Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21093/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 October 2013	**On 15 October 2013**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER-DHAKA

Appellant

and

SHEULY BEGUM SUMI

Respondent

Representation:

For the Appellant: Mr L. Tarlow, Home Office Presenting Officer
For the Respondent: Mr M. Haque, Solicitor.

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer ("ECO"). However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. The appellant, a citizen of Bangladesh born on 6 November 1988, made an application for entry clearance as a spouse on 26 June 2012. That application was refused in a decision dated 27 September 2012. Her

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appeal against that decision was allowed by First-tier judge A.R. Williams who heard the appeal on 7 August 2012.

3. The application for entry clearance was made under paragraph 281 of HC 395 (as amended). It was refused on the basis that the appellant had failed to provide an English language test certificate from an approved test provider as required by paragraph 281(ii).

4. Judge Williams appears on one view, to have found that the appellant had not met the English language requirement in terms of producing the relevant evidence as at the date of the decision but that by the time of the hearing she was able to produce a test certificate from an approved provider. Yet, referring to the decision in DR (ECO: post-decision evidence) Morocco * [2005] UKIAT 00038 he concluded, in summary, that her subsequent taking and passing of a English test from an approved provider cast light on the circumstances obtaining at the date of decision.

5. The test certificate that the appellant relied on in support of the application is dated 21 March 2011. It is from EMD International English Language Assessment ("EMD"). I note that it states "A1 (Mapped to the CEFR)" which in that respect at least, conforms with the Rules (as to the level required).

6. The appellant's representatives have submitted a response to the grant of permission. It has to be said that it is not altogether easy to follow. It states that at the hearing before the First-tier Tribunal it was conceded that the appellant "had passed in accordance with the relevant requirements on language requirements, which was valid when she undertook and remained valid for two years e.g. valid as of application, which she submitted with her first application when Respondent did not raise any question on it although they refused her application on other grounds."

7. The response goes on to refer to a judicial review pre-action notice, seemingly in respect of the earlier application for entry clearance, refers to the appellant having passed an approved test post-decision and argues that the First-tier judge was correct to decide that it would be disproportionate to expect the appellant to make a further application. There is also reference to 'fairness'. At [5] it is said that because the test submitted with the previous application was accepted as valid "it cannot subsequently be ruled as invalid just because the test provider lost their regulatory licence…(which could have been by way of suspension or delisting but no evidence was furnished by the Respondent)".

8. Mr Haque submitted that there was no evidence that EMD was not on the list of approved providers. He referred to a letter dated 3 October 2013 in which the matter of proof of the issue is referred to. He further suggested that the matter was raised at the hearing before the First-tier

Tribunal, and that the First-tier judge gave time to the Presenting Officer to see if she could provide evidence on the matter, which she was unable to do. As I indicated however, for what it matters there is no evidence from the determination that such enquiries were made and the judge's manuscript record of proceedings does not record the matter either.

9. Mr Tarlow submitted that at the time of the decision the appellant provided a certificate from a test provider that was not approved and the appellant could not therefore have succeeded under the Rules.

10. In further submissions Mr Haque said that he did not know whether or not EMD was on the list of approved providers at the date of decision. He argued however, that because EMD was part of or came under City and Guilds, which was on the list of approved providers, that was sufficient. He also suggested that I could take into account the length of time the application process can take, in terms of Article 8.

My assessment

11. The sole issue in the refusal of entry clearance and in the appeal is the English language requirement under the Rules. Paragraph 281(ii) of HC 395 (as amended) requires that an applicant for entry clearance as a spouse:

> "…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)…"

12. There are certain exceptions to that requirement, none of which are suggested to apply here.

13. At [15] Judge Williams noted that "it is accepted that the [English language] requirement was only satisfied after the date of decision by the Entry Clearance Officer."

14. At [17] he stated that

> "On the evidence before this Tribunal she had passed the necessary English language requirement at a time when EMD was on the Secretary of State's list but, at a later stage, and before her application, EMD was removed from the list. Thus she could not rely upon those certificates."

15. It is clear therefore, that Judge Williams found that EMD was not on the list of approved test providers at the date of decision.

16. Having found that EMD was not an approved test provider at the date of decision, he went on to conclude however, that given that the appellant had subsequently provided certificates in speaking and listening from

an approved provider, namely from City & Guilds dated 8 and 12 March 2013 (pages 63 and 64 of the appellant's bundle), those subsequent actions cast light on the position at the time of the decision. He referred to the appellant having been undertaking preparation for the City & Guilds ESOL examination and the evidence contained in a letter from ClearSprings EMD Centre in Sylhet dated 11 October 2012 to the effect that she was a good student in whom there was confidence that she would pass.

17. Having concluded that those matters cast light on the circumstances at the date of decision he stated at [18] that it would be

> "disproportionate in all the circumstances of this case for this appeal to be dismissed on the basis that the requirements were only formally satisfied after the date of decision."

He went on to state that

> "Everything could be said to have been anticipated at the moment of decision and the Appellant had, previously satisfied the requirement although she fell foul of the provider's removal from the list. It is also of very great relevance, so I find, that the English language requirement is the only issue advanced by the Entry Clearance Officer."

18. At [19] the judge concluded by stating that "In those circumstances this Tribunal is willing to allow the appeal."

19. With respect to this experienced judge, it is not clear from the passages that I have cited whether the appeal was being allowed under the Immigration Rules or under Article 8. The reference to evidence casting light on the position at the date of decision suggests that the appeal was allowed because at the time of the decision the appellant met the requirements of the Rules. On the other hand, stating that it would be disproportionate to dismiss the appeal and that the English language requirement was the only basis of the refusal, suggest that the judge had Article 8 in mind. The decision itself does not state whether the appeal is allowed under the Rules or under Article 8.

20. Judge Williams' willingness to allow the appeal is understandable in the light of the evidence that was before him. Nevertheless, I am satisfied that he erred in law in allowing the appeal. He concluded that by the date of application (and decision) the appellant had not provided an English language test certificate from an approved provider. The requirement in the Rules is the provision of an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State. The provision of a certificate, even from an approved provider, only after the date of decision self evidently means that the appellant had not provided it by the date of decision, as she was required to do. The decision in DR (Morocco) does not assist the appellant at all in this respect. She either provided the certificate at the relevant time or she did not.

21. Even if the judge had in fact meant to have allowed the appeal under Article 8 of the ECHR, that too would have been an error of law. Even in respect of Article 8 he was bound to consider only the circumstances obtaining at the date of decision (see AS (Somalia) [2009] UKHL 32).

22. Is the error of law such as to require the decision to be set aside? Arguably not if the judge was wrong and the appellant did in fact meet the English language requirement at the date of decision. This is where it becomes necessary to explore what I understood to be Mr Haque's assertions, namely that EMD were on list at the relevant time; that the appellant's previous certificate from EMD was still valid; that EMD being associated with City & Guilds meant that they were approved, or that the Respondent has not established that EMD were not on the approved list.

23. It is important to note that it was not, and has never been, argued that the rules do not legitimately impose a requirement for a test from an *approved* provider.

24. The appellant relies on her having produced a certificate from EMD for a previous application, in which it is said the certificate was not questioned. I was referred to the respondent's complete bundle (not the one on the Tribunal file) which has a certificate in the appellant's name from EMD, with the award date of 21 March 2011. That copy of the certificate does not say how long it is valid for. Mr Haque initially submitted that it was not time limited but as I pointed out, the letter from ClearSprings (EMD Centre) in the respondent's bundle and to which Judge Williams referred, states that it is valid for two years.

25. However long it is valid for is irrelevant in my view if EMD was not, at the date of decision, an approved test provider. If EMD was taken off the list of approved providers by the date of decision (and there were no transitional arrangements, none being relied on on behalf of the appellant before me), the appellant would not have met the relevant requirement of the Rules.

26. Mr Haque submits that the respondent has not proved that EMD was not on the list. However, it is for the appellant to establish that she meets the requirements of the Rules. Whilst on behalf of the appellant the issue seems to have been raised in correspondence with UKBA subsequent to the appeal before Judge Williams, it appears to have been accepted at the hearing before him that EMD were not on the list at the date of decision and Judge Williams so found. The appellant's reply does not contend that the judge was wrong to come to that view.

27. In any event, I note what is said in the letter from ClearSprings (EMD) Centre. It states that the UKBA "published a new list of approved English tests for spouse visa applications on 6 April 2011. EMD International English Language Assessment test was not included in it but UKBA announced that they will accept the EMD test until 17 July

2011." It goes on to state that on the date of the test and on the date of her visa application "this test was completely acceptable by UKBA and many of our students have received visa with this certificate."

28. Thus, it is clear from evidence from EMD itself that EMD was no longer on the approved list of providers from 6 April 2011. Even were I to accept Mr Haque's contention that the respondent has to prove that EMD were not on the list, which I do not, the fact is established by the letter from EMD itself. The letter also, incidentally does not suggest that at the date of writing it, 11 October 2012, it was back on the list.

29. It is as well to point out that the letter from EMD is incorrect to state that at the time of application they were on the list; they were not. The appellant's application for entry clearance was made on 26 June 2012. They were no longer on the list from 6 April 2011. They were on the list at the date of the award, namely 21 March 2011 but for reasons I have explained, that does not assist the appellant.

30. Mr Haque also sought to argue that because City & Guilds is an approved test provider and EMD are supervised by or part of City & Guilds, therefore EMD is also an approved provider. However, City & Guilds was not the provider of this appellant's test certificate; EMD was. In addition, as I have pointed out, the letter from EMD itself states that it was taken off the list.

31. I return then to the question of whether the error of law by the First-tier judge requires the decision to be set aside. I am satisfied that it does. At the date of the decision, or incidentally at the date of application, the appellant did not provide an English language certificate from an approved test provider.

32. I canvassed with the parties the question of whether, if I found an error of law such as to require the decision to be set aside, the parties were content for me to re-make the decision on the basis of the evidence and submissions already before me. Mr Haque submitted that if the decision was set aside I should, before re-making the decision, give directions, as I understand it, to the respondent for evidence to be produced as to EMD's status as an approved provider at the date of decision. However, I pointed out to the parties that I may decide to re-make the decision on the basis of the evidence and submissions already before me. That is what I now propose to do.

33. I am not satisfied that the appellant meets the requirements of the Immigration Rules. She did not provide an English language test certificate from an approved provider at the date of decision. EMD was not such a provider. The fact that subsequent to the decision she provided certificates from what is said to be an approved provider is not evidence of the circumstances obtaining at the date of decision. Her appeal under the Immigration Rules must therefore be dismissed.

34. So far as Article 8 is concerned, I apply the Razgar [2004] UKHL 27 formulation. The appellant's marriage to the sponsor is not in dispute. She therefore has family life with him. The decision of the respondent shows a lack of respect for that family life, lack of respect being the appropriate way of describing the 'interference', this being an entry clearance case. That lack of respect will have consequences of such gravity as potentially to engage the operation of Article 8, applying the second principle in Razgar. The decision is however, in accordance with the law and pursues a legitimate aim, namely the economic well-being of the country expressed through the maintenance of an effective immigration control.

35. As to proportionality, Mr Haque invited me to take into account how long the entry clearance process takes. As regards the fact that post-decision the appellant has passed a test from what is said to be an approved provider, that is not a matter that I can take into account since, as already explained, I am bound by the circumstances obtaining at the date of decision even under Article 8. Even if I were to take that matter into account, I do not see how it makes the decision disproportionate to the respondent's legitimate aim in circumstances where the appellant could submit a fresh application. That would involve cost, and delay before being able to join her husband, if successful. However, the previous application was in fact decided within about three months.

36. In addition, there is something to be said for consistency of treatment amongst applicants for entry clearance as a spouse. Furthermore, it would, potentially, defeat the purpose of the rule requiring evidence at the date of decision of an English test from an approved provider if an applicant could provide the evidence post decision.

37. That none of the other requirements of the Rules are said to be in issue in this appeal does not advance the proportionality argument at all. A 'near miss' argument is not a permissible approach to proportionality (see Miah [2012] EWCA Civ 261).

38. Accordingly, the appeal under Article 8 of the ECHR is also to be dismissed.

Decision

39. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made, the appeal being dismissed under the Immigration Rules and under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek

14/10/13