Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/01383/2016
HU/01391/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th March 2018	**On 10th May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

AYSHA [B] (FIRST APPELLANT)
FARJANA [B] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Mawla, Legal Representative
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are respectively mother and daughter. They are citizens of Pakistan. They had applied for entry clearance under Appendix FM to enter and live with their husband/father in the UK. Those applications were originally refused by Notice of Refusal dated 14th December 2015. The second Appellant was at date of application a minor having been born on 13th March 2001. Her Notice of Refusal is dated 14th December 2015.

2. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Housego sitting at Hatton Cross on 5th June 2017. In a decision and reasons promulgated on 6th June 2017 the Appellants' appeals were dismissed.

3. Grounds of Appeal were lodged to the Upper Tribunal. It was noted in those Grounds of Appeal that the Appellants were Bangladeshi nationals who had made their applications as a spouse and child of a person present and settled in the UK and that the applications had been refused under paragraph EC-C.1.1(d) of Appendix FM and on the basis of relationship requirement EC-P.1.1(d) of Appendix FM and also on the basis of the English requirement. The Grounds of Appeal stated that the judge had failed to give cogent reasons for findings on the English test results. It is on that basis alone that Grounds of Appeal are lodged to the Upper Tribunal. Those grounds were lodged on 2nd August 2017.

4. On 23rd December 2017 Judge of the First-tier Tribunal Birrell granted permission to appeal. Judge Birrell noted that the grounds asserted that the judge had erred and that his findings in respect of the English language test certificates were inadequate when he had no evidence in the unreliability of the test certificates before him or that the Appellant had been offered the chance for a free re-test.

5. I am advised that no Rule 24 response has been prepared by the Secretary of State. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their Sponsor Mr Uddin and by their legal representative. The Secretary of State appears by her Home Office Presenting Officer Mr Duffy.

Submissions/Discussion

6. It is accepted by the Secretary of State that the judge has dealt with the position relating to cohabitation and that the only extant issue relates to the taking of the English language test. Mr Mawla relies on the Grounds of Appeal. It is submitted that at paragraph 49 of his decision the judge had erred by comment that it was much harder for the embassies around the world to check up on test centres than it is to check up on centres in the UK. He notes that the Appellant's English certificate was issued by City and Guilds and the certificates were issued from the UK. Mr Mawla acknowledges that embassies cannot go and check up on test centres around the world and that that is the responsibility of the issuing authority. He acknowledges that the Appellant's test certificate issued by City and Guilds as an approved English test provider was valid and accepted for spousal applications. The Entry Clearance Officer had alleged that the English certificate which was issued by City and Guilds confirmed that they identified inconsistencies in testing in Bangladesh in the resulting investigations conducted by the City and Guilds in UK Visa and Immigration Authorities in Dhaka. However it was contended that the Respondent had not enclosed any evidence confirming the veracity of the

allegations made against the Appellant and no evidence from City and Guilds that her certificate had been revoked or that there were any inconsistencies in the test centre.

7. Mr Mawla relies on paragraph FM-SE.32(b) of the Immigration Rules. That paragraph states that:

> *"Where the decision-maker has:*
>
> *(a) reasonable cause to doubt that an English language test in speaking and listening at a minimum of level A1 of the Common Framework of Reference for Languages relied on at any time to meet a requirement for limited leave to enter or remain in Part A or Appendix FM was genuinely obtained; or*
>
> *(b) that the test certificate or results awarded to the Applicant had been withdrawn by the test provider for any reason,*
>
> *The decision may discount the document and the Applicant must provide a new test certificate or result from an approved provider which shows that they meet the requirement, if they are not exempt from it."*

8. Consequently relying on that ground and on the current IDIs Mr Mawla submits that there was a requirement upon the Respondent to ask the Appellant to take a new test. He submits that the error of law is to be found at paragraph 42 of the judge's decision. That paragraph states:

> "Assuming that the decisions do interfere with family life, the first point to consider is the language test. The first Appellant did not meet the provisions of Appendix FM in the provision of the test results as well as the certificate."

9. He submits that there is nothing to suggest that the test result has to be submitted and that the Rules do not reflect this. He then goes on to consider paragraph 43 where the judge states:

> "If she had met those provisions, the ECO did not accept the test certificate having reason to doubt the test certificates issued at that particular centre. There is no objective evidence that this particular certificate was obtained by deception and it is not so alleged. The ECO said there was uncertainty about some test certificates so that this certificate was not accepted at face value, but the first Appellant could not be re-tested at no cost. She made a choice not to do so."

10. Mr Mawla goes on to point out that at paragraphs 45 and 46 the judge has stated:

> "To be offered the opportunity to retake the test without charge I find meets the requirements of the balance between immigration control and fairness. … the application did not meet the Immigration Rules as the test results were not provided but my conclusion is the same even if they had been provided. The decisions met the test of inherent fairness."

11. It is the submission of Mr Mawla that there was no opportunity given to retake the test. He submits that there should have been and thus there is a material error consequently in the decision of the First-tier Tribunal Judge.

12. Mr Duffy is most constructive in his approach towards this matter. He admits that there is an error insofar as the judge has interpreted paragraph FM-SE 32(b) and that the Appellant should have been given the opportunity to retake the test and this appears to have been properly denied and not properly accepted by the judge.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

15. Having heard the submissions of the legal representative in this matter and having given due and proper consideration to paragraph FM-SE 32(b) of the Immigration Rules and having given due and proper consideration to paragraphs 42, 43, 45 and 46 of the First-tier Tribunal Judge's decision I am satisfied that there are material errors of law insofar as firstly there is nothing to say that a test result has to be submitted with the test certificate and secondly there is no evidence upon which the judge can draw his conclusion that the opportunity to retake the test was given and consequently the judge in making his findings at paragraph 46 fell into material error.

16. It does thereafter fall upon the Tribunal to consider what the best and proper approach is. It is the agreed approach of both representatives that the pragmatic stance that I suggest would be the best approach because merely rehearing this matter by way of remittal to the First-tier Tribunal would probably achieve very little. The question is whether or not the first Appellant can or cannot meet the English language test requirement. To that end it is agreed that the correct approach is to remit the matter back to the First-tier Tribunal insofar as I have found a material error of law but to stay any rehearing pending the outcome of the first Appellant being offered a rehearing of her English language test.

17. The Sponsor is in attendance. It is disheartening from this side of the bench to note that the Sponsor does not speak English. His legal representative advises that he will explain the position to him. As the very essence of this appeal appears to rise and fall on the ability of the Appellant's spouse to speak English the fact that in the event that she is successful she is unlikely to communicate in English with the Appellant does not stand well so far as the basis upon which the English language test certificate is made. Further it is not challenged that the finding at paragraph 44 that the second Appellant has any fluency in English is inaccurate. In such circumstances whilst it is obiter to these proceedings I have emphasised to the Sponsor that it would be for the best if it is his intention ultimately to maintain family life in this country for not only him but his family to ensure that they can speak English and therefore integrate into our society. However before that issue can be addressed in any way it will be necessary for the first Appellant to satisfy the requirements of the Rules.

Notice of Decision

The decision of the First-tier Tribunal Judge contains a material error of law and is set aside. The following directions are given:

(1) That it being accepted that the only issue outstanding is whether or not the first Appellant can satisfy the requirements of the English language test certificate in order to satisfy the requirements of Appendix FM that the remittal to the First-tier Tribunal be stayed pending the first Appellant taking a further English language test.

(2) In the event that the Appellant fails that test then it would be open to the Appellant's instructed solicitors to apply for directions for the matter to be relisted before the First-tier Tribunal. Any relisting should effectively be consolidated with any application that is made against a refusal at that stage by the Entry Clearance Officer to grant entry clearance.

(3) That in the event that the first Appellant meets the requirement of the English language test then the Appellant do provide to the immigration authorities a copy of that test certificate and the immigration authorities/Entry Clearance Officer do advise thereafter as to whether or not they are satisfied that the requirements of the Immigration Rules are

met. In the event that they are then there will be no further need to restore the appeal to the First-tier Tribunal.

(4) That in the event that the appeal is at any stage restored to the First-tier Tribunal then it is a requirement that in the event that an interpreter is needed it is the responsibility of the Appellant's legal representatives to notify the Tribunal within seven days of an application to restore.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris