IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21331/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 June 2015	**On 29 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS RUSHNA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Ms A Everett, Specialist Appeals Team
For the Respondent/Claimant: Mr S Kareem, Counsel instructed by Hamlet Solicitors LPP

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Majid sitting at Taylor House on 30 January 2015) allowing the claimant's appeal under the Immigration Rules against the decision by the Secretary of State to refuse her leave to remain as the spouse of a person present and settled here on the ground that she failed to satisfy the English language requirement in paragraph 284. The First-tier Tribunal did not make an anonymity direction, and I

do not consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Background

2. As from 29 November 2010, paragraph 284, which sets out the requirements for an extension of stay as a spouse or civil partner of a person present and settled in the United Kingdom, has contained an English language requirement as follows:

> ix(a) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:
>
> (i) the applicant is aged 65 or over at the time he makes his application; or
>
> (ii) the applicant has a physical or mental condition that would prevent him from meeting the requirement; or
>
> (iii) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement ...

3. The claimant is a national of Bangladesh, whose date of birth was 7 June 1970. She applied for entry clearance to the United Kingdom as a spouse in November 2010, just before the introduction of the English language requirement into Rule 281 and Rule 284. Her application for entry clearance was refused in February 2011, but was allowed on appeal. So she was granted entry clearance in the spring of 2012, and on 4 March 2014 Ethnic Community Service applied on her behalf for leave to remain in the United Kingdom as the partner of a person present and settled here.

4. On 24 April 2014 the application was refused on the sole ground that she had failed to provide an English language certificate which was on the approved list of providers, and she had not demonstrated that she was exempt from the English language requirement. So she did not meet E-LTRP4.1 and 4.2 of Appendix FM. Her case was considered under EX.1, but she had not demonstrated there are insurmountable obstacles preventing her from returning to Bangladesh. She had been in the United Kingdom for just over two years, having spent the majority of her life in Bangladesh. She had parents and siblings in Bangladesh. He and her spouse had no children within their relationship, and it was not unreasonable to expect them to return to Bangladesh and to continue their private and family life there.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. At the hearing before Judge Majid, the claimant gave oral evidence. She adopted as her evidence-in-chief a witness statement dated 21 January 2015, most of which Judge Majid reproduced verbatim when giving his reasons for allowing her appeal.

6. She believed the Secretary of State had refused her application very unfairly because when she came to the United Kingdom there was no requirement for the English language test. When she applied for further leave to remain as a spouse on

completion of two years probationary period the new Rule was applied in her case. She had sought to comply with the requirements of the new Rule. She had registered with Sanjari International College for ESOL course entry level 3 (B1), and had successfully passed the test on 6 February 2014, receiving certificates for speaking and listening. She asked the course provider before registering with them whether this was the right course for the requirements of the Home Office for the purposes of her application of further leave to remain in the UK. They said that it was. Anyhow, since the refusal decision, she had registered with Hamlets Training Centre and she was now "ready for exam".

7. The decision was a direct interference with their private and family life. Her father died on 9 November 2013 at the age of 80. Her mother was 70 years old with multiple health problems. Her mother was fully dependent on her younger brother, who was a full-time student and did not have his own income. They scarcely managed on the little income generated from cultivating land. So if she had to return to Bangladesh, she would face tremendous difficulties to maintain and accommodate herself there. On the other hand, her husband here was a 56 year old man with multiple health problems. He had had a heart attack on two occasions. He always needed her support. Her absence would not only affect their conjugal life, it would cause "our life to be threatened".

8. In his subsequent decision, the judge held at paragraph [7] that the claimant had given evidence consistent with her assertions in various documents. Further, she emphasised she had a genuine marriage. The judge continued:

> "However, the Home Office has made a mistake and has insisted on the language requirement which was imposed after her application. Thus, I find the decision totally without reason."

9. Under the heading of "Dispositive Reasons and Deliberations", the judge said at paragraph [10] that he had carefully perused the witness statement of the claimant (which he went on to set out extensively – see above), and his decision was dictated by the following facts:-

   (a) The respondent has made a mistake in rejecting the appellant's case and, as it is properly set out in a statement, her case fell before the language requirement was imposed. Mr Ahmed read some of the documents and made it clear that the application of the appellant was definitely much before the language requirement was imposed by the respondent.

   (b) The appellant has undertaken a language course from a college which told her that it will be suitable for the Home Office requirements.

   (c) As the current Rules (strictly speaking not applicable to this case) provide, the respondent has discretion in assessing the language requirements. This discretion is clear from the Immigration Rules, paragraph (ixa) (iii) which says "(iiii) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement." Accordingly, this appellant should have been given the benefit of discretion particularly when the respondent has not adhered to the timing of the change in the Rules.

The Application for Permission to Appeal

10. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal, arguing the judge had erred in law in holding that the refusal decision was totally without reason and in holding that the Secretary of State had made a mistake in rejecting the claimant's application as she had made it before the language requirement was imposed by the Secretary of State.

11. Rule 284(ix)(a) was introduced by paragraph 11 of CM 7944 and came into force on 29 November 2010 subject to the following provisions:

> 'The changes in paragraphs 6 to 20 shall take effect on 29 November 2010. However, if an applicant has made an application for entry clearance or leave to enter or remain as a spouse, civil partner, unmarried partner, same sex partner, fiancé or proposed civil partner of a British citizen or a person settled in the United Kingdom and the application has not been decided before 29 November 2010, it will be decided in accordance with the Rules in force on 28 November 2010.'

12. The claimant's application for leave to remain was received by the Home Office on 4 March 2014. As the date of application post-dated 29 November 2010, the claimant was required to satisfy the Rule, and failed to do so.

The Grant of Permission to Appeal

13. On 30 March 2015 First-tier Tribunal Judge Mark Davies granted permission to appeal as the judge was in error in his view in finding that the claimant did not need to satisfy the rules relating to the English language requirement.

The Hearing in the Upper Tribunal

14. At the hearing before me, Mr Kareem submitted that the judge had not made a material error of law for two reasons. Firstly, on the facts the claimant came within the exceptional compassionate circumstances exception; alternatively, the judge had also found in the claimant's favour under Article 8 ECHR, and there was no cross appeal by the Secretary of State against the favourable finding under Article 8 ECHR.

15. Having reviewed the judge's reasons and also the evidence relied on by Mr Kareem as showing that there were exceptional compassionate circumstances, I ruled an error of law was made out such that the decision had to be set aside in its entirety and remade. After further discussion, it was agreed that there did not need to be any further fact-finding, and that I could remake the decision on the basis of (a) the evidence that was before the First-tier Tribunal and (b) the judge's primary findings of fact which are undisputed and/or uncontroversial (such as his positive finding on the claimant's credibility).

Reasons for Finding an Error of Law

16. The judge plainly misdirected himself on the question of compliance with Rule 284. He was under the misapprehension that, because the claimant had been able to

obtain entry clearance to the United Kingdom without demonstrating a required level of competency in the English language, the Rule invoked by the respondent in the refusal decision of 2014 did not apply to the claimant.

17. Although in paragraph [10] of his decision he made reference to the "exceptional compassionate circumstances" exception, he did not go on to explain how the claimant could bring herself within this exception. Merely asserting that the claimant ought to have been given the benefit of the exception was not good enough. Nor was it sufficient to go on to set out a substantial part of the claimant's witness statement. While the contents of the statement, which the judge accepted, disclosed compassionate circumstances, the statement was not directed at the crucial question as to whether there were exceptional compassionate circumstances that *prevented* the claimant from meeting the English language requirement.

18. In argument before me, Mr Kareem relied on the fact that the claimant had been unable to secure the return of her passport from the Home Office in order to take an exam with an approved provider before the appeal hearing. No reference to this particular obstacle was made in the judge's decision, and therefore this obstacle cannot be said to have formed part of his discernable reasoning.

19. I accept that family life and proportionality considerations to some extent underpinned the judge's decision to allow the appeal. But he did not in terms allow the appeal on the alternative basis that the claimant qualified for Article 8 relief, either under Appendix FM or on a conventional proportionality assessment outside the Rules, applying Section 117B of the 2002 Act as amended by the Immigration Act 2014. So there was no obligation on the Secretary of State to appeal against a finding under Article 8 ECHR when, on the face of it, the appeal had been solely allowed on the ground that the decision was not in accordance with the Immigration Rules.

The Remaking of the Decision

20. For the purposes of remaking the decision, I take into account the following documentary evidence to which Mr Kareem drew my attention.

21. On 6 January 2015 Hamlets Training Centre confirmed that the claimant had been enrolled on an entry 1 course (which was equivalent to A1 under the CEFR) since 23 September 2014. Her attendance was satisfactory. Hamlets Training Centre was approved by Trinity College, London and was accredited by the BAC for independent further and higher education as a short course provider. At the end of the course, the student would be eligible to sit the Trinity College London ESOL GESE (grade 2–A1) examination if she could provide a valid identity document (passport). The centre attached the Trinity College London candidate identification and security policy.

22. As is apparent from the attached policy, all candidates taking a SELT for visa and immigration purposes must provide a valid passport for a SELT taken in the UK. A valid biometric residence permit is only acceptable for a test taken in the UK by

candidates who do not have a valid passport, for example, asylum seekers who have been awarded refugee status.

23. The policy further advises that in the event that candidates are unable to present the appropriate identification outlined in the above table, the SELT centre should advise the candidate to contact the UK Visas and Immigration Secure English Language Team for advice.

24. On 17 December 2014 the claimant's previous representatives sent by recorded delivery a letter to UK Visas and Immigration in Sheffield. They explained that the claimant urgently needed her original passport back for a short time as she had to produce the document to Hamlets Training Centre for the purpose of the English language test booking. The test was due to take place on 5 January 2014. Mrs Begum would return her original passport to them again as soon as this purpose was served.

25. On 22 December 2014 Mr Taylor of the Temporary Migration Team responded to the request, saying that they were unable to return the claimant's passport as the passport was currently with the First-tier Tribunal (Appeals) Team. They could be contacted on telephone number 0300 123 1711. He hoped that this would be of assistance.

26. On 6 January 2015 the claimant's representatives wrote to the Tribunal at Taylor House enclosing a copy of the letter that had been received from the Home Office. They said the content of the letter was self-explanatory. According to Home Office information, Mrs Begum's passport was currently with the First-tier Tribunal. They asked if her passport could be sent to her at her home address, and they confirmed that she would return her original passport before the date of the hearing on 30 January 2015.

27. On 15 February 2015 the First-tier Tribunal informed the claimant's representatives that the Tribunal could not return the passport, as it remained with the Home Office, in particular with the First-tier Tribunal (Appeals) Team.

28. There is a skeleton argument on file from Mr Ahmed of Counsel who appeared at the hearing in the First-tier Tribunal on the claimant's behalf. Hamlets Training Centre had informed the claimant in writing that, if she wanted to sit for an examination in January, she had to provide her passport. She had approached the Home Office for her passport without success. As a consequence she could not fulfil the requirement of the Immigration Rule, and this was not her own fault, but was caused by an administrative failure on behalf of the Secretary of State.

29. As I canvassed with the parties at the hearing, I do not consider there was an administrative failure on behalf of the Secretary of State. The inability of the claimant to secure her passport in time to take a test from the approved provider before the hearing arose from a misunderstanding. Her previous representatives assumed that the First-tier Tribunal (Appeals) Team was part of the First-tier Tribunal, when in fact, as I infer from the communication of 15 January 2015, it is a separate department of the Home Office. So, with the benefit of hindsight, the

claimant's previous representatives misdirected their enquiry for the production of the claimant's passport.

30. Reassessing the claim as at the date of the hearing before me, I am not persuaded that the claimant can invoke the "exceptional compassionate circumstances" exception to the English language requirement. There were not exceptional compassionate circumstances that *prevented* her from meeting the requirement to provide an English language test certificate from an approved provider. Regrettably, she was badly advised in the run up to her application for leave to remain, with the consequence that she did not take a test with an approved provider. As this is not a points-based system appeal, it was open to the claimant to try and rectify the situation by the date of the hearing in the First-tier Tribunal. In the end, it was a practical obstacle that prevented her from taking a test with her chosen alternative provider, namely the lack of a passport. It was not an exceptional compassionate circumstance that prevented her from taking a test with an approved provider. So her appeal falls to be dismissed under the Rules.

31. Insufficient evidence has been provided to enable me to make a finding that there are insurmountable obstacles to family life continuing in Bangladesh, and therefore I am unable to find that the claimant can succeed on the alternative basis that she comes within the exemption criteria contained in EX.1 of Appendix FM.

32. However, I find that there are compelling circumstances which give rise to an arguably good claim for Article 8 relief outside the Rules. I accept questions 1 and 2 of the **Razgar** test should be answered in the claimant's favour. The practical effect of the refusal decision is to require her to return to Bangladesh in order to sit an English language test there, and then to apply for entry clearance when she can demonstrate that she meets the English language requirement. In the interim, there will be disruption to the claimant's private and family life.

33. I accept that questions 3 and 4 of the **Razgar** test should be answered in the Secretary of State's favour, and I also accept that in the normal course of events the proposed interference would be proportionate, having regard to the public interest considerations set out in Section 117B of the 2002 Act as amended by the Immigration Act 2014.

34. She has yet to satisfy the Secretary of State that she can communicate in English to the required level of competence. It is in her favour that the other requirements of paragraph 284 are met, including the requirement that the parties are able to maintain and accommodate themselves and any dependants adequately without recourse to public funds. But this is not enough to tip the scales in the claimant's favour. What tips the scales in the claimant's favour is the accepted evidence of the claimant that there are significant obstacles to her going back to Bangladesh even for a short period, and that even a temporary separation from her husband will be unduly harsh, given his state of health and his need for the claimant's constant presence.

35. In the circumstances, I am satisfied that this is one of those rare cases where it is appropriate that the claimant should be accorded limited Article 8 relief so as to be able to sit an English language exam in the UK with an approved provider, with a view to making a fresh in-country application for leave to remain which is supported by the required English language test certificate. It is a matter for the Secretary of State as to how much leave to grant the claimant in accordance with this ruling, but I do not consider that the period of leave needs to be any longer than two months from the date when her passport is returned to her.

Decision

The decision of the First-tier Tribunal allowing the claimant's appeal under the Rules contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against the refusal of leave to remain as the spouse of a person present and settled here is allowed to a limited extent under Article 8 ECHR outside the Rules to enable the claimant to take an English language test with an approved provider, and thereby to demonstrate to the Home Office that she meets the English language requirement. The Secretary of State is directed to give the claimant at least two months leave for this purpose from the date when her passport is returned to her.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson