IAC-AH-DN-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17504/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2021	**On 01 April 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS PRUDENCE [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Tan, Home Office Presenting Officer
For the Respondent: Mr Leighton-Jones, Sponsor

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as she was before the First-tier Tribunal. She is a citizen of Zambia. Her date of birth is 8 April 1978.

2. The Secretary of State was granted permission by First -tier Tribunal Judge (FTTJ) O'Garro on 30 December 2020 to appeal against the decision of FTTJ Turner allowing the Appellant's appeal against the decision of the ECO on 10 October 2019 to refuse her application for leave to enter the UK. The

matter was determined by Judge Turner on the papers as requested by the Appellant.

3. The Appellant made an application to join her husband (the Sponsor) here in the UK. He is a British citizen. Her application was refused by the ECO on the basis that she could not meet the language requirements of the Rules. However, it was accepted that she could meet all other requirements of the Rules. There had been an earlier application made by the Appellant which was refused by the ECO on a number of grounds including the Appellant not being able to meet the English language requirements of the Rules.

The Decision of the First-tier Tribunal

4. The FTTJ summarised the Appellant's evidence, namely, that she speaks English fluently and did not anticipate that she would need to evidence this. She speaks English with the Sponsor. In addition, her evidence is that since she and her husband have been separated she has suffered issues with her mental health due to the stress that separation has caused.

5. The FTTJ, in his findings at paragraph 27, stated that the Appellant did not dispute that she had failed to complete the test before she submitted her application form. She had been given dates after to complete the test; however, she was not offered a date for completion of the test before the expiry of the 28-day appeal period and therefore she did not consider there was any point in sitting the test.

6. The FTTJ considered whether there were exceptional circumstances in the context of GEN.3.1 and 3.2. The judge found that the evidence demonstrated that the Appellant and her husband understood the requirements of the Rules and were in a position to make arrangements for the completion of the test.

7. The FTTJ found as follows:

> "32. I note however in the application for entry clearance that the Appellant claimed that she spoke English fluently and that she communicates with her husband in English. The Appellant also claims in her documentation that she has built a relationship with her husband's family whilst communicating via Skype, again suggesting that this was conducted in English.
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> 33. Overall, the Appellant has produced evidence that she has made enquiries of the various tests providers and explained a lack of understanding of the requirements of the Rules. Alongside this, she has explained that she does speak English and evidences this by fact that she communicates with her husband and extended family in English. I find therefore that the Appellant is likely to be able to speak English certainly to a basic standard.

34. The Appellant had met her husband in Zambia when he was present having intended to relocate. He had sold his businesses in the UK to facilitate this. He was then made to leave Zambia when his Visa was terminated. The Appellant's husband has not since travelled back to Zambia, despite the Appellant's husband's clear fondness for the country. The Appellant describe living a dream life in Zambia with her husband which again indicates that if given the choice the pair would have remained in Zambia to enjoy married life there. Although the Appellant has not evidenced any formal barrier to her husband returning to Zambia, the evidence to me indicates that there is a barrier to the Appellant's husband returning to Zambia.

35. The Appellant refers to the impact that this process has taken upon her mental health however I have seen no medical evidence to support this connection."

8. The FTTJ directed himself in respect of R v Secretary of State ex parte Razgar [2004] UKHL 27 and made the following findings:

"43. The consequence of refusal in this case is to delay the Appellant joining her husband in the UK until such time that she passes the English language test. I say that as based on my findings above, it is likely that when she is able to take the test, she is likely to pass it. All other requirements of the Rules have been satisfied.

44. As noted above, I find that there are barriers preventing the Appellant's husband from joining her in Zambia.

45. In ordinary times, it could be said that a short delay to the Appellant being able to join her husband may well not amount to unjustifiably harsh consequences. However, we are not in ordinary times. The Appellant has been unable to arrange an English language test anywhere in Zambia or a neighbouring African country on account of the Covid 19 pandemic. This has been evidenced. It is unclear how long the pandemic will impact upon such matters. The delay could be substantial. All the while the Appellant and her husband remain separated because of this failure to pass the test which is likely to be passed when arrangements are made.

46. I balance that against all other Rules that have been satisfied. The Appellant intends to go to live with her husband who meets the financial requirements. There are no other issues arising that would weight against the Appellant being able to join her husband in the UK, noting section 117B above. It appears that the relationship between the Appellant and her husband developed whilst her husband was in Zambia on a temporary Visa however the evidence provided shows that he had every intention of resettling in Zambia to the extent that he had sold his businesses in the UK.

47. In consider the issue that the English language test seeks to address. The Rule and provision in section 117B is to ensure that people who remain in the UK can speak to a basic level the English language. It is agreed fact that this saves cost to the public purse. As noted above, I find that the Appellant on balance is likely to be able to speak English to at least the basic level, thus addressing this issue.

48. Overall, I find that the refusal of the application for leave to enter the UK is a disproportionate interference with the Appellant's family life when noting the objective of maintaining effective immigration control."

The Grounds of Appeal

9. The Secretary of State's grounds of appeal at paragraphs 1 and 2 do not identify a potential arguable error of law. At paragraph 3 the grounds assert that the FTTJ's finding at [33] of the decision that the Appellant speaks English to at least a basic standard is "surprising" not only because the appeal was determined on the papers but because it was not for the FTTJ to make their own assessment of English language competency.

10. In addition the FTTJ's finding at [45] that the Appellant has been unable to make a test appointment due to the Covid-19 pandemic is not a basis for allowing the appeal in the light of the finding that there were no exceptional circumstances.

11. Mr Tan essentially relied on the grounds of appeal; however, he also raised another ground of appeal namely that the finding at [44], there are barriers preventing the Sponsor from joining the Appellant in Zambia, is not grounded in the evidence.

12. Mr Leighton-Jones, the Sponsor, was very helpful in assisting me to navigate my way through the evidence that was before the ECO.

Conclusion

13. It is accepted that this Appellant cannot succeed under Article 8 as informed by the Rules. In assessing proportionality, the policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about Article 8 is to be made outside the Rules: TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109. The Court of Appeal in GM (Sri Lanka) [2019] EWCA Civ 1630 said that the test to be applied outside the Rules is whether a "*fair balance*" is struck between competing public and private interests (and not one of exceptionality).

14. The grounds of appeal are essentially that the FTTJ's finding that the Appellant could not speak English which was not open to him and the finding that the Appellant had not been able to take the test due to the Covid-19 pandemic was not a lawful reason for allowing the appeal (in any

event the failure to sit the test pre-dates the pandemic). As a result of these two errors the proportionality assessment is flawed.

15. I conclude that the FTTJ attached weight to a letter from the Sponsor's father dated 21 October 2019 stating that he and his wife had built their own relationship with the Appellant through phone calls and video calls. The Applicant also stated on her application form that she spoke English fluently (recorded by the FTTJ at [32]). The FTTJ was entitled to attach weight to this evidence. It was not challenged that the Appellant could speak English as she claimed in her application. The issue is that she had not passed the English language test. The conclusion that the Appellant speaks English was open to the judge. There was no reason to disbelieve the Appellant. Credibility was not an issue raised by the ECO. The judge attached significant weight to the delay caused by the pandemic to the Appellant being able to re-sit the test. He was entitled to take this into account. Section 85(4) NIAA 2002 states:

> (4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

16. There was not a pandemic at the date of the application or decision, but the FTTJ was entitled to infer that the pandemic would cause a further delay to the Appellant being able to meet the Rules and therefore to make a further application. This was a reasonable inference to draw. The FTTJ was entitled to attach weight to this.

17. In respect of the ground raised at the hearing by Mr Tan, there was no application to amend the grounds, however, no material error arises from the finding at [44]. I accept that the judge did not explain what he meant by "barriers" to the husband remaining in Zambia. However, at [5] the judge recorded that the Sponsor's visa expired "unexpectedly". It appears from the evidence (the letter from the Sponsor's father) that the Sponsor was unable to renew his business visa. The FTTJ recorded at [46] that he had intended to settle in Zambia. The evidence before the judge disclosed difficulties explaining why the Sponsor had to leave Zambia and was not able to return at the date of the decision. Perhaps the judge put it too high, describing barriers; however, no material error arising from this. The judge was entitled to take into account why the Sponsor left Zambia.

18. The challenge in the grounds is to the assessment of proportionality; the fifth *Razgar* question: R (Razgar) v Home Secretary [2004] UKHL.[1] It is not

[1] Lord Bingham's speech, which had the assent of Lord Steyn and Lord Carswell, and in large part too of Lord Walker and Baroness Hale notwithstanding their dissent as to the outcome, proposed at §17 the following questions as those which were likely to have to be answered by an adjudicator on an art. 8 appeal:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2)If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3 If so, is such interference in accordance with the law?

suggested that the decision does not interfere with the Appellant's family life under Article 8.

19. Although he did not specifically refer to s117B (1), [48] discloses that the FTTJ put into the balance that the maintenance of effective immigration control is in the public interests. This in any event, is not an issue raised in the grounds. The FTTJ found that factors under s117B of the NIAA 2002 Act would not weigh against the Appellant.[2] The decision does not disclose that he considered this as anything other than neutral.

20. While the decision in respect of proportionality could have gone either way, the judge was entitled to allow the appeal. The decision is not irrational. Irrationality is not a basis of challenge, in any event.

21. Baroness Hale in AH (Sudan) v Secretary of State for the Home Department at [30] stated:

> "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

22. The FTT dealt with the appeal against the decision-maker's decision on the basis of the evidence before it and draw reasonable inferences. The FTTJ made an evaluative assessment of proportionality having engaged with material issues raised and he made material findings on the evidence before him. The decision is rational.

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(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

[2] 117B Article 8: public interest considerations applicable in all cases
(1)The maintenance of effective immigration controls is in the public interest.
(2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a)are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons
(a)are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4)Little weight should be given to—
(a)a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

23. The grounds do not identify a material error in the assessment of proportionality. The decision of the First-tier Tribunal to allow the appeal under Article 8 stands.

No anonymity direction is made.

Signed Joanna McWilliam Date 25 March 2021

Upper Tribunal Judge McWilliam