Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08328/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th September 2017	**On 5th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NAZIA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Error of Law hearing - Mr S Whitwell, Home Office Presenting Officer
Resumed hearing - Ms N Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr S Khan, instructed by Aston Bond Law Firm

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.

Error of Law

2. At the hearing on 9th August 2017 I set aside the decision of First-tier Tribunal Judge D A Pears promulgated on 23rd November 2016. This was

because, in determining the appeal, the First-tier Tribunal Judge relied upon two unreported cases. However as accepted by Mr Khan, no application had been made to admit these decisions under Practice Direction 11 in relation to citation of unreported determinations which requires that an unreported determination may not be cited in proceedings before the Tribunal unless it relates to the Appellant or a member of his family or the Tribunal gives permission in accordance with the guidance in paragraphs 11.2 to 11.6 of the Practice Direction. Such permission had not been sought or obtained. In the absence of the grant of permission in relation to those decisions it is clear that the First-tier Tribunal Judge made an error of law such that the decision had to be set aside.

Remaking the decision

3. The resumed hearing took place on 6th September 2017. In advance of that hearing the Appellant's representatives submitted an application under paragraph 11 of the Practice Direction to rely upon the unreported cases of **ECO (Islamabad) v Rashid Mahmood** (Appeal No OA/00985/2013) and **Mary Ann Pinder v Secretary of State for the Home Department** (Appeal No IA/13236/2013). At the hearing before me Ms Willocks-Briscoe objected to the submission of these two cases on the basis that the legislative provisions on which they are founded differ from those under consideration in this case. However I considered that the Appellant had shown that the Tribunal could be materially assisted by the citation of these determinations which appeared to relate to the same or similar provisions in relation to the ability of an Appellant to rely upon an English language certificate approved by the Home Office. In these circumstances I granted the application to rely upon the two unreported cases.

4. The background to this appeal is not in dispute. The Appellant applied for entry clearance as the spouse of a British citizen. She obtained certificates issued by Educational Testing Service (ETS) TOEIC on 2nd January 2014 in relation to English speaking and writing tests and on 3rd January 2014 in relation to listening and reading tests. On 5th February 2015 the Appellant applied for entry clearance as the partner of a British citizen. Her application was refused on 29th April 2015 on the basis that she could not meet the English language requirement in paragraph E-ECP4.1 of Appendix FM of the Immigration Rules because, although ETS was licensed to provide the test at the time the Appellant sat it, ETS was no longer an approved test provider by the time she submitted her application as it had been removed from the register on 1 July 2014.

5. Paragraph E-ECP4.1 of Appendix FM provides as follows;

> **"English language requirement**
>
> E-ECP.4.1. The applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;
(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State;
(c) have an academic qualification which is either a Bachelor's or Master's degree or PhD awarded by an educational establishment in the UK; or, if awarded by an educational establishment outside the UK, is deemed by UK NARIC to meet or exceed the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and UK NARIC has confirmed that the degree was taught or researched in English to level A1 of the Common European Framework of Reference for Languages or above; or
(d) are exempt from the English language requirement under paragraph E-ECP.4.2."

6. ETS was removed as an approved test provider by HC 198 by way of an amendment to Appendix O which sets out a table of approved test providers. Paragraph 1 of HC 198 provides:

> "1. In Appendix O, in the table, delete the row containing "TOEIC" and the row containing "TOEFL iBT Test"."

7. The Implementation section of the Statement of Changes in Immigration Rules states:

> "The changes set out in paragraph 1 of this statement, which remove Educational Testing Service (ETS) as an approved test provider, take effect on 1 July 2014."

8. The key provisions are contained at page 2 of HC 198 which provides transitional provisions as follows;

> "However –
>
> (a) Appendix O as it applied on 30 June 2014 will apply to a person who makes an application for entry clearance before 1 October 2014 where:
> i. the relevant Confirmation of Acceptance for Studies has been assigned by a sponsor which is a UK Recognised Body within the meaning of the Immigration Rules or a body in receipt of public funding as a higher education institution from the Department for Employment and Learning in Northern Ireland, the Higher Education Funding Council for England, the Higher Education Funding Council for Wales, or the Scottish Funding Council; and
> ii. the course is:
> aa. a pre-sessional course as defined in note (ii) to the table in paragraph 245ZW(b) of the Immigration Rules and lasts no longer than three months; or ab. a foundation degree as defined in paragraph 6 of the Immigration Rules; or ac. a foundation course awarded at a minimum of level 3 on the revised National Qualifications Framework, or awarded on a directly equivalent basis in the devolved administrations.

(b) other than in a case falling within (a), Appendix O as it applied on 30 June 2014 will apply to a person who makes an application for entry clearance to enter the UK before 22 July 2014; and

(c) Appendix O as it applied on 30 June 2014 will apply to a person who makes an application for leave to remain in the UK before 1 July 2014."

9. The decision in **ECO (Islamabad) v Rashid Mahmood**, relied on by the Appellant, made a finding based on the interpretation of paragraph 281 of the Immigration Rules which were applicable at that time. Paragraph 281 required an applicant to produce an original English language test certificate from a test provider approved by the Secretary of State. The Appellant in that case produced a certificate from EDEXCEL which was approved at the date on which the Appellant sat the test but, by the time the Appellant made his application for entry clearance, the body was no longer approved. In his decision Upper Tribunal Judge Clive Lane found that it did not make logical sense that an English language certificate would be rendered invalid retrospectively when the provider ceased to appear on the list of approved test providers. He concluded;

> "Such an argument would indicate that, during periods when the test provider appeared on the Secretary of State's list, the Appellant's certificate was valid but that, at any time when the provider did not appear on the list, it became invalid. It would also mean that a valid certificate would be rendered useless if, for whatever reason, the approved provider subsequently ceased trading."

10. He found that the fact that the provider was approved the Secretary of State on the date that the test was passed showed that the quality standard which the provision existed to meet had been met and that *"It makes no sense that a valid certificate might drift in and out of validity depending on the vagaries of the Secretary of State's registration system"*. Upper Tribunal Judge Lane concluded that the Appellant met the requirements of paragraph 281. In the case of **Pinder**, although not required to determine the matter, the President made an obiter comment that he would have been minded to follow the decision in **Mahmood**.

11. I accept Mr Khan's submission that the provisions of paragraph 281 and Appendix FM are virtually identical. I accept that the Appellant's English language certificates were valid for two years and that it would appear that the Appellant could meet the requirement of Appendix FM by showing that she has passed an English language test.

12. However Ms Willocks-Briscoe relied on the wording of HC 198, in particular the transitional provisions at paragraph (b) which provides that the version of Appendix O as it applied on 30th June 2014 would apply to anyone making an application for entry clearance or leave to enter the UK before 22nd July 2014.

13. Therefore the Appellant in this case had a transitional period in which she could have made an application for entry clearance relying on her ETS

certificate. However the Appellant did not make the application for over a year after she sat the test. There is nothing in the decision in **Mahmood** to suggest that there were any transitional provisions applicable to the removal of the test provider which provided the certificate relied on by the Appellant in that case. In that case the Appellant was told after the application for entry clearance that the cancellation of the tester's status had retrospective effect on certificates obtained when the provider was on the register. The decision in **Mahmood** goes to the need for certainty for applicants in submitting English language certificates valid at the time they were obtained.

14. However the situation for the Appellant in **Mahmood** is different from that of the Appellant in the instant appeal. The purpose of the Immigration Rules is to provide clear guidance to an Appellant. The information about the changes and the transitional provisions were in the public domain. By the time she made the application the Appellant had gone significantly beyond the transitional period. By that time she could and should have known that the certificate upon which she relied was no longer recognised by the Secretary of State.

15. Mr Khan submitted that the HC 198 does not specifically expressly state that all previous tests have been invalidated. However in my view it does not need to. HC 198 is sufficiently clear to let applicants know that their certificates would only be recognised during the period covered by the transitional provisions.

16. I accept that the effect of HC 198 is that the English language certificate submitted by the Appellant did not meet the requirements of E-ECP4.1 of Appendix FM at the date of her application.

17. In these circumstances the Appellant has not demonstrated that she can meet the requirements of the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

I remake the decision by dismissing the appeal.

No anonymity direction is made.

Signed Date: 4th October 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 4th October 2017

Deputy Upper Tribunal Judge Grimes