



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

Appeal Number: OA/10499/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 27 January 2015**

**Determination
Promulgated
on 27 January 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SHYNAR MUKAMEJANOVA

Respondent

Representation:

For the Appellant: Mrs Saddiq, Senior Home Office Presenting Officer

For the Respondent: Mr Sharma, of Matthew Cohen & Associates Ltd., Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.
2. The ECO appeals against a determination by First-tier Tribunal Judge Balloch, allowing the appellant's appeal against refusal of her entry clearance application as a spouse, in terms of the Immigration Rules. The grounds of appeal do not dispute the outcome on the financial aspects.

Their point is that the Judge went wrong by granting the appeal in absence of the specified evidence to meet the English language requirement.

3. In his written argument and in submissions Mr Sharma correctly conceded that the ECO is right about that issue.
4. The appellant now has the appropriate IELTS certificate, but that post-dates the ECO's decision, which is the relevant date in an entry clearance appeal.
5. The circumstances of the appellant have changed considerably over the course of these proceedings. She, her husband and their two daughters (all three being UK citizens) now live in the UK. The children both attend primary school. The appellant's argument runs that taking account of the family life interests involved and the best interests of the two children, the appeal should be allowed under Article 8 of the ECHR, and the appellant should not have to apply again from abroad; *Chikwamba v SSHD* [2008] UKHL 40.
6. The appellant has a strong case for leave to remain in the UK as matters now stand, but there are two insuperable problems in the way of reaching that result in these proceedings.
7. Firstly, in an entry clearance case not only issues under the Immigration Rules but also Article 8 issues are assessed as at the date of decision: *AS (Somalia) v SSHD* [2009] UKHL 32, [2009] INLR 339.
8. Secondly, there is nothing in the way of the appellant applying for leave under the family life provisions of the Rules on the basis of her current circumstances. Even if the Upper Tribunal could look at matters as they stand today, the requirement to make an application under the Rules can never itself be a disproportionate interference.
9. While of course any application the appellant may make will have to be decided by the respondent on its own merits, all presently available information suggests that she may expect a favourable outcome; but the application will have to be made (and in it the appellant will have the benefit, if needed, of Part 5A of the 2002 Act and section 117B(6) in particular).
10. The First-tier Tribunal erred by allowing the appeal under the Rules, because the appellant's case had to fail on the language requirement. Its determination is **set aside**. Looking at matters as at the date of the respondent's decision, there is no available route by which the appeal can properly be allowed. The appellant's appeal, as originally brought to the First-tier Tribunal, is **dismissed** on all grounds available.
11. No anonymity direction has been requested or made.

 Hugh Maclean

27 January 2015
Upper Tribunal Judge Macleman