



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/08390/2014

THE IMMIGRATION ACTS

Heard at Field House
On 17 March 2015

Determination Promulgated
On 26 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR

Between

SIMERJIT KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Waheed of Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. Although the Secretary of State is strictly the appellant to this present appeal, I have for the sake of consistency continued to refer to the parties as they were in the First-

tier Tribunal. Miss Simerjit Kaur is accordingly referred to throughout as “the appellant”.

2. The Secretary of State has appealed against the decision of First-tier Tribunal Judge C H Bennett who, in a decision promulgated on 31 October 2014, allowed the appellant’s appeal against the respondent’s decision on 11 December 2013 refusing her application for an extension of leave as a Tier 4 (General) Student under the points-based system. The essential reason that the respondent had refused her application was because she had failed to demonstrate that she was competent in the use of the English language at the appropriate level by providing an English language test certificate from an approved English language provider.
3. In his decision, the First-tier Tribunal Judge noted, and accepted the appellant’s explanation, that when she made her application the appellant believed that she had passed all the necessary specified subjects in the English language test because she had received a certificate to that effect. It was only when she received the refusal decision that she learnt that the testing authority had notified the Home Office that she had “narrowly failed” the examination in writing in December 2011.
4. It is accepted by both parties that, since receiving the refusal decision, and before the appeal came on for hearing in the First-tier Tribunal, the appellant has taken and passed in full the English language test. Mr Nath, for the respondent, confirmed that if the appellant were to make her application today, it is likely that her application would be granted.
5. The First-tier Tribunal Judge found that the appellant did not meet the strict requirements of the Immigration Rules in relation to her application for further leave to remain. He nevertheless allowed her appeal under Article 8 of the European Convention on Human Rights and found, at [45], that:
 - “(a) the reason she does not qualify is because of what was, in reality, a clearly understandable error on her part,
 - (b) she has now passed the relevant examination in all the four component parts,
 - (c) she wishes to continue with the course, and
 - (d) she had qualified for the requisite number of points for maintenance in the original application.”

The judge noted that it does not follow that she still qualifies for the maintenance points but that that would have to be established on any fresh application that she makes.

6. The judge held that her removal at this time would be an unlawful and disproportionate interference with the appellant's private life and allowed the appeal on that basis. At [49] he gave a direction, in order to give effect to his decision, that the appellant "is to be granted a period of leave of 45 days to enable her to make a fresh application for leave to remain under paragraph 245ZX".
7. The respondent sought permission to appeal. The grounds argued that the judge had failed to consider the public interest considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 and further submitted that the appellant should be required to return to India to make a new application from outside the UK; there was no certainty that the requirements of the Rules would be met and accordingly the case of **Chikwamba** should be distinguished.
8. On 26 January 2015 First-tier Tribunal Judge Chohan gave permission to appeal on the basis that it was arguable that the judge had failed to take into account the public interest element of Section 117B. It was on this basis that the matter came before me.
9. Very brief submissions were made to me by both representatives. Mr Nath argued that no mention had been made of Section 117B in the judge's decision and there is now statutory obligation for the Tribunal to consider public interest considerations under that Section. He acknowledged that the only issue under Section 117B that is relevant to this appeal is 117B(1) which provides that "the maintenance of effective immigration controls is in the public interest".
10. In reply Mr Waheed submitted that the judge had been correct in the way that he dealt with the Article 8 considerations outside the Immigration Rules. It is clear, he said, that the question of proportionality is dealt with fully by the judge and his findings were reasonable. He noted that at the First-tier Tribunal the Secretary of State had chosen not to be represented and it could be said that the Secretary of State, being unhappy with the decision, simply now wishes to relitigate the matter.
11. I reserved my decision on the question of whether there had been an error of law in the First-tier Tribunal decision. Having reviewed all the documentation and the submissions I have come to the conclusion that there was no error of law in the judge's decision.
12. The only substantive issue raised by the respondent in the appeal before me was the fact that the First-tier Tribunal Judge had not considered Section 117B. That was the only matter that he raised in his submissions save to acknowledge that the case of **Chikwamba** was not relevant. The Presenting Officer had already conceded, on behalf of the respondent, that if the appellant were to make a new application now, she was likely to succeed as the English language test certificate was valid and acceptable.
13. In my judgment, this is an appeal that should never have been brought by the Secretary of State. I agree with the submissions made by Mr Waheed. The decision of

the First-tier Tribunal Judge was lengthy, detailed and clear and gave good and adequate reasons at length for his findings that the appellant must succeed under Article 8. The direction that he gave at [49] was eminently sensible. I am satisfied that there was no error of law in his decision.

Notice of Decision

There was no error of law in the decision of the First-tier Tribunal and the decision, including the Direction at [49], shall stand.

No anonymity direction was sought or is made.

Designated Judge David Taylor
Deputy Upper Tribunal Judge
26 March 2015