Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/24509/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 May 2014	**On 10 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MRS PRITIBEN VALJI VARSANI
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jeshani (Counsel)
For the Respondent: Mr S Kandola (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant whose date of birth is 20 September 1990 is a citizen of India.

2. This matter comes before me for consideration as to whether or not there is a material error of law in the determination before First-tier Tribunal Judge N Paul who dismissed the appeal against a refusal of leave to enter the UK as the spouse of a person present and settled in the UK under paragraph 281 HC 395 (as amended).

Background

3. The appellant and sponsor married on 29 June 2012. The sponsor, a British citizen lived in a six bedroomed property owned by his uncle and was employed full-time as a packer earning a monthly net income of £1,012. In support of her application the appellant submitted a Pearson test score report showing an overall score of 27, a score of 39 for speaking and a score of 23 for listening.

4. In a notice of immigration decision dated 3 October 2012 the respondent refused the application under paragraph 281(i)(a) and (ii). The reasons were that the appellant failed to achieve a score of 24 or above in the listening component of the test which requires a level of A1 to be achieved.

5. In her grounds of appeal dated 26 October 2012 the appellant set out generalised grounds of appeal. At paragraph 6 stated that she had undertaken the Pearson academic exam again on 16 October 2012 and successfully passed the listening component with a score of 28 and the speaking component with a score of 40.

6. An Entry Clearance Manager reviewed the decision on 16 August 2013. He upheld the decision of the Entry Clearance Officer made some ten months previously and attached no weight to the further Pearson test completed on 16 October 2012 as it was a post decision evidence.

7. The appeal was heard before First-tier Tribunal Judge N Paul who heard oral evidence from the sponsor and submissions from both representatives. He found on the evidence before him that the appellant failed to show that she met the requirements of the Immigration Rules under paragraph 281 with regard to the English language test requirements. At paragraph 17 the judge stated that the Immigration Rule itself makes plain that the English language test is specific to speaking and listening and not an overall English language ability. He found that the respondent's guidance was available and would and should have been properly consulted by an appellant before taking the test or at least submitting the results of the test. He did not accept the submissions that the appellant and /or sponsor were reliant on the guidance provided by the Pearson test which related to an overall English language ability and not the specific requirements of the Rules as set out in the Home Office guidance. In dealing with Article 8 the judge treated the matter as essentially a "near miss" argument. At paragraph 21 he was satisfied that the right approach was one dictated by the Rules. He considered that the fact that the appellant may be confronted with a difficulty in respect of financial requirements was not a ground for finding the decision to be disproportionate. He went on to consider the issue of delay and whether or not this amounted to a disproportionate interference and found that it did not. He then found no other arguably good grounds following principles in **Gulshan [2013] UKUT 00640**.

8. **Grounds of appeal for permission**
In lengthy grounds of appeal it was submitted that the judge made material errors of law as follows:

(1) The judge elevated what amounted to guidance to be treated akin to Immigration Rules, although there was no evidence to show that it had been subject to Parliamentary scrutiny. The judge failed to follow the correct law and test laid down by the Supreme Court in **Alvi**. The appellant's score was short of the policy guidance requirement of 24 by only one mark in the listening component as she obtained 23. The policy ought therefore to have been adapted in the interests of fairness and good sense in favour of the appellant particularly given that at the time of the respondent's own review of the case the appellant had retaken the test and obtained a score of 28 in listening.

(2) The judge failed to make adequate findings of fact on the sponsor's evidence with regard to legitimate expectation or with reference to the settlement checklist form which indicated that the appellant provided evidence of speaking and understanding English and that the score was 27.

(3) The judge failed to follow the two stage process with regard to consideration of the appeal under the Immigration Rules and thereafter under Article 8 ECHR following the step-by-step process in **Razgar**. The judge appeared to have applied the new Immigration Rules implemented on 9 July 2012 and further the principles in **Gulshan [2013] UKUT 00640** which was not decided as at the date of the appeal.

9. In a Rule 24 response the respondent submitted that the First-tier Tribunal Judge directed himself appropriately and made sustainable findings open to him on the evidence. It was accepted that at the relevant time the English language test requirements for scores were not contained in the Rules but in a policy document to which the appellant could refer for information as to what score met level A1 of the Common European Framework of Reference. Accordingly the respondent was satisfied that the Rule as it was set out with reference to the requirement of level A1 was "**Alvi**-compliant" because it contained "information the application of which will determine whether or not the applicant will qualify" (see paragraph 57 of **Alvi**).

10. As for Article 8 it was submitted that the reference to **Gulshan** was mere conjecture on the part of the judge regarding the likely success of a fresh application where financial requirements of the new Rules would come into play. It is accepted that the judge failed to apply **Razgar** but this was not a material error capable of having a material impact on the outcome of the appeal which was reasonable and open to the judge on the facts before him.

Permission to Appeal

11. The matter came before Designated Judge Garratt who granted permission to appeal on 15 April 2014 on the following grounds;

*"The grounds contend that the judge was wrong to give the Secretary of State's policy guidance the force of law by failing to take into consideration the findings of the Supreme Court in **Alvi** **[2012] UKSC 33**. On this basis the decision of the judge should have been that the respondent's decision was not in accordance with the law because the policy should, in any event, have been adapted in the interests of fairness and good sense and the appellant granted entry clearance because her score was only one point less than that required. The grounds also contend that the judge failed to adopt a "mandatory" two stage process to consideration of Article 8 issues requiring him to apply the five stage **Razgar** test. That is because the new Immigration Rules set out in HC 194 are not applicable to the present appeal where the application was made on 4 July 2012 before the new Rules came into force.*

Paragraph 17 of the determination shows that the judge arguably decided the appeal on the basis that guidance relevant to the applicant's English language test results had the same force as the Rules themselves when that was wrong.

*The judge's approach to Article 8 issues is also arguably flawed because of the apparent failure to consider the claim outside of the Immigration Rules, **Gulshan** having arguably no application to the appeal."*

The Hearing Before Me

12. I have decided that there was a material error of law in the decision made by First Tier Tribunal Judge N M Paul. His decision is premised on the basis that the guidance relevant to the appellant's English language test results had the same force as the Rules themselves, when clearly that was wrong. The Rules refer to the need to obtain a score of A1 for the listening and speaking component. I do not accept the argument that there was ambiguity as to whether or not the Rules related to the overall score or specific components. The guidance which appears in the Home Office documentation establishes clearly that A1 is a score of 24. As guidance does not have the same status or force as the Rules decision makers can exercise discretion to the extent that the guidance can be applied without rigidity and fairness and good sense. (as per Sedley J in **Pankina**) I accept Mr Jeshani's argument that if a requirement leads to the success or failure of an application then that requirement must be specified in the Rules. In this instance the requirement namely the specific score was not specified and in my view it ought to have been made clear; there is no reason why the Rule could not have set out the specific scores. Given that the specific score was not set out in the actual Rules and was the reason for the failure of the appellant's application, this certainly comes within the test in paragraph 57 of **Alvi**. There was no consideration of that argument or legal principles by the judge. Further, I take into account that the judge had before him the appellant's results for the test retaken on 16 October 2012 (some two weeks after the decision to refuse and prior to the very delayed review by the Entry Clearance Manager on 16 August 2013). Having regard to the fact that the actual scoring requirements are included in guidance then a flexible and fair approach may be exercised, and taking into account that the retest was taken very close to the decision date, the Entry Clearance Manager and /or Tribunal ought to have exercised discretion in favour of the appellant.

13. I find further material errors of law as regards the First-tier Tribunal's treatment of Article 8 ECHR. From reading the determination in particular at paragraphs 21 and 22 the judge appears to have applied the new Rules (in force post 9 July 2012) when this application predated the implementation of those amendments to the Rules. This is further supported by his reference to **Gulshan [2013] UKUT 00640** which provides guidance on the consideration of Article 8 ECHR outside of the Rules and the need to establish arguably good grounds. I find a misdirection on the law. The correct approach was for the judge to have followed the five stage process set out in **Razgar**, having considered and dismissed the appeal on immigration grounds. The determination assessed proportionality of the decision regarding the discrete point concerning the English language requirement. However, there is no discussion or consideration with reference to family life in the determination. The judge did not find the interference to be disproportionate notwithstanding that a further application which would have to be considered under the new Rules which would lead to a longer delay.

Decision re error of law

14. I find material errors of law in the determination. I set aside the determination and I remake the decision. I allow the appeal.

15. In following the step-by-step **Razgar** guidance I find that there is family life as the parties are married. I find that the decision is of sufficient gravity to engage Article 8 , a low threshold. I find that the decision is an interference with that family life as the parties remain separated. The decision was not in accordance with the law. The issue of proportionality necessarily involves some reflection on the degree to which the appellant has failed to meet the Rules. I do not regard this as a near miss case. I have treated the scoring requirements to be part of guidance and in the context of proportionality where there are no other grounds relied on for refusing the application, the existence of the retaken test some ten days after the reasons for refusal and prior to the reconsideration by the Entry Clearance Manager and the delay which is significant prior to the review, the decision was not proportionate.

Decision

(1) I allow the appeal on immigration grounds.

(2) I allow the appeal on human rights grounds.

Signed Date 4.6.2014

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I make a partial fee repayment award of £50.

No anonymity made.

Signed Date 4.6.2014

Deputy Upper Tribunal Judge G A Black