Upper Tribunal
(Immigration and Asylum Chamber **Appeal Number: HU/05701/2019**

THE IMMIGRATION ACTS

Heard at: Field House (remotely) **Decision & Reasons Promulgated**
On: 12 April 2021 **On: 23 April 2021**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MHB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr C Timson, counsel instructed by Maya Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of an appeal against the refusal to grant the appellant entry clearance to join her minor British citizen child in the United Kingdom, which was made in a decision dated 12 March 2019.

Anonymity

2. Such a direction was made previously and is reiterated below because this case involves a minor.

Background

3. The appellant's youngest child, "R" is a British citizen and came to the United Kingdom in 2009 in order to undertake his education, residing with his older siblings thereafter. He was aged 14 at the time of the appellant's latest entry clearance application. R's father died in 2008. The appellant made a series of applications for visit visas between 2014 and 2018, all of

which were unsuccessful. On 13 December 2018 she sought entry clearance for settlement to join R, in the United Kingdom as his parent. It is the refusal of that application, by way of a decision dated 12 March 2019, which is the subject of this appeal.

4. According to the said decision letter, the appellant did not meet the eligibility requirements because she had not submitted a birth certificate confirming that she was the biological parent of R. In addition, the appellant had not provided a death certificate relating to R's father which was required as evidence that the appellant was solely responsible for R. The evidence of contact between the appellant and R was considered to be inadequate. The appellant also failed to meet the English language requirement. While the respondent noted that the appellant had provided medical evidence to support her claim to be exempt from the said requirement, the respondent did not accept that the appellant's mental health diagnoses meant that she could not take the test. The respondent decided that the circumstances were not exceptional; that the appellant did not enjoy a family life with her son and that even if she did, her exclusion from the United Kingdom was a proportionate decision. No concerns were raised with either the suitability or financial requirements of the Rules.

5. An Entry Clearance Manager (ECM) reviewed the matter on 15 November 2019 but maintained the ECO's initial decision to refuse entry clearance.

The decision of the First-tier Tribunal

6. The decision of First-tier Tribunal Judge Cole was set aside, following a paper consideration of the error of law issue which took place on 27 October 2020. The reasons were as follows.

"There is rightly agreement between the parties that the First-tier Tribunal materially erred in the dismissal of the medical evidence relating to the appellant's claim to be exempt from the English language requirement. Accordingly, the judge's decision in relation to this aspect is set aside. However, this was not the only issue advanced in the grounds. Issue was taken with the judge's Article 8 assessment and it was said that the judge failed to take section 55 into consideration. The grant of permission did not address these matters and nor was permission refused in relation to them. The respondent's Rule 24 response does not comment on the remaining grounds. Given the lack of consideration given to the second and third grounds in the written submissions, the safest option is for the judge's decision to be set aside in its entirety. "

The rehearing

7. At the start of the hearing, there was some discussion regarding the parameters of the appeal. Essentially, Ms Isherwood accepted Mr Timson's submission that the respondent had not taken issue with any of the other findings of the First-tier Tribunal Judge and that those findings ought to be preserved.

8. I agreed with the parties that it would be right to preserve the previous findings that the appellant was the biological mother of R [31] and that she had sole parental responsibility for R [36], which left only the issue of whether the appellant was exempt from meeting the English language requirement under the terms of the respondent's policy. Mr Timson therefore had no need to call his witnesses as the issue for consideration was fully addressed by the medical evidence.

9. For the appellant, Mr Timson relied on the Secretary of State's guidance, namely "*Assessing the English language requirement*" V3.0 dated 6 April 2021 (hereinafter referred to as the Guidance). In essence, he argued that the medical evidence provided by the appellant was sufficient to demonstrate that she had a mental condition which prevented her from taking the test. The veracity of that evidence had not been challenged by the respondent.

10. Ms Isherwood argued that there was a lack of evidence as to the impact of the appellant's illness on her sons and that the medical evidence now made mention of dementia which had not been raised previously. She pointed to the fact that the CT scan results reported no abnormalities. Ms Isherwood heavily relied on the authority of *SD (British citizen children – entry clearance) Sri Lanka* [2020] UKUT 00043(IAC), emphasising that the appellant's case was wrongly focused on her medical condition and that having a British child was not a powerful factor. Turning to the Guidance, Ms Isherwood argued that there was no evidence that the appellant's conditions severely restricted her ability to take the English language test nor that they were sufficiently serious. The evidence provided did not explain how the appellant met the test set out in the Guidance.

11. In reply, Mr Timson expressed concern that there had been an attempt to widen the issues. He urged me to note that the appeal solely concerned whether the appellant had provided sufficient evidence as to her inability to take the English language test. The witness statements did not address this point because it was a medical issue. Mr Timson offered his non-expert view that a CT scan could not give a definitive diagnosis of dementia to counter Ms Isherwood's similarly non-expert opinion. Thereafter Mr Timson took me through the policy and medical evidence in some detail, emphasising that the appellant's conditions severely restricted her ability to learn English or take the test. He submitted that the appellant's doctor gave the reason she cannot learn which are linked to her medical conditions and her medication and it had not been suggested that the doctor was not telling the truth. Considering section 55, if the Rules are met, the decision of the Entry Clearance Officer is disproportionate.

12. At the end of the hearing, I reserved my decision.

Discussion

13. In reaching this decision, I have considered all the evidence before me, contained in the appellant's three bundles and the respondent's bundle as well as the submissions made.

14. The appellant established that she met the requirements of the Rules for entry as a parent of a British child with the exception of the English language requirement. As is apparent from the foregoing paragraphs, she claims an exemption on the basis of her mental and physical conditions which it is argued prevent her from studying English and taking the test.

15. The current evidence in relation to the exemption claimed by the appellant was not before the respondent, however I am required to determine the relevant factual issues for myself on the basis of the evidence before me, giving proper consideration and weight to respondent's decision, applying *MS (Pakistan)* [2020] UKSC 9.

16. The appellant relies on two medical reports from her treating physician, Dr Rahman. The CT scan results show no abnormality and therefore do not advance her case. I have not had sight of the report of Dr Rahman which was before the ECO and which was dated 13 December 2018.

17. The first report is dated 31 October 2019 and states that the appellant is suffering from hypertension and anxiety disorder for which she is prescribed various medication. The report explains that the appellant's capacity for acquiring new knowledge, specifically English, is affected by her diagnoses because she "*struggles to maintain new information*" and her medications bring about side effects including "*depression, headaches, confusion*." The doctor goes on to state that the appellant's existing knowledge of English is lacking and that his professional medical opinion is that the appellant would not be able to undertake an English language course at the time of the report or in the future. The second report of Dr Rahman is dated 1 February 2020 and confirms his earlier opinion in full. In addition, a diagnosis of dementia has been added and two further types of medication are prescribed, making a total of five. The appellant's medical records also show that Dr Rahman has been treating her for her various conditions since 1 February 2017. The reliability of this evidence has not been challenged and I can see no obvious reason to reject it. The reports, in particular, provide diagnoses, details of treatment, are reasonably detailed and demonstrate sufficient knowledge of the appellant as a patient. I therefore accord considerable weight to these reports and find them to provide reliable evidence as to the physical and mental state of the appellant.

18. I now turn to the Secretary of State's Guidance, with particular emphasis on exemption from the English language requirement. Page 27 of the Guidance explains that there is no specified evidence for the medical exemption under Appendix English Language but that original current medical evidence from a medical practitioner "*must*" be provided. In this instance, there were two such pieces of evidence which meet that description before me. An example provided in the Guidance as to when an exemption can be claimed is where an applicant: "*is suffering from a long-term or ongoing illness or disability (which may last for years) that severely restricts their ability to learn English or to take the test*." The evidence before me is that the appellant is suffering from anxiety disorder and, in addition, experiences depression, headaches and confusion owing

to the side effects of her medication. There is no evidence to suggest that the appellant's health is likely to improve. On the contrary, she has been treated by Dr Rahman for these conditions for over four years and, on balance, I accept that her conditions are long-term. I am satisfied that the effect of the appellant's conditions and medication on her mental state severely restrict her ability to learn English and therefore to take the test. Accordingly, the appellant qualified for the exemption claimed.

19. Neither representative made lengthy submissions regarding Article 8 ECHR. Mr Timson argued only that if the appellant could show that she met the Rules, combined with the best interests of her minor child this sufficed to render the ECO's decision a disproportionate outcome. Ms Isherwood did not argue otherwise, her submissions being based on the premise that the appellant could not meet the Rules.

20. The appellant's son R, who is still only aged 16, has been waiting for his mother to join him in the UK since the application was made in 2018. In his statement he describes his desire for her to join him here and his feeling of deflation when her application was refused. Given that R's brother "K," who has been caring for him, wishes to hand over day to day care of R to the appellant so that he can marry, I accept that it is in R's best interests that the appellant is granted entry to the UK. I am satisfied that the appellant and R have established a family life, indeed she is solely responsible for his upbringing, as found by the First-tier Tribunal. The ECO's decision has prevented that family life from resuming in the UK, where R has been living for more than a decade. That decision was lawfully made at the time on the basis of the evidence before the respondent and rightly concerned the maintenance of effective immigration control. It is non-controversial that the Immigration Rules reflect the position of the Secretary of State on proportionality and reflect how the balance should be struck between individual rights and the public interest. The appellant has demonstrated that she meets the requirements of paragraph EC-P of Appendix FM to the Rules and that her exclusion from the United Kingdom is disproportionate. The appellant's human rights appeal is, accordingly, allowed.

Notice of Decision

The appeal is allowed on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date 13 April 2021
Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the following reason. The evidence which led to the appellant being able to demonstrate that she met the requirements of the Rules was not before the Entry Clearance Officer.

Signed Date: 13 April 2021
Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email