



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15858/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3rd May 2018

Decision & Reasons Promulgated
On 29th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

NEHARUN [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Mustafa of Kalam Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer in New Delhi made on 22nd March 2016 to refuse her application for entry clearance to the UK as the partner of a British

national under Appendix FM of the Immigration Rules. First-tier Tribunal Judge O'Garro dismissed the appeal in a decision dated 28th August 2017. The Appellant now appeals with permission to this Tribunal.

2. The background to this appeal is that the Sponsor is a British national who resides in the UK. The Sponsor says that he became a British national in 1962. He and the Appellant were married on 6th April 1989 and have four children of the marriage. The children are all British as a result of the Sponsor's nationality. The Sponsor did not reside in Bangladesh with his wife after the marriage but visited Bangladesh to see his wife and children every year between 1990 and 2014 and visited every year.
3. The Appellant's son joined him in the UK in 2004 and the other three children came in 2014. All of them live with the Sponsor. The Appellant's application for entry clearance to join her husband was refused as the Entry Clearance Officer was not satisfied that the relationship was subsisting and that the Appellant and the Sponsor intend to live together permanently in the UK. The Entry Clearance Officer also refused the application on the basis that the Appellant was not exempt from the English language certificate and had not provided the relevant evidence to demonstrate that she speaks English and therefore failed to meet the requirements of paragraph EC-P1.1(d) (with reference to E-ECP4.1) of Appendix FM of the Immigration Rules.
4. Having heard oral evidence from the Sponsor and considered the documentary evidence the First-tier Tribunal Judge found the Sponsor's evidence to be credible and found that the relationship is subsisting and that the parties intend to live together permanently [28]. That finding is not challenged.
5. The judge went on to consider the English language requirement and considered medical evidence submitted but decided that the Appellant had not established that she is exempt from meeting the English language requirements and therefore could not meet all of the requirements of Appendix FM. The judge undertook an assessment under Article 8 of the European Convention on Human Rights. The judge concluded that the Appellant's failure to meet the Immigration Rules was of significant weight and decided that the Respondent's decision was proportionate.

Error of law

6. There are two grounds to appeal to the Upper Tribunal. The first ground contends that the judge made a material error of fact in relation to the contents of the medical evidence. The second ground contends that the judge failed to undertake a proper assessment of the best interests of the children.
7. In the grounds and at the hearing Mr Mustafa contended that the judge had made a material error of fact in relation to the medical evidence in the context of the English language exemption.
8. It appears that the letter from the appellant's Doctor, Dr Das, which was before the Entry Clearance Officer was dated 7th March 2016 and, although Mr Mustafa had a

copy of that letter in connection with the Upper Tribunal proceedings, it appears that that letter was not before the First-tier Tribunal Judge. However that letter is quoted in the entry clearance decision as follows

“You have submitted a handwritten letter from Dr Pronoy Kanti Das dated 7th March 2016 stating you are suffering from hypertension and early dementia. However you have submitted no further evidence of any medical tests or treatment. I also note you have answered ‘no’ to the question ‘do you or your Sponsor, have any physical or mental condition(s) which currently require personal care or medical assistance at home, or have learning difficulties”.

9. At paragraph 33 of the decision, in considering the disability exemption in relation to the English language certificate, the judge said:

“Firstly I would say at this point that I do not find Dr Das’ letter reliable. The letter which is before the Tribunal is dated 26th June 2017 and states that the Appellant has been suffering from hypertension and early dementia since July 2017. Of course July 2017 was still in the future if the date on the letter is taken into account.”

10. The judge considered this issue further at paragraph 34 where she said

“Further even if Dr Das meant to say the Appellant had been suffering from ‘hypertension and early dementia since July 2016’, then I still have doubts about Dr Das’ letter because his letter which was before the ECO, which I have not seen but was referred to in the ECO’s decision was dated 7th March 2016, which means that at the time the application was made the applicant had not been assessed by Dr Das. Without some credible explanation for the inconsistencies noted, I will give Dr Das’ letter no evidential weight. This of course means that there is no evidence before me about the Appellant’s medical condition which satisfies me that she has a physical or mental condition which prevents her from learning English or taking an approved English language course test”.

11. In the grounds and at the hearing before me Mr Mustafa submitted that the judge made a material error of fact in relation to this matter. It is submitted that the judge misread the contents of the letter of July 2017 as it is submitted it is clear that this letter states that the Appellant has been suffering from hypertension and dementia since July 2014, not July 2017.
12. In his submissions Mr Nath suggested that it was clear from paragraph 34 that, as the judge had not had sight of the 2016 letter, this caused further confusion and he submitted that there was confusion as to what was before the judge.
13. However I am satisfied reading paragraphs 33 and 34 that the only letter before the judge was that dated 26th June 2017. That letter is handwritten. The date on which it was written is shown at the top of the letter and is repeated under the doctor’s signature. In the middle of the letter the judge says “she has been suffering from hypertension and early dementia since July 2014”. I accept Mr Mustafa’s submission that, although the four in 2014 is not particularly clear, when it is compared with the

seven in 2017 at the beginning and end of the letter it is more than clear that the date referred to in the text of the letter is July 2014.

14. In these circumstances I reach the view that the judge made a material mistake of fact. This mistake goes to the heart of the judge's finding in relation to the only matter left in contention as regards the Appellant's compliance with Appendix FM.
15. The judge set out the details of the disability exemption from the Immigration Directorate Instruction Family Migration: Appendix FM, Section 1.21. This states at 6.3 that in order to demonstrate disability which prevents an Appellant from learning English or taking an approved English language test is:

"To qualify for this exemption, the applicant must apply for it in their application and submit satisfactory medical evidence from a medical practitioner who is qualified in the appropriate field which sets out the relevant physical or mental condition and from which it may be concluded that exemption on those grounds is justified. Each application for an exemption on this basis will be considered on its merits on a case by case basis".
16. Mr Mustafa submitted that the letter from Dr Das satisfies this part of the IDI. Mr Nath agreed that if the letter were accepted that it would satisfy the evidence required to demonstrate disability.
17. Mr Mustafa submitted that it was known that someone who had suffered from dementia would not be in a position to learn English or take an approved English language test and Mr Nath did not object to that submission.
18. Accordingly I find that the Appellant has demonstrated a disability which prevents her from meeting the English language requirement. I note that the Appellant did not tick the appropriate box on the application form to indicate that she was claiming an exemption from the English language exemption, however, in my view, in light of the medical evidence, I do not consider that that is determinative of the exemption issue.
19. On the basis of the letter from Dr Das I am satisfied that the appellant has shown that she meets the exemption in paragraph E-ECP4.2(b).
20. Having made the finding above this means that the Appellant meets the requirements of Appendix FM for entry clearance as a partner. It was Mr Mustafa's submission, with which Mr Nath agreed, that in meeting all of the requirements of Appendix FM the Appellant has demonstrated that the decision amounts to a breach of her private or family life under Article 8. There is no need therefore to undertake a freestanding Article 8 assessment.

Notice of decision

21. The decision of the First-tier Tribunal Judge contains a material error of law.
22. I set that decision aside.

23. I remake that decision by allowing the Appellant's appeal on human rights grounds.

24. No anonymity direction is made.

Signed

Date: 24th May 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid as the relevant evidence was submitted to the ECO.

Signed

Date: 24th May 2018

Deputy Upper Tribunal Judge Grimes