



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18115/2018

THE IMMIGRATION ACTS

Remote Hearing held at
Field House on 12 August 2020

Decision & Reasons Promulgated
On 24 August 2020

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

CLARISSE BIKALOU

Appellant

and

ENTRY CLEARANCE OFFICER (PRETORIA)

Respondent

Representation:

For the appellant: Mr V. Sharma of The Chamber Practice
For the respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 19 July 2018 to refuse a human rights claim in the context of an application for entry clearance as the spouse of a British citizen.
2. The respondent accepted that the appellant met all the substantive requirements of the immigration rules save for the English language requirement. The application was refused for the following reasons:

"You do not meet the eligibility English language requirement of paragraphs E-ECP.4.1. to 4.2. for the following reason. You are not exempt from the English language requirement

under paragraph E-ECP 4.2. You have stated in your application that you (sic) there is no test centre in Congo Brazaville (sic). I am aware that there are test centres in neighbouring countries. You are not a national of a majority English speaking country listed in paragraph GEN 1.6 and have not passed an English language test (A1 Level of Common European framework) with a provider approved by UKBA. You also have provided no evidence to show that you hold an academic qualification recognised by NARIC UK to be the equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English. I therefore refuse your application under paragraph EC-P.1.1(d) of Appendix FM of the Immigration rules. (E-ECP.4.1)"

3. First-tier Tribunal Judge Agnew ("the judge") dismissed the appeal in a decision promulgated on 26 March 2019. The sponsor attended the hearing in person with a Mackenzie Friend. The judge noted the appellant's arguments as follows:

"9. In the argument on behalf of the appellant, reliance was placed on the case of R (Ali); R(Bibi) v SSHD [2015] UKSC 68 in which it was found that the respondent's requirement to provide a certificate of knowledge of the English language was lawful. However, that it would in a significant number of cases breach Convention rights because of particular circumstances. I note that the case itself was not lodged but a Press Summary. A copy of the latter was provided in the appellant's bundle. It was submitted for the appellant that as there was no test centre in her country of nationality she should be exempt from the requirement. It was further submitted, that to refuse entry clearance on a language basis was unlawful as the appellant had demonstrated that it was not practicable or reasonable for her to travel to sit the test in a neighbouring country "as she was likely to face severe practical or logistical difficulties, which cannot reasonable be overcome, in attending the test centre."

4. The judge went on to quote a lengthy section from the respondent's policy "Immigration Directorate Instruction: Family Migration: Appendix FM section 1.21 English Language requirement - Family Members under part 8, appendix FM and Appendix Armed Forces" (05 August 2018). The judge noted that the appellant claimed that it would be prohibitively expensive for her to travel to take the test in a neighbouring country. She asserted that a flight to Rwanda would require a visa, several days round trip at the estimated cost of around £1,000 including the flight and accommodation. Although the appellant produced evidence to support her estimation of the costs the judge observed, without reference to any alternative evidence, "that does sound extremely expensive for flights and a hotel in Rwanda and it may be that there are cheaper alternatives both in mode of travel and hotels." She stated that there might be other "neighbouring countries" with test centres that the appellant could travel to. The judge concluded that the appellant had failed to show that there were "exceptional circumstances" that prevented the appellant from meeting the English language test requirement.
5. The appellant appealed the First-tier Tribunal decision on the following grounds:
 - (i) The judge failed to engage with or apply the principles outlined in the Supreme Court decision in *R (Bibi & Anr) v SSHD* [2015] UKSC 68.
 - (ii) The judge failed to conduct a proper proportionality assessment.
6. A face to face hearing was not held in the Upper Tribunal because it was not practicable due to public health measures put in place to control the spread of Covid-

19. The appeal was heard by way of a remote hearing by Skype for Business with the parties' consent. All issues could be determined in a remote hearing. The documents before the Upper Tribunal include those that were before the First-tier Tribunal:

- (i) The respondent's bundle before the First-tier Tribunal (RB1).
- (ii) The appellant's bundles before the First-tier Tribunal (AB1 & AB2)
- (iii) The application for permission to appeal to the Upper Tribunal and grant of permission.
- (iv) The appellant's bundle before the Upper Tribunal (AB3).

Decision and reasons

Error of law

7. At the beginning of the hearing I gave an indication to Mr McVeety of my preliminary views regarding the First-tier Tribunal decision. He accepted that the decision involved the making of an error of law.
8. Even though the First-tier Tribunal had a duty to assist an unrepresented appellant, the judge's comments at [9] appear to indicate that she did no more than consider the press summary of the Supreme Court decision in *Bibi* produced by the appellant. Nothing in the First-tier Tribunal decision indicates that the judge engaged with the findings of the Supreme Court, which were binding and should have been considered and applied by the First-tier Tribunal. The First-tier Tribunal is an expert tribunal and a judge is expected to be aware of and to apply relevant case law.
9. The judge's failure to consider *Bibi* adequately meant that she failed to apply the correct test and failed to give appropriate weight to the public interest. Although the Supreme Court found that the overall policy of requiring an English language test certificate was lawful, it made clear that there may be a significant number of cases where the application of the rule might not strike a fair balance for the purpose of Article 8. Lady Hale made the following findings:

"53. The problem lies not so much in the Rule itself, but in the present Guidance, which offers little hope, either through the "exceptional circumstances" exception to the English language requirement (see paras 17, 18 above), or through the even fainter possibility of entry clearance outside the Rules (see para 20 above). Only a tiny number achieve leave to enter through these routes. This is not surprising given the way in which the Guidance is drafted. The impracticability of acquiring the necessary tuition and practice or of accessing a test centre is not enough. Financial impediments are not enough. Furthermore, all applications for an exception to be made will be considered on a case by case basis. This means that the considerable expense of making an application has to be risked, even though, on the current Guidance, the chances of success are remote.

54. It is not enough to say (see para 7.2 of the Guidance at para 18 above) that partners are expected to be self-sufficient without recourse to public funds when they come to this country and can therefore be expected to find the resources to meet this requirement. It is one thing to expect that people coming here will not be dependent upon public funds for their support. It is quite another thing to make it a condition of coming here that the applicant or sponsor expend what for him or her may be

unaffordable sums in achieving and demonstrating a very basic level of English. Given the comparatively modest benefits of the pre-entry requirement, when set against the very substantial practical problems which some will face in meeting it, the only conclusion is that there are likely to be a significant number of cases in which the present practice does not strike a fair balance as required by article 8.

55. This does not mean that the Rule itself has to be struck down. There will be some cases in which the interference is not too great. The appropriate solution would be to recast the Guidance, to cater for those cases where it is simply impracticable for a person to learn English, or to take the test, in the country of origin, whether because the facilities are non-existent or inaccessible because of the distance and expense involved. The guidance should be sufficiently precise, so that anyone for whom it is genuinely impracticable to meet the requirement can predictably be granted an exemption. As was originally proposed, those granted an exemption could be required to undertake, as a condition of entry, to demonstrate the required language skills within a comparatively short period after entry to the UK."

10. The judge applied the test of "exceptional circumstances" rather than considering whether it was "reasonable and practicable" to expect the appellant to travel to another African country to take a test in the context of the "comparatively modest benefits of the pre-entry requirement" in public interest terms. Nor did she consider whether this might be one of the significant number of cases that might lead to a disproportionate result on the facts of the case.
11. Despite evidence to support the appellant's assertion that the cost of air travel to one of the nearest test centres would be disproportionately expensive, the judge speculated that the appellant could travel by unspecified alternative means or to other neighbouring countries without any meaningful analysis of the real world practicalities. The appellant is a citizen of the Republic of Congo. The nearest test centres were likely to be in Cameroon or Rwanda (the current list of international test centres does not appear to suggest that there is a test centre in Angola as stated). As an experienced Presenting Officer, Mr McVeety accepted that air travel in Africa is more expensive. Air travel is less common and as a result airlines cannot charge the low fares common in European air travel. In assessing whether it was reasonable for the appellant to travel to another African country by cheaper means, the judge failed to consider the distance involved or the relative lack of infrastructure in the countries that the appellant would have to travel through if she travelled overland. Publicly available information suggests that travel to Yaoundé or to Kigali from Brazzaville would involve a round trip of at least 2,000 miles (the approximate equivalent of travelling from London to Rome and back).
12. A different picture emerges when these facts are considered within the proper context of Article 8 and the Supreme Court decision in *Bibi*. Although Article 8 does not oblige a state to respect the choice of country of residence of a married couple, the Supreme Court recognised that the immigration rules permit entry to the spouses of British citizens. The appellant met all the other substantive requirements of the immigration rules for leave to enter as a partner. The only aspect of the rules that she failed to satisfy was the English language requirement. In terms of the weight to be given to the public interest, the Supreme Court accepted that there was a legitimate aim in requiring a basic level of English language, but made clear that the requirement only had "comparatively modest benefits" and that refusal solely on this

ground may lead to a disproportionate result in a significant number of cases. The judge failed to take into account these material considerations.

13. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside.

Remaking

14. It is accepted that the appellant is in a genuine and subsisting marriage with a British citizen and meet all the other requirements of the immigration rules for entry as a partner. The effect of refusing entry clearance has led to the prolonged separation of the appellant from her partner. I am satisfied that the decision shows a lack of respect for the appellant's right to family life that is sufficiently grave to engage the operation of Article 8(1) of the European Convention.
15. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.
16. The Supreme Court found that there was a legitimate public interest in requiring a basic level of English language for leave to enter as a partner. However, it was described as a modest public interest consideration. The Supreme Court emphasised that there may be a significant number of cases where the requirement for an English language certificate could lead to a disproportionate result under Article 8. One of those circumstances might be when it is not reasonable or practicable for a person to travel to another country to prepare for or to take an English language test or to do so would incur inordinate additional cost. The decision in *Bibi* makes clear that the requirement is lawful but whether it is justified and proportionate may depend on the facts of each case.
17. In this case the appellant comes from a country where there is no facility to take an approved English language test. Nevertheless, she sought to address the public interest requirement to show that she can speak a basic level of English by enclosing a non-approved English language test with the original application.
18. Although it would be reasonable to expect the appellant to travel to the nearby city of Kinshasa in the Democratic Republic of Congo given its proximity to Brazzaville, there is no approved test centre there either. The only option would be for the appellant to take a round trip of at least 2,000 miles to Yaoundé or Kigali. I find that it would be unreasonable to expect the appellant to undertake such a long journey overland through countries with a rudimentary infrastructure. The only option would be to travel by car or bus and the journey might take many days if it was possible at all.

19. The only reasonable way to travel to the nearest test centres would be by air. The evidence produced by the appellant supports her assertion that the costs would be disproportionate. She would require a visa to enter Rwanda, flights could cost from £400 to £800 and there would be the additional cost of accommodation for a couple of days. A flight to Yaoundé could cost US\$600, and again there would be additional accommodation costs. According to the application form, the application for entry clearance already cost the couple US\$2,335. Albeit the sponsor met the £18,600 income threshold, he is in relatively low paid employment and must work two jobs to earn the required income. For this couple, the additional cost of travel to take an English language test is significant and is likely to be unaffordable.
20. Part 5A of the Nationality, Immigration and Asylum Act 2002 (“NIAA 2002”) applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person’s right to private or family life and as a result is unlawful under the Human Rights Act 1998. In considering the ‘public interest question’ a court or tribunal must have regard to the issues outlined in section 117B in non-deportation cases. The ‘public interest question’ means the question of whether interference with a person’s right to respect for their private or family life is justified under Article 8(2) of the European Convention.
21. The public interest requirements contained in section 117B of the NIAA 2002 are largely focussed towards appellants who are already in the UK. The maintenance of an effective system of immigration control must be given weight (section 117B(1)) and it is in the public interest for an appellant to speak a basic level of English (section 117B(2)), but I have already discussed the modest weight to be given to legitimate aim of requiring a basic level of English. The appellant meets the financial requirements of the immigration rules and would be financially independent (section 117B(3)). The requirements contained in section 117B(4)-(6) do not apply on the facts of this case.
22. When the circumstances of this case are considered in the round, in my assessment, the additional time and cost of travelling to a test centre in another African country is unreasonable and disproportionate when the modest public interest in requiring the appellant to demonstrate a basic level of English language is balanced against the appellant’s personal circumstances. The requirement for the appellant to obtain an English language certificate does not strike a fair balance on the facts of this case.
23. I conclude that the decision is unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade

The appeal is ALLOWED on human rights grounds



Signed *M. Canavan*
Upper Tribunal Judge Canavan

Date 19 August 2020