Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37009/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 3rd November 2015	**On 4th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MRS TANZEELA SHAZADI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Holt – Counsel
For the Respondent: Mr G Harrison – Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Mrs Tanzeela Shazadi, a citizen of Pakistan born 10th January 1989. She appeals against the decision of the Respondent made on 3rd September 2014 to refuse further leave to remain as a spouse and to remove her from the United Kingdom.

2. The Appellant appealed against that decision and her appeal was allowed by First-tier Tribunal Judge Farrelly in December 2014. He allowed it on Article 8 grounds. The Secretary of State had refused her application because she was not satisfied that the Appellant met the English language

requirements set out in the Immigration Rules. Permission to appeal was sought by the Respondent and granted. On 6th August 2015 having heard submissions, I found that there was a material error of law in the determination of Judge Farrelly in that he had not given sufficient reasons for allowing the appeal under Article 8 and I set his decision aside with no preserved findings of fact.

3. The appeal came before me for a rehearing on 3rd November 2015. I was advised that the Appellant had sat a test at Manchester Learning Academy on 14th October 2015. The test that she did was not a valid one. It seems to be likely that she was misled by Manchester Learning Academy who set the test.

4. Mr Holt then provided guidance notes from the Home Office which would indicate that where the Home Office has already accepted a test it can accept a test that does not meet the current requirements. The issues are the validity date and the provider. Mr Holt said that this argument was not run before the First-tier Tribunal. He noted that the Appellant has done three tests:

   (i) An ETS test in Pakistan. This test was not valid and ETS are no longer on the approved list.

   (ii) A test set by EMDQ which was not valid and so was not acceptable.

   (iii) The test done in October 2015 which is apparently not valid either.

5. Mr Harrison submitted that this is a very impressive argument. He said it is a question of whether or not discretion was exercised by the decision-maker. He said that his view would be that the discretion was exercised because the decision-maker said that there was insufficient evidence that the relationship was subsisting and the English language requirement issue was raised as an ancillary matter. The issue therefore would be whether the discretion was exercised properly. Mr Holt submitted that it is not clear that the Home Office has even purported to exercise its discretion. Mr Holt said he would forward to me the current guidance. The view of Mr Harrison was that there is no bar to the Appellant making a further application.

6. I did receive both the historic and the current guidance as well as that applicable at the date of the decision. The paragraph relied upon states –

   > 'You may not need to provide evidence of meeting the English Language Requirements if you have previously done so as part of a successful application for leave as a partner or parent, or if you sat your approved English language test on or after 6th April 2015.

7. The issue of this discretionary provision had not previously been raised. Mr Ahmed who represented the Appellant at the hearing on 6th August 2015 submitted that the Secretary of State had failed to exercise her discretion but when I asked what discretion he meant he said it was her general discretion under the Immigration Act 1971.

8. There was nothing in the grounds seeking permission challenging the subsistence of the marriage. I accept that the marriage is subsisting. It would arguably be perfectly reasonable for me to take the view that the Appellant has again quite simply failed to provide the required English Language Certificate and so her appeal must fail. I do note however that once again there was a problem with the college. It seems that the Appellant was misled. I also cannot ignore the fact that the Home Office have published guidance which appears to cover the situation the Appellant finds herself in. It may well be that the Respondent will not exercise her discretion in favour of the Appellant and will give sound reasons for doing so but the fact is that the Appellant did submit satisfactory evidence of her English ability with a previous application and there is nothing to suggest that the Respondent did exercise her discretion. Indeed as I have already said the issue of discretion was raised at the previous hearing before me. The Respondent was represented and the Presenting Officer did not mention this specific guidance but appeared to agree that the only discretion available was that under the 1971 Act.

NOTICE OF DECISION

In all the circumstances I allow the appeal to the extent that the case is remitted to the Secretary of State so that she can consider properly exercise her discretion in terms of the guidance referred to above.

Signed Date: 13th December 2015

N A Baird
Deputy Judge of the Upper Tribunal