



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03351/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 21 June 2018

Decision & Reasons Promulgated
On 25 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

RAMIDA KHATUN
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr Vaughan a Solicitor

For the Respondent: Mr Diwyncz a Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Respondent refused the application for leave to enter as a spouse on 13 January 2016. The appeal against this was dismissed by First-tier Tribunal Judge Herlihy ("the Judge") following a hearing on 21 April 2017.

The grant of permission

2. Judge Ransley granted permission to appeal (11 December 2017). She said it is arguable that the Judge materially erred in failing to consider whether the Appellant would qualify for the 'exceptional circumstances' exemption (E.ECP.4.2

(c) regarding the requirement to provide an English language test certificate under the Immigration Rules, having exercised her discretion in not submitting a TB certificate as she was born in a refugee camp and had no valid ID document.

Parties' positions

3. No rule 24 notice was issued. Mr Diwyncz submitted that discretion was just that. As discretion was applied by the ECO regarding the TB certificate, the ECO should have thought about exercising it on the English Language point. Mr Vaughan noted that the Judge identified the provision of exceptional circumstances but made no finding as to its application.

Discussion

4. I note from within the Appellant's bundle, that evidence was provided that in order to take the English language test, an Appellant had to produce one of various forms of ID, none of which this Appellant could produce.
5. The Judge stated [1.7] "The Respondent acknowledged that it may not be a straightforward process but notes that the Appellant...has provided no evidence that she has attempted to learn English or explored any options to do so or that she would be unable to sit and (sic) English test and is not satisfied that she should be exempted from the English Language requirement..."
6. The Judge further stated [6.10] that "It is clear that the Appellant cannot satisfy the English Language requirements and appears to have made no effort to do so. I note the submissions made by the Respondent's Representative that she made no attempt to access any online courses and simply relies on the fact she has been unable to pursue secondary education and that she cannot access facilities outside the camp."
7. I raised with the representatives' R (on the application of Ali and Bibi) v SSHD [2015] UKSC 68 promulgated on 18 November 2015. The Supreme Court considered the lawfulness of the English language test within the Immigration Rules. Baroness Hale noted that [53] "all applications for an exception to be made will be on a case by case basis." She further noted that... "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..."
8. I stood the matter down for the representatives to seek to find out of any such guidance was issued between the promulgation of Ali and Bibi and the decision being made by the Respondent in this case. None could be found and Mr Diwyncz conceded that it was unlikely given the short time frame of about 8 weeks.

9. I am satisfied that the Judge materially erred by not engaging with what the Appellant was actually saying the reason was for her not taking the English Language test – namely her lack of ID document. That is a material error of law.
10. In addition, in failing to address whether the Respondent had recast the relevant Guidance, or took any such Guidance into account when making the decision, I am satisfied that the Judge materially erred in finding that discretion had been lawfully exercised, and that it was proportionate to refuse the application and require her to reapply when she plainly could still not satisfy the requirements of the Immigration Rules.
11. In addition, the criticism of the Appellant appearing to make no effort to satisfy the English Language requirement, when it is clear that she could not do so, was unfair, although not of itself a material error of law.
12. I therefore set aside the decision.

Consideration of matters having set the decision aside

13. Mr Diwyncz submitted that I should remit the matter to the ECO to consider exercising discretion, or that it should be remitted to the First-tier Tribunal for that purpose, or that he would not oppose the hearing being adjourned to ascertain the relevant Guidance. Mr Vaughan submitted that I could simply remake the decision and he doubted that ascertaining the relevant Guidance would assist.
14. I am satisfied that I have enough information to remake the decision.
15. The Appellant could not take an English Language test as she did not have appropriate ID for reasons entirely beyond her control as she was born in and living in a refugee camp (see [5.1] of Judges decision). It is precisely what concerned Baroness Hale as to the inadequate Guidance then in force. There is no evidence the Guidance was changed prior to the Respondent's decision.
16. I am satisfied that the inability to take the English Language test amounts to one of the 'exceptional circumstances which prevents the applicant from being able to meet the requirement prior to entry to the UK'. The Respondent's assertion in the refusal that she had "provided no evidence" she was "unable to sit an English test" was wrong as she had established she could not take it due to her lack of an appropriate ID. The failure to address this undermines the purported discretion exercised as the relevant factors were not taken into account.
17. The only ground of appeal open to the Appellant is that her human rights have been breached. It is clear that separating her from her husband engages article 8 as the family are separated. It is equally clear that consequences of gravity may flow from the decision as they are separated. It is not in accordance with the law as the Respondent has not exercised his discretion (given the available exemption)

lawfully by considering the relevant factors. It would be pursuing the lawful aim of maintaining the economic well-being of the country but for the fact that there is an exemption which can diminish the relevance of that. It is not proportionate to the right they have regarding respect for their family life to interfere with it where an exemption has not been properly considered that may have led to entry clearance being granted. I have of course considered the economic burden on the country (s117 (b) of the Immigration and Asylum Act 2002) but note that the Respondent's exemption significantly reduces the weight to be given to that in this case.

18. I allow the appeal to the extent that the Respondent, in failing to appropriately consider the evidence, did not appropriately exercise the available discretion and breached her human rights. Accordingly, the matter is allowed to the extent that the application will need to be considered afresh by the Respondent.

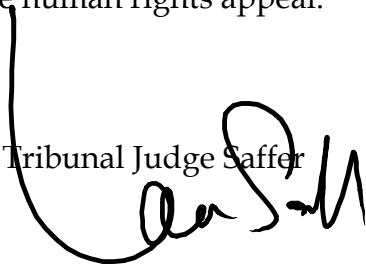
Decision:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I allow the human rights appeal.

Deputy Upper Tribunal Judge Saffer
19 April 2018

A handwritten signature in black ink, appearing to read 'Deputy Upper Tribunal Judge Saffer', written over a large, stylized flourish that extends upwards and to the left.