Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20684/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 February 2020	**On 10 March 2020**

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE KEITH

Between

NATALIE KAPINGA NTUMBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:
For the appellant: Mr A Bader, Counsel, instructed by Iras & Co Solicitors
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are a written record of the oral reasons given for our decision at the hearing.

Introduction

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Clapham (the 'FtT'), promulgated on 16 August 2019, by which he dismissed her appeal against the respondent's refusal on 19 April 2018 of her application for entry clearance to settle with her partner, Mr Mutshipay, (the 'Sponsor'), a DRC national with leave to remain as a

refugee in the UK. For the avoidance of doubt, the appellant did not seek reunification under the applicable provisions of the Immigration Rules, as the appellant and the Sponsor met, after his grant of asylum, in a third country, Zambia, following which they had married by proxy.

3. The respondent rejected the application on the basis that that she failed to meet the English language requirements for entry clearance, and refusal of entry clearance would not have unjustifiably harsh consequences for the couple.

4. In her appeal to the FtT, the appellant sought to rely on an exception to the English language requirements of the Immigration Rules (paragraph E.ECP4.2(c)) on the basis that there were no English language test centres or learning centres in the DRC and it would not be reasonable and would be disproportionate to expect her to access education and take a test in a neighbouring country.

5. In essence, the appellant's claims involved the following issues: (1) whether she could rely on paragraph E-ECP.4.2(c) within the Immigration Rules; and (2) whether her application should succeed on a wider analysis under article 8 of the ECHR, including whether there were unjustifiably harsh consequences for the couple of the refusal of entry clearance.

The FtT's decision

6. The FtT was not impressed by the fact that the applicant had in fact taken an English language test in a third country, Zambia, but had failed the test. She therefore had no difficulties in taking the test in Zambia. Health issues were raised by the appellant, but no further details were provided to the FtT. The appellant did not meet the requirements of paragraph E-ECP.4.2(c). The FtT concluded that was no need to consider the appeal outside the Immigration Rules because it was possible to consider the application within the rules by reference to 'exceptional circumstances'. The expense of travelling to another country to take the English language test was not an exceptional circumstance and the FtT dismissed the appeal on that basis.

The grounds of appeal and grant of permission

7. The appellant lodged grounds of appeal which are that the Sponsor could not be expected to return to the DRC as he was a refugee; and the FtT had failed to consider the proportionality of the refusal of entry clearance outside the Immigration Rules for the purpose of his article 8 rights.

8. First-tier Tribunal Judge Gumsley granted permission on 16 December 2019, regarding it as arguable that the FtT's analysis of article 8 rights was inadequate. The grant of permission was not limited in its scope.

The hearing before us

The appellant's submissions

9. In relation to ground (1), while Mr Bader made no formal concession that the appellant failed to meet the requirements of paragraph E-ECP.4.2.(c) he indicated that he was not pursuing ground (1) with any vigour, noting the FtT's finding that the appellant had been able to take an English language in Zambia, but had failed the test.

10. The focus of Mr Bader's submissions was in relation to ground (2), namely the FtT's article 8 analysis. He referred to the brevity of the FtT's analysis at [38] and [39], in contrast to the Court of Appeal's identification in GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 of the need for an assessment outside the Immigration Rules requiring a fair balance between competing public and private interests, which was a proportionality test and was, by its nature, fact-sensitive. In that regard we also referred the representatives to the recent example, in KF and others (entry clearance, relatives of refugees) Syria [2019] UKUT 413, in which the Upper Tribunal undertook a 'balance sheet' analysis in relation to proportionality, also relating to an appeal against the refusal of entry clearance.

The respondent's submissions

11. In relation to ground (1), Mr Melvin submitted that the FtT had considered the evidence before him in relation to the appellant taking the English language test and failing it; and the lack of any further evidence about the lack of availability of test centres and educational provisions within the DRC, where she lived. Those were findings that were open to the FtT to make. The burden was on the appellant to show the lack of access to educational provision and test centres and she had not done so.

12. In relation to ground (2), the FtT was entitled to apply a test of exceptionality, the support for which was the Court of Appeal case of TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 118.

Discussion and conclusions – error of law

Ground (1)

13. We conclude that the FtT was entitled to reach the conclusion that the appellant did not meet the requirements of the exception under E-ECP.4.2. (c), in relation to exceptional circumstances which would justify her not needing to meet the requirements of the English language test. The FtT had clearly considered the distinction between the absence of test centres, as distinct from the absence of educational facilities in the DRC, with an analysis at [24] to [27]. The fact that the appellant adduced no further evidence on the point is not one for which the FtT can be criticised and the FtT was entitled to take into account the fact that the appellant had taken a test in Zambia and had failed it. In essence, the FtT's findings in relation to the appellant not meeting E-ECP.4.2(c) do not disclose an error of law and the appeal fails on that ground.

Ground (2)

14. We conclude that the FtT did err in law in his article 8 analysis. We do not accept Mr Melvin's submission that a reference, brief as it was, at [38] and [39] to exceptionality, by reference to the authority of TZ (Pakistan) was sufficient for the purposes of an analysis of the appellant's article 8 rights; either within the Immigration Rules for the purposes of GEN.3.2. of Appendix FM, namely unjustifiably harsh consequences for the couple of the refusal of entry clearance; or more widely, as a freestanding article 8 analysis outside the Immigration Rules. The fact-sensitive nature of such an analysis was emphasised not only in GM, but also in TZ (Pakistan), which reaffirmed a 'balance-sheet' analysis as recommended by Hesham Ali (Iraq) v SSHD [2016] UKSC 60. The FtT's brief reference to the absence of 'exceptional circumstances' cannot, in our view, be an appropriate substitution for a fact-sensitive analysis of balanced proportionality.

Conclusion on error of law

15. In the circumstances, the FtT erred in his failure to carry out the necessary fact-finding and the subsequent analysis in relation to article 8. That failure amounts to an error of law, such that the decision of the FtT cannot stand and must be set aside. In doing so, we preserve the findings and the conclusion of the FtT that:

    15.1. the applicant did not meet the requirements of 'exceptional circumstances' as referred to in E-ECP.4.2.(c), but noting that those exceptional circumstances applied to an inability to take an English language test, not a wider assessment of 'exceptionality' as understood in relation to article 8;

    15.2. the applicant and the Sponsor have a genuine family life together, as found by the FtT at [29].

Disposal

16. Given the narrowness of the factual and legal issues which needed to be remade, we regarded it as appropriate and in accordance paragraph 7.2 of the Senior President's Practice Statements that the Upper Tribunal remakes the decision on the appellant's appeal.

Remaking decision

17. In considering remaking the decision on the appellant's appeal, we were conscious of the authorities to which we have already been referred; paragraph GEN.3.2. of Appendix FM, which refers to there being 'unjustifiably harsh consequences' as a result of the refusal of entry clearance; as well as a wider assessment outside of the Immigration Rules by reference to article 8 of the ECHR and in particular, sections 117A and B of the Nationality, Immigration and Asylum Act 2002.

18. In referring ourselves to these provisions, we reminded ourselves that a proportionality assessment is fact-sensitive, and we have adopted the "balance-sheet" approach, to which we have already referred.

19. In reaching our decision, we recite briefly the Sponsor's oral evidence, which he gave in addition to a brief written witness statement which he adopted before us. He was also cross-examined by Mr Melvin. In making our findings, we believe it is important to note that we found the Sponsor to be an honest witness, albeit we did not necessarily accept the reliability of some of his assertions, which we will set out below.

The Sponsor's evidence

20. The Sponsor has lived in the UK for 20 years. He does not have any relatives in the UK, and he described, in simple terms, his loneliness in returning from work to a home without his wife, with whom he has been married since December 2016. He had relatives in the DRC (four brothers, with his parents having deceased) but could not return to the DRC for the same reasons that he had been recognised as a refugee.

21. The appellant also had family in the DRC and lived there with her mother and 15-year old sister. She had travelled to Zambia where she had taken the English language test in 2017, although the sponsor described his unease and worry about her travelling alone in future, or to live there for any extended period of time, to retake the test. He had visited her on four occasions in Zambia leading up to and following their marriage and these visits are evidenced in stamps in his passport which is included in the appellant's bundle.

22. Prior to getting married, the Sponsor had been unaware of the necessity of an English language test and had only discovered this on reviewing the requirements of the Immigration Rules. He had paid for the appellant to receive informal private tuition to learn English in the DRC for a six-month period, but she had not successfully passed the test, having received that private tuition. He believed that were she permitted to come to an anglophone country such as the UK, she would more readily learn English, whereas the difficulty in the DRC was because it was a francophone country.

23. The appellant had not attempted to retake the test since taking it on the one occasion in 2017. The Sponsor referred to the appellant as suffering from depression, or something of the equivalent, although he did not suggest that any health issues impacted on the appellant's ability to learn English. In her words, when she tried to learn English in the DRC, she became too "excited".

24. The Sponsor had delayed making the application for entry clearance, on the appellant's behalf, for around eighteen months after the couple were married, in order to allow the Sponsor time to prepare for the appellant to come over to the UK. He asserted, albeit we do not find this to be reliable evidence, that there was nowhere in the DRC where alternative English language education would be available. When asked what research he had done in connection with his assertion, he stated that he knew this as he was from the DRC. When it was pointed out that he hadn't lived in the DRC for 20 years, he suggested that if the appellant had been aware of

where to learn English in the DRC other than via the informal tutoring he had paid for, she would have accessed that alternative language tuition. She had not, so it followed that there was no alternative provision available.

The respondent's closing submissions

25. Mr Melvin challenged the reliability of the Sponsor's assertion that English language tuition was not available in the DRC. The Sponsor had previously obtained it in the DRC for the appellant and the fact that she had not passed the test first time did not mean that she could not do so in the future. No research had been done by the couple on the availability of tuition and the Sponsor had not visited the DRC in 20 years. There was no other evidence produced by the appellant before the respondent or the FtT. There was no medical evidence that the applicant could not access tuition or take a language test in Zambia because of any medical condition.

26. In terms of the wider article 8 analysis, the appellant lived at home with her mother and younger sister, and whilst she may miss the Sponsor and it may be very distressing, nevertheless she did not meet the Immigration Rules and such distress could not outweigh the public interest in her meeting the Immigration Rules when it was simply a question of her retaking the test.

The appellant's submissions

27. Mr Bader asked us to consider that the appellant was a credible witness, who, for example, had candidly admitted to having family in the DRC. In the proportionality assessment, Mr Bader initially suggested that we should attach little weight to the requirement of English language proficiency, although when we explored this with him further he accepted he had no authority for that proposition and further accepted that the requirement to speak English was not only a requirement of the Immigration Rules, but also referred to in section 117B of the 2002 Act. He accepted that we should attach weight to English language proficiency, but we should consider the countervailing weight that the Sponsor was in a genuine relationship with the appellant, which he wished to continue in the UK.

28. The couple could not continue their relationship in the DRC, and it would be disproportionate to expect them to continue that family life in a third country such as Zambia, where neither had settled previously. We should instead take a holistic view in relation to family and private life. Where the refusal of entry clearance was based solely on the fact that the appellant had failed the English language test, when considering the couple's circumstances, that refusal was disproportionate.

Discussion on remaking

29. We have adopted a 'balance sheet' analysis on the question of proportionality, which feeds into the requirement under GEN.3.2. of the Immigration Rules and also the wider assessment by reference to a freestanding right under article 8.

Factors in the appellant's favour

30. First, is the fact that the couple are in a genuine relationship, a finding made by the FtT and a finding that we have preserved.

31. Second, we also accept that the refusal of entry clearance is based solely on the appellant's failure to pass the English language test and while there is no 'near miss' principle, the narrow, albeit important ground on which the appellant failed to meet the Immigration Rules, is a factor in her favour, in an holistic assessment of proportionality.

32. Third, is the fact that the Sponsor cannot return to the DRC, where he has relatives and where the appellant lives with her family, by virtue of his refugee status.

33. Fourth, we accept that weight should be attached, in the appellant's favour, to the fact that an alternative option (but by no means the alternative option) of the appellant and the Sponsor living together in a third country, Zambia, would represent a substantial upheaval for both, noting that neither of them has lived permanently in a third country and the appellant's trips to Zambia have been limited to meeting the Sponsor on four occasions, including when the appellant took the English language test.

34. Fifth, we attached weight to the Sponsor's concerns about the safety of the appellant living alone in Zambia, while she retook the English language test. She currently lives with her family in the DRC. In the circumstances, to allay these concerns while the appellant retook the test would require the Sponsor or a family member to meet her in Zambia, with the consequential costs, as they did on the first occasion that he took the test.

35. Sixth, and linked in with the fourth point, we noted the fact that the Sponsor has spent a significant period of time in the UK, namely twenty years, and he would effectively be asked to give up his private life, including his job, in relocating to a third-country such as Zambia.

36. Finally, we accept as genuine the obvious distress that the Sponsor conveyed to us which has been caused by the couple's separation, and the limited ability of the couple to see one another because of the costs of his travelling to see her in Zambia frequently.

Factors weighing against the appellant

37. First, we noted that proficiency in the English language is a requirement that is central to the Immigration Rules; and as clearly set out in section 117B of the 2002 Act, the maintenance of effective immigration controls is in the public interest (see section 117B(1)). We are fortified in that conclusion, noting that section 117B(2) explains why it is in the public interest that those seeking to enter or remain in the UK can speak English, as they are less likely to be a burden on taxpayers and are better able to integrate into society. We therefore apply significant weight to that public interest. To the extent that Mr Bader initially suggested that we should only attach limited weight to that interest, albeit a suggestion he then retracted, we were referred to no authority for that proposition, which we reject.

38. Second, we attached significant weight to the fact that the Sponsor was able to arrange private tutoring for the appellant in the DRC for a six-month period; the appellant was able to take the English language test in Zambia; and she had only attempted to take the test on a single occasion, and had not attempted to retake it, nor, do we find, has she satisfied us that there is any practical barrier to her continuing to improve her English in the DRC and to retake the test. Whilst it may be that the quality of private tuition in the DRC is not as high as an Anglophone country, we do not accept the Sponsor's assertion that with extra tuition, from the same source, it is not viable for the appellant to successfully pass the test. The Sponsor has not explained how the previous tuition was deficient, as opposed to the appellant not applying herself sufficiently. Even had we concluded that the current source of private tuition was not of sufficient quality (and we do not accept that assertion as reliable), we do not accept the Sponsor's assertion, given his lack of knowledge in the DRC and lack of research, that alternative tuition could not be found in the DRC. In reality, we find that no attempt has been made to seek alternative sources of tuition and note the absence of evidence which could otherwise have been presented by the Sponsor of his searches for private tuition via, for example, the internet.

39. Third, the Sponsor's alternative assertion that to study further and travel to retake the test in Zambia would incur further expense was not a factor in the appellant's favour, noting that since the appellant failed the test in 2017, the Sponsor has sufficient funds to have travelled to visit the appellant in Zambia and stayed there with her. There is no explanation for why some of these funds could not have been used for tuition and retaking the test, and the availability of funds is a factor weighing against the appellant.

40. Fourth, there is no suggestion or evidence that the appellant suffers from a medical condition which might prevent her from reaching the required level of proficiency in English.

41. Tying together the factors weighing against the appellant, we find that a viable option remains open to the appellant to study further; and retake the test. She has the access to tuition of sufficient quality and the ability

to travel re-take the test, with accompaniment by family members or the Sponsor, to the Zambia; and the financial support from the Sponsor to do so.

Conclusions

42. Considering the factors that support the appellant; and weighing them against the factors which count against the appellant, first of all by reference to GEN.3.2., whilst we do regard the consequences of the refusal of entry clearance as harsh, we do not regard that harshness as unjustifiable, particularly where, as here, the impact of the appellant's previous failure to successfully take the English language test can be mitigated simply by her retaking the test and there are no real barriers to her doing so, aside from inconvenience, application in her studies, and expense. The reason for the refusal of entry clearance is on a narrow ground, but a very weighty one. The couple need not relocate to Zambia permanently and the Sponsor can meet the appellant in Zambia to ensure her safety, on a temporary basis, as he has done previously. In the circumstances, we conclude that the appellant does not begin to meet the high threshold of GEN.3.2

43. In relation to the wider article 8 assessment by reference to the well-known five-stage test in Razgar v SSHD [2004] UKHL 27, on the one hand, we accept that the Sponsor has established a family life with the appellant. We also accept, given the genuine distress of the continuing separation, that the refusal of entry clearance does amount to interference with that family life of sufficient seriousness to engage article 8. On the other hand, the refusal of entry clearance was for a legitimate aim, namely the maintenance of immigration control and was in accordance with the Immigration Rules.

44. That leaves the final question of whether the refusal was proportionate. We have no doubt that the separation between the couple is distressing. The couple cannot live in the DRC and the expectation that they live in Zambia, when the Sponsor has lived in the UK for 20 years, amounts to a significant upheaval. Nevertheless, aside from expense and inconvenience, the impact on the couple can be wholly mitigated by the appellant simply studying further and retaking the test, which she has only taken on a single occasion before. The importance of the appellant passing that test is, in the current circumstances, more weighty than the effect of the continuing, albeit potentially temporary, separation of the couple. The refusal of entry clearance is proportionate.

Notice of remaking decision

45. In the circumstances, we remake the FtT's decision by refusing the appellant's appeal on human rights grounds. Her appeal therefore fails and is dismissed.

46. No anonymity direction is made.

Signed J Keith Date: 26 February 2020

Upper Tribunal Judge Keith

TO THE RESPONDENT
FEE AWARD

The appeal has failed and so there is no fee award.

Signed J Keith Date: 26 February 2020

Upper Tribunal Judge Keith