Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21075/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2021	
Extempore	**On 08 October 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE BLUNDELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N F
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr A Rehman, Counsel instructed by Kenton Solicitors

DECISION AND REASONS

The appellant appeals against a decision by the Secretary of State made 3 October 2018 to refuse her further leave to remain and to refuse her human rights claim. Her appeal against that decision was allowed by First-tier Tribunal Judge Munonyedi for the reasons set out in her decision of 5 December 2019. For the reasons set out in Upper Tribunal Judge Rintoul's decision of 22 March 2021, a copy of which will be attached to this decision, that decision of the

First-tier Tribunal was set aside. Directions were also given as to the type of evidence that would be useful for the Tribunal in remaking the decision.

There is no need to go to the background of this case as it is already set out in the error of law decision at paragraphs 1 to 4 but the core issue is that the Secretary of State refused to give the appellant further leave to remain as the spouse of a British Citizen because she had been unable to complete an English language test which was required as one of the conditions of her being granted further leave to remain.

The relevant paragraph of the Immigration Rules is E-LTRP.4.2. which provides:

> E-LTRP.4.2. The applicant is exempt from the English language requirement in paragraph E-LTRP.4.1. or E-LTRP.4.1A. if at the date of application-
>
> (a) the applicant is aged 65 or over;
>
> (b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or
>
> (c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement.

The appellant's case is that, owing to a combination of health issues, she is unable to concentrate, is unable to read and has difficulty in hearing. She has a number of health conditions which prevent her from both learning and also in taking a test in English. We have today been assisted by the provision, albeit belatedly, of a letter from the appellant's doctor and the provision of a skeleton argument from Mr Rehman attaching both the guidance for the Home Office which is relevant and also two examples of the type of test that the appellant would need to pass in order to reach the CEFR level A2 required by the Immigration Rules.

As there was no dispute as to the facts it was not necessary for us to hear evidence from the appellant but we thank her for taking the trouble to attend as it is evident from the medical evidence that she does suffer from a number of disabilities which make it difficult for her to travel, not the least of which is restricted vision and hearing.

We remind ourselves that there are two possibilities here regarding whether the appellant should be exempted from the requirements of the Immigration Rules. Those are either that she suffers from a physical or mental disability or second, that there are exceptional circumstances. We accept that there is some guidance provided by the respondent as to both of these conditions but we consider that in general, insofar as exceptional circumstances is applicable, those circumstances relate not so much to physical conditions or mental conditions but to difficulties inherent in for example being unable to travel to a place to take a test.

We remind ourselves also that the relevant guidance refers not just to being able to learn English but also to being able to take the test. In particular, the

guidance says, is the person 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, second, is suffering from a serious or life threatening illness such as cancer. Also, the guidance says that consideration must be given to whether the person's condition would prevent them from learning English or taking a secure language test, for example if they are deaf, unable to speak or have a speech impediment or undergoing treatment for cancer.

In this case, we have considered the report from the appellant's doctor, Dr Farooq, which is dated 15 July 2021. It builds to a significant extent on the detailed extracts from the appellant's medical notes which we have been provided with. Whilst those are in some respects helpful, in others they are not because they are raw data on which doctors rely to explain to their patients and to others the nature of the conditions and how that impacts on their abilities.

We have had the advantage of reading much of that material and we consider that there is nothing in it which is inconsistent with the letter from Dr Farooq.

We consider that there are certain passages in that letter which are of particular importance:

> "[NF] has been suffering from multiple ailments since her early childhood in Pakistan. Records show that she arrived in the UK in April 2013. A letter dated 10 June 2013 written by Dr Rashmi Sawhney indicates that she has clinically evident unilateral proptosis with poor visual acuity."

The letter then goes on to note that she has been seen by the GP over 50 times as consequence of low mood, total body pain, headache, dizziness and abdominal pain. It also notes that she has been reviewed by various ophthalmologists and maxilla facial surgeons and has undergone a number of operations in an attempt to ameliorate some of the difficulties she has faced as a result of the strokes in the sense that she has suffered paralysis to part of her face but more importantly, and sadly, it records that

> [The appellant's] health has unfortunately continued to deteriorate in recent years, … [S]he has been suffering from chronic headaches which have become worse over the last 5-6.
>
> [The appellant's] chronic ill health and continuing deterioration has meant that she has had to give up working as a cleaner and if she tries to read with her right eye she suffers with migraines associated with dizziness and nausea and she sometimes loses vision in her right eye for a few minutes at a time, rendering her completely blind. She has also had two fainting episodes in the last six months. She has also become progressively deaf in the left ear and thus struggles with day-to-day living and communication. This recent deterioration and her CT brain scan findings have warranted a referral for the specialist neurology service for further evaluation.

Importantly, the letter concludes:

> "I am of the medical opinion that [NF]'s physical and mental health would deteriorate further if she was required to do any tasks that warrant focussing or concentrating for several minutes at a time and with this in mind I do not believe she is in a position to be able to undertake any studies or work that would require her to be able to read with her one remaining eye."

Mr Melvin has helpfully indicated that the Secretary of State does not take issue with the diagnosis, the prognosis or the conclusions about the appellant's ability to concentrate or read for any length of time.

We consider that at this point it is sensible to note what would be required in the taking of the CEFR A2 test. We have been helpfully taken through the sample papers by Mr Rehman and we note that whilst the speaking and listening test is primarily oral, at several times there are points at which the candidate is asked to listen to passages and to make notes. At other points they are told that they are going to, for example, talk about hobbies, have 30 seconds to write some notes to help and then to talk for two minutes on that.

Given the unchallenged evidence of Dr Farooq, we consider that the appellant's conditions, either singly or together, would make it difficult if not impossible for her to concentrate for the necessary time to undertake this test. We also accept that even beyond that she would have difficulty in taking notes and of course in reading what she had written, in making notes in order to assist her with the task. We consider that realistically there is no basis on which the appellant currently or indeed in the foreseeable future, given that these conditions are chronic, would be able to undertake the test, and for these reasons we conclude that the appellant ought to be exempted, and accordingly she meets the requirements of the Immigration Rules.

Having concluded that the appellant meets the requirements of the Immigration Rules, we consider, following TZ (Pakistan) & Anor v SSHD [2018] EWCA Civ 1109, that there is no public interest in her removal from the United Kingdom and accordingly her appeal must be allowed on human rights grounds and we do so.

In summary, we consider that although the decision of the First-tier Tribunal did involve the making of an error of law we should remake the decision by allowing the appeal on human rights grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

We remake the decision by allowing the appeal 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 her or any member of her 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 30 July 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW

IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21075/2018

THE IMMIGRATION ACTS

Heard at Field House
On 5 March 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N F
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr Rahman of Counsel, instructed by Kenton Solicitors

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of First-tier Tribunal Judge Munonyedi promulgated on 5 December 2019 allowing Ms N F's appeal against the decision to refuse her further leave to remain and to refuse her human rights claim. That decision was made on 3 October 2018.

2. It is, I consider, necessary in this case to set out some of the background to the respondent's position. The respondent, although born in Pakistan, was granted leave to enter the United Kingdom to join her husband. Her entry was as a spouse with a valid visa valid from 20 February 2013 to 20 May 2015. The respondent applied for indefinite leave to remain on 17 April 2015 but that was refused on 10 March 2016 with a grant of leave to remain to expire on 9 March 2018. The reason for that was that she had been unable to show that she met the English language requirements or the knowledge of life in the UK test. The reason that the respondent is not able, she says, to learn English or to pass the knowledge of life in the UK test, is because of her health. It is not in dispute that she has had a stroke in the past and that her condition has deteriorated. She has lost the sight in one eye and is partially sighted in the other and she has hearing difficulties also. In fairness it needs to be said that this does not appear to have prevented her taking employment and it is to her credit that she had been able to do so.

3. The most recent application was made on 9 February 2018 for her to be granted leave to remain on a human rights basis. The refusal letter from the Secretary of State, dated 3 October 2018 is, with respect, not particularly helpful. It is only when one reads the decision of Judge Munonyedi that it becomes apparent that the sole reason for refusal was that the respondent had not met the requirements of paragraph ELTRP.4.1, which relates to the having passed a test in the English language. That, and there is no disputing it, is the sole reason of which further leave to remain was refused.

4. The appeal against the decision was first heard by Judge Munonyedi on 10 May 2019. On that occasion she heard evidence from the respondent and she also had the benefit of hearing submissions by Mr Rahman of Counsel and from Mr Nath, Presenting Officer. The judge found that it would be a disproportionate interference with the respondent's right to family and private life to require her to leave the United Kingdom, the judge finding that the interference with the right to private life was disproportionate. The notice of decision however states the respondent has succeeded in her protection claim as removal of the respondent would breach the Refugee Convention. That was clearly an error and the Secretary of State sought permission to appeal on that basis seeking also to aver that the decision was wrong for a failure to provide proper reasoning as to how the respondent was unable to take the required English language test.

5. The application for permission was brought to the attention of Judge Appleyard who, rather than granting permission, gave an order directing that the judge should reconsider her decision and he said that the second ground of appeal, to which I had referred was not arguable, but although it was clear that the judge intended to allow the appeal on human rights grounds only, he was unable, in light of Katsonga ("Slip Rule"; FtT's general powers) [2016] UKUT 228 (IAC) to change the basis of that decision. That is no longer good law – see Devani [2020] EWCA Civ 61. The matter was however sent back to Judge Munonyedi to be determined on

the papers on the basis of the evidence which is before her. That then occurred and she produced a further decision promulgated on 5 December 2019.

6. The Secretary of State sought permission to appeal against that decision on four grounds:

   (i) the judge had given inadequate reasons for finding that the respondent had a physical disability which prevented her from taking a test. In particular, it was noted that there had been no medical evidence in front of the judge and that the judge did not have any medical expertise to make the findings at paragraph 32;

   (ii) the judge had failed to explain why, if the respondent was able to maintain her job her disability she cannot complete the English language test;

   (iii) there was a procedural irregularity in that the hearing should have been adjourned to allow for the requisite medical information to be obtained; and,

   (iv) the judge had misdirected herself in law with regard to the public interest considerations set out in Section 117 of the 2002 Act.

7. On 27 April 2020 Tribunal Judge Buchanan granted permission on all grounds. It is apparent that in doing so he had considered the set of grounds that the Secretary of State had made initially, in May 2019 and which had been considered by Judge Appleyard rather than the grounds which had been drafted as a challenged to Judge Mononyedi's second decision. This was noted by the Upper Tribunal and on 25 June 2020, Upper Tribunal Judge Kamara made directions, to which the Secretary of State made further submissions, recognising that Judge Buchanan was referring to the earlier grounds of appeal but submitting that nonetheless permission had been granted without restriction.

8. Further directions were issued by Upper Tribunal Judge Kebede on 10 August 2020 but these were superseded by directions from Upper Tribunal Judge Sheridan on 23 November 2020 directing an oral hearing to take place remotely.

9. In considering the position before me, I conclude that I must proceed on the basis that permission has been granted on all the grounds referred to in the second application by the Secretary of State, that is the one containing four discrete grounds.

10. As a preliminary observation, the decision is poorly structured. What the judge should have done was consider first whether the requirements of the Immigration Rules, which would have included a reference to an exemption were met, and only then to consider if they were not, whether there were other compassionate or other reasons why it would be

disproportionate to remove the respondent from the United Kingdom. In this decision, these issues are blurred.

11. Dealing first with ground (i), I consider that despite Mr Rahman's submissions, there are significant defects in the reasoning in this case. The judge was not in a position to reach a medical diagnosis, nor was she in a position to make findings as to whether or not the respondent was able to pass an English language test. She makes no reference to any standards which were applied and at best the evidence before her showed that the respondent had difficulty with sight and in concentration. The applicable guidance states that the exemption from having to take the English language test is such that it would apply if the applicant's physical and mental condition prevents them from learning English or taking the approved language test at the required level. That, the judge refers to at paragraph 22, but it is not at all clear on what basis she has reached a conclusion that this exemption was met. Nor indeed is there any clear basis in which the judge reached her decision.

12. It is of note that in this case, as the judge noted at paragraph 23, there was no medical evidence submitted with the application. The conclusion, with regards to the disability, was reached therefore only on the basis of what the respondent said and what the judge observed. That is an inadequate evidential basis for the conclusion reached and for that reason I consider that ground (i) is made out.

13. With respect to ground (ii) which is linked, I consider it is relevant that the judge did not appear to take into consideration in assessing whether the respondent would be able to take an English language test, with or without any adaptations as necessary, that the respondent was able to hold down a job. Not all disabilities prevent people from learning English and there are means by which people can learn through adaptive technology, which would allow them to pass a test but the judge did not consider this.

14. Indeed, there is no real focus of what would be required to learn, what standard would need to be reached, how the test would be administered and why the respondent's disabilities would prevent her from preparing for the test or taking it. And on that basis, ground (ii) is made out.

15. In the circumstances it is unnecessary to address ground (iii) in any detail. Indeed, it makes little sense at all for the Secretary of State to suggest that the hearing should have been adjourned to permit the production of medical evidence. It was for the respondent to produce evidence on that. There was no indication that any application for an adjournment was made and in the circumstances I do not consider that there was any procedural irregularity.

16. With regard to ground (iv), I consider that this is not relevant, given the findings I have already made. The judge's assessment of the factual situation and whether or not an exemption applied, which would have then meant that the Immigration Rules were met, is clearly a material matter

and affected any consideration within Article 8 and to that extent whether or not the judge had misdirected herself is not relevant.

17. For these reasons, I consider that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. With respect to remaking I consider that it is necessary to hear evidence from the respondent and that it would be necessary to do so at a hearing. It will also be necessary, I consider, to have an interpreter present given that her level of spoken English is relatively low. Consideration will also have to be given, given the nature of her disability as to how and where this appeal should take place.

18. Subject to anything that the parties may wish to say in representations at a later date, I am of the view that a face to face hearing is necessary. Where, as here, the respondent's vision and hearing are impaired, and she is to give evidence, a remote hearing would not be appropriate.

19. The Tribunal is likely to be assisted by a letter from a doctor or an ophthalmologist explaining what difficulties the respondent has in reading, in concentrating and, importantly, which would prevent her from studying a course leading to an A1 or A2 qualification in English. The Tribunal would also be assisted by details of what such a course involves and whether it would require reading or writing or whether it would just be spoken English; and, whether there are any courses in English available for those who are partially sighted and/or who have hearing difficulties.

20. The hearing will need to focus on how the respondent's disability prevents her, from acquiring the skills to prepare for and take the relevant A1 or A2 test.

21. Finally, I do not understand how the respondent's Counsel could have been left in the position of appearing in front of me to represent a vulnerable disabled respondent who cannot see well, cannot hear well and does not speak English without having a proper set of papers, including two vital documents, that is, the grant of permission to the Secretary of State and the decision of the First-tier Tribunal, which was under appeal.