Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03789/2019

THE IMMIGRATION ACTS

Heard at Leeds	**Decision & Reasons Promulgated**
On 14 January 2020	**On 28 February 2020**
Decision given orally at hearing	

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

SANDHYA MULA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal, brought with permission granted by the First-tier Tribunal, to challenge the decision of a judge of the First-tier Tribunal who, following a consideration on the documents in Newport in July 2019, dismissed the appellant's appeal against the decision of the respondent to refuse her human rights claim.

2. The judge who dismissed the appeal was clearly extremely sympathetic to the appellant. She recorded that the appellant entered the United Kingdom in 2016 as the spouse of a resident British citizen. Her leave was valid until March 2019. She applied in time for further leave. The reason why the respondent refused the appellant's application for further leave was because she had failed to satisfy the respondent's financial and English requirements. So far as the financial requirements were concerned, the judge was fully satisfied on the evidence that those requirements had been met. The respondent today takes no issue with that.

3. The sole issue, accordingly, for the judge was whether the appeal fell to be allowed because of the appellant's failure to satisfy the relevant English language requirement. The appellant had provided a Life Skills A1 Test Certificate. It was, however, common ground that the appellant needed to provide a Life Skills A2 Certificate. She accepted that she had not done so. That was, the judge found, the result of a genuine mistake. I am satisfied that that mistake can be explained, as the appellant's representative pointed out, by recent changes in the requirements in that regard set by the respondent. The judge found that the appellant "became confused about the required English language test and took and passed Life Skills A1 instead of A2". The judge accepted that this was, as I have indicated, a genuine error.

4. The appellant was in a position immediately to take the A2 test and the judge found that there would be no issue in her passing that test because of her knowledge of English. She is, amongst other things, employed in a customer-facing role in a large pharmacy in the United Kingdom, where she has to engage competently in English. The difficulty, however, for the appellant, which the judge graphically described towards the end of her judgement as a "lobster pot", was that the respondent was refusing to hand back to the appellant her Indian passport, which she needed in order to be able to sit the A2 test.

5. The appellant has corresponded with the respondent in respect of the return of her passport. An email from the respondent dated 28 February 2019 refers to section 17 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as being the provision under which her passport was being retained. The email, having cited that section said: "Therefore we are unable to return the passport as you have requested". The passport would, the email continued, only be returned to her if she was either granted leave to remain in the United Kingdom or if she chose voluntarily to depart from it.

6. In the circumstances, the respondent's stance in relation to the passport is, I find, extremely problematic. The email reads as if section 17 imposes a duty on the respondent to retain passports in certain circumstances. In fact, if one looks at the section, it does nothing of the kind. It gives the respondent a power to retain if the person in question is suspected of being liable to be removed from the United Kingdom.

7. The judge, as I have said, was extremely sympathetic to the appellant. She considered, however, in all the circumstances, that certain caselaw which she did not specify meant she could not allow the appeal. I agree with the judge who granted permission that the judge who dismissed the appeal seems to have erroneously considered herself bound by caselaw which she did not properly articulate.

8. The position is, therefore, that there is an error of law in the decision. In the circumstances, that error is one which was material to the outcome; and I set aside the decision and proceed to re-make the decision myself. In doing so I adopt the unchallenged findings of fact in the First-tier Tribunal Judge's decision.

9. The appellant's representative in his grounds refers to a number of cases including Chikwamba v the Secretary of State [2008] UKHL 40 as authority for the proposition that, in certain circumstances, requiring somebody to go abroad in order to make an application may be a disproportionate interference with their rights or otherwise unlawful.

10. The problem for the appellant, however, it seems to me, is not the same as that faced by the appellant in Chikwamba. If she were to be required to leave the United Kingdom, the application she would make would necessarily be a different application than the one she is seeking to make at present for leave to remain. She would have to apply for entry clearance and there is, more importantly, significant doubt as to whether it would be possible for her to take an English language test in India. I say that, notwithstanding what Mr Diwnycz has told me, based upon his instant internet research, which suggests it might be possible in certain places to take the test. If she was required to return, however, there would undoubtedly be serious disruption to her employment in the United Kingdom, which would cease. I am satisfied from the materials before me, which are not questioned by the respondent, that it would also be very difficult, to say the least, for her husband to accompany her while she made the application.

11. The point of difference between the Chikwamba caselaw and the present one is significant. The jurisdiction of the Tribunal in a human rights appeal is confined to deciding whether the removal of the appellant would be contrary to section 6 of the Human Rights Act 1998. In Chikwamba, the issue was whether the very form of leave that was sought by the appellant in that case should in effect be granted. A human rights appeal is very different. The issue for me is whether in all the circumstances of this somewhat unusual case it would be proportionate for the Secretary of State to interfere with the human rights of the appellant and her husband to by requiring her to leave, with all the difficulties that that entails, rather than granting her a period of leave which, compatibly with what the power the respondent possesses under section 17 of the 2004 Act, would result in the appellant obtaining her passport and thereby being able to take the necessary A2 test.

12. Accordingly, if I were to allow this appeal I would do so only on the basis that it would be disproportionate for the Secretary of State not to grant a very short period of additional leave so as to enable the appellant to take that test and to perfect her application.

13. The appellant's representative is concerned as to whether this might be effected by means of a variation of the existing application, or an amendment thereof, rather than a new application. Given the extreme difficulties that he and the appellant have encountered in their dealings with the respondent hitherto, I understand his concern. I record it in this decision so that consideration should be given to it by the respondent.

14. Be that as it may, however, I have concluded that in the circumstances of this case, it would be disproportionate to remove the appellant. Proportionality requires doing no more than is necessary in order to achieve the public aim; in this case, the maintenance of immigration control. Granting a short period of leave of the kind I have described to this appellant in order to enable her to take the A2 test seems to me to be an appropriate response. Conversely, requiring her to leave and not granting even that short period of additional permission to remain would, in all the circumstances, be disproportionate.

15. I therefore set aside the decision of the First-tier Tribunal and substitute a decision of my own, allowing the appeal on human rights grounds, so as to enable the Secretary of State to grant a period of leave which will be sufficient to enable the appellant to take the A2 test and to present it to the respondent in connection with her application for leave to remain.

16. I have mentioned earlier the financial issues which were found in the appellant's favour by the First-tier Tribunal Judge. Those findings stand and the respondent should therefore address the matter solely by reference to the requirements of the English language test.

No anonymity direction is made.

Signed Date 20 February 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber