Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06017/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 13 April 2016	**On 15 April 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ENTRY CLEARANCE OFFICER (ISLAMABAD)

Appellant

and

AMMAD AHMAD

Respondent

Representation:

For the Appellant: Mr T. Wilding, Home Office Presenting Officer
For the Respondent: Ms S.B. Iqbal, Sponsor

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant appealed against the respondent's decision to refuse entry clearance as the spouse of a British citizen under Appendix FM of the immigration rules. The Entry Clearance Officer (ECO) refused the

application on the ground that the English language test certificate produced in support of the application, which was obtained through a company called ETS, was not valid. Since 01 July 2014 ETS was no longer licensed by the Home Office to award test certificates for immigration and nationality purposes. Applications made after 22 July 2014 could no longer rely on an ETS certificate. The appellant's application was made on 19 December 2014 therefore the test certificate was not valid for the purpose of the application.

3. First-tier Tribunal Judge Gribble ("the judge") allowed the appeal on human rights grounds in a decision promulgated on 06 October 2015. She noted that there was no copy of the original test certificate before the tribunal so she was unable to assess whether the appellant took the initial test at a time when ETS was properly licensed [15]. She accepted that he may not have appreciated that ETS subsequently lost its licence. However, it made no material difference. Whether he knew about it or not the ETS certificate was not valid at the date of the application in December 2014 [16]. She accepted that the appellant sat a further test and sent the certificate to the First-tier Tribunal on 16 June 2015. The tribunal forwarded a copy to the respondent in Islamabad on 29 June 2015. Unfortunately, by that time the Entry Clearance Manager (ECM) had reviewed the application on 17 June 2015 and did not have an opportunity to consider the further evidence. The judge reminded herself that she was constrained to consider the evidence as it was at the date of the decision [14]. She was unable to take into account the second test certificate and had to conclude that the appellant did not meet the strict requirements of the immigration rules [17-18].

4. The judge went on to consider whether there were any circumstances that might engage the appellant's right to family life under Article 8 outside the immigration rules. She made proper reference to the Court of Appeal decision in *SSHD v SS (Congo)* [2015] EWCA Civ 387, which recognised that it is possible for cases that fall outside the requirements to engage Article 8 but only if there are compelling circumstances not sufficiently recognised under the rules. She noted that the appellant and his wife were married in 2008 and have a daughter who is a British citizen born in 2012. The judge accepted that the appellant made the application for entry clearance in good faith. As soon as he became aware of the fact that there was a problem with the English language test certificate he sat a test with another provider. It was unfortunate that the ECM was unable to consider the further test certificate at the date when the application was reviewed [20].

5. In light of this factual background the judge went on to assess the case according to the five stage approach outlined in *R v SSHD ex parte Razgar* [2004] 3 WLR 58. She made clear that she had regard to the public interest considerations outlined in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). With reference to section 117B(2) (English language) she took into account the fact that the appellant

passed the required English language test in April 2015. The judge took into account the family circumstances and concluded that it would be in the child's best interests for her to be brought up by both parents in the UK [20]. She made clear that the child's welfare needs did not stand above other factors and could be outweighed by countervailing factors, including the need to maintain firm immigration control [31]. The judge concluded [33]:

> "It seems to be to be disproportionate, in circumstances where, had the Entry Clearance Manager seen the new test, the application may have been granted, to refuse the application and expect the Appellant to make a fresh application. He has waited to join his wife and daughter long enough. Whilst maintaining effective immigration control is a weighty factor, the child's need to be brought up with both parents, added to the fact the Appellant has now passed an English test and meets S117B(2)-(3) outweigh in my view that factor on balance, and for the reasons outlined above, I conclude that the respondent's decision is not proportionate."

6. The respondent seeks to appeal the First-tier Tribunal decision on the following grounds:

   (i) In taking into account the further English language test certificate dated April 2015 the First-tier Tribunal took the role of the primary decision maker. The judge should have "allowed the appeal to the limited extent of remitting it back to the respondent".

   (ii) The First-tier Tribunal erred in taking into account post-decision evidence relating to English language: *DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038 referred.

   (iii) The judge failed to give adequate reasons as to why she considered the facts of the case were so compelling to warrant consideration under Article 8.

Decision and reasons

7. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision did not involve the making of an error on a point of law.

8. In assessing the appeal under the immigration rules the judge made several references to the legal framework, which indicate that she was well aware of the fact that she could only consider specified documents submitted with the application [13] and was constrained to consider the situation as it was at the date of the decision in February 2015 [14]. Indeed, the whole basis upon which she dismissed the appeal in relation to the immigration rules relied solely upon her correct analysis of the law.

9. The respondent seeks to challenge the judge's findings relating to the human rights aspect of the appeal. The judge made proper reference to the relevant law. She made clear that she considered the case according

to the five stage approach outlined in *Razgar* and her references to *SS (Congo)* and *Mostafa (Article 8 in Entry Clearance)* [2015] UKUT 0112 show that she was well aware of the stringent nature of the human rights assessment outside the rules.

10. It is clear that the immigration rules and the public interest considerations which must be taken into account by courts or tribunals when considering proportionality under Article 8(2) both emphasise the public interest in applicants being able to speak a minimum level of English. However, some distinctions can be made between the English language requirements contained in the rules and the more wide ranging assessment made outside the rules.

11. An applicant for leave to remain as the spouse of a British citizen must meet the English language requirement contained in paragraph E-ECP.4.1 of Appendix FM of the immigration rules.

> E-ECP.4.1 The applicant must provide specified evidence that they-
> (a) are a national of a majority speaking country listed in paragraph GEN.1.6;
> (b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State;
> (c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree of PhD in the UK, which was taught in English; or
> (d) are exempt from the English language requirement under paragraph E-ECP.4.2.

12. Appendix FM-SE sets out the evidential requirements for an application for leave to remain as a family member. It is not necessary to set out the whole provision but for the purpose of making this point the following section of paragraph D is relevant.

> (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision maker") will consider documents that have been submitted with the application, and will only consider documents after the application where sub-paragraph (b) or (e) applies.

13. The judge was required to take into account the appellant's ability to speak English as part of her overall proportionality assessment. Section 117B(2) NIAA 2002 states:

> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.

14. The public interest in an applicant being able to speak a minimum level of English underpins both provisions but the way in which the respondent seeks to achieve compliance under the immigration rules is by way of a

strict set of evidential requirements. A person may be able to speak English but if they do not provide the evidence in the specified format with the application then they will not meet the requirements of the immigration rules. In contrast, section 117B(2) does not specify any particular evidence. The provision serves to emphasise to courts and tribunals making decisions in the context of Article 8 of the European Convention the importance of the underlying public interest consideration. Section 117B(2) makes clear that it is in the public interest that a person can speak English because they are likely to be less of a burden on taxpayers and are better able to integrate into society.

15. The respondent's reliance on *DR (Morocco)* does not assist her argument. It is clear from that decision that a judge is entitled to take into account evidence that is relevant to circumstances "appertaining at the time of the decision". A judge is able to consider evidence arising after the date of decision as long as it is relevant to the circumstances at the date of the decision. In this case the appellant acted swiftly to take another English language test as soon as he was informed of the reasons for refusal. The entry clearance application was refused on 23 February 2015. The new test certificate was dated 02 April 2015. It is highly unlikely that the appellant's English language ability was markedly different from the date of decision a mere five weeks earlier.

16. The judge correctly identified the fact that she was unable to take into account the new test certificate for the purpose of her assessment under the immigration rules because of the strict nature of the evidential requirements. For the reasons already given I find that it was open to her to take into account post-decision evidence relating to the appellant's ability to speak English, which was relevant to the public interest question she was required to consider under section 117B(2). The evidence was sufficiently contemporaneous to be relevant to the question of whether, at the date of the decision, the appellant was likely to be a burden on taxpayers and was better able to integrate into society. She concluded that no weighty public interest considerations arose because there was evidence to show that the appellant spoke the required level of English. I find that she was entitled to take that evidence into account and her approach could not be criticised.

17. It is not arguable that the judge failed to give adequate reasons to support her conclusion that the decision was disproportionate in all the circumstances of the case. She made clear that she had considered the stringent nature of the test to be applied when considering Article 8 outside the rules. The best interests of the child are a primary consideration. The judge was entitled to give weight to those considerations. She made clear that they could be outweighed by the cumulative effect of other countervailing factors. Given the importance of the right to family life and the best interests of the child there were, in fact, very few weighty public interest considerations to obviate the positive obligation to respect family life in circumstances where there was

evidence to show that the appellant did, as a matter of fact, speak sufficient English. In other words, the public interest considerations underpinning the evidential requirement to produce an English language certificate were nevertheless satisfied.

18. Given the nature of the shortcoming in the application for leave to remain it was open to the judge to conclude that it would be disproportionate to require the appellant to make a further application simply in order for the further English language certificate to be considered. In doing so she recognised the core right that Article 8 is intended to protect. This point was emphasised by Baroness Hale in *AS (Somalia) v SSHD* [2009] UKHL 32:

> "30. …There is some logic in requiring out of country appeals against the refusal of entry clearance to be decided on the evidence as it was presented to the entry clearance officer on the ground at the time. But the restrictions on the powers of appeal tribunals do not mean that the other public authorities are except from their duty to act compatibly with the convention rights. We have been shown nothing which suggests that they are disabled from taking changes of circumstance into account without requiring a prohibitive fee for a fresh application every time. It is the fee, as much as anything else, which may stand in the way of the system operating compatibly with the convention rights. It remains the duty of all concerned to respect those rights insofar as statute law allows them to do so."

19. The respondent's grounds of appeal amount to little more than general disagreements with the decision and do not disclose any material errors of law. The effect of allowing the appeal on human rights grounds is that the ECO must consider how to proceed in light of the First-tier Tribunal decision. If satisfied with the further English language certificate it will be open to the ECO to exercise discretion and grant entry under the immigration rules rather than granting entry outside the rules but that is a matter for the respondent.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 14 April 2016

Upper Tribunal Judge Canavan