IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06298/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 April 2015	**On 18 May 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER – ISLAMABAD

Appellant

and

MRS PARWANA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, a Senior Home Office Presenting Officer
For the Respondent: Not present or represented

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant is a citizen of Afghanistan who resides in Pakistan and was born on 1 January 1985. She is married to a British citizen, Delawar Khan (hereafter referred to as the sponsor) and has three children by him. The children (born respectively in 2009, 2010 and 2012) are also British citizens. She applied for entry clearance for the purpose of settlement in the United Kingdom with the sponsor but her application was refused by a decision of the ECO dated 2 May 2014. The appellant was refused

because she failed to comply with the English language requirement of the Rules (paragraph E-ECP4.2). She had sought exemption from the English language requirement on account of a medical condition (brain abscesses). The ECO was not satisfied that the condition was such as to exempt her from the English language requirement.

2. The appellant appealed to the First-tier Tribunal (Judge Kershaw) which, in a determination promulgated on 22 January 2015, allowed the appeal on human rights grounds (Article 8 ECHR). The Entry Clearance Officer now appeals, with permission, to the Upper Tribunal.

3. In granting permission, Judge Shimmin, summarised the grounds as follows:

> "The grounds requesting permission to appeal to the Upper Tribunal argue that the judge does not attach weight to the fact that the appellant does not satisfy the requirements of Appendix FM of the Immigration Rules and therefore fails to give weight to the public interest considerations weighing against the appellant. Furthermore, no adequate reasons are given for finding that the decision is disproportionate."

4. The appellant was represented by Counsel before the First-tier Tribunal. Her solicitors (Kothala & Co) were duly served with the notice of hearing by first class post on 16 April 2015. The sponsor was also served at his address in London. There is nothing on the file to indicate that Kothala & Co have ceased to act for the appellant nor is there anything to indicate that the notices of hearing addressed to the solicitors and the sponsor did not reach their intended recipients. In the absence of any or any proper explanation for the absence of the sponsor and/or the solicitors, I decided to proceed with the hearing in any event.

5. Having heard the submissions of Mr Avery, I reserved my determination.

6. The judge in the First-tier Tribunal considered the question of the English language test [19]. He noted that the appellant had attended a hospital for three days in July 2013 and had then been discharged. He noted the contents of the hospital report and the diagnosis. However, at [22], he found:

> "I can see nothing within this document [the medical report] that would satisfy the burden [the appellant] is under to show that she is unable to learn another language. The memory loss referred to appears to be linked to the epileptic fit she suffered and coupled with the evidence of the sponsor appears to be short lived."

7. The judge declined to draw the inference urged upon her by Counsel for the appellant that the appellant was, as a consequence of her medical condition, unable to satisfy the English language test requirement.

8. The judge went on to consider Appendix FM and in particular EX.1. He acknowledged that the EX.1 did not apply in the case of leave to enter the

United Kingdom (as opposed to leave to remain). Correctly, the judge found that the appellant could not rely upon EX.1.

9. The judge then considered Article 8 ECHR. At [32] the judge set out a number of factors which he considered rendered the decision to refuse entry clearance disproportionate. He noted that the sponsor could not live in Afghanistan, a country from which he had fled as a refugee. He noted that the sponsor could visit the family if he were to travel to Pakistan, that he could do so "without too much trouble."

10. Although the judge has considered in detail the difficulties currently facing this family, he has, in my opinion, attached inadequate weight to the public interest concerned with the refusal of this application. As regards the public interest, he says nothing more at [32] that, "maintaining effective immigration control is a very important factor." He then brushes aside the public interest by noting that "however one has to look here at the overall effect of not allowing the appellant into the UK for settlement with her children." Part of that "overall effect" is the effect of allowing the appellant to enter the United Kingdom when she was unable to comply with the requirements of the Immigration Rules. As in all cases, the public interest engaged in this appeal should have been be particularised and considered in detail in a manner specific to the facts of the case. The judge has failed to do that. Further, guidance is now offered by the Court of Appeal in *SS (Congo)* [2015] EWCA Civ 387. The judge in the First-tier Tribunal did not, of course, have regard to *SS (Congo)* which has only recently been decided. However, the legal principles which it contains are relevant here, in particular what is said at [40]:

> "In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave."

11. There is nothing to indicate that the judge identified compelling circumstances in this instance or that he properly considered that public interest concerned with denying the appellant entry clearance. The judge also failed to have any regard to the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002:

> ‘(2) It is in the public interest, and in particular the interests of the economic wellbeing 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.’

12. In the circumstances, I consider the judge’s analysis to be inadequate. I therefore set aside his determination.

13. Mr Avery, for the ECO, did not seek to cast any doubt upon the First-tier Tribunal’s summary of the various problems currently facing this family. However, the family remain separated essentially because the appellant is unable to speak English. Not only is speaking English a requirement of the Rules it is also, as I have noted above, a requirement in meeting the public interest in all cases as is now outlined in Section 117B. I agree with Judge Kershaw that this appellant has no excuse for failing to learn to speak English. She has had a brief medical episode which the First-tier Tribunal quite rightly decided did not exempt her from taking and passing the English language test. There appears to be no medical or other impediment to her studying English and passing the required test. The fact that success or failure in a future application for leave to enter rests entirely on the appellant’s own hands is, in my opinion, a significant consideration in this case. She has not been asked to overcome some insuperable obstacle nor are there financial hurdles which might, in practical terms, be impossible to overcome. Whilst I fully acknowledge both the difficulties currently faced by this family and the obligation on the United Kingdom Government to respect (as opposed to refraining from interfering with) family life, I am not satisfied that the decision to refuse her entry clearance is disproportionate. I therefore re-make the decision by dismissing the appellant’s appeal against the decision of the Entry Clearance Officer.

DECISION

14. The determination of the First-tier Tribunal promulgated on 20 January 2015 is set aside. I re-made the decision. The appellant’s appeal against the decision of the Entry Clearance Officer dated 2 May 2014 is dismissed both under the Immigration Rules and on human rights grounds (Article 8 ECHR).

Signed Date 5 May 2015

Upper Tribunal Judge Clive Lane