IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46208/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 10th March 2016	**On 11th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MJ
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr G Harrison, Senior Home Office Presenting Officer
For the Respondent: Mr F Aziz, of Maidstone Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appealed against the decision of Judge Malik of the First-tier Tribunal (the FtT) promulgated on 27th March 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to her as the Claimant.

3. The Claimant is a female citizen of Pakistan born [ ] 1989 who entered the United Kingdom on 22nd January 2012 as the spouse of a British citizen. Her visa was valid between 29th December 2011 and 29th March 2014.

4. The Claimant and her spouse have three children who are British citizens. On 27th March 2014 the Claimant applied for further leave to remain in the UK, using form FLR(M). She had failed to pass her Life in the UK test, and required an extension of her stay in the UK, to enable her to re-take that test, so that she could make an application for indefinite leave to remain.

5. The Secretary of State refused the application on 20th November 2014 and made a decision to remove the Claimant. The reasons for refusal are set out in a letter dated 20th November 2014. In summary the Secretary of State contended that the Claimant had used deception in order to pass an English language test. The test result had subsequently been declared invalid, and the Secretary of State relied upon S-LTR.2.2 of Appendix FM of the Immigration Rules which is set out below;

> S-LTR.2.2
>
> Whether or not to the applicant's knowledge –
> (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application);

6. The Secretary of State noted that following information provided by Educational Testing Service (ETS) it was believed that the Claimant's speaking test indicated the presence of a proxy test taker.

7. The Secretary of State did not accept, even if deception had not been used by the Claimant, that the Claimant could satisfy the requirements of section EX.1 as it was not accepted that she had established a genuine relationship with her children, nor was it accepted that there were insurmountable obstacles to her family life with her spouse continuing outside the UK. It was also not accepted that the Claimant could satisfy paragraph 276ADE in relation to her private life, nor was it accepted that there were any exceptional circumstances that justified allowing the application outside the Immigration Rules.

8. The Claimant's appeal was heard on 13th March 2015. The FtT heard evidence from the Claimant and her spouse and found the evidence of the witnesses to be credible, and did not find that the Secretary of State had proved that the Claimant had used deception to pass her English language test. The FtT recorded, at paragraph 34;

> "Consequently, for this reason, I find that the Respondent's decision is not in accordance with the rules and law and the Appellant should be granted an

> extension of her leave to remain to enable her to re-take again the Life in the UK test, which she acknowledges she did not pass."

9. The FtT went on to consider Article 8 of the 1950 European Convention on Human Rights, and found that the Secretary of State's decision was not proportionate, and therefore also allowed the appeal under Article 8.

10. The Secretary of State applied for permission to appeal to the Upper Tribunal relying upon two grounds. Firstly it was contended that the FtT had failed to give adequate reasons for findings on a material matter. It was submitted that the FtT was wrong to find that the Secretary of State had not discharged the burden of proof in relation to the Claimant's deception. It was contended that the FtT had failed to provide adequate reasons for rejecting the Secretary of State's evidence.

11. Secondly it was contended that the FtT made a material misdirection of law in allowing the appeal on Article 8 grounds. It was submitted that the proportionality assessment was incomplete, and based on selective elements of the evidence and was not adequately reasoned. Permission to appeal to the Upper Tribunal was granted.

Error of Law

12. At the hearing before me on 2nd November 2015, I heard submissions from both parties regarding error of law. On behalf of the Secretary of State reliance was placed upon the grounds contained within the application for permission to appeal, and in addition it was submitted that the Claimant's appeal could not have been allowed under the Immigration Rules, as it was common ground that she did not have a valid English language test certificate, which was required in order for leave to be granted under the rules. The FtT had not considered this.

13. On behalf of the Claimant it was pointed out that the lack of an English language test certificate had not been raised in the Grounds of Appeal, and it was explained that the Claimant had been unable to take a further English language test without identification, and her identification had been held by the Home Office. It was only very recently that the Home Office had provided to the Claimant a certified copy of her passport, which would enable her to take a further English language test.

14. I set out below my conclusions and reasons for finding an error of law, and setting aside the decision of the FtT;

> 18. I find no material error of law in the consideration of the FtT, of the evidence produced by the Secretary of State, in which it was contended that the Claimant had used deception to pass her English language test. I find that the FtT gave adequate reasons for concluding that the burden of proof had not been discharged by the Secretary of State. A recent relevant authority on adequacy of reasoning is Budhathoki (reasons for decision) [2014] UKUT 00341 (IAC) the headnote of which I set out below;

> "It is generally unnecessary and unhelpful for First-tier judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they won or lost."

19. The evidence before the FtT comprised statements made by Peter Millington and Rebecca Collings, neither of which refer directly to the Claimant. In addition there was a printout recording the Claimant's name, date of birth, nationality, the test centre and test date, her speaking score, and an indication the test was invalid.

20. The FtT analysed the evidence contained in the two witness statements in paragraph 33 and in paragraph 34 noting that the Secretary of State's representative in making oral submissions had "accepted the evidence was thin". The FtT accepted that the two witness statements indicated that there had been widespread abuse, but noted that the Secretary of State had not provided any evidence of the recording of the test taken by the Claimant, and was not satisfied on the evidence presented that the Claimant had been part of the widespread abuse of the system.

21. The FtT set out the evidence given by the Claimant and her husband in considerable detail. The FtT noted the evidence given by the Claimant's husband in relation to his involvement in funding the Claimant's course, and the meetings that he had with the college to update him on progress. In my view the FtT properly evaluated the evidence, and was entitled to reach the conclusion that the evidence submitted by the Secretary of State was insufficient to discharge the burden of proof.

22. However it does appear that the FtT then did not proceed to consider the other issues raised in the Secretary of State's refusal letter, but found that because deception had not been proved, the appeal should be allowed under the Immigration Rules. The FtT recorded at paragraph 5 that both representatives agreed that the application should not have been considered by the Secretary of State with reference to Appendix FM, because the Claimant's initial application for a visa as a spouse, had been made in 2011, prior to the introduction of Appendix FM into the Immigration Rules in July 2012. However, whether the application should have been considered under the rules in force prior to the introduction of Appendix FM, which presumably would have been paragraph 284 of the Immigration Rules, or whether Appendix FM should have been considered, there is a requirement that in order to succeed under the rules, whichever version is used, an English language test certificate must be produced showing that the required standard of English has been reached. In this case it is common ground that the Claimant was unable to produce such a certificate, as the certificate that she had initially obtained, had been cancelled and declared invalid by the test provider.

23. Therefore the appeal could not have been allowed under the Immigration Rules and the FtT erred in indicating that it could.

24. I next consider the assessment by the FtT of Article 8. I find a material error of law in the assessment of proportionality. The FtT did not factor into the consideration of proportionality section 117B(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) which confirms that the maintenance of effective immigration controls is in the public interest. The assessment of Article 8 is contained within paragraph 35 of the FtT decision, and there is no satisfactory reference or assessment of the public interest in the maintenance of effective immigration control.

25. The FtT placed weight upon the fact that parties may be separated for a prolonged period of time if the Claimant has to leave the UK and make an application for entry clearance from abroad, because her husband did not currently earn sufficient income to satisfy the minimum income requirement. The Upper Tribunal confirmed in Sabir [2014] UKUT 63 (IAC) at paragraph 33 that the likelihood or otherwise of an individual not being able to meet the requirements of the rules for entry clearance is not a relevant consideration, and referred to SB (Bangladesh) v SSHD [2007] EWCA Civ 28.

26. For the reasons given above I conclude that the FtT erred in assessing Article 8, and also erred in allowing the appeal under the Immigration Rules. The decision of the FtT is set aside and will be re-made by the Upper Tribunal.

27. However as the FtT did not err in considering the evidence in relation to the Claimant's alleged deception, the finding that the Claimant did not use deception to obtain her English language test certificate is preserved.

15. The hearing was adjourned to enable the Claimant to give further evidence so that the Upper Tribunal could re-make the decision.

Re-Making the Decision – Upper Tribunal Hearing 10th March 2016

16. The Appellant attended the hearing. There was no need for an interpreter and proceedings were conducted in English.

17. The Appellant had provided further evidence. This indicated that she had completed the ESOL entry level 1 qualification.

18. Mr Harrison confirmed that he had received the documentation to confirm that the Appellant had passed the course, and indicated that he was satisfied that the Appellant had obtained the required qualification in English language, and as this was the only outstanding reason why her application had been refused, it was conceded that she was entitled to be granted leave to remain and her appeal should be allowed.

19. Mr Harrison stated that it was conceded that the appeal should be allowed under the Immigration Rules, which because the initial application was made in 2011, related to paragraph 284.

20. I indicated that a written decision would be issued.

My Conclusions and Reasons

21. The Claimant's application was initially refused on the basis that she had used deception in obtaining an English language qualification. The FtT found that this was not the case, and although the decision of the FtT was set aside, the conclusion that the Appellant had not used deception was preserved.

22. Therefore, as accepted by Mr Harrison, the only issue that remained outstanding under the Immigration Rules, is whether or not the Appellant had obtained the necessary English language qualification.

23. As it was conceded on behalf of the Secretary of State, that the Claimant had the necessary English language qualification, and it was conceded that her appeal should therefore be allowed, I conclude that it is appropriate to allow the Claimant's appeal under the Immigration Rules. I was not asked to go on and consider Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision. The Claimant's appeal is allowed under the Immigration Rules.

Anonymity

An anonymity direction was made by the First-tier Tribunal. I continue that direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 11th March 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

Although the Claimant's appeal is allowed I make no fee award. The Claimant had not passed the necessary English language qualification when the decision was made to refuse her application.

Signed Date 11th March 2016

Deputy Upper Tribunal Judge M A Hall