considered that he had not demonstrated any exceptional circumstances warranting the grant of leave outside the Rules.
3. The Appellant had come to appreciate the inadequacy of the test results he had supplied in the course of the application process, and explained that he had submitted his application relying on a test result that he subsequently came to appreciate was not at the right level. He sought his passport's return (as such a document would be essential in satisfying any test provider as to his identity), it being held on the Home Office file alongside his outstanding application, but without success.
4. His appeal, lodged on 29 December 2017, was determined without a hearing. His submissions were to the effect that he had been unable to take the test in question because test providers had demanded his passport as a condition of permitting him to sit for assessment. The Respondent's refusal to release the passport had frustrated his attempts to obtain the correct results.
5. The First-tier Tribunal noted that it was necessary for an applicant to show they had demonstrated English language proficiency at Level A2 of the Common European Framework of Reference, and he had not done so. Accordingly he could not satisfy the Immigration Rules.
6. His claim outside the Rules, based on requiring more time to sit the test in question, did not have any compelling element demonstrating unjustifiably harsh consequences, and accordingly his appeal fell to be dismissed.
7. Grounds of appeal argued that the public interest assessment should have considered the extent to which the Appellant's inability to meet the Rules was caused by the Respondent's failure to release his documents.
8. Permission to appeal was granted on 22 November 2018 by the First-tier Tribunal, on the basis that the Judge's conclusion that it was open to the Appellant to sit the test and re-apply did not address the fact that his appeal's dismissal would render him returnable to Colombia, without having any further opportunity to make a further application.
9. Mr Nawaz submitted that there had been a technical failure to meet the Rules, and the consequences for the Appellant and his partner if he had to return abroad to seek entry clearance were disproportionate to the public interest sought to be achieved. Mr Tufan pointed out that nevertheless the Rules were not met. Mr Tufan stated that it was clear from the Home Office file that a senior caseworker had begun to make arrangements for the return of the passport. Indeed he had hoped the document might have reached him for today's appeal hearing.

However, nothing had eventuated. He noted that the Rules were not met, though acknowledged that one solution to justice in this particular case might be for the Upper Tribunal to retain the appeal, if it found a material error of law in the First-tier Tribunal's decision, and to issue directions for the passport's return to its rightful owner.

Findings and reasons

10. This appeal turns on a narrow point. On his application, the Appellant provided a Grade 2 Graded Examination in Spoken English certificate in ESOL (CEFR Level A1). This was not sufficient to meet the requirements of the Appendix FM partner route, which demands proficiency at Level A2. The parties agreed before me that more than one request had been made for the return of the passport, including one on 8 November 2017.
11. Article 8 ECHR affords some degree of procedural protection to the right to private and family life. Thus the Master of the Rolls for the Court of Appeal in *Gudanaviciene* [2014] EWCA Civ 1622 stated:

“Article 8 is frequently engaged in immigration decisions. The procedural protections inherent in article 8 are necessary in order to ensure that article 8 rights are practical and effective. The necessity for this is at least as important in immigration cases as in any other cases.”
12. In a similar vein, the ECtHR in *Ciubotaru v Moldova* (27138/04; 27 April 2010) stated that effective protection of Article 8 rights “may require the existence of an effective procedural framework whereby an applicant can assert his or her rights under Article 8 under conditions of fairness including as regards matters of proof and evidence.”
13. It seems to me that on the uncontested evidence, the Appellant was prevented from satisfying the Immigration Rules by the refusal of the Respondent to return to him his passport. The original fault, of course, lay with the Appellant, and one response to this appeal would be to consider that determinative; the making of a further fee-paid application would be appropriate and proportionate. However, given the extended period over which the passport has been held by the Respondent, it was essential for the First-tier Tribunal to carefully evaluate whether any further application was in fact feasible. However it failed to do so. This is particularly important given that the Appellant potentially faced removal from the UK upon exhaustion of his appeal rights. Indeed the refusal letter stated “If you do not appeal you will be liable to enforced removal to Colombia”.
14. At the error of law hearing, I considered this was a material error of law and that the decision of the First-tier Tribunal accordingly could not stand.
15. As Mr Tufan very fairly indicated at the error of law hearing, the Secretary of State had in fact recognised that returning the document was an appropriate step to take, but the administrative systems in place proved inadequate to the task. This

demonstrates that the Respondent recognised the need to assist with ensuring the procedural protection of the Appellant's right to family life (and that of his wife).

16. The parties invited me to remake the decision in the event I identified a material error of law, though giving an opportunity to the Secretary of State to make good the procedural unfairness so far occasioned by retaining the Appellant's passport. I considered this to be appropriate in the interests of justice.
17. At a case management review hearing of 25 May 2019, the appeal came on again before me, and it was agreed that in the circumstances, the appeal could be allowed. The Secretary of State having returned the Appellant's passport to him, the Appellant had been able to take an English language test. He now provided a Grade 3 Graded Examination in Spoken English from Trinity College London dated 25 February 2019 from London Holborn SELT Centre (No 58506), recording that he had passed the speaking and listening dimension at CEFR Level A2.1.
18. If the Appellant has a viable case under the Rules, then so long as he can establish private and family life in the UK, his appeal would inevitably succeed: see *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109 §35. It seems to me that that is the case here. The Appellant's relationship with his partner is established as genuine and subsisting, they intend to live together permanently, and the financial and immigration status requirements of the Rules are satisfied. The one missing ingredient of a successful case, his English language test results, has now been supplied. Accordingly his appeal should succeed.

Decision:

There was a material error of law in the decision appealed, which is set aside.
The appeal is allowed.

Signed:

Date: 24 May 2019



Deputy Upper Tribunal Judge Symes