UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: HU/18634/2016**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 20 November 2017	**On: 6 December 2017**

Before

Deputy Upper Tribunal Judge Mailer

Between

MR TAFSEER SHAHZAD SHANI
ANONYMITY DIRECTION NOT MADE

Appellant

and

ENTRY CLEARANCE OFFICER: PAKISTAN

Respondent

Representation
For the Appellant: **No attendance**
For the Respondent: **Ms Z Ahmad, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. I shall refer to the parties as "the claimant" and the "ECO" respectively.

2. The claimant's appeal was stood down until 1pm. Attempts were made to contact his representatives, namely UNQ Immigration, as well as the sponsor. However, only voicemail was reached.

3. I am satisfied that the claimant, sponsor and the claimant's representatives have been notified of the hearing. I consider that it is in the interests of justice to proceed with the hearing.

4. The claimant is a national of Pakistan, born on 4 January 1990. He appeals with permission granted on 15 February 2017, against the decision of First-tier Tribunal Judge Amin, promulgated on 27 February 2017, in which he dismissed the claimant's appeal against the decision of the ECO to refuse his human rights claim.

5. There was no appearance by the parties on 15 February 2017, which was the scheduled date of appeal. The claimant had requested to have his appeal determined on the papers only.

6. Judge Amin noted that the claimant appealed against the decision of the respondent against his application made on 7 April 2016 for entry clearance as a partner of a person present and settled in the UK pursuant to Appendix FM of the Immigration Rules.

7. He noted that the claimant met the suitability and relationship requirements of the Rules but failed to meet the financial and English language requirements set out in the refusal letter.

8. The claimant lodged an appeal against that refusal and submitted documents listed in the solicitor's letter dated 26 July 2016.

9. Following the notice of appeal, the entry clearance manager conceded that the claimant had met the financial and relationship requirements. However, the manager was not satisfied that the claimant had submitted information that he had passed a valid English language test and the refusal was therefore upheld.

10. The Judge had regard to the bundles from the parties - [8-9].

11. In relation to the English language test, the appellant enclosed payment receipt verification that he had booked an IELTS test for 28 July 2016 and that he would forward the pass certificate in due course [12]. Just prior to the hearing, he produced an IELTS test certificate showing that he had passed the test [13].

12. The Judge noted that the claimant made his application on 7 April 2016 which was refused on 5 July 2016. At the date of refusal, he did not have the required certificate and therefore failed to meet the English language test requirements under the rules. The evidence of the certificate post-dated the refusal decision. The Judge noted that he was not entitled to have regard to that evidence at the date of hearing [14].

13. He went on to find that as the claimant had not met all the Immigration Rules, '...his appeal fails and is dismissed' [15].

14. Notwithstanding that he dismissed the appeal, the Judge stated in his "Notice of Decision" directly below paragraph [15] that the appeal '…..is allowed under the Immigration Rules'. He also stated that as he has allowed the appeal, and a fee has been paid or is payable, he makes no award as many of the key documents were not submitted with the application form.

15. Following the dismissal of the appeal the claimant applied for permission to appeal against the decision promulgated on 27 February 2017.

16. Designated Judge of the First-tier Tribunal McClure granted the claimant permission to appeal. He noted that the Rules require documentation be submitted with the application. The certificate now produced is dated 17 August 2016 and is therefore a month after the refusal and more than four months after the application. It was for the claimant to ensure that he could meet the requirements of the Rules at the date of application and not at any subsequent review by an entry clearance manager. There is no breach of anyone's rights to expect an applicant to comply with the requirements under the Rules. The Judge was entitled on the basis of the evidence presented to expect the claimant to comply with the Rules.

17. However, he noted that there was a clear inconsistency between the 'notice of decision' and paragraph 15 of the decision. He also noted that this is an appeal on human rights and consideration has to be given as to whether or not there were factors warranting consideration of the appeal outside the Immigration Rules.

18. It was on that basis that leave to appeal was granted.

19. Ms Ahmad accepted that there was a contradiction between the finding at paragraph 15 and the notice of decision. She referred to the Upper Tribunal's decision in Katsonga v SSHD ("slip" rule: First tier's general powers) [2016] UKUT 228 (IAC).

20. The Tribunal noted that the slip rule of the First-tier Tribunal Procedure Rules cannot be used to reverse the effect of a decision. The decision has been given in a particular sense and it may be subject to setting aside under Rule 32 or the appellate process. In all other respects, having made and sent out the decision, the Judge was functus.

21. There has been an obvious error made by the Judge. He clearly had no intention to allow the appeal under the Immigration Rules. He had earlier set out his reasons for his conclusion at [15] of his decision.

22. I accordingly set aside the "notice of decision" and substitute for that decision the following: "The appeal is dismissed under the Immigration Rules."

23. As noted by Judge McClure, this is an appeal on human rights and consideration must be given as to whether there were factors warranting consideration outside the rules. Judge Amin did not consider this at all.

24. In the claimant's grounds of appeal before the First-tier Tribunal, he expressly relied on Article 8, contending that the sponsor had now been married for "an

excessive period of time". They have remained apart from one another throughout this period except for short visits made by the sponsor. Keeping them apart is not contrary to the public good [sic].

25. In the circumstances I set aside Judge Amin's decision and re-make it.

26. The decision to refuse entry clearance is treated by the ECO as a refusal of a human rights claim. In the result the claimant has a right of appeal pursuant to s.82(1)(b) of the 2002 Act. The grounds of appeal found at s.84(2). The appeal under s.82 (Refusal of Human Rights Claim) must be brought on the grounds that the decision is unlawful under s.6 of the Human Rights Act 1998.

27. The claimant's claim is that the ECO's decision breaches his right to respect for his private and family life under Article 8 and is therefore unlawful under s.6 of the Human Rights Act 1998.

28. The burden lies on the claimant to establish that Article 8 (1) is engaged. If that is achieved the burden lies on the ECO to show that the decision appealed against is proportionate in all the circumstances. The standard of proof is a balance of probabilities. I must consider evidence up to the date of hearing.

29. I have had regard to the five stage approach advocated in Razgar [2004] UKHL 27. Although Razgar related to a removal case the guidance is nevertheless appropriate when considering entry clearance.

30. Article 8 is engaged on the basis of family life that has been established between the claimant and sponsor.

31. I find the ECO's decision is in accordance with the law as he/she was entitled to refuse entry clearance. It was believed that the requirements of the relevant Rules were not met and that there would be no breach of Article 8.

32. I move to the fourth question which involves considering the public interest in maintaining effective immigration control. That in turn involves considering whether or not the claimant can satisfy the requirements under the Rules. It is for the claimant to prove that the Immigration Rules can be satisfied on the balance of probabilities.

33. The claimant needed to provide an English language certificate or his unique reference number (URN) from a provider or test approved by UKVI, listed in Appendix 0 of the Rules. The certificate he provided did not show a URN and his test is no longer acceptable.

34. His application was accordingly refused under paragraph EC-P.1.1(d) of Appendix FM of the Rules.

35. I have had regard to Appendix FM-SE which requires in respect of family members that specified evidence be produced. At D(a) it is provided that in deciding an application in relation to which this Appendix states that specified documents must be provided, the ECO considers documents which have been submitted with the

application and will only consider documents submitted after the application where sub paragraph (b) or (e) applies. Those sections did not apply in his case.

36. The English language requirement at E-ECPT.4.1 provides that the appellant must provide specified evidence as set out. He is not exempt from that requirement – E-ECPT.4.2.

37. In Ali and Bibi, R (on the application of) v SSHD [2015] UKSC 68 the Supreme Court held at [45] that the rule does have a legitimate aim (or a series of aims or links to the promotion of integration and within the larger aim of community cohesion) and that the aim is sufficiently important to justify interfering with the fundamental rights to respect for family life of British citizens or persons settled here who wish to be joined here by partners from overseas. Nevertheless, the aim is not as important as the other aims to which the pre-entry qualifications of foreign partners are addressed. The aim of a pre-entry language requirement is not as important as the aim of ensuring that all migrants learn English once they are here.

38. Whilst it may be doubted that requiring a very basic level of spoken English before entry makes a great contribution to the overall aim of promoting integration, it cannot be said that it makes no contribution towards it at all.

39. In Agyarko and Ikuga, R (on the application of) v SSHD [2017] UKSC 11 the Supreme Court noted at [47-48] that the rules and instructions are compatible with Article 8. The Home Secretary's policy is qualified by the scope allowed for leave to remain to be granted outside the rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then "the insurmountable obstacles" test will be met and leave will be granted under the Rules.

40. Similarly if there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances", as defined, it is not apparent why it should be incompatible with Article 8 for leave to be refused. That is not to say that decisions applying the rules and instructions in individual cases will necessarily be compatible with Article 8: that is a question which if a decision is challenged must be determined independently by the Court or Tribunal in the light of the particular circumstances of each case.

41. With that in mind, I move to the fifth Razgar question which concerns proportionality. This involves the balancing exercise. In considering proportionality and whether the interference with his right to respect for family life is justified under Article 8(2), I have regard to the considerations set out in s.117B of the 2002 Act.

42. The maintenance of effective immigration controls is in the public interest. It is also in the public interest that a person seeking to enter the UK can speak English.

43. Although it is contended that the sponsor and the claimant wish to live together in the UK, I follow the guidance in SS (Congo) [2015] EWCA Civ 387 in that compelling circumstances would be required to justify a grant of leave to enter when the immigration rules are not satisfied. At paragraph [51] it is specifically stated that this applies when the evidence rule set out in Appendix FM-SE are not complied with.

44. I have had regard to the guidance in Patel and Others [2012] EWCA Civ 960 at [57] where it was held that it is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the secretary of state's discretion to allow leave to remain outside the rules which may be unrelated to any protected human rights.

45. In my view I must attach significant weight to the public interest in maintaining effective immigration control which means attaching significant weight to the fact that the immigration rules which relate to entry clearance are not satisfied.

46. I do not find that the claimant has demonstrated any compelling circumstances warranting allowing the appeal, notwithstanding that the relevant immigration rules were not satisfied.

47. The Judge noted that the claimant made his application on 7 April 2016. As at the date of refusal, he did not have the required IELTS certificate and therefore failed to meet the English language test requirements. Evidence of the certificate was produced prior to the hearing, post dates the refusal decision. I am not entitled to have regard to that evidence as at the date of hearing.

48. It is open to the claimant to make a further application for entry clearance to provide evidence which satisfies the mandatory requirements under the Rules.

49. On the evidence presented to the Tribunal however I do not find that the respondent's decision disproportionate and therefore there could be no breach of Article 8 if the appeal were dismissed. The respondent's decision was not unlawful under s.6 of the Human Rights Act 1998.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Having set it aside I re-make the decision refusing the appeal under the Immigration Rules as well as on Shuman rights (Article 8) grounds.

Anonymity direction not made.

Signed Date 30 November 2017

Deputy Upper Tribunal Judge C R Mailer