



IAC-AH-SC-V1

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

Appeal Number: IA/20426/2014

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons Promulgated
Birmingham
On 4th January 2016**

On 13th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MD ABDUL HYE
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr G Harrison, Senior Home Office Presenting Officer
For the Respondent: Mr M Hasan of Kalam Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge Asjad of the First-tier Tribunal (the FTT) promulgated on 7th May 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him as the Claimant.
3. The Claimant is a male citizen of Bangladesh born 1st August 1962. He entered the United Kingdom on 3rd February 2012 as the spouse of a

person settled in this country. The Claimant had leave which was valid until 28th February 2014.

4. On 21st February 2014 the Claimant submitted form FLR(M) seeking further leave to remain as the spouse of a person settled in the United Kingdom. His three children also made applications for further leave to remain.
5. The Secretary of State refused the Claimant's application on 16th April 2014 and made a decision to remove him from the United Kingdom. Similar decisions were made in relation to his three children.
6. In giving reasons for refusal, in relation to the Claimant, the Secretary of State refused the application with reference to paragraph 284(ix)(a) of the Immigration Rules which requires that an applicant must provide 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 (the CEFR). The Claimant had provided an EMD (Qualifications) Limited certificate as evidence that he met the English language requirement. However, EMD was not included in Appendix O of the Immigration Rules which outlines which English language test providers are accepted by the Secretary of State, and therefore the requirements of paragraph 284(ix)(a) were not satisfied.
7. The Secretary of State then went on to consider the Claimant's family and private life under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention), which from 9th July 2012 was considered under Appendix FM of the Immigration Rules. The Secretary of State decided that Appendix FM could not be satisfied in relation to family life, nor could paragraph 276ADE(1) be satisfied in relation to private life. Therefore the applications of the Claimant and his three children were refused.
8. The Claimant appealed to the FTT, as did his three children, and the appeals were heard together on 12th March 2015. The FTT refused an application to adjourn the hearing to enable the Claimant to provide evidence that he satisfied the English language requirements. The Claimant had explained that he had not been able to take a further test because the Home Office held his passport, and a certified copy of his passport which had been provided to him, was not deemed acceptable evidence of identification by the test provider.
9. The FTT allowed the appeals on the basis that the Secretary of State's decision to refuse was not in accordance with the law. This was because the FTT accepted a submission made by Mr Hasan, on behalf of the Claimant, that the applications should have been considered under the Immigration Rules in force as at 8th July 2012, in accordance with transitional provisions which applied to persons granted entry clearance or limited leave to remain under part 8 of the Immigration Rules prior to the

amendment of the rules on 9th July 2012, and who subsequently applied for further leave on the same basis.

10. The FTT decision caused the Secretary of State to apply for permission to appeal to the Upper Tribunal, although the application for permission to appeal only related to the Claimant, and not to his three children.
11. The Secretary of State contended that the FTT had made a material mistake of fact. The FTT had found that the only issue to be decided was whether the Claimant had passed the English language test, and found that the Secretary of State's decision was not in accordance with the law, because the application should have been considered under the Immigration Rules as at 8th July 2012 in accordance with the transitional arrangements.
12. The Secretary of State pointed out that the reasons for refusal letter dated 16th April 2014 expressly refused the Claimant's application pursuant to paragraph 284(ix)(a) in accordance with the transitional arrangements, which was the Immigration Rule in force as at 8th July 2012, and had not considered the English language requirements under Appendix FM.
13. Permission to appeal was granted by Judge Simpson of the FTT on 10th July 2015. Following the grant of permission, the Claimant did not submit a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.
14. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FTT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

Error of Law

15. Mr Hasan confirmed that there had been no response pursuant to rule 24 of the 2008 Procedure Rules, but indicated that the Claimant did not accept that the FTT had erred in law. I noted that the FTT had made an anonymity direction because two of the Appellants before the FTT were minors. Mr Hasan confirmed that as the Upper Tribunal was only dealing with the Claimant, a male adult, there was no application for anonymity. Mr Harrison indicated that there was no apparent reason why the Secretary of State had only applied for permission to appeal in relation to the Claimant.
16. I then heard submissions in relation to error of law. Mr Harrison relied upon the grounds contained within the application for permission to appeal.
17. Mr Hasan accepted that the Secretary of State had refused the application with reference to paragraph 284(ix)(a) and contended that the transitional arrangements meant that the Claimant did not in fact need to submit a

further English language test certificate, but could rely upon the certificate that had been issued when he was initially granted entry clearance. Mr Hasan could not, when requested, show me where in the transitional arrangements this was stated.

18. I decided that the FTT had materially erred in law. The error was to conclude that the Secretary of State had not dealt with the application under the transitional provisions. The Secretary of State did act in accordance with the transitional provisions, and specifically considered the application with reference to paragraph 284(ix)(a) and therefore the decision of the Secretary of State was in accordance with the law.
19. I therefore set aside the decision of the FTT in relation to the Claimant. I had no jurisdiction to consider the Claimant's three children as no application for permission to appeal had been made in relation to them.
20. Both representatives indicated that they were in a position to proceed so that the decision could be re-made.

Re-Making the Decision

21. Both representatives agreed that the only reason that the application had been refused by the Secretary of State, was the absence of evidence, to prove that the Claimant satisfied the English language requirements. I observed that following the FTT hearing, the Claimant's solicitors contacted the FTT to indicate that the Claimant had passed his English language test, and the certificate was issued on 18th March 2015. The FTT had declined to take that certificate into account as it had been received after the FTT hearing had taken place, although before promulgation.
22. Mr Harrison accepted that as the decision was being re-made, the certificate could be admitted into evidence if I thought that was appropriate, and he did not object to the certificate being admitted into evidence.
23. I took into account that I must consider the circumstances as at the date of hearing. I decided that the certificate should be admitted into evidence. Mr Hasan had the original certificate. It was issued by Trinity College, London to the Claimant, and indicated that he had achieved level A1 of the CEFR. The date on the certificate confirmed that it was issued on 18th March 2015.
24. I indicated that I would reserve my decision, and issue a written decision.

My Conclusions and Reasons

25. I have already set out the reasons for setting aside the decision of the FTT. I re-make the decision in respect of the Claimant, by allowing his appeal.
26. This is because the only issue to be decided is whether the Claimant had achieved level A1 of the CEFR. As there was no objection to the Trinity

College certificate dated 18th March 2015 being taken into account, and because it was accepted by Mr Harrison on behalf of the Secretary of State, that this certificate indicated that the Claimant had achieved the required level of speaking and listening in English, it was appropriate to allow the appeal.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside in relation to the Claimant.

I substitute a fresh decision.

The Claimant's appeal is allowed under the Immigration Rules.

Anonymity

There was no request for anonymity to the Upper Tribunal and no anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

6th January 2016

TO THE RESPONDENT FEE AWARD

As the Claimant's appeal is allowed I have considered whether to make a fee award. I do not consider it appropriate. The Claimant had not passed the English language test when the Secretary of State's decision was made.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

6th January 2016