



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12421/2016

THE IMMIGRATION ACTS

Heard at Field House
On 02 May 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MRS BASHIRAN BIBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S A Salam, Solicitor, instructed by Salam & Co Solicitors
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer dated 11th April 2016 to refuse her application for entry clearance to the UK as an adult dependent relative under Appendix FM of the Immigration Rules. First-tier Tribunal Judge Dean dismissed the Appellant's appeal in a decision promulgated on 22nd January 2018. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Landes on 13th March 2018.

2. The background to this matter is that the Appellant applied for entry clearance as an adult dependent relative of her son. The Entry Clearance Officer refused the application under the suitability requirements of Appendix FM of the Immigration Rules on the basis that the Appellant had failed to present a valid medical certificate confirming that she had undergone screening for active pulmonary tuberculosis and is free from the disease. Further grounds for refusal were under the eligibility requirements of EC-DR 1.1(d) of Appendix FM. The Entry Clearance Officer was not satisfied on the basis of the evidence that the Appellant was unable to obtain the required level of care in Pakistan.
3. At the hearing in the First-tier Tribunal the judge refused an application to adjourn the hearing on the basis that the Appellant's son (the Sponsor) was ill. The judge determined the appeal taking into account the papers and oral submissions. In considering the appeal the First-tier Tribunal Judge noted at paragraph 13 that the issue of the TB certificate was fundamental to the case and went on to consider A39, Part 1 of the general provisions of the Immigration Rules and Appendix T. The judge found at paragraph 15 that the Immigration Rules required that the Appellant must present a valid TB certificate "at the time of the application". Accordingly the judge considered that an undertaking to obtain the TB certificate before departure was not sufficient to meet the requirements of Appendix T and found that the Appellant did not meet the requirements of the Immigration Rules and dismissed the appeal under the Immigration Rules [17].
4. The Grounds of Appeal contend that the judge erred in failing to consider the Appellant's appeal against the Entry Clearance Officer's decision to cancel the Appellant's five year multiple entry visit visa. In my view this ground is not made out because, apart from a note on the Appellant's passport, there is no decision cancelling the five year multiple entry visit visa before the First-tier Tribunal or before me. At the hearing before me Ms Willocks-Briscoe was unable to provide any further information as to that decision or as to any challenge which could be pursued against that decision.
5. The Grounds of Appeal further contend that the First-tier Tribunal Judge erred in refusing to adjourn the hearing. However, the only evidence before the First-tier Tribunal as to the failure on the part of the Sponsor to attend the hearing was a fitness for work certificate signed by his GP on 2nd January 2018 indicating that he was not fit to work. The judge pointed out that the Appellant's solicitor had submitted a statement indicating that the Sponsor was unwell as he was overly stressed with this matter due to his immense attachment to his mother. The judge pointed out that there was a witness statement from the Sponsor as well as medical evidence in relation to his mother. The judge considered that the fitness for work certificate did not state that the Sponsor was unfit to attend court, only that he was unfit to work and the judge concluded that the hearing could proceed by way of submissions, that it was in the interests of justice to do so and refused the application for an adjournment. I find that this ground of challenge has not been made out. The judge properly considered the application for adjournment and the evidence put forward in connection with that application and it was open to the judge to conclude that insufficient evidence had

been provided as to the fitness of the Sponsor to attend. It was open to the judge to refuse the application for adjournment in these circumstances.

6. The third Ground of Appeal contends that the judge erred in concluding that the TB certificate had to be submitted with the application. It is contended in the grounds that either the Entry Clearance Officer should have exercised the evidential flexibility contained in Appendix FM/SE, paragraph D(b)(ii) which requires that the Entry Clearance officer will ask for any missing document. It is contended further that the Respondent's policy in relation to the provision of a TB certificate is more liberal as it is always requested if it is missing and it is only if it is not provided upon request that an application should be refused. Ms Willocks-Briscoe was unable to provide any further clarification as to the Respondent's policy in relation to this matter. I find it unnecessary to determine this issue in light of my findings below. However I consider that this matter has not yet been determined completely and will be a matter for which clarification should be provided for the rehearing of this appeal.
7. A more significant issue was that raised in paragraphs 9 and 20 of the grounds of appeal and dealt with in the permission to appeal where First-tier Tribunal Landes highlighted that this was not an appeal under the Immigration Rules as the Appellant's only right of appeal was on human rights grounds. She pointed out that it is arguable in these circumstances that the judge should have made findings on the family life issues raised rather than simply deciding the case under the Immigration Rules on the basis of the absence of the TB certificate without considering Article 8 more widely. Judge Landes points out that the material referred to in the grounds in relation to the TB certificate indicates that there is some discretion on the part of the Entry Clearance Officer and accordingly, had the judge known that a test had been booked and had she considered that the refusal of entry clearance would otherwise have been disproportionate, it is arguable that she may have reached a different conclusion.
8. This issue was acknowledged by the Respondent in the Rule 24 notice filed in response to the grant of permission to appeal. There it is accepted on behalf of the Secretary of State that this is a human rights appeal and where the Appellant could not meet the Rules the appeal should have been considered as an Article 8 assessment outside the Rules. It was accepted on behalf of the Secretary of State that, as no consideration had been given to the Article 8 issues, the decision could not stand and it was submitted that the matter should be remitted to the First-tier Tribunal.
9. I agree that this is the proper approach in this case. This was an appeal only on human rights grounds. The judge erred in failing to look at the appeal through the prism of Article 8, instead concentrating only on the Immigration Rules. The judge failed to undertake any assessment as to family life or failed to consider the Immigration Rules in the context of an assessment of proportionality. No oral evidence was given and, more importantly, the judge made no findings as to the matters relevant to an Article 8 assessment, in light of her concentration on the issue of the TB certificate. In light of the error of approach there is a material error of law in the decision and I set it aside. In light of the Presidential Practice Statements I take into account that the effect of the error identified has been to deprive the Appellant of the opportunity for her case to be considered by the First-tier Tribunal and that the nature or extent of the judicial fact

finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal.

10. Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

The appeal is remitted to the First-tier Tribunal to be determined afresh.

No anonymity direction is made.

Signed

Date: 16th May 2018

Deputy Upper Tribunal Judge Grimes