Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
UI-2022-004625 (HU/52964/2021); IA-08743-2021
UI-2022-004628 (HU/52976/2021); IA-08747-2021
UI-2022-004627 (HU/52975/2021); IA-08746-2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 December 2022 at 10am in person	**On 29 December 2022**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY
UPPER TRIBUNAL JUDGE ALLEN

Between

MUSAMMAT SHELLY BEGUM (1ST APPELLANT)
MOHAMMAD IMRAN ALI (2ND APPELLANT)
MOHAMMAD KAMRAN ALI (3RD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim of counsel
For the Respondent: Mr Melvin a Home Office presenting officer

DECISION AND REASONS

Introduction

1. The appellants appeal the decision of First-tier Tribunal (FTT) Judge Anthony (the judge).

2. In his decision promulgated on 26 February 2022 the judge dismissed their appeals against the respondent's decision to refuse entry clearance on 3rd June 2021, their applications having been made on 17 November 2020.

3. They appeal to the Upper Tribunal (UT) with permission from First-tier Tribunal Judge Hatton on 22nd May 2022.

The hearing

4. Mr S Karim submitted on behalf of the appellants that the grounds were fully relied on. A striking feature of the "determination", he said, was that physical or mental impairment had been considered but the Judge ought to have considered the further question: whether there were exceptional circumstances for deciding the appeal outside the Immigration Rules in accordance with paragraph E-ECP.4.2.(c) of Appendix FM of those Rules?

5. The current version of that paragraph of the Immigration Rules reads as follows (we will assume for the purposes of this appeal that it represents the version in force at the time of the FTT's decision):

   "E-ECP.4.2. The applicant is exempt from the English language requirement if at the date of application-

   (a) the applicant is aged 65 or over;

   (b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or

   (c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK."

6. Mr Karim argued that this case plainly fell within that exception and the judge failed to properly consider "exceptional circumstances". This, he argued, constituted a material error of law.

7. A number of favourable findings were made. Paragraph 6 recognised that the first appellant had attempted to take an English language test on a number of occasions but had not so far succeeded, because she claimed to be illiterate. The judge took account of a letter from S.K. Jalil Sir, at paragraph 7. Mr Sir was an English language education specialist, who had attempted to teach the first appellant

English. The first appellant had failed the English language test given to her, several times, because of her "weakness". The judge had taken account of this evidence. He was also referred to the appellant being tutored but still being unable to pass the relevant test. Overall the judge had found the first appellant to be illiterate and ill-educated.

8. The judge had considered the physical and mental impairment when he should also have considered that there was a separate limb requiring the FTT to consider exceptional circumstances which made her exempt from the requirements in the Immigration Rules. Exceptional circumstances were in addition to "any physical or mental condition". Reference to these had been mistakenly omitted from the decision. At this stage all Mr Karim aimed to show was that the absence of reference to that sub-paragraph of the Immigration Rules could have influenced the outcome.

9. The second ground related to the appellant's disability. At paragraph 9 of the decision the judge said that the letter from Dr Iqbal "does not state which of the first appellant's 'present physical condition' (*sic*) is the disabling condition resulting in the first appellant's inability to study and pass the English language test". There were a number of conclusions which the judge reached which clearly recognised that the first appellant had been unable to complete the English language test (see, for example, paragraph 10 of the decision).

10. The judge accepted the truthfulness of the sponsor's evidence. The sponsor confirmed the appellant's illiteracy. However, the judge went on to find that the sponsor's account provided no evidence of the first appellant's alleged physical or mental disability. The judge was criticised for not engaging with the totality of the grounds (see ground 6 of the current grounds of appeal referring to paragraph 10 of the decision, for example). The judge should have gone onto make appropriate findings including in relation to a disabling condition in the form of depression.

11. Ground 3 of the grounds raises article 8. Paragraph 15 of the decision complains that under article 8(1) the burden is on the appellant but under article 8(2) it is on the respondent. At paragraph 17 the judge erred in not finding the appellant was living independently. It was argued that the financial requirements in the Immigration Rules were met.

12. The sponsor had chosen to live separately from the appellants (his wife and children) but the judge failed to engage with the reasons for this: a land feud, which resulted in the sponsor fearing for his safety etc. At least the judge should have made findings on these aspects of the sponsor's evidence. The judge should have grappled with this to a

greater extent than he did. This explained why the sponsor's separation from the appellants had not been fully considered.

13. Ground 4 challenges the absence of family life finding. The sponsor was remitting money to the appellants. It was submitted that the appellants had not begun living an independent family life but were to some degree dependant on the sponsor. This feeds into the assessment as to whether it was unduly harsh to separate the sponsor and his other family members. It is the mother's failure to meet the English language test that is preventing the family being re-united. The sponsor also has his own health issues (see ground 5).

14. Therefore, Mr Karim submitted that the appeal ought to be allowed.

15. Mr Melvin relied on his rule 24 response. The respondent carried out a review of the refusal prior to the hearing before the FTT. The review considered all aspects of the case. Article 8(2) was not argued before the FTT. It did not really feature in the refusal either. It was explained why illiteracy and physical or mental disability were not sufficient to depart from the requirements in the Immigration Rules and they did not form part of the argument before the FTT. The judge found that the evidence did not show that the exemptions to the English language requirement were met. The respondent argued that the evidence had entitled the judge to make the decision he had made, there being no perversity. The points raised with regard to article 8 were minor, Mr Melvin submitted. This appeal had to be looked at holistically. The judge had reached a correct article 8 assessment in all the circumstances, there being no evidence before the FTT that the sponsor had tried to meet with his family for a considerable time. This was an obvious point, although it did not feature in the actual decision. They could have met up in a neutral third country. No documentary evidence relating to a land dispute had been produced. This had not been used as part of the sponsor's asylum claim when he made it in 2012. The appellants were entitled to apply for entry clearance at that time but left it until just before the child's 18th birthday before they actually applied. No material error of law had been shown, therefore.

16. The appellant said in response that the judge ought to have considered the argument that the first appellant's failure to meet the English language requirement constituted exceptional circumstances. It was incumbent on the tribunal to consider article 8 (2) if raised but the burden rested on the Home Office to satisfy the tribunal as to that article. The judge did not engage with this point. The respondent argues that the appellants and the sponsor could meet in a third country but Mr Karim was not sure that it was put to the sponsor that this was viable. The sponsor's subjective concerns were not considered either.

17. The decision was reserved.

Discussion

18. The English language test requirements were set out in the respondent's refusal and summarised by the judge in his decision. He considered them at paragraph 5 et seq of his decision. It was common ground that the first appellant had not met that requirement. However, it was necessary for the judge to go on to consider whether there were exceptional circumstances for allowing that application under E-ECP.4.2 (c) on the basis of there were exceptional circumstances preventing the applicant from being able to meet the requirements of the Immigration Rules.

19. In **R (on the application of Bibi and another) v Secretary of State for the Home Department [2016] 2 All ER 193** the appellants argued that the requirement that the appellants had to speak English infringed their article 8 rights. The Court of Appeal agreed with the judge who heard a judicial review challenge to that requirement. The appellants argued it was unlawful, on the basis that the applicants' article 8 rights were infringed. The Supreme Court, however, upheld the requirements of the Immigration Rules. It held that four questions generally arose for the court to consider:

    (i) Whether the legislative objectives were sufficiently important to justify limiting a fundamental right;

    (ii) Whether the measures which had been designed to meet it were rationally connected to it;

    (iii) Whether they were no more than necessary to accomplish it; and

    (iv) Whether they struck the right balance between the rights of the individual and the interests of the community.

    The court decided that in the case of the English language requirement it struck a fair balance between the rights of the applicants and those of the wider community. There was a legitimate aim in promoting integration and requiring migrants to learn English prior to entry to ensure they achieved a sufficient standard to "get by" in English.

20. Thus a balance must be struck between the right to respect for private and family life and the legitimate aims of the respondent in protecting the national interest, including the economic well-being of the UK and promoting the integration of those who come to the UK. As a result of the amendments included within Part 5A of the Nationality, Immigration and Asylum Act 2002 and specifically

sections 117A – D thereof the control of immigration is a legitimate aim and in the public interest.

21. However, the decision-maker must consider exceptional circumstances, where they are made out. These include exceptional circumstances under ECP.4.2 (c) which prevent the applicant from meeting the English language test requirement. Provided the exception is properly applied, the correct balance will normally have been struck between the requirements of the Immigration Rules and the applicant's right to protection of his right to a private or family life in the UK.

Conclusions and disposal

22. The judge was entitled to characterise the medical evidence produced before him as "vague" because, although a number of medical documents were produced suggesting that the first appellant suffered from a "physical condition", that evidence was disparate and did not need to a clear conclusion that the first appellant was unable to study or take part in an English language test as a result of that condition.

23. The first appellant's inability to undertake an English language test is more likely to flow from the fact that the first appellant is illiterate and is unable to absorb sufficient information about an alien language to pass a successful test in it. The judge's failure to consider this possibility was a material error as it appears to have led the judge to conclude that the first appellant did not fall within the exception in ECP.4.2. (c). Arguably, she ought to have fallen within that exception but this can only be established once the evidence is properly evaluated. As Mr Karim submitted, the judge appears to have failed to engage with this basis for finding that she fell within one of the exceptions to the requirements of the Immigration Rules.

24. We have therefore concluded that there was a material error of law in relation to this aspect of the decision.

25. As to the other aspects:

    (i) The judge was entitled to conclude that the sponsor's evidence did not, essentially, go to the first appellant's medical condition.

    (ii) Despite having concluded that the sponsor's evidence was credible, the judge was entitled to conclude that the family life in the UK was limited. The explanation for it was not wholly to do with factors personal to the sponsor-fear of a feud etc. The appellant had not satisfied the judge to the civil standard of proof that it represented the reason for their separation. The appellant and the sponsor did not enjoy a significant family life

together, the sponsor having apparently voluntarily decided to remain apart from his family for many years.

26. None of the other alleged errors appear to us to have been material.

27. The error of law we have identified does not infect the remainder of the decision which appears otherwise to be well-reasoned and in accordance with the law. Accordingly, our provisional view is that the appeal should be remitted to the judge for him to assess whether there were any exceptional circumstances for allowing this appeal on the basis that the first appellant qualified for an exemption from the English language test requirement in E – ECP.4.2 (c) or she qualified outside the Immigration Rules. It may also be appropriate for the judge to consider article 8 afresh in the light of those findings.

28. We invite submissions by the representatives as to appropriate directions for a further hearing to be held before the judge on the first available date in the New Year upon onward transmission to the FTT. Due to the Christmas break we would invite the parties to submit their proposed directions for onward transmission to the first-tier Tribunal by no later than 4 PM on Friday, 13 January 2023.

Signed Date 29 December 2022

Deputy Upper Tribunal Judge Hanbury