Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04529/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th May, 2014	
Signed 20th May, 2014	**On 23rd May 2014**

Before

Upper Tribunal Judge Chalkley

Between

Entry Clearance Officer Dhaka

Appellant

and

RUKSHANA ZAMAN SUMI

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr Hafizur Rahman the Sponsor was present

DETERMINATION AND REASONS

1. In this appeal the Entry Clearance Officer Dhaka is the appellant and to avoid confusion I shall refer to him as being "the claimant". I shall refer to Rukshana Zaman Sumi as the appellant as she was before the First Tier Tribunal.

2. The appellant is a citizen of Bangladesh who was born on 31st October, 1968, and who is the wife of Hafizur Rahman, a British subject settled in the United Kingdom ("the sponsor").

3. The claimant appeals against the decision of First-tier Tribunal Judge Herbert OBE, who in a determination promulgated on 23rd January, 2014, allowed the appellant's appeal against the decision of the claimant to refuse to grant her entry clearance as the partner of the sponsor under Appendix FM of Statement of Changes in Immigration Rules, HC 395, as amended ("the immigration rules").

4. In paragraph 20 of his determination, First-tier Tribunal Judge Herbert found that the appellant did not meet the requirements of the Immigration Rules. He purported to apply the decision of the Administrative Court in *MM [2013]* EWHC 1900 Admin and allowed the appellant's appeal on human rights grounds under Article 8.

5. The claimant's refusal of entry clearance was taken on 7th January, 2013, and the appellant's application was refused because the requirements of paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules was not met. The application was also refused because the documents required to be produced in accordance with Appendix FM-SE had not been produced.

6. When the appellant gave Notice of Appeal, the Entry Clearance Manager reviewed the Entry Clearance Officer's decision and in the Entry Clearance Manager's review decision dated 15th December 2013, the Entry Clearance Manager noted that the appellant had included two City & Guilds certificates as evidence that she satisfied the requirements of paragraph 281(1)(a)(ii). Although not challenged by the Entry Clearance Officer at the date of the decision, subsequent investigations conducted by City & Guilds and UK Visas and Immigration Dhaka revealed inconsistencies in testing in Bangladesh and, as a result, the Entry Clearance Manager was not satisfied that the documents which the appellant had provided satisfactorily demonstrated that she had obtained the qualifications referred to on the certificates. First-tier Tribunal Judge Herbert OBE allowed the appellant's appeal under Article 8 and in paragraph 28 of his determination said this:-

> "I therefore allow this appeal on a balance of probabilities for the reasons set out above. I do however advise the appellant to undertake the City & Guilds English language test again although it is unfortunate to say the least that this requirement was only communicated very recently to the appellant based upon apparent inconsistencies that had gone back for some two years. There is no letter in the bundle other than a statement of the Entry Clearance Manager to verify the extent of this problem or indeed the

necessity that it affects every single claimant and not simply those that obtain some form of borderline score."

7. The claimant's grounds point out that in allowing the appellant's appeal under Article 8, the judge erred by failing to properly apply *Bibi and another v Secretary of State for the Home Department* [2013] EWCA Civ 322.

8. At the hearing before me, the sponsor was present with his sister and he confirmed that he did not require the services of an interpreter.

9. He told me that the appellant no longer had a representative. I explained the purpose of the hearing to him. Mr Bramble told me that he relied on the grounds and pointed out that the judge had misapplied *MM*. Unfortunately at the time of the appellant's application the sponsor had not been in salaried employment for sufficient time and under Appendix FM was required to supply specific evidence namely wage slips for six months with the same employer. The judge found that the appellant could not meet the requirements of the Immigration Rules but then went on to purport to allow the appellant's appeal under Article 8 notwithstanding that he was aware that the appellant had not met the English language requirement that, suggested Mr Bramble was an error of law. He invited me to set the decision aside and remake it myself refusing the appellant's appeal.

10. I explained to the sponsor the significance of what Mr Bramble had said. He told me that he had not received the Entry Clearance Manager's notice, but I pointed out to him that it appeared to be addressed to the appellant and was in the form of a letter sent to her on 17th December, 2013. He felt that the appellant had been wrongly advised to appeal in the circumstances but had relied on lawyers in Bangladesh.

11. I explained to him that it appeared to me that the judge had erred in law.

12. I indicated that I would prepare a determination and reserve my decision.

13. The First-tier Tribunal found that the appellant could not meet the requirements of the Immigration Rules for the reasons it clearly set out. However it purported to allow the appeal under Article 8. As I have indicated above, the judge was well aware of the fact that the Entry Clearance Manager had pointed out that the English language certificates relied on by the appellant were not acceptable, because of difficulties which had come to light during the course of an investigation by City & Guilds and by UK Visas and Immigration Dhaka.

14. At paragraphs 30, 31, 32 and 33 of *Bibi and another v Secretary of State for the Home Department* Lord Justice Maurice Kay said this:-

“30. The pre-entry test was conceived as a benign measure of social policy with the purpose of facilitating the integration of non-English-speaking spouses. Where a State seeks to change its immigration rules in order to produce a benign result, it would be regrettable if, in order to justify the measure, whether pursuant to Article 8.2 or Article 14, it faced a burden which could only be discharged by irrefutable empirical evidence. The Secretary of State's perception is essentially one of predictive judgment. Many a well-intentioned social change is supported by a rational belief in its potential to achieve its benign purpose but without being susceptible to empirical proof prior to its introduction. It is for this reason that it is appropriate for the State authority to be accorded a margin of appreciation in the formulation of its social policy. Without such an indulgence, many benign reforms would be stifled *in limine*. Of course the implications of the change of policy may be so dubious that it is demonstrably not justifiable. However, in some situations a margin of appreciation has to be pitched at a level which allows for change, even if there is some risk to some individuals, that they will be adversely affected by it. The principle was articulated in *Stec v United Kingdom* (2006) 43 EHHR 47, a case concerning Article 14, together with Article 1 of the First Protocol, but relevant to the present case, not least because the appellants emphasise the discriminatory aspect of the pre-entry test requirement (to which I shall return). The Strasbourg Court said (at paragraph 52):

"… a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. … Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."

This test informed the recent decision of the Supreme Court in *Humphreys v Revenue and Customs Commissioners* ([2012] 1 WLR 1545, [2012] UKSC 18). Without it, it might become impossible for a government to govern without waiting for judges to judge.

31.I can see no reason or contrary authority to preclude such an approach in a case such as this. The Secretary of State identified a social problem which may be described as an impediment to integration. A great deal of consideration was given to the implications of a change to pre-entry testing. There were two Impact Assessments and two Equality Impact Assessments. They are substantial documents. It is possible to take issue with points here and there but they have not been significantly undermined. Moreover, at the hearing before Beatson J, the appellants were not able to refute the submission on behalf of the Secretary of State that, in the first seven months of operating the amended Rule, there had not been a significant fall-off in spouse visas. Beatson J said (at paragraph 103):

> "[The figures] show that 'spouse entry clearance applications remain largely high' and that in the period between June and August 2011 there were only 40 less cases compared to the volume of applications in the same two month period in 2009. Mrs Sayeed also stated that the number of settlement visas issued in that period was higher than the number issued in the same period in 2009 and 2010. Those statements are accurate."

For what it is worth, we have also been shown the figures to June 2012. They do not demonstrate any significant difference.

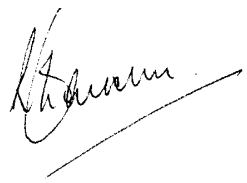
32. I am led to the conclusion that the Secretary of State identified a social problem (see Beatson J at paragraph 94); she considered an ameliorating solution; she assessed the implications of introducing it; she provided for exempt and exceptional cases; and, in the event, the effect on applications and grants was not numerically significant. Moreover, it may well be that a significant number of those who are unable to satisfy the pre-entry test certificate requirement will benefit from the exceptions, particularly the one based on "exceptional compassionate circumstances". Applying the wide margin of appreciation which I consider to be appropriate, I consider that Beatson J was right to conclude that the move to a pre-entry requirement, pitched at a rudimentary level, was proportionate. There is a world of difference between this requirement and the prohibition in *Quila* which acted as an insuperable barrier to entry to those in the proscribed age group, even when the intended marriage was demonstrably unforced. It is, of course, possible that in an individual case, with favourable facts found, a particular applicant may be able successfully to invoke Article 8 or some other protection (for example, section 55 of the Borders, Citizenship and Immigration Act 2009). The Secretary of State accepts this. But the head-on challenge to the amended Rule itself fails.

> 33I have read in draft the judgment of Sir David Keene. He takes a different view about proportionality. He considers that prior to its amendment Rule 281 was not shown to give rise to significant problems and refers to statistics suggesting "a diminishing problem". It is not easy to interpret all the statistical material. The "diminishing" figures referred to were interpreted by the Secretary of State as being "most likely due to greater awareness of the need to meet the requirements", which had only been introduced in 2007: Equality Impact Assessment, October 2010, paragraph 2.1. That Assessment concluded that "Spouses granted leave to enter the UK are a key group unable to demonstrate the required knowledge of English language and life in the UK (KOL) when they come to the end of the two year probationary period at which they can apply for settlement". In the Impact Assessment of July 2009 it was stated that foreign spouses seeking settlement "are the largest group who do not pass the English test after two years". One also has to have regard to the fact that the pass rate in relation to the post-entry test included many who were not in this country on spouse visas but had entered, for example, for work purposes. Many would have been competent in English before arrival but would still have been required to pass the test. Their doing so inevitably inflated the pass rate. In her witness statement, Mrs Helen Sayeed stated that the data indicates that, after two years in the United Kingdom, almost a third of spouses/partners were not taking the post-entry test, "which suggests they may have acquired insufficient English to enable them to do so". That seems to me to be a natural inference. I do not consider that the Secretary of State or we are precluded from accepting (as has also been accepted in Germany, the Netherlands and Denmark) that there is evidence of a significant problem, which is susceptible to alleviation by a switch to pre-entry testing at an appropriately rudimentary level. For these reasons, I respectfully disagree with Sir David Keene."

15. Lord Justice Toulson agreed with Maurice Kay LJ and at paragraph 52 said this:-

> "I do not consider that it would be right for the court to apply article 8 so as to stultify the experiment undertaken by the government through the adoption (subject to exceptions) of a requirement of pre-entry tests. In this respect I particularly agree with Maurice Kay LJ's approach in paragraph [31], except that I would prefer to substitute "unobtainable" for "irrefutable" in the second sentence. The point is that government would be unduly trammelled if judges required an unrealistic level of proof of the benefits intended to be obtained by new processes. A broader approach is justified, under the rubric of a broad margin of appreciation. In this context I find it difficult to differentiate between rationality and proportionality as a measure of scrutiny of the lawfulness of the pre-entry test requirements. I conclude that they are within a category of measures which the government might not unreasonably adopt for addressing the perceived problems and therefore proportionate."

16. I do not need to deal with *MM* because, in the light of the decision of the Court of Appeal, the determination cannot stand. I find that the First-tier Tribunal did err on a point of law. I set aside the previous decision. My decision is that the appeal of Rukshana Zaman Sumi be dismissed.



Upper Tribunal Judge Chalkley