



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/00523/2013

THE IMMIGRATION ACTS

**Heard at : Field House
(by video link to Birmingham IAC)
On : 27 May 2014**

**Determination
Promulgated
On : 30 May 2014**

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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MADIHA AFTAB

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr T Mahmood of Zenith Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer (ECO). However, for the purposes of this decision, I shall refer to the ECO as the respondent and Mrs Aftab as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, born on 3 July 1989. On 4 July 2012 she applied for entry clearance to the United Kingdom as a spouse. Her application was refused on 3 December 2012 on the grounds that she could not meet the English language requirements in paragraph 281(i)(a)(ii) of the Immigration Rules. She had not provided an original English language test certificate in speaking and listening from an approved English language test provider and was not exempt from the English language requirement. The respondent considered that she did not hold an academic qualification recognised by NARIC UK to be the equivalent to the standard of a Bachelor's or Master's degree or PhD in the United Kingdom which was taught in English.

3. The appellant lodged an appeal against that decision, stating that she was enclosing a TOEIC test certificate and that she had not provided one earlier because she was wrongly informed at the Embassy that a qualification taught in English would suffice. Following a review by an entry clearance manager (ECM), the decision was maintained, with the ECM noting that no new documentary evidence had been produced with the appeal.

4. The appellant's appeal came before the First-tier Tribunal on 25 October 2013 and was allowed in a determination promulgated on 12 November 2013. First-tier Tribunal Judge Ford was satisfied that the appellant had produced her TOEIC test certificate with her Notice of Appeal and noted that, whilst the test certificate post-dated the ECO's decision, it did so by less than a fortnight and confirmed that she had the required English language ability at the relevant date. She found that the respondent had failed to follow her own established internal administrative review procedures because the ECM had failed to notice the English language certificate and failed to take it into account. On that basis, and on the basis that the British High Commission had given the appellant incorrect advice, she found the respondent's decision unfair as per Thakur (PBS decision - "common law fairness) Bangladesh [2011] UKUT 151. She went on to consider Article 8 and concluded that the appellant met the requirements of E-ECP.4.1(b) of Appendix FM of the immigration rules as she had met the English language requirements. She allowed the appeal under the Immigration Rules and on the grounds that the decision was not in accordance with the law.

5. Permission to appeal to the Upper Tribunal was sought by the respondent on the basis that the judge had misdirected herself by relying on evidence arising after the date of the decision. Permission was granted on 8 April 2014.

Appeal hearing and submissions

6. Mr Smart relied upon an old judgment of the Administrative Court in ex parte Maya Banu [1999] A R 161 in submitting that the ECM review was not part of the original decision-making process and that the date of decision remained the date of the original refusal. The judge had erred by allowing the appeal when the appellant was unable to meet the requirements of the immigration rules at the date of the decision.

7. Mr Mahmood submitted that the judge was entitled to take the English language test certificate into account. He also produced in evidence a letter dated 12 May 2014 from UK NARIC confirming that the appellant's MSc in Sociology from the International Islamic University, Islamabad was comparable to a British Bachelor degree and submitted that the ECO ought to have granted entry clearance on the basis that her qualification was recognised by NARIC UK at the time the decision was made.

8. Mr Smart, in response, submitted that there was an evidential requirement which had nevertheless not been met, as paragraph 281(i)(a)(v) required the application to be accompanied by confirmation from NARIC UK.

Consideration and findings

9. It is not in dispute that, at the time of the decision to refuse entry clearance, the appellant did not have an English language test certificate from an approved English language test provider. It was only after her application was refused, on 16 December 2012, that she took and passed the TOEIC test, achieving the required level. It is not claimed that she fell within any of the exemptions in paragraph 281(i)(a)(ii) and accordingly it is the case that she was not able to meet the requirements of the rules on that basis at the relevant time, the date of the decision to refuse entry clearance, 3 December 2012.

10. Judge Ford, however, decided to allow the appeal on the basis that the requirements of E-ECP.4.1 of Appendix FM had been met. In so doing, she relied upon the fact that the appellant passed the TOEIC test less than a fortnight after the respondent's decision; that the appellant had produced her TOEIC test certificate to the ECM with her Notice of Appeal; that the test certificate showed that she had the required English language ability at the date of the decision to refuse entry clearance; and that the ECM had ignored the certificate in the administrative review. However in allowing the appeal on that basis she clearly erred in law. Contrary to the judge's understanding, the rules did not require simply that the appellant had the relevant level of ability in English language at the time of the decision to refuse entry clearance. Paragraph 281(i)(a)(ii) contained an evidential requirement, that an original English language test certificate actually be provided with the application. On that basis the appellant simply could not succeed and the fact that she subsequently passed the TOEIC test and produced her certificate with her Notice of Appeal was irrelevant, given that it post-dated the original refusal decision. Likewise, the fact that the ECM may have failed to consider the test certificate in his review was an irrelevant consideration and an erroneous basis upon which to allow the appeal. In the same way, the appellant could not rely upon the claimed erroneous advice from the British High Commission, given that that did not undermine the fact that the rules simply had not been met.

11. Mr Mahmood went on to pursue a different argument, namely that the appellant was nevertheless able to meet the alternative requirements of paragraph 281(i)(a), in paragraphs 281(i)(a)(v) and (vi), at the date of the

respondent's decision, since her qualification had been deemed by UK NARIC to be comparable to a United Kingdom degree. He produced a letter dated 12 May 2014 from UK NARIC confirming that her MSc in Sociology from the International Islamic University was considered comparable to a British bachelor degree. However that does not appear to have been an argument pursued before the First-tier Tribunal. Indeed the judge's comments at paragraph 9 of her determination in relation to fee awards make it clear that it was not known at that time whether UK NARIC considered the appellant's qualification to be comparable to a United Kingdom degree.

12. In any event, as Mr Smart submitted, the rules again have an evidential requirement which was not met at the relevant time. Paragraph 281(i)(a)(v) requires that confirmation from UK NARIC, that the qualification was taught or researched in English, be available at the time of the application, which it clearly was not in the appellant's case. It is also relevant to note, for the purposes of paragraph 281(i)(a)(vi) as well as paragraph 281(i)(a)(v), that whilst the appellant had produced with her application a letter dated 26 June 2012 from the International Islamic University confirming that the medium of instruction was English, she did not provide evidence to show that she actually had the qualification at the time. What she produced at the time of the application was the letter of 26 June 2012 together with several "result intimation" documents, but there was no evidence that she had actually been awarded her degree. The bundle of documents now produced before me contains a certificate of award but the date of issue has not been included. Indeed it is clear from the refusal decision that the relevant evidence had not been produced with the application. Accordingly, the letter now relied upon by the appellant from UK NARIC cannot assist her in this appeal as it was not available at the relevant time.

13. Accordingly, Judge Ford's decision contains material errors of law and has to be set aside. For the same reasons as giving rise to the error of law, Mrs Aftab's appeal has to be dismissed. She was not able to meet the requirements of paragraph 281(i)(a) at the time of the respondent's decision to refuse entry clearance. The fact that she may have been advised by staff at the British High Commission that a qualification taught in English would suffice for the purposes of her application is unfortunate but cannot now assist her. There is no evidence of what that advice specifically consisted of, but in any event the rules are clear in what they require and the appellant, as an educated and intelligent woman, would have been able to establish what was required of her by consulting the UKBA website.

14. Mr Mahmood sought to persuade me that the appellant could nevertheless succeed under Article 8 of the ECHR, given the unfairness of the outcome and the passage of time keeping her and her husband apart. However Article 8 applies also only to the date of decision. At that time the appellant simply could not meet the requirements of the rules. Had she taken the TOEIC test prior to making her application or provided evidence of her qualification taught in the medium of English, as clearly required by the rules, she would probably have been granted entry clearance, but she did not. It was open to her at that time

to make a fresh application with the required evidence after passing the TOEIC test and obtaining her qualification, but instead it was her choice to pursue an appeal which unfortunately had no chance of success. It still remains open to her to make a fresh application. There is plainly no merit in any Article 8 grounds and Mr Mahmood did not seek to make any further submissions in that regard.

15. Accordingly, and for the reasons given above, I dismiss the appeal on all grounds.

DECISION

16. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and to that extent the appeal made by the ECO is allowed. I re-make the decision and substitute a decision dismissing Mrs Aftab's appeal on all grounds.

Signed
Date

Upper Tribunal Judge Kebede