



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01855/2017

THE IMMIGRATION ACTS

Heard at Field House
On 13th July 2018

Decision & Reasons Promulgated
On 1st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

NAZEERAN YAQUB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Vatish, Counsel; instructed by Law Lane Solicitors
For the Respondent: Ms L Kenny, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against a decision of First-tier Tribunal Judge Butler refusing her appeal against a decision of the Secretary of State on her application for settlement in the United Kingdom pursuant to paragraph 196D of the Immigration Rules. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge C A Parker in the following terms:

“The grounds allege that the Judge erred in failing to consider the appellant’s ability to meet the requirements of para 196A of the Immigration Rules; erred in his consideration of whether it would be unreasonable to expect the appellant to take the English test and failed to give weight to the medical evidence: wrongly concluded that family support would be available in Pakistan when assessing whether there were insurmountable obstacles to family life there; applied a threshold test of “exceptional circumstances” in error and failed to give proper weight to the appellant’s circumstances in assessing proportionality.

I have carefully considered the decision. Although the application made by the appellant was for indefinite leave to remain under para 196D of the Rules, on the face of it, she was able to meet the requirements of para 196A for a further period of limited leave. Her ability to meet the requirements of the immigration rules is a significant factor in the proportionality exercise under Article 8 and I find that the Judge’s failure to consider, and take into account, the appellant’s apparent ability to meet the requirements of para 196A is an arguable error of law. Reference to a threshold test of “exceptional circumstances” also arguably amounts to an error of law (*Agyarko*).

The grounds allege that the Judge’s conclusions concerning the appellant’s medical condition; obstacles to family life in Pakistan and the extent of family support in the United Kingdom were not in accordance with the evidence. To some extent, these grounds amount to no more than a disagreement with the Judge’s findings. However, I note that the Judge appears to have placed no weight upon the appellant’s presentation at the hearing or the evidence of her family members concerning her health. Further, he did not appear to have put his credibility concerns about the witnesses’ evidence (set out at para 19) to them for comment before reaching adverse findings. It is arguable that there may be errors of fact which amount to an arguable error of law. There is an arguable error of law in the decision. Permission to appeal is granted.”

2. The Secretary of State did not produce a Rule 24 response but indicated that the appeal was resisted.

Error of Law

3. At the close of the hearing I indicated that there was an error in respect of Ground 1 alone, but not in respect of the other grounds. I indicated that my reasons would follow, which I shall now give.
4. In respect of the first ground, in summary, the challenge to the judge’s decision is that his assessment of whether paragraph 196A of the Immigration Rules was or was not met is materially flawed. At paragraph 28 of the judge’s decision the judge states as follows in respect of the assessment of paragraph 196A:

“Mr Alam submitted the Rules were met on two counts. Firstly, because under paragraph 196A, there is no requirement for an English language qualification

in respect of the Appellant's application. I do not accept that submission since paragraph 196A only relates to applications for an extension of stay as a partner and the Appellant's application was for indefinite leave to remain. There is a significant difference and paragraph 196A is not applicable to this appeal. It remains the case that paragraph 196D(iii) requires an applicant to demonstrate sufficient knowledge of the English language and sufficient knowledge about life in the UK."

5. In my view the judge was quite right to observe that paragraph 196D(iii) does require an English language certificate however, as also noted in the grant of permission by Judge Parker, the requirements of paragraph 196A may be subsumed within paragraph 196D in that paragraph 196A holds similar requirements to that for settlement, but as it is a mere 'extension' of leave and not 'settlement', the key distinction is that for a grant of an extension of leave one does *not* require an English language certificate as this requirement is only present when one finally applies for settlement in the United Kingdom. I pause to observe that the grounds of appeal against the indexed decision to the First-tier Tribunal do not include a challenge on the basis that 196A of the Immigration Rules has been met. However, at some point subsequent to the bringing of this appeal, the point would have been raised by the Appellant's representatives in advance of or during the hearing as it is clearly identified at paragraph 25 of the decision at least. Notwithstanding that this was an application for settlement by the Appellant, I asked Ms Kenney specifically if there was any indication that the Presenting Officer at the appeal below objected to the Appellant appealing on the basis of her meeting paragraph 196A of the Immigration Rules as this would have potentially constituted a new matter under Section 85 of the Nationality, Immigration and Asylum Act 2002 (as amended). Ms Kenney indicated that there was no indication as far as she could see of any objection to this new matter being taken by the Secretary of State at the First-tier Tribunal. In any event, in my view this was a new matter which the Tribunal should have considered given that the Secretary of State did not indicate any objection to the First-tier Tribunal doing so.
6. Turning to the judge's reasoning, the only reason given for not considering this matter is because it was not raised in the application for settlement itself. However the basis of the application does not confine the basis upon which the Appellant can bring or pursue an appeal, and it is trite that an Appellant can vary or supplement the basis of their appeal at any point following an indexed decision of the Secretary of State and prior to the close of an appeal before the First-tier Tribunal, *inter alia*, pursuant to section 120 of the 2002 Act. Thus in my view this ground does reveal a material error of law in respect of paragraph 28 of the First-tier Tribunal Judge's decision in respect of any consequent Article 8 analysis that may have followed based upon that same assessment (although none is apparent as the judge appears to have been exercised by 196D(iii) of the Immigration Rules as the primary matter before him).
7. Turning to the remaining grounds, Grounds 2 and 3 firstly concern the judge's consideration of the medical evidence before him particularly in relation to whether

the judge should have given more weight to the letter from the Appellant's GP concerning her depression and memory impairment.

8. In respect of Ground 2, in my view the judge gave due attention to this evidence at paragraph 32 and paragraph 35 of his decision and it is unfortunate that the Appellant had not obtained a *specialist* report regarding her ability to take the English language test and did *not* have any letter from her follow up with a memory clinic either. Consequently there was a finite amount of weight that the judge could place upon the GP's letter and I do not find that there is any material error of law in respect of that assessment.
9. In respect of Ground 3 the ground argues in a few sentences that the judge did not properly assess the insurmountable obstacles which may exist in the Appellant's appeal. In my view this ground does not hold any weight given that the judge has adequately considered these matters at paragraph 3 and 38 of his decision and I cannot see any inadequacy in the judge's reasons in those paragraphs.
10. Turning finally to Ground 4 the Appellant complains that the judge's finding at paragraph 42 that there are no "exceptional circumstances" in order to consider the matter outside of Article 8 is contrary to the Supreme Court authority of *R, (on the applications of Agyarko & Ikuga) v Secretary of State for the Home Department* [2017] UKSC 11. That complaint is indeed a valid one, and given that the decision was promulgated in December 2017 long after the hand down of the judgment in *Agyarko & Ikuga* on 22 February 2017, I cannot understand the judge's reference to the need for exceptional circumstances "warranting consideration of Article 8 outside the Rules". There is no threshold or equivalent parameter before which the First-tier Tribunal should consider matters which are not covered by the Immigration Rules. Indeed, the judgment of *Agyarko & Ikuga* makes plain that the Secretary of State has decided to granting leave to persons outside the rules pursuant to Article 8 ECHR based upon the presence of exceptional circumstances as she has defined them, however that is not the approach that the Tribunal must take. What matters is whether the First-tier Tribunal has made an *independent* proportionality assessment applying a 'fair balance' approach pursuant to the House of Lord's authority of *Huang*. Notwithstanding the above, the offending paragraph of the First-tier Tribunal Judge's decision is saved from materiality of error by virtue of the fact that the First-tier Judge has gone on to consider the *Razgar* proportionality approach (in the following paragraph) at paragraph 43 of the decision which renders the error immaterial, albeit the paragraph is notably robust.
11. In light of the above findings, I set aside paragraph 28 of the First-tier Tribunal Judge's decision and any consequent findings under Article 8 as being infected by material error to that limited and discrete extent.

Remaking the Decision

12. In light of my decision that there was a material error of law in respect of Ground 1, as agreed by the parties, I was equipped with sufficient material and was in a

position to go on and remake the appeal in respect of paragraph 196A of the Immigration Rules, and in respect of Article 8 to that limited extent.

13. Paragraph 196A of the Immigration Rules states as follows in relevant part:

“Requirements for extension of stay as the partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K)

196A. The requirements to be met by a person seeking an extension of stay in the United Kingdom as the partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) are that the applicant:

- (a) (i) is the spouse, civil partner, unmarried or same sex partner of a person who:
 - (1) has limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K); or
 - (2) has indefinite leave to remain in the United Kingdom or has become a British citizen, and who had limited leave to enter or remain in the United Kingdom under paragraphs 128-193 (but not paragraphs 135I-135K) immediately before being granted indefinite leave to remain; and
- (ii) meets the requirements of paragraph 194(ii) - (vii); and
- (iii) was not last granted:
 - (1) entry clearance or leave to enter as a visitor, short-term student or short-term student (child),
 - (2) temporary admission,
 - (3) temporary release, or
 - (4) after the date on which paragraph 1 of Schedule 10 to the Immigration Act 2016 is commenced, immigration bail in circumstances in which temporary admission or temporary release would previously have been granted; and
- (iv) must not be in the UK in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded.”

14. In light of the above provisions and in light of the fact that these provisions are mirrored in paragraph 196D – save for paragraph 196D(iii) which requires an applicant to demonstrate sufficient knowledge of the English language and sufficient knowledge about life in the UK in accordance with Appendix KoLL – in my view the Appellant has plainly established that she is the spouse of a person who previously held limited leave to enter or remain in the UK and who has now as I understand it become a British citizen, and who also meets the requirements of paragraph 194(ii) to (vii) and is furthermore not in breach of the Immigration Rules. Consequently in my view the Appellant has shown that she meets the requirements for an extension of stay as the partner of a person who had leave to remain in the United Kingdom as a diplomat.
15. Consequently given that the Appellant unquestionably meets the Immigration Rules for an extension of stay I now go on to assess the implications and proportionality of the public interest in her removal balanced against her private life under Article 8 applying a fair balance approach.
16. In my mind the Appellant's private life is plainly engaged by virtue of her lawful residence in the United Kingdom since 24th September 2011 till date. The decision to remove her plainly has consequences of gravity to engage Article 8 and is more than a technical interference. In respect of the third limb the decision is in accordance with the law given that the Secretary of State considered the settlement application on the basis made. Turning to the fourth limb of *Razgar* in terms of whether it is necessary in the public interest for the Appellant to be removed in respect of firm and fair immigration control given that the Appellant is able to meet the Immigration Rules under paragraph 196A in my view the public interest must be given only nominal weight given that it is only her failure to apply for this extension which has set her in the position in which she stands and given that the Rules for such an extension are met the public interest in her removal would logically be nominal at best. Thus the public interest would be given discrete and nuanced weight by virtue of her meeting the immigration rules but not applying under the relevant paragraph when she should have: see *Patel v Secretary of State for the Home Department* [2017] UKSC 72 and also see *TZ Pakistan & PG India v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [30]. I pause to observe that, the Secretary of State has a duty to consider whether any of her immigration rules are applicable to a particular application, and thus something must be said for the Respondent failing to consider whether the Appellant qualified for a grant of extension of her leave as opposed to settlement, if she did not meet the requirements for indefinite leave to remain, which she plainly did, even on the Secretary of State's basis of refusal. Taking into account the nuanced public interest alongside the public interest as stated under Section 117B of the Nationality, Immigration and Asylum Act 2002 in its statutory form (as I am bound to consider), notwithstanding the Appellant remains unable to demonstrate she speaks English to the desired level but is financially independent, balanced against the factors going in in favour of the Appellant's private life, including her ability to meet paragraph 196A of the Rules in particular, in my view the scales are tipped in favour of the Appellant's private life which

outweighs the public interest in her removal. Consequently the decision to remove her is thus proportionate.

17. One final word regarding the Appellant's ability to demonstrate she speaks English and meets that requirement under the rules. If there is any prospect of her being able to meet the rules, then she should in my view apply for consecutive extensions of her leave until she is able to do so, as opposed to settlement. Plainly if she cannot meet this requirement, she should produce specialist evidence demonstrating her inability to do so as required by the immigration rules. After all, these rules have been challenged at deigned to be lawful at the highest level of our domestic court hierarchy (see *R, (on the applications of Ali & Bibi) v Secretary of State for the Home Department* [2015] UKSC 68) and thus the Appellant must show she either meets the rule or should be excepted from it without question.

Notice of Decision

18. The appeal is allowed on the basis that the decision is disproportionate in light of the above reasons, particularly given the Appellant's ability to qualify for an extension of leave under paragraph 196A as set out above.
19. No anonymity direction is made.

Signed

Date: 27.07.2018

Deputy Upper Tribunal Judge Saini