Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28804/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 8 August 2015	**On 21 August 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THI TUYET NGA LE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Sharma, of Matthew Cohen Associates Ltd, Aberdeen
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against a determination by First-tier Tribunal Judge McGavin dated 23 October 2014, dismissing her appeal against refusal of leave to remain in the UK as a spouse under the Immigration Rules and on human rights grounds.

2. The respondent refused the appellant's application because the English Test Certificate on which she relied was not from a provider on the Home Office approved list.

3. The test certificate is dated and issued on 10 May 2011, when the provider was on the approved list. I find that the relevant date for validity of the certificate is when it is issued, not the date on which an application is made to the respondent or the date of the respondent's decision. Any other date would have the absurd consequence of a certificate moving in and out of validity as the provider went on and off the list. That finding is in line with an unreported decision of Upper Tribunal Judge Clive Lane, *Mahmood* OA/00985/2013, promulgated on 23 January 2014, and with an unreported decision by the President, the Honourable Mr Justice McCloskey, *Pinder* IA/13236/2013, promulgated on 24 July 2014. The President indicated at paragraph 3, *obiter*, that subject to further argument in a future case he would have been minded to follow *Mahmood*. Mr Mullen put forward no argument to the contrary.

4. In the alternative, I would have allowed the appeal on human rights grounds outwith the Immigration Rules on the basis of the principle in *Chikwamba* [2008] Imm AR 700. While I think the appellant has rather exaggerated the difficulties to her and her husband and children if she were to return to Vietnam to apply for entry clearance, it is accepted that there is no reason to think that an entry clearance application from abroad would not succeed; there is nothing adverse in the appellant's immigration history; and there is no good reason in the public interest to insist on such an application being made from abroad. Mr Mullen acknowledged that if the case reached that stage there was no reason why the principle in *Chikwamba* should not apply in favour of the appellant.

5. I raised one point arising from the determination which is not dealt with in the appellant's grounds of appeal and which is also overlooked in the Secretary of State's Rule 24 response. The Judge at paragraph 21 was not prepared to accept that the test certificate dated 10 May 2011 had been submitted with a previous application and accepted as valid at that time. Having entered the UK in 2010 on an EEA family permit, the appellant unsuccessfully sought leave to remain in the UK on the basis of her marriage, returned to Vietnam and was granted a visa as a spouse valid from 10 February 2012. Mr Mullen acknowledged that there was no good reason to think that the certificate of 10 May 2011 was not the one used for that application. This point is therefore no barrier to the determination being reversed.

6. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **allowed under the Immigration Rules**. Alternatively, the appeal would have been allowed on human rights grounds, applying *Chikwamba*.

7. No anonymity order has been requested or made.

Hugh Macleman

Upper Tribunal Judge Macleman
19 August 2015