Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06538/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 5 March 2019	**On 27 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

HABIB AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. W. Khan, Fountain Solicitors
For the Respondent: Mr. D. Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Hawden-Beal, promulgated on 31 January 2018, in which he dismissed the Appellant's appeal against the Respondent's decision to allow further leave to remain on human rights grounds.

2. Permission to appeal was granted as follows:

> "The grounds are based on the alleged misunderstanding by the judge in failing to note that the English language certificate had been

> submitted in March 2015 valid to October 2016. At [29] and [30] there were arguably incomplete findings as to the English language certificate and as this is central to the issue arguably the lack of findings amount to an arguable error of law."

3. The Appellant attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Error of Law

4. The Judge states at [29] and [30]:

> "That then leaves the question as to whether the appellant can meet the other eligibility requirement, which is the English language test at level A1 on the Common European Framework of Reference, which has to be obtained from an approved provider specified in Appendix O. The appellant claims he did submit an IELTS certificate with his September 2014 application which the respondent does not dispute but that was an application for further leave to remain as a student and not a spouse in which case it cannot be taken into account. He has to provide a test certificate with the spouse application unless that test certificate has been submitted previously in a successful spouse application which was successful. In other words, if the certificate had been submitted in a successful entry clearance application within 2 years, then the respondent would not need to see it again. But that does not apply in this case because this is the first time in which the appellant has made a spouse application. [29]
>
> The appellant would be required to pass the English-language examination as set out in paragraph E-LTRP 4.1 if he was applying for leave to remain under the 5 year route but according to page 10 of the Appendix FM 1.2 English Language Requirement of April 2017, if the appellant is applying under the 10-year route, he is not obliged to meet the English language requirement and therefore he does not have to provide evidence of his English-language ability." [30]

5. I find that the Judge has made a mistake of fact relating to the English language test certificate. It is dated October 2014, and was submitted with the application made in March 2015. At [29] he states that the IELTS certificate was submitted with a September 2014 application. Given that it is dated October 2014, it cannot have been provided with an application made in September 2014. I find that the Judge has made a mistake at the outset of his consideration of the English language test certificate as he has misunderstood when this certificate was provided.

6. Further, the Judge has failed in these paragraphs to make a finding as to whether or not the Appellant meets the English language requirements. The issue is left hanging, following the mistake of fact made in relation to the IELTS certificate. There are no more findings in [29], the Judge merely sets out the law. The same is the case at [30].

7. The Judge has misunderstood the evidence, and I find that this mistake of fact has led to the erroneous finding that the Appellant had not provided the correct evidence. I accept that the reasons for refusal letter confused

the issue with reference to "previously successful spouse applications". The Appellant made a student application, which was varied in March 2015 to a spouse application. The certificate was provided with this spouse application. No response was received to this application, so he made a fresh spouse application in June 2016. The Appellant never claimed to have made a successful spouse application, but neither had the test certificate provided been used in a previous student application.

8. I find the Judge has erred in failing properly to consider the evidence before him. He made a mistake of fact regarding when the certificate was provided, and then failed to make a clear finding as to whether or not the Appellant had provided evidence which met the English-language requirements. I find that this is an error of law, and that it is material, given that this was the only issue which remained outstanding under the five year partner route. The Respondent refused the application on grounds of suitability, but this was resolved in the Appellant's favour. The Respondent also refused the application on eligibility grounds due to the Appellant's status, but this was also resolved in the Appellant's favour. Therefore the only issue which remained outstanding under the five year partner route was the issue of the English language test. I therefore find that the mistake of fact, and the failure properly to consider the evidence, is a material error of law.

9. I set the decision aside to be remade.

Remaking

10. The Judge found that the Appellant met all of the other requirements of the immigration rules under the five year partner route. There was no cross-appeal by the Respondent in relation to these findings.

11. The reasons for refusal letter states as follows in relation to the English language requirement:

"You have submitted an IELTS test report dated 11 October 2014 which you state was submitted in your previous FLR(FP) application, however this was not submitted and accepted in a previously successful spouse application and is not an English language test certificate in speaking and listening from an English-language test provider specified in Appendix O. Therefore you have not submitted any evidence required to show that you meet the English requirements."

12. At the hearing Mr. Mills accepted that IELTS was an English language test provider specified in Appendix O, both now and in May 2017, when the Respondent's decision was made. The reasons for refusal letter is therefore wrong when it states that IELTS was not an approved provider. Mr. Mills also accepted that at the date of the application the IELTS test certificate dated 11 October 2014 was valid. By the date of the Respondent's decision the certificate was no longer in date, and therefore

was no longer valid, but the rules require that the certificate be valid as at the time of application, and Mr. Mills accepted that the IELTS test certificate dated October 2014 was therefore valid when the application was made in June 2016.

13. I find that the Respondent accepted that the Appellant submitted an IELTS test report dated 11 October 2014. This much is clear from the first sentence of the paragraph. The fact that it was not submitted and accepted in a previous successful spouse application is irrelevant. The Respondent accepted that the Appellant had submitted an IELTS test certificate. The Respondent had the certificate in his possession. Had it been previously submitted in a successful spouse application, he would not need to have seen it. However, the Appellant had never claimed that he had made a previous successful spouse application, so he submitted the certificate as required.

14. The second reason given for refusing the application on this ground is that is not an English-language test certificate from a test provider specified in Appendix O. However, as I have set out above, Mr. Mills accepted that IELTS was an approved provider.

15. I therefore find that the Appellant provided a valid English language test certificate from an approved provider with his application. The reasons given by the Respondent for refusing the application in relation to the English language requirements are without merit. I find that the Appellant met the English-language requirements of the immigration rules. I therefore find that the Appellant has shown that at the time of the application he met the requirements of Appendix FM of the immigration rules.

Article 8

16. I have considered the Appellant's appeal under Article 8 in accordance with the case of Razgar [2004] UKHL 27. The Respondent was satisfied that the Appellant met the relationship requirements of the immigration rules, and that he and his wife were in a genuine and subsisting relationship. I find that the Appellant and his wife have a family life sufficient to engage the operation of Article 8. I find that the decision would interfere with this family life. I find that the Appellant has been in the United Kingdom since October 2009, almost 10 years, and has built up a private life during this time sufficient to engage the operation of Article 8. I find that the decision would interfere with his private life.

17. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair

immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

18. In carrying out the proportionality assessment, I have taken into account all of my findings above. In assessing the public interest I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have found above that the Appellant meets the requirements of Appendix FM of the immigration rules. I therefore find that there will be no compromise to the maintenance of effective immigration control by allowing his appeal.

19. I have found above that the Appellant met the English language requirements (section 117B(2)). The application was not refused with reference to the financial requirements, and I find that the Appellant will be financially independent (section 117B(3)).

20. Sections 117B(4) and 117B(5) are not applicable to the Appellant's family life. It was found in the First-tier Tribunal that the Appellant had "not overstayed his leave by any period not covered by the immigration rules". He did not form a relationship when he was in the United Kingdom without leave. Section 117B(6) is not relevant.

21. Giving particular weight to the fact that the Appellant meets the requirements of the immigration rules, I find that the balance comes down in favour of the Appellant. I find that the Appellant has shown, on the balance of probabilities, that the decision is a breach of his rights, and those of his wife, to a family and private life under Article 8 ECHR.

Decision

22. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.

23. I remake the decision allowing the Appellant's appeal on human rights grounds. The Appellant meets the requirements of Appendix FM.

Signed Date 21 March 2019

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. The First-tier Tribunal found that the Respondent had not discharged the burden of proof showing that the Appellant had used deception, nor had he provided evidence to show that the decision of 11 February 2015 was ever served on the Appellant. I have found that the Respondent should not have refused the application on the basis that the Appellant had not provided a valid English language certificate. In the circumstances I make a fee award for the entire fee paid.

Signed Date 21 March 2019

Deputy Upper Tribunal Judge Chamberlain