



IAC-AH-SC-V1

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

Appeal Number: IA/30635/2015

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Centre
On 15th March 2017**

**Decision & Reasons
Promulgated
On 6th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MRS ZOYA RIAZ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hashim (Counsel)
For the Respondent: Miss R Pettersen, (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Frankish promulgated on 19th May 2016, following a hearing at Bennett House, Stoke-on-Trent on 16th May 2016. In the determination, the judge allowed the appeal of the Appellant, to the limited extent of enabling her to obtain a valid English language certificate and to submit it to the

Respondent Secretary of State for her decision. The Respondent Secretary of State has subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Pakistan, born on 4th May 1989, and is female. She is the wife of Azizur Reman, who is present and settled in the UK. She appealed against the decision of the Respondent dated 27th August 2015 refusing her further leave to remain as the spouse of a person settled in the UK.

The Appellant's Claim

3. The Appellant's claim is that she went to a test centre and sat her English language test. She subsequently discovered that the test centre had been engaged in malpractice. She did not submit her test certificate. Instead she applied for limited leave to be given time to submit another test certificate. During this time she did obtain another test certificate from another centre. However, before she could submit this latest test certificate, the test centre was shut down as well. The Respondent in the refusal letter reasoned that the Appellant took her English language test at a test centre which ETS now conceded in an administrative review was one that was engaged in deception. At the hearing before Judge Frankish, the Appellant's representative conceded that the best he could hope for from the appeal was to achieve what was actually applied for, namely, limited leave to afford the Appellant time within which to re-sit her test at an approved centre, and then to submit the test certificate from that centre.

The Judge's Findings

4. The judge applied the strictures in **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229**, which highlighted the tendency to the use of generic evidence which the Secretary of State had relied upon to date in all ETS cases, such that this has been held to be insufficient to discharge the legal burden of proof on the Secretary of State. The judge also, however, had regard to an expert report by Professor French from York University, dated 20th April 2016, which was to the effect that the rate of false positives would be very substantially less than one percent. The judge took the clear view here that "the new report does not justify my departure from applying the guidance in **SM**" (paragraph 10). The judge heard evidence that, as far as the choice of test centres was concerned by the Appellant, "there was nothing more sinister in this than this centre in question being her nearest. She has retaken the test in another centre which was, in turn, closed down in similar circumstances" (paragraph 10). In the circumstances the judge took the view that the case that the Appellant had cheated or needed to cheat was not made out. He observed that all that the Appellant had done now was to apply for limited leave to enable her to retake the test at a yet third centre, this time one to which the Respondent does not take exception. Under Appendix FM, the

Appellant was entitled to limited further leave pursuant to S-LTR.1.1 to the extent of having sufficient time to demonstrate the one missing ingredient from a prospective further leave application, namely, the production of a TOEIC certificate (see paragraph 10).

5. The appeal was allowed.

Grounds of Application

6. The grounds of application state that the judge had misconstrued the law. The witness statements, the spreadsheet and the professor of French report provided necessary evidence to demonstrate on the balance of probabilities that the Appellant did employ deception, and the judge failed to heed this. The reliance upon paragraph S-LTR.1.1 of Appendix FM is misconceived because that provision is limited to circumstances in which an application is to be refused.
7. On 27th September 2016, permission to appeal was granted on the basis that the judge may have allowed the appeal on the basis of Article 8, outside of the Immigration Rules, to afford the Appellant opportunity to obtain a test certificate. If that was the case then the judge should have demonstrated a proper balancing exercise required along with the **Razgar** lines.

The Hearing

8. At the hearing before me on 15th March 2017, Miss Pettersen, relied upon the grounds of application. She submitted that the permission to allow the appeal was on a very narrow basis and she would rely upon the grounds of application. If the appeal had been allowed to the limited extent of allowing the Appellant to obtain and submit a valid English language certificate then the decision was not understood because the Appellant had made an application for further leave to remain as a spouse and submitted it on the appropriate FLR(M) form. The Tribunal could only allow the appeal if it was satisfied that the decision was unlawful under Section 6 of the Human Rights Act, as being incompatible with the Appellant's rights under Article 8 ECHR. This was not shown by the Tribunal.
9. For his part, Mr Hashim submitted that the position here was that the Appellant sat the first test, but had no certificate given to her, and the college was intervened by the Secretary of State, and was shut down. The second test that the Appellant sat, did lead to her being granted a certificate by the college, but then the college was denied its licence, but the important thing to recognise was that when the application was made by the Appellant the licence was validly in place for the college. The application was for further leave to remain. However, the wrong date of 28th January 2014 was inserted, whereas the application was dated 29th January 2014, and in this application the Appellant stated that, "I applied

for extension as I have been unable to pass, and so apply for extension ...". If there was an error, it was not a material error of law.

10. In reply, Miss Pettersen submitted that paragraph 13 of the refusal letter does confirm that the test scores taken on 5th February 2014 had been cancelled, and Mr Hashim interrupted to say that no further tests were being issued after this date.
11. Following the Hearing, at the end of the day, I drafted my determination.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
13. First, the grounds of application state that, according to paragraph 10 of the refusal letter, "your scores from the test taken on 5th February 2014 had been cancelled" and this can only mean that the Appellant did supply a fraudulently obtained English language certificate to the Home Office. This is, I find, incorrect. The correct position is that stated at paragraph 13 of the refusal letter which was that, "because the validity of your test results could not be authenticated, your scores from the test taken on 5th February 2014 had been cancelled. You are specifically considered a person who has sought leave to remain in the United Kingdom by deception ...". The Appellant then undertook another test at another test centre, and having passed that, and also having been issued with a test certificate, she submitted this test certificate, which was dated May 2014. If, it is the case, that at the time of the submission of the test certificate, the second test centre was still with a valid licence, then it would have been a valid test certificate. At the very least, there is absolutely no basis for suggesting that the Appellant had submitted a fraudulent application or that she had cheated.
14. Second, however, it does remain the case that that second college also had its licence withdrawn, such that the tests were then nullified. The Appellant has applied then for limited leave to enable her to retake the test at a third test centre.
15. Third, in these circumstances, it was wrong for the judge to have allowed the appeal by reference to paragraph S-LTR.1.1 of Appendix FM, because that provision is inapplicable except in circumstances where an application is to be refused. If the judge did allow the appeal on Article 8 grounds, then this is plainly not sufficiently reasoned and there is no balancing exercise carried out along the lines of **Razgar**.
16. That being so, I now proceed to remake the decision (see Section 12(2)(ii) of TCEA 2007).
17. Under Practice Statement 7.2(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be

remade may be such, that having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal. I so conclude here. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Frankish with specific regard to these balancing factors under Article 8, for a decision to be made in that regard.

Notice of Decision

18. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge Frankish under Practice Statement 7.2(b).
19. No anonymity order is made.
20. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

6th July 2017