Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12746/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2013	**On 26 June 2013**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

SAMAIRA SHAHEEN

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:
For the Appellant: Mr M Aslam, Counsel, instructed by UK Immigration Legal Services
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Pakistan, born on 10 August 1989 against the decision of the Respondent dated 6 June 2012 to refuse to the Appellant the grant of an entry clearance with a view to settlement as the spouse or civil partner of a person present and settled in the United Kingdom, the relevant Immigration Rule being paragraph 281(i) (a) (ii) of HC 395 (as amended).

2. This was not the first time that the Appellant had made such an application for entry clearance in that an earlier application was refused by the Respondent on 14 June 2011 on the basis that the Entry Clearance Officer (ECO) was not satisfied that the Appellant and her Sponsor would be able to maintain themselves without recourse to public funds in accordance with the requirements of paragraph 281(v) of the Rules.

3. In support of that particular application, the Appellant submitted a certificate from the College of Excellence confirming her English language ability and it was apparent by the nature of the refusal that the Appellant's ability to meet the required English language level was considered to have been met not least because the certificate provided with that application, was at that time, from an acceptable test provider.

4. Mindful of the basis of the refusal of that first entry clearance application, the Appellant made a fresh application in relation to which she again submitted the same certificate from the College of Excellence, when unbeknown to her, the College had been removed from the UKBA approved list on 17 July 2011 and was no longer acceptable for the purpose of UK settlement applications from that date.

5. In consequence, the Appellant's fresh application for entry clearance was refused and in the notice of decision, the Entry Clearance Officer explained that the English language certificate that the Appellant had provided, was, on this occasion, not acceptable and as a result and for that reason alone, he was not satisfied that the Appellant met the requirements of paragraph 281(i) (a) (ii) that states that:

> "(ii) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference)".

There are exceptions to those requirements but none of them met this Appellant's particular circumstances.

6. The Appellant's appeal against that decision was heard at Hatton Cross on 5 March 2013 before First-tier Tribunal Judge Mace and was dismissed. In giving her reasons for dismissing the Appellant's immigration appeal and indeed her appeal on human rights grounds, the First-tier Tribunal Judge properly recognised that the issue in the case was "*a narrow one, whether the Appellant met the English language requirement of the Rules"*. It was observed that no issue had been taken with the remaining requirements. Further that the Appellant accepted that she had submitted a certificate from the College of Excellence confirming her English language ability that she had also used in support of her earlier application which had been refused. That application was refused on grounds for a reason other than her language skills. As the Judge put it "*In other words, her ability to meet the required English language level was found to be met at that time. The certificate provided was, at that time, from an acceptable test provider".*

7. The Judge recognised that the Appellant had not been contacted before her application was refused and informed that the test certificate submitted was from a provider no longer on the list.

8. The Judge recorded that submissions were made to her in relation to the policy of evidential flexibility. It was her understanding that this policy only related to applications under the Points-Based System of which the present application was not one. The Judge continued at paragraph 14 of her determination:

> "I consider that the onus is upon the Appellant to ensure the document submitted in support of a later application are still valid. That would only have required the Appellant to check that the test provider was still on the approved list. She would have then been able to undertake the test with a different provider, as indeed she did do, and submit that with her application".

9. The Judge noted that the Appellant had now submitted a further English language test certificate from a currently approved provider that showed an acceptable score, but pointed out that she was only entitled to take account of evidence relating to circumstances appertaining at the date of the decision when the Appellant had not provided such a test certificate.

10. Whilst the Judge understood that no grounds of appeal were raised in relation to the Appellant's human rights in terms of Article 8 and her family and private life, the First-tier Judge nonetheless (and as she saw it for the sake completeness) considered the Appellant's appeal in terms of Article 8 of the ECHR. In that regard and at paragraph 17 she had this to say:

> "In relation to her family life that has existed since her marriage with her in one country and her spouse in another .. there was nothing before me to indicate any time they have spent together since the marriage. The decision will keep them apart until such time as a further application is made but that simply maintains the situation as it is at present. Even if the right to a family life is engaged in these circumstances, the Sponsor is in employment and there was nothing before me to indicate that he would be unable to visit the Appellant in the meantime. I am not satisfied that any interference with the Appellant and the Sponsor's family life is disproportionate".

11. The Appellant successfully sought permission to appeal the Judge's decision and in granting permission Designated First-tier Tribunal Judge Zucker recognised that the sole issue in the case was whether the language requirement had been met. It was noted that the grounds in support of the application argued that the Appellant had obtained a certificate that met the requirements of the Rules from a college that was at the time when the certificate was obtained, an approved provider even though subsequently the provider was removed from the list. It was submitted that as such it did not invalidate the certificate and therefore the Judge had erred in law. The Designated Judge considered that the point was arguable.

12. Thus the appeal came before me on 19 June 2013, when my first task was to decide whether the determination of the First-tier Tribunal Judge

disclosed an error on a point of law, such that it might have materially affected the outcome of the appeal.

The Parties' Submissions

13. It was submitted by Mr Aslam that the Judge erred in inadequately considering the Appellant's Article 8 appeal as this was an issue raised in the grounds of appeal. I have noted from the grounds in support of the application for permission to appeal, that the challenge raised to the Judge's consideration of the appeal under Article 8, was that the Appellant had passed a new English language assessment and obtained a TOEIC certificate on 18 July 2012 after the date of decision, and that in accordance with the principles of fairness, the First-tier Judge should have allowed the appeal under Article 8.

14. Mr Aslam relied on the grounds, in particular that the First-tier Judge had misdirected herself as to the law. It was said that the primary submission at the hearing before the First-tier Judge that also appeared in the grounds of appeal, was that the Appellant met the requirements of the Immigration Rules in that paragraph 281(i)(a)(ii) simply required the Appellant to provide an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes and that the Appellant had obtained such a certificate from the College of Excellence on 25 March 2011 when that college was on the UKBA approved list of providers. It was submitted that the subsequent removal of this provider from the UKBA list on 17 July 2011 did not affect the validity of the certificate as it was issued prior to that date.

15. It was submitted by Mr Aslam that the requirement did not specifically refer to the date of decision and that as such this omission reinforced his argument that the certificate that had originally been submitted by the Appellant could still be regarded as valid for the purposes of compliance with the Rules.

16. Ms Isherwood firmly disagreed. She pointed to the fact that it has always been the case that the determinative date in cases of this sort is the date of decision and that at that date the Appellant clearly failed to comply with the requirements of the relevant Rule. It followed that the First-tier Tribunal Judge was correct as a matter of law, when at paragraph 16 of her determination, she stated that at the date of the decision the Appellant had simply not provided the appropriate test certificate and that the fact that she had now obtained it post-decision was not a matter that the First-tier Judge was able to take into account.

17. I reserved my determination.

Assessment

18. I appreciate that from the Appellant's point of view, the decision of the First-tier Judge in dismissing her appeal is in the circumstances, infuriating in the extreme. The only problem in her case, properly identified by the First-tier Judge in her determination as "*a narrow one*" is that the Appellant failed to produce a certificate from an approved provider because unbeknown to her, the provider of the certificate that she had presented in support of her application was, at the relevant time, no longer approved.

19. There is no reason to doubt the Appellant's sincerity when she did this and the First-tier Judge clearly did not do so. The Appellant's good faith is properly illustrated by her obtaining thereafter an English language test certificate from an approved provider.

20. I find that the problem for the Appellant is that she did not satisfy the clear and unambiguous requirement of the Rules and I reject the suggestion that the certificate apparently properly submitted in support of an earlier application comes within the requirements of the Rules. That clearly cannot be right, because any contrary interpretation would involve recognising the validity of a certificate issued by a college that was no longer approved.

21. However and in an effort to act with scrupulous fairness to both parties, I had at the hearing, drawn to their attention the decision of the Upper Tribunal in Rodriguez (Flexibility Policy) [2013] UKUT 00042 (IAC). My first observation with regard to the headnote to that decision, was that the First-tier Judge at paragraph 14 of her determination was clearly wrong in her understanding that the policy related solely to applications under the Points-Based System, not least because the second paragraph of the headnote refers to "*all other applications, to which the policy letter does not apply*".

22. It was on that basis that Mr Aslam further submitted, that there had been a failure on the part of the Entry Clearance Officer, to be aware of and give full effect to the UKBA caseworker's "Evidential Flexibility" policy document that required inter alia, that there be due appreciation of the discretionary powers enshrined within the policy to request further information from applicants, in any case where relevant and by implication, before a final decision was made on the application. This was firmly disputed by Ms Isherwood, who submitted that even if the decision in Rodriguez demonstrated that the policy extended beyond Points-Based System cases, it was confined to UKBA caseworkers whom, as held in Rodriguez, were under a public law duty to give effect to their own policy in all cases to which it applied. It followed that the requirements of the flexibility policy did not extend to out of country entry clearance applications.

23. I have carefully considered this aspect of the matter and on reflection I find that the decision in Rodriguez does not assist me, because the Entry Clearance Officer had in any event, acted entirely rationally and fairly on the material the Appellant chose to produce in support of her application. It was not the ECO's fault that the Appellant did not appreciate that the college was no longer approved. Indeed this was recognised by the First-tier Judge who in her determination at paragraph 14, pointed out that it was for the Appellant to check that the test provider on the submitted certificate, was still on the approved list and that had she made that check "*she would have then been able to undertake the test with a different provider as indeed she (*later*) did, and submit that with her application"*.

24. In those circumstances, this is very far removed from the paradigm example of the Flexibility Rule of one document being missing from a sequence of documents by reason of administrative error.

25. This takes me to a consideration of the further submission on the part of Mr Aslam, that as a matter of fairness, the First-tier Judge should have allowed the appeal under Article 8. Such a submission fails to appreciate that the establishment of an administrative error necessarily underpins the guidance given by the Tribunal in cases such as Patel and Thakur and it is apparent that on the particular circumstances of this appeal, it does not apply here.

26. I have further concluded that this is not a case where refusing admission of entry clearance to the Appellant constitutes a disproportionate interference with her human rights. Firstly I find that the First-tier Judge (whilst under albeit the mistaken impression that Article 8 had not been pleaded in the grounds) nonetheless considered this aspect of the appeal and I have to say that on my consideration of the particular circumstances of the Appellant in the present appeal, that even if the First-tier Judge had failed to do so, it would not have established a material difference to the outcome.

27. The Secretary of State is perfectly entitled to prescribe strict Rules which are an alternative to a decision maker subjectively deciding if a person's command of the English language is sufficiently good to satisfy less prescriptive arguments.

28. Following the grant of permission to appeal, I note that the Secretary of State by letter of 29 May 2013 provided a Rule 24 response. In summary it was contended that the First-tier Tribunal Judge directed herself appropriately. The Rules were clear and unambiguous as to the requirements of the English language test and it fell on the Appellant to demonstrate that she met the requirements of the Rules. I would agree with those submissions for the reasons that I have above identified.

29. The Rule 24 response continued that given the evidence of the Appellant that she now met the requirements of the Rule the Respondent questioned

"the purpose of the appeal given that a fresh application would appear, on the facts within the determination, to be most likely to be successful".

30. Although, for the above reasons, I have concluded that the determination of the First-tier Judge does not disclose an error on a point of law, this should not preclude the Appellant if she so chooses, from making a fresh entry clearance application, supported by what would appear to be an English language test certificate issued by an approved test provider.

31. A submission in terms of the principles of fairness was pleaded in the grounds in the alternative, but I find that it cannot be said that the Respondent acted unfairly. Indeed, in Patel (Revocation of Sponsor licence – fairness) [2011] UKUT 00211 (IAC) it was held that the Respondent had acted unfairly when she revoked a college's status after the application had been made (at a time when it was still an approved Sponsor) but failed to inform the applicant of the revocation. She also failed to give him an opportunity to vary the application. That is not the case here. The requirements had changed and that change was advertised before the Appellant made her current application for entry clearance. The subsequent decision of the Upper Tribunal in Contractor (CAS – Tier 4) [2012] UKUT 00168 (IAC) headnote 1 states:

> "1. UKBA's announcement in March 2011 of changes to the Immigration Rules which came into force on 21 April 2011 means that in general those who stood to be affected by those changes had adequate time to take appropriate action and hence that in general no Patel fairness issues arise".

32. The difficulty for the Appellant in the present case is that she did have time to take appropriate action, but failed to check whether the test certificate she submitted with her fresh application was still issued by an approved provider. Her failure to carry out that check was nobody's fault but her own. Indeed as the Entry Clearance Officer pointed out in the Notice of Immigration Decision the removal of the College of Excellence from the UKBA approved list, was advertised on 17 July 2011 and that English Language Certificates from that date were no longer acceptable for the purpose of UK settlement applications.

33. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982, I find that it cannot be said that the First-tier Tribunal Judge's findings were irrational and/or Wednesbury unreasonable such as to amount to perversity. It cannot be said that they were inadequate. This is not a case where the First-tier Judge's reasoning was such that the Tribunal was unable to understand the thought processes that she employed in reaching her decision.

34. I find the Judge properly identified and recorded the matters that she considered to be critical to her decision on the material issues raised before her in this appeal. The findings that she made were clearly open to her on the evidence and thus sustainable in law.

Decision

35. The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

Signed Date 24 June 2013

Upper Tribunal Judge Goldstein