Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18018/2014

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision and Reasons Promulgated**
On 22 December 2015	**On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

WIPHARAT LAMONT
(NO ANONYMITY ORDER)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision and reasons statement of First-tier Tribunal Judge J S Pacey promulgated on 2 October 2014 on the grounds that the judge failed to take proper consideration of the transitional provisions relating to the English language test criteria listed in appendix O to the immigration rules.

2. Mr Mills conceded that the judge erred in law by failing to accept the appellant's English language certificate from Trinity College as meeting the relevant requirements. Mr Mills advised me that as a result the judge's decision should be set aside and remade to allow the appeal under paragraph 284 of the immigration rules because the only issue to be decided was whether the appellant met the English language requirements.

3. Of course I accept the concession and allow the appeal to the Upper Tribunal and remake the decision to allow the appeal against the immigration decisions of 15 April 2014 to refuse to grant further leave to remain and to remove the appellant. However, it is appropriate to set out in more detail my reasons for proceeding with the appeal in the absence of the appellant and to give reasons for the decision.

4. With regard to proceeding in the absence of the appellant, I made that decision before being addressed by Mr Mills. I noted that the Tribunal gave notice of hearing to the parties on 26 November 2015. The appellant requested that this hearing should be adjourned to await the outcome of a settlement application the appellant sent to the Home Office on 2 November 2015. That application was refused. The fact an application for an adjournment was made is a clear indication that the appellant was aware of the hearing. No explanation was provided for the non-attendance of the appellant or her legal representative. It was on these facts that I decided to proceed.

5. With regard to the substantive issues, I noted that the Tribunal's file lacked the appellant's bundle. Mr Mills provided his copy which contained the English language certificate issued in July 2015 by Trinity College and the reasons for refusal letter. At the date of application the appellant indicated that she required further leave to remain in order to obtain the KoLL qualification. Her application was refused because she had not provided an English language qualification but by the date of hearing she provided the Trinity College certificate.

6. Mr Mills confirmed that the judge was entitled to consider the certificate even though it was not submitted with the application because Home Office policy permitted a judge to review an in-country case based on up to date evidence unless appendix FM-SE specifically linked evidence to the date of application. Paragraph 27 of appendix FM-SE did not impose such a restriction. Although I had no copy of the relevant policy I have no reason to think Mr Mills was not providing a reasonable summary. As a result, I accept that the judge did not err in law by considering the certificate supplied for the appeal. In any event, as this appeal relates to issues arising under part 8 of the immigration rules, it is not entirely clear that appendix FM-SE would have any relevance although it might because of paragraph A277A.

7. There is a question about what law the judge should have considered. As per Odelola the applicable immigration rules would be those in force at

the date of decision subject to any transitional provisions. At the date of decision certificates issued by Trinity College were approved in appendix O.

8. Alternatively, in YM (Uganda) the immigration rules at the date of hearing should be considered. If that were to be applied, then the transitional provisions in the Statements of Changes to Immigration Rules in July 2014 (HC 198 and HC 532) would apply to the amended appendix O. Each made provisions for applications made before specified dates being considered under the previous version. As the application was made prior to those specified dates the appellant benefited from the transitional provisions and her English language certificate was adequate proof.

9. So either way the appeal should have been allowed in light of the Trinity College certificate.

10. In allowing the appeal, I should specify that this means the appellant should have been granted further leave to remain as the requirements of paragraph 284 were met at the date of hearing. It will be for the Home Office to decide whether in light of the application made on 2 November 2015 indefinite leave should be granted. That will depend on a number of factors but they are not ones on which I can comment as I have not seen that application.

Decision

The determination of First-tier Tribunal Judge Pacey contains an error on a point of law and is set aside.

I remake the decision and allow the appeal against the decisions refusing further leave to remain and to remove the appellant.

Signed Date

Judge McCarthy
Deputy Judge of the Upper Tribunal

Fee award

Even though a fee was paid and I have allowed the appeal, I make no fee award because the reasons for allowing the appeal are based on evidence that was not before the Home Office.

Signed Date

Judge McCarthy
Deputy Judge of the Upper Tribunal