



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

Appeal Number: IA/28143/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 13th February 2015**

**Decision & Reasons Promulgated
On 18th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

**MRS VANITHA SUNDARAMOORTHY
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karnik, Counsel instructed by Adamsons Solicitors

For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, Mrs Vanitha Sundaramoorthy date of birth 31st October 1982, is a citizen of India.
2. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking account of all the circumstances I do not consider it necessary to make an anonymity direction.
3. This is an appeal by the Appellant against the determination of First-tier Tribunal Judge Edwards promulgated on 9th October 2014. The judge

dismissed the appeal of the Appellant against the decisions of the Respondent to refuse the Appellant further leave to remain in the United Kingdom and thereupon to make a decision to remove the Appellant from the United Kingdom. By permission granted on 10th December 2014 leave to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Deans.

4. In granting leave to appeal it was noted that in the first instance the Appellant had failed to produce a valid English language test certificate. However in considering that issue Judge Edwards had applied Section 85A of the 2002 Act and indicated that he was limited to considering the circumstances appertaining at the date of decision and the evidence relevant thereto. Whilst it was acknowledged that that was an error of law in the leave it was noted that that of itself may not have resolved the issue as even the post decision evidence, it was submitted, did not meet the requirements of the Rules.
5. The central issue with regard to the matter was that whether or not the Appellant's English language test certificate had been provided by an approved provider. The Appellant's case as can be gathered from page 25 of her bundle was that she had submitted a valid English language test certificate authorised by Edexcel and the Community Support Plus Ltd. The certificate itself appears at pages 23 and 24 and refers to Edexcel but also refers to the certificate being issued by Pearsons.
6. According to the Register Pearsons were on the Register of Approved Providers and the issue was whether or not the certificate had been genuinely issued by Pearsons. The Register itself indicated that Pearsons did not issue paper certificates but rather issued online certificates and provided the same to the Respondent. The argument being that the paper certificate therefore cannot be genuine. It appears to me that it is a simple matter that once one receives such a certificate one prints it off and produces it. It may be that that is what has happened here. It would have been a simple matter to check with Pearsons whether or not this was a valid certificate issued by them and authorised by them.
7. It does not appear that anybody has checked that detail. If Pearsons confirm that it is a certificate issued by an organisation that they run, therefore is a genuine certificate. It does not appear to be challenged that otherwise the Appellant would meet the requirements of the Rules. It should be a simple matter for those instructed on behalf of the Appellant to provide such details.
8. Further with regard to this matter the judge went on to refuse the matter under Appendix FM EX.1 and EX.2 on the basis that there were no insurmountable obstacles to the Appellant and her family returning to India. There was no evidence that was submitted to the judge that there were insurmountable obstacles. Whilst Mr Karnik does indicate that the Appellant's spouse was settled here and had been given indefinite leave and that a child of the family was settled here with indefinite leave, that of itself would not constitute insurmountable obstacles. Further whilst the Appellant was pregnant and indeed now has given birth in November to a

second child, that itself would not have prevented family life continuing within India. It may be that the analysis with regard to EX.1 and EX.2, provided the issue with regard to the English language test certificate is made out, cannot be challenged.

9. However with regard to the issues under Article 8 the judge has applied the principles set out in the case of Gulshan [2013] UKUT 640 and Shahzad (no citation given by the judge in either case). However since the date of those cases further authority of MM [2014] EWCA Civ 985 has indicated that there is no justification for an additional step of whether or not there are exceptional circumstances being imposed within an Article 8 assessment. That has recently been endorsed in the case of Singh [2015] EWCA Civ 74 that there is to be a two stage test in applying the requirements of the Rules and thereafter proceeding to approach the issue of Article 8 on the basis of the case of Razgar [2004] UKHL 27 and Huang [2007] UKHL 11.
10. It is clear from the determination by Judge Edwards that in paragraph 21 he does impose an exceptionality test in considering the issue of Article 8. Whilst it would be correct to say that if the Appellant does not meet the requirements of the Rules Article 8 has to be considered in accordance with the case of Razgar and Huang. Clearly by imposing an exceptionality test the judge has not done so. It may be that little criticism could be made of the judge as the cases of MM and Singh were only recently issued, it does follow however that the fact that he did apply those cases results in the fact that there is an error of law in his approach.
11. In the circumstances the appropriate course would be for it to be considered afresh. Prior to this matter being considered further the Appellant's representative will have to obtain evidence from Pearsons to show whether or not this is a valid certificate. It is not challenged that Pearsons were on the Register at the time. The alternative being that the Community Support Plus Ltd were alleged to have been an authorised provider but they do not appear to be on the Register at the moment and if the Appellant's representative is seeking to continue with that assertion they would have to produce a copy of the relevant Register.
12. However for the reasons set out I find that there is an error of law within the original determination. The appropriate course to dispose of this matter is for the matter to be remitted back to the First-tier Tribunal for a hearing afresh. None of the findings of fact are preserved, the hearing afresh will determine all the issues. The parties have 28 days to provide such further evidence as is necessary to substantiate their case including such evidence about the new child of the family of the Appellant, which may be material as that child is now a British citizen.

Notice of Decision

I rule that there is a material error of law in the original determination. I set aside the decision and remit the matter back to the First-tier Tribunal for a hearing afresh.

No anonymity direction is made.

Signed

Date **13th February 2015**

Deputy Upper Tribunal Judge McClure