Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42062/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 2nd June 2014	**On 16th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR MUHAMMAD NAEEM HABIB
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sadiq
For the Respondent: Miss Johnstone

DETERMINATION AND REASONS

Introduction

1. The Appellant born in 18th October 1987 is a citizen of Pakistan. The Appellant who was present was represented by Mr Sadiq. The Respondent was represented by Miss Johnstone a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application for leave to remain on 18th December 2012 under paragraph 284 of the Immigration Rules. The Respondent had refused that application on 2nd October 2013 and the Appellant had appealed, such appeal being heard by First-tier Tribunal Judge Pickup at Manchester on 27th March 2014. The judge had dismissed the Appellant's appeal. Permission to appeal was sought on 10th April 2014 and granted by Designated Judge Dearden on 24th April 2014. Whilst noting that it was open to the judge to dismiss the appeal under the Immigration Rules it was said that it was incumbent upon the judge to embark on a detailed analysis of Article 8 in all the circumstances of this case given what was said to be a fairly technical basis for refusal and on that basis an appeal to the Upper Tribunal was granted. Directions were issued and the matter comes before me in accordance with those directions.

Submissions on Behalf of the Appellant

3. Mr Sadiq referred me to the Grounds of Appeal. It was said that firstly there had been no proper proportionality assessment of the Appellant's situation. Secondly I was referred to the Home Office policy in a published IDI dated in April 2013 relevant to the Appellant's case and it was said that the Appellant should have succeeded within the terms of the Home Office's own policy.

Submissions on behalf of the Respondent

4. It was submitted that the Appellant did not fall within the Rules. In respect of the IDI I was referred to page 13 and the terms of paragraphs 3.6 and 3.7 of the IDI. It was said there was no error of law.

5. At the conclusion of the hearing I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

Decision and Reasons

6. The Appellant falls within what may now be a small category of individuals. The Appellant had entered the United Kingdom lawfully as the spouse of a person present and settled in the United Kingdom on 12th October 2010. That was at a time shortly before the entry requirement included the need to pass an approved English language test to the appropriate standard which was introduced in November 2010.

7. The Appellant made application on 18th December 2012 for further limited leave to remain as a spouse under paragraph 284 of the Immigration Rules. A requirement of paragraph 284 of the Immigration Rules from November 2010 is the English language requirement. The evidence discloses that the Appellant met all requirements of paragraph 284 of the Immigration Rules save the language requirement. Whilst the Appellant had taken and passed an English language test to the requisite standard it was not according to the Home Office from an approved provider and

therefore it could not be said that the Appellant had fulfilled each and every requirement of that aspect of paragraph 284.

8. The judge in the First-tier Tribunal had found that the Appellant therefore did not meet all the requirements of paragraph 284 of the Immigration Rules. He had also considered the Appellant's family and private life within the terms of Appendix FM and paragraph 276ADE of the Rules. He found the Appellant did not fall within those Rules. Whilst accepting the single reason for failing to meet the Rules the judge nevertheless concluded that a near miss was still a miss and therefore he failed within the Rules.

9. The judge thereafter had correctly identified the recent case law in consideration of Article 8 and had concluded that the Respondent had given proper consideration to the Appellant's circumstances within the Immigration Rules including a consideration of the exceptional circumstances. He did not find that the Appellant's circumstances were so compelling as to justify an examination of Article 8 outside of the Rules or that the Respondent's decision in like manner was unjustifiably harsh.

10. The judge had been referred to the Home Office IDI April 2013 in respect of this case and had concluded that to read the IDI as suggested by Mr Sadiq would essentially be a nonsense as it would seem to remove the need for passing an English language test essentially in all cases.

11. An IDI is published Home Office guidance for use by Home Office decision makers amongst others. It would be unlawful for the Home Office not to follow its own published guidance when dealing with an individual case.

12. In one sense the use and publication of IDIs is questionable. One can understand two circumstances where they may have a use. Firstly if the legislation is sufficiently complex and difficult to understand then a simpler explanatory guidance within an IDI may be useful for decision makers. Secondly if the Respondent has the ability to exercise discretion in a particular field then guidance on the exercise of such discretion may also have a use for decision makers not least to try and achieve a parity within cases. Paragraph 284 of the Immigration Rules is written in reasonably clear language however and on the face of it the requirements of the Rules are mandatory.

13. The IDI of April 2013 Chapter 8 applies to this Appellant in terms of the second category noted in the heading namely "Applications made by persons who were granted entry clearance or limited leave to remain under part 8 of the Rules before 9th July 2012 and that leave is still extant where there is a requirement at part 8". The Appellant then falls within part 3 of Chapter 8 of the IDI namely "Leave to remain as a spouse of a person present and settled in the United Kingdom". After that heading there is reference to the requirements of paragraph 284 and a reminder of the English language requirement from 29th November 2010.

14. Thereafter the IDI is headed 3.1 Key Points. It states "As stated above all of the relevant provisions must be referred to when considering applications for leave to remain in this category but in general case workers need to be satisfied: …".

15. A number of Key Points are then listed that deal with differing circumstances. Following the Key Points Section, there are further short Sections headed:

    3.2 Making further enquiries

    3.3 Further guidance

    3.4 Interview/home visits

    3.5 Maintenance and accommodation

    3.6 English language requirement

16. Finally there is importantly the heading 3.7 Granting leave to remain. This states "If there is no reason to doubt that the marriage is genuine then provided the Key Points are satisfied leave to remain should be granted for two years on code 1".

17. In this case there has never been a suggestion that the marriage is not genuine. The reference to Key Points in Section 3.7 Granting leave to remain, is clearly a reference to Section 3.1 Key Points. It is not obviously and on a normal interpretation a reference to any other Sections. Section 3.1 Key Points whilst referring to essential requirements contained within paragraph 284 makes no reference to the English language requirement.

18. It is understandable that the judge in the First-tier Tribunal may not have found the argument concerning the IDI placed before him by Mr Sadiq particularly attractive. It would, as he says, appear to be a little difficult to interpret 3.7 in the manner suggested because that would seem to remove the need for a language requirement.

19. The Immigration Rules are placed before Parliament by the Secretary of State for Parliament's approval and thereafter if approved become part of the legislation that is then applied by the judiciary. The Rules within paragraph 284 are mandatory in terms of language and the judiciary are bound to uphold the Rules and there is no interpretation of the Rules seemingly in any other way. What therefore in those circumstances is the purpose of the IDI. Two potential purposes have been suggested above. However, whatever the purpose or rationale behind the production and publication of IDIs it nevertheless exists and is clearly guidance used by the Home Office in such cases. A proper reading of that IDI, as indicated above, suggests that the Home Office guidance given to decision makers focuses on those matters referred to as Key Points within Section 3.1 and to grant leave if such Key Points are met (3.7 Grant of leave).

20. If the Home Office seek to given themselves elasticity in the use and consideration of paragraph 284 that is a matter for them. However, having taken that approach it would be unjust and potentially unlawful to refuse to grant an Appellant leave to remain in circumstances where he does meet the Key Points of their own policy for granting leave, notwithstanding a difficulty in meeting the language requirements.

21. Alternatively if it is maintained that language is a mandatory requirement of paragraph 284 and the IDI however interpreted cannot cure a language requirement deficit then the IDI could certainly be regarded as clear evidence as to how the Home Office expect decision makers to exercise discretion when looking at a case either within the Immigration Rules under EX.1 or outside of the Immigration Rules in order to be compliant with Strasbourg jurisprudence. If there own IDI indicates that a language requirement is not a Key Point and is not necessary prior to the granting of leave to remain then it would be both logical and fair to consider that an individual who meets the Key Points but fails to meet other matters could be regarded as a person within exceptional circumstances either under EX.1 or outside of the Rules.

22. Alternatively even if the IDI provided no foundation for looking at the Appellant's case exceptionally outside of the Rules the specific facts of this case do suggest such consideration.

23. Firstly the Appellant, as indicated, is part of a narrow group not required to take an English language test prior to admission to the UK but now requiring to take such test for further leave to remain. The Appellant had on the documentary evidence taken and passed such a test but merely failed on the somewhat technical basis that the provider was not allegedly one recognised by the Home Office. The documentary evidence notes that the Appellant had passed an English language test by the provider EDEXCEL and the certificate on the face of it appears to have approval or at least the logos of OFQUAL and the Welsh Government. The Appellant is in employment and his wife is in full-time education at university. A removal of the Appellant to Pakistan would potentially end his employment. His wife would have the choice of either giving up her university course in which she is in the final year or being separated from her husband. It is also very difficult to see how the Appellant could then having been removed to Pakistan necessarily meet the financial requirements of the Immigration Rules as he would no longer be a wage earner and his wife (the UK Sponsor) is a student. In order to meet the financial requirements presumably therefore it would be necessary for her to give up her studies, find employment and progress to the point where her income level was such that the Rules were met. That would by necessity involve a period of separation of uncertain length from her husband.

24. It is in those circumstances that, ignoring the impact of the IDI, whilst a near miss is just that there is nevertheless a requirement to look at the circumstances of each case either exceptionally within the Rules or

outside of the Rules. The circumstances of this case can in my view for reasons provided be described as falling within that category even perhaps leaving aside any potential impact the IDI may have.

25. In summary, the Home Office own IDI indicates that this Appellant should be granted leave to remain within the terms of their own guidance policy for the reasons outlined above and not to have done so would be both unfair and potentially unlawful. Secondly and alternatively the IDI could on a different interpretation be taken as a guide for decision makers on a question of exceptionality and a conclusion that the Appellant falls to be considered exceptionally in that he meets the Key Points within Section 3.1. Thirdly and again alternatively, leaving aside the IDI, the circumstances of this case do place the Appellant within an exceptional basis such that removal in all the circumstances would be disproportionate.

26. The judge in this case made an error of law in his conclusions (understandably) of the impact of the IDI and/or alternatively not having greater regard to the circumstances that could render the Appellant's case exceptional such that it needed careful consideration outside of the Rules.

Decision

27. I find that an error of law was made by the judge of the First-tier Tribunal such that I set aside the decision of the First-tier Tribunal.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Lever