



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/26465/2011

THE IMMIGRATION ACTS

Heard at Manchester
On 5th July 2013

Determination Promulgated
On 16th August 2013

Before

Mr C M G Ockelton, Vice President
Upper Tribunal Judge Martin

Between

FATAH NAWSHIRWAN AHMED

Appellant

and

ENTRY CLEARANCE OFFICER, AMMAN

Respondent

Representation:

For the Appellant: No appearance
For the Respondents: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Iraq, appealed to the First-tier Tribunal against the decision of the respondent on 18 August 2011 refusing him Entry Clearance as a spouse. Judge Higgins dismissed the appeal because in his judgment the appellant failed to meet the requirements of the Rules in two respects: he did not produce an

English Test Certificate from a provider approved by the Secretary of State; and he failed to show that on arrival he would be adequately maintained.

2. Grounds of appeal were submitted, challenging the decision on both grounds. Permission was refused by the First-tier Tribunal. Judge Saffer remarked that the challenges to the decision about the English test had no merit, but was more circumspect in relation to the maintenance point. Because the appeal could not succeed, he refused permission. The application was renewed to the Upper Tribunal. In relation to the English test there was reference, as there had been previously, to the "flexibility policy". Further, for the first time we think, it was suggested that the judge should have taken into account the difficulties the appellant might have in taking the test in Iraq. The grounds on maintenance were more lengthy. Judge Freeman granted permission. He made no mention of the appellant's difficulties in relation to the English test but said that he thought it was a suitable case for the resolution of potential conflict of authorities on maintenance.
3. There was no appearance on behalf of the appellant before us. His solicitors indicated that it had not been possible to obtain instructions, although they had previously sought an adjournment and transfer of venue. The notice of hearing had been properly served and there was no adequate explanation of the absence of any representative. The appellant himself is outside the United Kingdom. This appeared to be an appropriate case to proceed in his absence and we did so.
4. The appellant's principal problem is in relation to the English test. The test result submitted with his application did not meet the requirements of the rules because it was not from an approved test provider. Before the First-tier Tribunal there was a letter, adding nothing to the matter, and an IELTS certificate derived from a test on 29 October 2011. The certificate itself is dated 10 November 2011. It shows an overall score of 4.0 including speaking at 6.0 but listening only at 2.0.
5. The judge noted that he was concerned with the position at the date of the decision, 18 August 2011. He said that he could not take into account the IELTS certificate, dated months later, and that if he could take it into account he would have had doubts, from the 2.0 score for listening, whether it demonstrated the necessary competence.
6. It is true, as the grounds point out, that it is (for some purposes) the overall score that counts, but the judge was, or would have been, being asked to derive from this certificate a conclusion about the appellant's ability to obtain such a certificate at the date of the decision. He was right to be very cautious about doing so; and in any event it is difficult to see how the evidence could fill the requirement to have a certificate at the relevant date.
7. There is no perceptible merit in the invocation of the 'flexibility policy'. There is not, and has never been said to be, any document that was in existence and would have enabled the appellant to meet the requirements of the rules if only the respondent had asked for it shortly after the application on 10 June 2011. Nor, indeed, is there

anything in that application that ought to have caused the respondent to make any such request.

8. We do not know on what basis it is said now that the judge ought to have enquired into the difficulty for the appellant in taking the test. No such difficulty appears to have been suggested to the judge, and there is no mention of any difficulty in the appellant's witness statement or even any subsequent evidence of difficulty. The fact is that the appellant did take a test on 29 October 2011, apparently having no difficulty in doing so.
9. The judge was entirely right in his conclusion that the appellant did not meet the requirements of the Rules relating to an English test certificate, and his judgement shows no error of law.
10. Irrespective of any arguments as to maintenance, this appeal cannot therefore succeed, and we dismiss it.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 6 August 2013