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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09497/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 15th October 2014	**On 7th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

MRS JIRAPON DOIDGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Willsteed
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

Details of the Appellant and Proceedings

1. The appellant is a Thai national, born on 19th August 1977. She appealed before First-tier Tribunal Judge L Murray (the Judge) against the decision of the respondent to refuse to vary her leave to remain as a spouse on

grounds that she did not meet the requirements of paragraph R-LTRP.1.1(d) and EX1 of Appendix FM, or paragraph 276 ADE of the Immigration Rules. In a determination promulgated on 30th May 2014 the judge dismissed the appeal under the Immigration Rules and Article 8 of the ECHR.

2. On 14th July 2014 First-tier Tribunal Judge Cruthers granted permission to appeal to the Upper Tribunal for the following reasons:

> It appears to be common ground that the appellant was only outside the Immigration Rules regarding leave to remain as a spouse because she did not/does not have the requisite English language qualification regarding Appendix O of the Rules (see paragraph 19 of the determination). Having assessed the evidence the Judge concluded that the appeal did not succeed through the application of Article 8 of the ECHR.
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> In effect the crux of the complaints advanced through the grounds on which the appellant seeks permission to appeal is that the Judge has misunderstood when the appellant was first aware that the English language qualification that she had obtained was not sufficient for the purpose of the Rules (and therefore, has misunderstood the amount of time that the appellant has had to correct the deficiency). And has erred when proceeding with the assessment of proportionality in this case.
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> The grounds are arguable.

3. The matter accordingly came before me to determine whether making of the decision in the First-tier Tribunal involved the making of an error on a point of law.

My Consideration of the Submissions and Issues

4. It was not disputed before the Judge that the appellant did not have the requisite English language qualification as required by Appendix O of the Immigration Rules. She had achieved the NOCN Functional Skills qualification in English at Entry 1, a test not included in Appendix O, and she therefore failed to meet the requirements of E-LTRP.4.1. The Judge found no insurmountable obstacles to the appellant continuing family life outside the United Kingdom with her British husband and found EX.1 not to apply.

5. The Judge then took account of the relevant case law, including Gulshan (Article 8 – new rules- correct approach [2013] UKUT 00640 (IAC), and found arguably good grounds for leave outside the Rules as aspects of the claim were not covered by Appendix FM. She found that in the light of the appellant's leave to remain as a spouse in the UK since 2008, the focus of the Rules being around the practicalities of relocation, there was insufficient consideration of the appellant's family ties in the United Kingdom. She accordingly undertook a full consideration of the appellant's protected family rights under Article 8 of the ECHR, adopting the 5-step Razgar approach.

6. The grounds of appeal assert firstly that the Judge erred in fact by finding that the appellant had not taken steps to undertake the correct English language test after April 2013; the Judge erred in stating that the refusal decision was made on 29th April 2013 because the decision appealed against was in fact made in February 2014. The Judge therefore erred in finding that the appellant had ample opportunity to undertake the correct test. Ms Willsteed therefore submitted for the appellant that following the refusal in April 2013 the appellant had, as far as she was aware, undertaken the correct test by July 2013.

7. The appellant is submitted not to have been aware that anything was wrong until February 2014 when her next application was refused. The wording of the respondent's 2014 refusal is submitted not to have clearly stated that the wrong test certificate had been provided, rather than none at all. Ms Willsteed further submitted that the appellant has demonstrated that if the February 2014 decision had been clear she would have rectified the problem as soon as possible and the Judge has failed to take this into account.

8. Mr Richards opposed the appeal on all the submitted grounds on behalf of the respondent. He submitted that the decision of the judge discloses no material error; she has correctly considered case law and considered the Immigration Rules first; she has properly directed herself in accordance with Gulshan (Article 8 – new rules- correct approach [2013] UKUT 00640 (IAC) by embarking on an analysis of facts in the appellant's favour before looking outside the Rules at Article 8 of the ECHR. If anything, Mr Richards submitted, there had been generous findings on the part of the Judge in favour of the appellant. In conclusion he submitted that the Judge had done all that was required of her.

9. I accept that the Judge has erred in referring to the decision appealed against being that made on 29th April 2013. However, I do not accept that the error was in any way material. There was a refusal decision, the details of which were before the Judge, made in April 2013. The refusal letter for that decision states that the respondent: "is not satisfied that you have provided 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 your name and the qualification obtained (which must meet or exceed level A1 of the CEFR)."

10. The refusal letter dated February 2014 states that the appellant has: "failed to provide an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State, therefore you fail to meet the requirements of paragraph 281(ii) stated above." I have no doubt that the Judge considered the relevant substance of the decision appealed against and I do not accept that the wording of either decision was unclear. There is clear reference to the need for the provider to be approved and it cannot

be the responsibility of the respondent that the appellant was wrongly advised by her college.

11. The Judge clearly took into account, in paragraph 35 of her determination, the appellant's evidence that her college wrongly advised her about which test to take. I accept that the Judge then weighed in the proportionality balance the ability of the appellant to have corrected the situation from April 2013 onwards, but I do not necessarily accept that this was wrong, although the appellant claims not to have understood the basis of refusal until February 2014. If the Judge has erred in this respect I find that it was not material because it did not tip the balance against the appellant in any event. The Judge took into account a range of other factors which stand apart from the time the appellant may or may not have had to correct her position. In particular, the Judge found that it would not be unreasonable for the appellant to relocate; she found that there may be initial, practical, difficulties but she would nonetheless be likely to find employment in Thailand. The Judge took into account the appellant's strong connections to Thailand and the presence of her immediate family there.

12. The second ground of appeal asserts that the Judge failed adequately to consider whether the decision was a proportionate breach of the rights of the appellant and her husband. In particular, she failed to consider factors such as the length of the spouse's work as an HGV driver for over 25 years in the United Kingdom; his close family ties with his daughter and granddaughter living a short distance from him and his close family ties with his nephew who suffers from autism. The Judge is submitted not to have adequately considered that the appellant was only in breach of the Rules in relation to English language because her college gave her misleading information and that she meets the purpose of the Rules because she does speak English, works in an English-speaking environment and is integrated into the community.

13. The third ground of appeal asserts that the Judge failed to consider whether the breach of Article 8 was proportionate to the legitimate aim. She failed to consider matters including the appellant living and working in an English-speaking environment for 5 years, undertaking adequate education albeit not at an approved institution, and acting on the advice of her college.

14. I find no merit in grounds two or three as set out above. Ground three in my view represents a continuing argument, without merit, that the appellant in effect meets the requirements of the Rules because she does speak English and that it was not her fault that her test was not from an approved provider. The Judge took full account of this factor from the outset and has set out a clear record of the evidence, starting in paragraph 8 of the determination, when the appellant was asked about her failure to obtain the correct English language test. In paragraph 11 of the determination the Judge sets out the appellant's evidence that she believed that she had done the right course. These matters are carried forward into the proportionality assessment with extensive references to case law relevant to the public interest; the judge took account of lawful

requirement to obtain the requisite test in accordance with R (on the application of Chapti & Others) v SSHD [2011] EWHC 3379 (Admin).

15. The Judge was obliged to deal with the appellant's situation on the basis of the fact that she failed to meet the necessary requirements of the Rules because she did not. The Judge in my view correctly and fully directed herself in relation to Article 8 from paragraph 27 onwards in her determination, starting with the Razgar 5-step approach. Thereafter, where the balance fell was a finding of fact to be made by the Judge, absent perversity, and the grounds do not rely on perversity.

16. Looking at the decision as a whole, I am satisfied that the judge has given sufficient reasons to explain why the particular circumstances of this appellant in the context of Article 8 led her to conclude as she did. I am satisfied that the proportionality balance paid due regard both to the public interest in the enforcement of the Immigration Rules and the particular and individual circumstances of the family rights of the appellant and her husband in the context of that public interest. Having considered the case of Chikwamba v SSHD [2008] UKHL 40 the Judge concluded that this is not a case on all fours in relation to whether the appellant would be allowed to enter the UK to live with her family in the long term.

17. The fourth and final ground of appeal is that the Judge failed to consider that in all the circumstances it would be proportionate to grant leave to the appellant for a short period of time to enable the appellant to take the necessary test; the Judge should have extended leave accordingly. I find no merit in this ground. In accordance with the response from Mr Richards made on behalf of the Secretary of State I find that the appeal was properly dismissed under Article 8 of the ECHR and it was not within the Judge's power to extend leave for the appellant on any basis.

18. I accordingly find that there is no material error of law requiring me to set the decision aside and the First-tier Tribunal decision dismissing the appellant's appeal stands. The appeal to the Upper Tribunal fails.

Summary of Decisions

19. The making of the decision in the First-tier Tribunal did not involve the making of a material error of law on a point of law. It follows that the First-tier Tribunal decision dismissing the appellant's appeal stands.

20. The appeal to the Upper Tribunal fails.

Anonymity

No party has applied for an anonymity direction under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 in these proceedings and none is made.

Signed:

J Harries

Deputy Upper Tribunal Judge
Date: 5th November 2014

Fee Award

The position remains that there is and can be no fee award.

Signed:

J Harries

Deputy Upper Tribunal Judge
Date: 5th November 2014