Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/10720/2014**

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 13 November 2014	**On 20 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUDASSAR FAROOQ

Respondent

Representation:
For the Appellant: Ms Johnstone (Home Office Presenting Officer)
For the Respondents: Dr Thorndike (Counsel)

DETERMINATION AND REASONS

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge De Haney dated 14 July 2014 in which the respondent's appeal was allowed under Article 8 of the ECHR.

Background

2. The background to this case can be summarised for the purposes of this appeal. The respondent entered the UK as a

spouse in 2011 with leave to remain until 10 February 2014. In order to obtain leave to enter the respondent relied upon an English language test certificate ('certificate') dated 24 April 2010. In January 2014 he made an in time application for further leave to remain on the basis of his marriage. He deliberately did not apply for indefinite leave to remain because he knew that he did not have a current English language test certificate, which he was working towards. He did have and included the older 2010 certificate (however this was only valid for two years). His application was refused for one reason – he did not provide a relevant valid certificate.

3. Judge De Haney heard evidence from the respondent and his wife and found them to be entirely credible [11]. He noted that the respondent met every aspect of the requirements of the Immigration Rules save for the issue of the certificate [12]. The Judge accepted that as at the date of hearing but not at the date of decision the respondent had been able to produce a certificate with a level of proficiency that entitled him to indefinite leave to remain [15]. The Judge directed himself to **Gulshan (Art 8 – new Rules – correct approach)** [2013] UKUT 640 (IAC) [18] and then went on to set out why he regarded this as a sufficiently compelling case to allow the appeal under Article 8 [19].

Procedural history

4. The respondent appealed against this decision on the basis that the Judge failed to provide reasons why his circumstances are compelling or exceptional, and also failed to take into account that the respondent had the option of returning to Pakistan in order to apply for entry clearance, as opposed to permanently.

5. When granting permission on 9 September 2014 Judge J M Lewis observed that whilst the Judge recognised the need to identify compelling circumstances, he failed to do so.

6. The matter now comes before me to decide whether or not the determination contains an error of law.

Error of law

7. Ms Johnstone relied upon the SSHD's grounds of appeal. She submitted that the Judge erred in law in seeking to fill a lucana he believed existed within the Rules [17]. Dr Thorndike accepted that the Judge had erred in law in this respect but submitted that the Judge had nevertheless identified other compelling factors to be found throughout the determination.

8. I accept that the Judge has made reference to a number of factors that may be viewed as compelling. These include the

credibility of the witnesses, the fact that at all material times the respondent had the requisite language skills, even though there was a period when the certificate was no longer valid this was cured by the date of hearing, the impact of a refusal of the decision would have serious consequences upon the respondent and his wife and they received poor advice concerning the need for an updated certificate.

9. However the Judge focussed his decision upon a '*lacuna which should be filled*'. The Judge was plainly unimpressed with the absence of any flexibility within the rules concerning this type of issue and he made his position very clear [17 and 19]. The Judge seems to have regarded this as a particularly compelling factor. Whilst the Judge was entitled to allow the appeal under Article 8 if there are compelling circumstances, in my judgment he was not entitled to predicate his decision on his view that the Rules themselves were unreasonable. The Judge also erred in law in failing to consider the possibility of the respondent applying for entry clearance in order to return to the UK. The Judge seems to have wrongly assumed that the respondent and his wife would have to give up everything in the UK in order to live permanently in Pakistan or Abu Dhabi.

Re-making the decision

10. Both representatives agreed that I should re-make the decision. It was also agreed that the respondent cannot meet the Immigration Rules because his certificate was not available when he made the application.

11. I accept that the respondent's removal will breach his private and family life and that it will have consequences of such gravity to engage Article 8. I bear in mind that the Judge regarded the respondent and his wife as credible. Dr Thorndike asked me to find that the consequences of not allowing the appeal would be drastic. That is because he argued that the parties would not be able to meet the relevant financial requirements under the current rules. They were able to do so under the old rules but the transitional provisions would no longer apply (as they would have done for the extension of leave application). I do not accept that I can make a clear finding on this issue on the material available to me. I have been provided with mostly net figures when gross figures must be used. It is very unclear whether or not the respondent will be able to meet the relevant threshold, although it seems likely that the wife's current income may be just below the relevant threshold. It is however undoubtedly the case that the respondent has been in the UK for a number of years lawfully with his settled wife and to expect him to return to Pakistan and therefore disrupt all that they have built together in order to make an application for entry clearance, when the prospects of

that application being successful are unclear, will be an interference with the family and private life that has been built in the UK such that Article 8 is engaged.

12. I also accept that the interference is in accordance with the law and necessary. The Immigration Rules are an important starting point for where the public interest lies. I must therefore consider whether the interference with the public interest is proportionate. I am prepared to find that the respondent and his wife are financially independent as they have both been working for a number of years and have managed a joint household in the UK on that income.

13. They have also demonstrated compliance with the relevant rules. The fact that the respondent did not have a certificate was an oversight but at all material times he spoke English to a high standard and he has now demonstrated this through two certificates. The relationship has blossomed in the UK whilst the respondent has had leave to remain with the reasonable expectation that this would continue and be extended (as he met the relevant requirements). This is an exceptional case. The respondent at all material times met all the requirements of the Immigration Rules save that he did not provide a certificate with his application to extend his leave. He entirely met the spirit of that requirement because he spoke and understood English to a high standard. He obtained the certificate in time for the hearing before Judge De Haney and this remains valid. The disruption to the credible relationship between the parties that has been established in the UK over a period of years together with the respondent's employment is likely to be significant. I accept that the public interest in securing strict compliance with the rules is important and I have fully taken into account section 117B of the Nationality, immigration and Asylum Act 2002 but in my view the public interest is outweighed by the compelling factors relevant to the respondent's private and family life that I have already referred to.

Decision

14. The decision of the First-tier Tribunal contains an error of law. I set it aside and I re-make the decision by allowing the respondent's appeal.

Signed:

Ms M. Plimmer
Deputy Judge of the Upper Tribunal

Date:

19 November 2014