



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/25985/2015  
IA/25982/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22 June 2017**

**Decision & Reasons Promulgated  
On 3 July 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**(1) MRS FATMA SUSAM  
(2) MISS AYSE NUR SUSAM  
(ANONYMITY DIRECTION NOT MADE)**

Respondents/Claimants

**Representation:**

For the Appellant: Mr P Nash, Senior Home Office Presenting Officer  
For the Respondents: Mr Reza Choudhury, Counsel instructed by VE White &  
Co Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge Maxwell, sitting at Hatton Cross on 26 October 2016) allowing

under the Rules and, in the alternative, outside the Rules under Article 8 ECHR, the claimants' appeals against the decision of the Secretary of State made on 7 July 2015 to maintain upon reconsideration her earlier decision made on 21 August 2014 to refuse the first claimant's application for a further period of limited leave as the spouse of a person present and settled here. The second claimant, who is the daughter of the first claimant and their UK sponsor, made a parallel application as the dependant of her mother, and her application was refused in line with that of her mother.

2. The sole issue arising under Rule 284 was whether the first claimant was exempted from providing a certificate or other documentary evidence to show that she had taken and passed an acceptable English Language test so as to qualify for leave to remain in the United Kingdom: did she have a physical or mental condition that would prevent her from meeting the requirement to provide an original English language test certificate in speaking and listening which must meet or exceed level A1 of the CEFR?
3. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimants require anonymity for these proceedings in the Upper Tribunal.

### **The Reasons for the Grant of Permission to Appeal**

4. The Secretary of State applied for permission to appeal to the Upper Tribunal raising two grounds. Ground 1 was that the Judge had materially directed himself in law, and/or had been irrational, and/or was guilty of procedural impropriety, in finding in the first claimant's favour that she came within the exception provided for in paragraph 284(ix)(a)(ii): "*The applicant has a physical or mental condition that would prevent him from meeting the [production of an English language test certificate] requirement*".
5. The Secretary of State pleaded that the Judge's first error was to treat this provision as operating retrospectively, rather than prospectively. The Judge's second alleged error was to take judicial notice of the fact that the side effects of Clomipramine (the drug which had been prescribed to the first claimant for depression) included memory loss and trouble in concentrating, along with feelings of anxiety. The Judge's third alleged error was that his finding that the first claimant's depression was the cause of her not providing an English Language test certificate was inconsistent with his parallel finding that she was more than capable of following the proceedings before him in English. The Judge's fourth alleged error was that he failed to take into account that the first claimant had not previously intimated to the Secretary of State that she would be relying on an argument that she was unfit to take the English language test, and so the Secretary of State had been precluded from advancing a case in rebuttal of the Judge's finding on the side effects of Clomipramine.
6. Ground 2 was that the Judge's findings on Article 8 ECHR outside the Rules

were vitiated by inadequate reasoning and speculation.

7. On 12 May 2017 First-tier Tribunal Judge Ransley granted the SSHD permission to appeal on both grounds. He considered that the Judge had arguably erred in finding that the first claimant qualified for the exemption at the date of the hearing, given that the relevant Immigration Rule had no retrospective application. In addition, arguably his finding of fact was not supported by the evidence which was before him. As to ground 2, it was arguable that the Judge had failed to give the proper and adequate reasons for allowing the appeals under Article 8.

### **The Error of Law Hearing**

8. At the hearing before me to determine whether an error of law was made out, Mr Nash developed the arguments advanced in the permission application. On behalf of the claimants, Mr Choudhury submitted that the error of law challenge was, in essence, no more than expression of disagreement with the findings that were reasonably open to the Judge, having regard to the guidance given by the Upper Tribunal in **Shizad (Sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)**.

### **Discussion**

9. The claimants are nationals of Turkey, who were born on 1 January 1962 and 12 July 1996 respectively. They landed in the United Kingdom on 17 May 2012 having been granted entry clearance as, respectively, the spouse and child dependant of the first claimant's husband. However, as noted by Judge Maxwell, their application for entry clearance had been made as far back as 5 October 2010 and had been initially refused on 13 December 2010. The refusal was the subject of a prolonged appeal process, which led to a significant delay in their eventual admission.
10. The claimants' leave was valid until 26 July 2014, and they applied to extend their leave to remain on 9 July 2014. This was when the second claimant was 3 days short of her 18<sup>th</sup> birthday.
11. Their applications were refused in August 2014 on the sole ground that the first claimant had failed to comply with the requirement to provide an English Language test certificate. The claimants successfully appealed to the First-tier Tribunal. Their appeals were allowed in a decision promulgated on 13 April 2015. The decision is not before me, and so my understanding of its salient contents is derived from Judge Maxwell, who had sight of it. The appeals were allowed on the ground that the decisions had been made otherwise in accordance with the law, as there had been no material consideration of the circumstances of the second claimant, who was a child under the age of 18 at the date of application.
12. As rehearsed by Judge Maxwell at paragraph [13] of his decision, the judge in the earlier appeal addressed the issue of the first claimant's failure to produce an English Language test certificate. He noted that the first

claimant said that she had problems with her memory “*because she was on medication for depression*”. She said that she used to travel back to Turkey to see her doctor every few months until her daughter’s English was good enough to take her to see a doctor here.

13. The judge at the earlier appeal noted that, although the first claimant gave evidence with the assistance of an interpreter, she also answered some questions spontaneously in English before they were translated. Judge Maxwell said that he observed the same type of response from the first claimant when she gave evidence before him. He found that she was clearly following the discourse because she had made several interventions while the second claimant and her spouse were giving their evidence in English.
14. Judge Maxwell held that it was apparent to him that the actual level of the first claimant’s command of English seemed to be adequate to satisfy the very basic requirements of CEFR Level A1. He said it was reasonable to infer that this was also the case when the first claimant appeared before the previous Tribunal. He concluded that, “*there must be some reason as to why she apparently cannot pass her test.*”
15. He noted that there was a letter from her GP in the bundle dated 11 March 2015. The GP said that the first claimant had come to see him on 20 February 2015 and reported that she had been seeing a doctor in Turkey for the past 16 years for depression: “*She reported that she is on Clomipramine 75mg once daily. She reports that she is unable to study and learn in view of her depression.*”
16. Judge Maxwell said at paragraph [18] that he was aware of, and took judicial notice of the fact, that amongst the side effects of Clomipramine, were memory loss and trouble in concentrating, along with feelings of anxiety.
17. At paragraph [19], he considered the first claimant’s background. She was an ethnic Kurd whose spouse had fled Turkey in the year 2000 and come to the UK, leaving her to look after their children. Although her spouse had not been granted asylum, one of her sons had. He had been granted asylum on political grounds as he had been active whilst studying at university in Turkey, and he had had to leave the country to avoid arrest. He was now currently studying at the University of Sheffield. The Turkish authorities used to come to their home and question the first claimant as to the whereabouts of her son. For many years, she was anxious for her family, both in Turkey and in the UK, and she had developed depression for which she continued to be treated.
18. At paragraph [20], the Judge held that the first claimant found it extremely difficult to concentrate on a course leading to the examination she knew she must undertake to gain her A1 certificate. She had the confidence of her course-provider as to her competence to pass the examination “*now*”, but she was not able to do so because the Secretary of State continued to

retain her passport. The issue of her passport had been raised at the previous appeal.

19. At paragraph [21], the Judge said that he was satisfied that the first claimant had done her best to comply with the English Language test requirements of paragraph 284, but her progress had been impeded by her depression which he found to be a mental condition "*capable of preventing her from meeting this requirement.*"
20. At paragraph [22], the Judge directed himself that he had to look at the position at the time of application, rather than as to how the first claimant was presently faring. He concluded, at paragraph [23], that there was sufficient evidence before him to find, on a balance of probabilities, that at the date of decision the first claimant had a mental condition that prevented her from meeting the requirement and providing a certificate, and she was therefore entitled to the benefit of this exception.

#### *Ground 1*

21. I consider that the Judge has given adequate reasons for reaching the conclusion that the first claimant could bring herself within the stated exception, and I find that no error of law is made out.

#### *Alleged Procedural Unfairness*

22. There is no procedural unfairness as alleged, because the Secretary of State was put on notice by the evidence given at the previous appeal hearing, and which was recorded in the subsequent decision of the judge, that the first claimant suffered from depression, which she said inhibited her ability to study and learn. So the Secretary of State knew that it was her case that she had problems with her memory because she was on medication for depression, and she knew that the first claimant had thereby intimated that she had a mental condition which prevented her from sitting for and passing the required English Language test so as to provide the required English Language test certificate.

#### *Alleged Irrationality*

23. There is no irrationality in the Judge on the one hand recognising that the first claimant appeared to display to a level of competence in the English language of at least CEFR Level A1 but, on the other hand, finding that she had a mental condition which would prevent her from actually sitting for and passing the required English language test.
24. The Judge was right to focus on the position as it stood at the date of decision, rather than upon the first claimant's current condition. So the fact that there was evidence of an improvement in her ability to communicate in the English language since the date of decision did not preclude a finding that at the date of application and/or date of decision she had a mental condition which would, and did, prevent her from meeting the requirement to produce an English language test certificate.

The finding was supported by the evidence from her GP contained in the letter dated 11 March 2015, which the Judge cited at paragraph [17] of his decision.

25. The gloss which the Judge adds at paragraph [18] is not strictly necessary. The first claimant attributed her inability to study and learn to her depression. The Judge opines that the cause, or a contributory factor, for this professed inability arises from the side effects of the drug which she has been taking for her depression. The Judge is thus endorsing the evidence given by the first claimant by drawing on his own knowledge. In short, he is explaining why he finds her credible. But even if he is wrong about the side effects of Clomipramine (and no evidence has been brought forward by the Secretary of State to suggest that he is wrong) there has never been any challenge by the Secretary of State to the evidence given in the first appeal as to why the first claimant had thus far failed to provide an English language test certificate: namely, she suffered from depression which made her feel unable to study and learn; and she had problems with her memory because she was on medication for depression.

*Alleged error in treating the exemption as operating retrospectively, not prospectively*

26. The exception is expressed in the present tense, and so it is arguable that the applicant has to continue to suffer from the condition relied on at the date of the hearing. But the contrary proposition is also sustainable, for the reasons which the Judge gave. The Rule envisages the certificate being provided with the application. So if the first claimant had a condition which prevented her from producing a certificate with the application and/or by the date of decision, she fulfilled the requirements of the Rule at the date of decision and there is no justification for depriving her of the benefit of the exception retrospectively. It would be particularly unfair to do so in circumstances where, as the Judge also noted, she could not sit for the test when her condition had improved as the Home Office had retained her passport.

## *Ground 2*

27. Even if I am wrong to find that ground 1 is not made out, I consider that ground 2 is not made out. The Judge has given extensive reasons for finding that the consequences of the refusal decision would be unjustifiably harsh for the first claimant, the second claimant and for the other members of their family. The Secretary of State takes issue with two of the reasons given: one is that the second claimant may face problems in Turkey as she shares the same political views as her older brother, who has been recognised as a political refugee; the other is that the first claimant's depression consequential upon her enforced return to Turkey would "*almost certainly*" prevent her from obtaining the necessary English language test certificate. I consider that it was open to the Judge to find that the second claimant's political views could create difficulties for her in Turkey. I agree that the other reason which is under attack is tendentious.

But it is only one reason amongst many given by the Judge, and overall I consider that he has given adequate and sustainable reasons for finding that the refusal of further limited leave to remain to the claimants is disproportionate.

**Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date 27 June 2017

Judge Monson  
Deputy Upper Tribunal Judge