IAC-BFD- MD

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02654/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 6th October 2015	On 21st October 2015

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

MR AAMIR BASHIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr V Jagadeshan, of Counsel
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant a citizen of Pakistan born 17th February 1971, appeals with permission against the decision of a First-tier Tribunal (Judge Saffer) who in a decision promulgated on 12th May 2015, dismissed his appeal against the Respondent's refusal to grant him entry clearance as the spouse of Aysa Riaz a British citizen, now settled in the UK.

2. The Entry Clearance Officer refused the application on 30th December 2014 on three grounds.

   - Inability to meet the financial requirements of the Rules.
   - Inability to meet the English language test requirements and/or TB certificate not provided.
   - No exceptional circumstances which might warrant a grant of entry clearance outside the Rules.

Background

3. The Appellant is a citizen of Pakistan, who is married to Aysa Riaz a British citizen. They married in 1997. Following their marriage they lived in Pakistan because the Appellant, who is a retired Lieutenant Colonel in the Pakistan Army, worked there. It is a matter of record, that he had a distinguished career in the army. The couple have three children all of whom were born in Pakistan, but all of whom of course are British citizens.

4. Sadly all three children have genetic and degenerative visual impairment and are registered blind.

5. Because of the children's medical history, Mrs Riaz returned to the UK in May 2013 with the children following in August 2013. The school system in Pakistan could not cope with their special educational needs and they were being victimised, alienated and discriminated against. Whilst she was here before the children arrived, the Appellant looked after them. He was helped by his mother and he took leave from work. He then came to the UK on a visitors visa but returned to Pakistan to seek other work, having left the army. The situation with the children's health worsened. Therefore the couple changed their plans and decided that the only option to serving their children's best interests was for Mr Bashir to apply for settlement here.

The FtT Hearing

6. When the Appellant's appeal came before the First-tier Tribunal, the Judge noted that it was accepted that the Apellant's application could not succeed under the Immigration Rules and that the appeal therefore was premised on an Article 8 basis only. The Judge properly noted at [6],

> "In summary, I must consider all the family members human rights, and bear in mind that they are all affected by the Respondent's decision. When considering the issue of proportionality, the children's best interest is my primary but not the only consideration. Being British is not a trump card. It is generally in their best interest to have both parents living with them. The older they are, the more I should consider their wishes and the less focussed on their parents they become. Compelling circumstances can arise such as to mean that their rights are breached even though they do not fulfil the Immigration Rules. The disparity of health care provisions can be relevant in a very few rare cases. I have to consider the economic well being of the country and the ability of Mr Bashir to speak English and not be a drain on public (including health) services. The Respondent enjoys a wide margin of appreciation in

determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."

7. He then made the following findings of fact, none of which are challenged.

"I accept that the school system in Pakistan could not cope with their Special Educational Needs and they were being victimised, alienated and discriminated against as I have no real reason to doubt Mrs Riaz's evidence.

I accept that the children have the identified health challenges of being significantly visually impaired and that they are registered as being blind. Their needs are such that they need full time individual support in school and in transport to and from school. I accept that Dr Hussain and Mrs Riaz have both told the truth about Mohammed's daily difficulties. The apparent discrepancy is an illusion as they have said what they see where different support structures are in place. At home Mrs Riaz is by herself and has 3 disabled to child (sic) to look after. At school Mohammed has 1 dedicated professional all to himself. In those circumstances it is not surprising that there is a difference in what he can do. I am satisfied that the reality is that with professional support (which he gets at school) all for himself those daily tasks are within his ability, whereas when he is at home and he has to share Mrs Riaz's time and energy and where he does not get proper support (not through lack of trying I hasten to add) he struggles. I accept that if Mr Bashir was here (and is well which is an issue I will revert to in due course), it would be far easier to help Mohammed as he is a second pair of hands, and a male which makes personal care easier for Mohammed and Mrs Riaz. I accept the position now is very different to when he was in Georgia for the reasons she gave (namely them being much younger and less demanding and her having his mother's support) as I have no real reason to doubt her evidence.

I accept that the stress of being a single mother of 3 disabled pubescent and pre-pubescent children will inevitably take its toll. The medical evidence of her stress, anxiety, and panic attacks merely confirms the obvious. The children are now of an age to see and understand that. It is likely to be terrifying for them given the limited help they can give given their visual impairment, and stressful on them if they think that they are the "cause" of it. That stress is likely to affect the care she can provide on a long term basis. It will inevitably be alleviated by Mr Bashir being here as a second adult in the house assuming he is well."

8. The Judge then went on to say at [25] and [26],

"It is in the children's best interest to be with Mr Bashir here for all the reasons I have already given. Assuming Mr Bashir is well (and I will come back to this in due course) he would be unable to work initially as there is no evidence he has a job to go to and would be an economic burden on the taxpayer. He would however (assuming he is well) be able to take the burden off Mrs Riaz to enable her to work, and given his skills, would be better placed than many seeking employment in due course. Those matters in my judgement would in due course reduce the burden on the tax payer as they would need less external support out of school.

However, I do not accept that he has established that he speaks English even given the jobs he has had and his education as he has not taken the relevant English Language test. Bluster is no substitute for evidence that can easily be obtained. In addition, he can take the tuberculosis test and should take it to ensure he personally is not a drain on

> the health service and is going to be well enough to help care for the children. He knew when the application was refused 5 months ago that these were important matters."

9. The Judge dismissed the appeal concluding that it would not be disproportionate to require the Appellant to reapply for entry clearance, once he is able to prove he can speak English, has obtained a T.B. certificate and Mrs Riaz earns sufficient to meet the financial requirements of the Immigration Rules or shows exemption due to receipt of disability living allowance. When reaching those conclusions the Judge made a finding that although it was in the children's best interests that Mr Bashir be here in the UK, he would be unable to work initially, as there was no evidence that he had a job to go to.

10. Permission to appeal that decision was granted by UTJ Martin. The grant of permission neatly encapsulates the issues before me.

> "The Appellant seeks permission to appeal, in time, against the Decision of the First-tier Tribunal (Judge Saffer) who, in a Decision and Reasons promulgated on 12th May 2015, dismissed the Appellant's appeal against the Entry Clearance Officer's refusal to grant entry clearance as a spouse on Article 8 grounds.
>
> It is arguable that given all of the Judge's findings supporting allowing the appeal on Article 8 grounds, it was perverse to dismiss it because the Appellant had not produced an English language test certificate (which he arguably did not need) and that he had not produced a TB certificate."

Thus the matter comes before me in the Upper Tribunal.

The Upper Tribunal Hearing

11. I had before me the grounds seeking permission, together with a Rule 24 Response from the Respondent. Mr Jagadeshan appeared on behalf of the Appellant and Mr Diwnycz on behalf of the Respondent.

12. Mr Jagadeshan sought permission to offer further evidence. He informed me that so far as the English language requirement is concerned, the Appellant has now taken the test and passed it. There was also evidence of a TB certificate. I fully recognise that the English test result post dates the ECO's decision. However it has always been the appellant's case that he is proficient in the English language having attained both a BA and Masters Degree which were taught in English and therefore fulfilled the Rules in any event. I am satisfied that on this basis I can admit the post decision evidence simply as evidence tending to show a proficiency in the English language at any event. This effectively renders academic much of that issue which was of concern to the ECO.

Consideration

13. I am satisfied that the Judge has erred in his decision, because of two material factors which he appears to have overlooked.

14. The first is at [25], where after carefully setting out his findings in [15] to [22], he says this,

> "It is in the children's best interest to be with Mr Bashir here for all the reasons I have already given. Assuming Mr Bashir is well (and I will come back to this in due course) he would be unable to work initially as there is no evidence he has a job to go to and would be an economic burden on the tax payer."

That is an incorrect factual finding. There was clear evidence before the Judge that the Appellant had an offer of employment available to him on entry. This evidence the Judge appears to have overlooked.

15. The second material point concerned the English language requirement as noted by me in [12] above. There was evidence before the Judge that the Appellant was educated in several institutions where English was the spoken language. The Judge did not accept that the Appellant had established that he speaks English (even accepting the jobs he has had) and went on to conclude at [26],

> "However, I do not accept that he has established that he speaks English even given the jobs he has had and his education as he has not taken the relevant English language test. Bluster is no substitute for evidence that can easily be obtained…"

I am satisfied that this shows the Judge has given insufficient reasoning for his finding that he did not accept the Appellant spoke English. This finding does not lie easily with the Judge's acceptance that the Appellant had been educated as claimed and had followed a distinguished career in the army. It was incumbent upon the Judge to evaluate the evidence before him and to give reasons explaining why, in the face of all that evidence, he concluded as he did that the Appellant could not speak English. A Judge of course, is fully entitled not to accept evidence put forward, but must give his reasons for so doing. As I have noted above in any event, this issue has been largely rendered academic.

16. Nevertheless I find for the foregoing reasons, that there are material errors in the factual matrix of this decision. Those errors are ones which are capable of tipping the balance against the weight to be given to the public interest in any proportionality test. I therefore find that the errors are such that the decision of the FtT must be set aside and remade.

Remaking the Decision

17. Both representatives agreed, there being no further evidence to call, other than that the Appellant now has an English language test certificate and a TB certificate, I was in a position to remake the decision. I find no reason to disturb the findings made by the Judge and set out in [15] to [22]. None of those findings were subject to challenge. In essence, therefore, the following is accepted.

> "That the school system in Pakistan could not cope with the children's Special Educational Needs and that they were being victimised, alienated and discriminated against [16];

That the children have the identified health challenges of being significantly visually impaired and registered blind [17];

That if the Appellant were here it would be far easier because he could provide a second pair of hands – particularly with Mohammed (the third child) as the Appellant could provide personal care which is better provided by a man [17];

That the stress of being a single mother of 3 disabled pubescent and pre pubescent children has taken a toll on the Appellant's wife who suffers from stress, anxiety and panic attacks [18];

That it is likely terrifying for the children given the limited help they can give their mother and stressful for them to think they are the cause of their mother's health problems [18];

That the mother's stress will be alleviated by the Appellant being here as a second adult in the house [18];

That the Appellant's wife lacks support from her family and is effectively on her own with the children when they are not at school [19];

That the children want their father here and their views are important [20];

That the Respondent's decision interferes with the respect to which all the members of the family are entitled with regard to their family and private life [21];

That the Appellant has never attempted to circumvent immigration control [21];

That consequences of gravity flow from the decision as the family are struggling now and the Appellant may not be able to come for some time; each day increases the stress on the family [22];

It is in the children's best interests to be with the Appellant here [25];

In due course the Appellant's presence here would reduce the burden on the tax payer as the children would need less external support out of school [25]; and

There are compelling circumstances in this case not recognised by the rules [27]."

18. I have no hesitation in finding that this is one of those exceptional cases which is capable of falling outside the Rules as recognised by *SSHD v SS(Congo) [2015] EWCA Civ 38.*

19. The significant weight which must be afforded to the public interest, I find in this case is reduced because the Appellant is well able to speak English, now has the relevant TB certificate and has an offer of employment available to him. The countervailing interests in any event do not in my judgment outweigh the considerable body of evidence available showing that the best interest of the three children is in having their father here with them in the United Kingdom. I accept that this appeal is what is termed an 'overseas' case, but I am satisfied that the evidence

before me shows that in this Appellant's case, family life cannot reasonably be enjoyed abroad.

Decision

20. The decision of the First-tier Tribunal is set aside for legal error. I hereby remake the decision. The appeal of Aamir Bashir against the Entry Clearance Officer's refusal of 30th December 2014 to grant him entry clearance is allowed.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal

Fee Award

As I have allowed the appeal I make a fee award for £140.00.

Signature **Dated**
Judge of the Upper Tribunal