**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/05214/2017**

**THE IMMIGRATION ACTS**

| **Heard at: Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On: 26 February 2019** | **On: 13 March 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**MRS AROBI ABBASI SHWARGO**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation**

For the Appellant: Ms N Ostadsaffar, counsel, instructed by Legend Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Bangladesh, born on 24 November 1994. She appeals with permission against the decision of the First-tier Tribunal Judge, promulgated on 14 November 2018, dismissing her appeal against the respondent's refusal of her application for leave to remain as the spouse of a settled partner, Saikiran Pudhota. Her husband is a British citizen

2. The First-tier Tribunal Judge noted that the respondent considered the appellant's application under the five year partner route. It was accepted that she met the suitability requirements of S-LTR. However, the respondent noted that she had not provided evidence of passing the English language speaking and listening test at Level A1 of the Common European Framework.

3. When considering the application under the ten year partner route, the respondent contended that there were no insurmountable obstacles to be faced by the appellant or her partner in continuing their family life together outside the UK or Bangladesh.

4. The Judge found with regard to the five year route, that the appellant would not have been in a position to meet the requirements as she had not passed the relevant English language test and further, having been the subject of a curtailment of leave, had been unlawfully here since 26 April 2016 [20].

5. He noted at [21] that the respondent, for reasons best known to her, had not taken issue with the fact that at the time the application was considered, the appellant was not here lawfully.

6. The appellant did not deny that she did not have the requisite English language qualification but argued that this was because the respondent had her passport, without which she was unable to take the English language test. The Judge stated that whilst that is a factor, he would have to take that into account in assessing proportionality when assessing her claim outside the Immigration Rules. However, he found as a matter of fact that at the time she made her application she did not have the relevant English language qualification. As a result the respondent was correct in refusing her application under that route [22].

7. He found that the appellant has not demonstrated that there are insurmountable obstacles to her relocating to Bangladesh because her family did not accept her marriage. That was a last minute excuse [26].

8. With regard to her claim that her husband does not speak the language, he saw no reason why her husband could learn the language [25]. In the two statements deposed by her husband there was no reference to the assertion regarding his inability to speak the language, nor with regard to her family not accepting the marriage.

9. With regard to her claim outside the Rules, the circumstances would have to be exceptional, resulting in unjustifiably harsh consequences for her or a member of her family.

10. He recognised that both would wish to live together in the UK. Her husband is settled and has a job here. The evidence did '…...not suggest that for them both to either live together in Bangladesh, or for the appellant alone to return to apply for an entry clearance to come, would result in unjustifiably harsh consequences' [29]. The appellant's exclusion was accordingly justifiable [30].

11. In granting permission to appeal, First-tier Tribunal Judge Cruthers found it to be arguable that the Judge erred in his proportionality assessment generally, and in particular by not sufficiently factoring in the claimed circumstance that the respondent's retention of the appellant's passport may have rendered it impossible for her to take a further English language test. Further, he may not have factored in that the appellant apparently having obtained a Bachelor's degree, could satisfy the relevant English language requirement.

12. Ms Ostadsaffar, who did not represent the appellant before the First-tier Tribunal, referred to the grounds submitted on behalf of the appellant.

13. She noted that the appellant stated in her witness statement that she has completed her Bachelor of Arts with Honours in Business Studies from Cardiff Metropolitan University and claimed to have qualified in respect of the English language requirement.

14. She referred to the decision of Agyarko R (on the application of) v SSHD [2017] UKSC 11. Lord Reed, with whom the other Justices agreed, stated at [48] that the Rules and Instructions are compatible with Article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with Article 8: that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

15. Lord Reed went on to state at [50] that domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions and whether leave to remain should therefore be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant "[formed] their relationship with their partner at a time when they had no immigration status, or this was precarious". They are instructed:

> "Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK."

16. Lord Reed found that Instruction to be consistent with the case law of the European Court. As the Instruction makes clear, "precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.

17. Lord Reed went on to state at [51] that:

> Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department.

18. Ms Ostadsaffer submitted that the First-tier Judge failed to consider the fact that the appellant had produced evidence satisfying the English language requirement by obtaining a Bachelors degree. There was no assessment of that at all.

19. The appellant contended that she met all the requirements under the five year route except for the English language requirement. At the time of the application, she stated that she requested the Home Office to return her passport as she was unable to take the English language test without the passport. The passport had been placed before the Home Office during the initial period of the application itself.

20. There was no response from the Home Office; after that a reminder was again sent on 1 February 2017 reminding the Home Office of that need but there was no response.

21. In accordance with Home Office guidelines, the Home Office is required to return the passport for the purpose of undertaking the English language test. The passport was given to the Home Office at the date of the curtailment of the visa during the interview on 8 December 2016. She had commenced a degree in 2014 to 2015.

22. At [22] the Judge found that whilst he was aware that the appellant contended that the reason she did not have the requisite English language qualification was because the secretary of state had her passport was a factor to be taken into account when assessing proportionality, as a matter of fact, at the time she made her application she did not have the English language qualification.

23. Ms Ostadsaffer submitted that in the circumstances, the Judge did not properly consider the reasonableness of requiring entry clearance in line with authorities such as Chikwamba, Hyatt (Pakistan) and Chen. Accordingly the Article 8 proportionality assessment was not properly reasoned.

24. In reply, Ms Isherwood submitted that there has been no material error of law. The guidance relied on is in respect of indefinite leave to remain cases.

25. At the date of her application, she would have had full knowledge that she had to show that the Rules were met. However, she did not have the passport. That had been sent in when her leave was curtailed.

**Assessment**

26. The appellant contended that she met all the other criteria under the five year route except for the English language requirement. The refusal itself was based upon her not meeting the English language test requirement in speaking and listening.

27. However, she was unable to take the English language test as her passport had been taken and without it she was unable to take the test.

28. The student transcript placed before the First-tier Tribunal from the Cardiff Metropolitan University, indicates that the appellant obtained a Bachelor of Arts with Honours in Business Studies and that the award year was "15/16". She received the BA with Honours in Business Studies on 24 May 2017.

29. There are letters in the appellant's bundle from her solicitors requesting the passport. On 1 February 2017 her solicitors referred to an earlier letter dated 16 December 2016 requesting the passport of the appellant in order for her to attend the English language examination. They undertook to return the original passport after the English language test.

30. In the reply to the solicitors' letter dated 1 September 2017, the Home Office stated that her application was refused on 9 March 2017 at which time their documents were retained under s.17 of the Asylum and Immigration (Treatment of Claimants Etc.) Act 2004. They were therefore unable to return her documents as requested.

31. It was evident from the appellant's Cardiff Metropolitan University student transcript, that the language of instruction was English. The language of assessment for her programme of study in BA Hons Business Studies was English.

32. There is reference to the various modules that she was enrolled for, including the level. It is recorded that she produced a dissertation at London School of Commerce. She received a credit for that, and a passing grade.

33. At her appeal before the First-tier Tribunal, the appellant produced a witness statement which she made in English and which she confirmed was true and correct. She gave her evidence in English. She was cross-examined in English.

34. The Judge noted from his knowledge of hearing cases from appellants of Bangladeshi origin, that English is quite widely spoken. He concluded at [27] that the appellant has not demonstrated that there are insurmountable obstacles to her relocating to Bangladesh with her husband.

35. With regard to her claim outside the Rules, he considered that the evidence did not suggest that for both of them to live together in Bangladesh or for the appellant alone to return to apply for an entry clearance to come would result in unjustifiably harsh consequences [29].

36. However, what he did not consider was whether in the circumstances there might be no public interest in her removal if she were certain to be granted leave to enter. The only basis upon which her application was refused was because she did not undertake and fulfil the English language test requirement under the Rule. However, the respondent had not been prepared to release the passport to her at the time.

37. It was nonetheless evident that the appellant was able to speak English at a high level, having obtained a degree where the course had been taught in English over a period of two years and where her various assignments and examinations had all been taken in English.

38. In the event the Judge did not undertake a proper proportionality assessment. Where the only issue related to her fulfilment of the English language requirement, he was bound to consider whether she was certain to be granted leave to enter.

39. The evidence before the First-tier Tribunal was that she had in fact obtained a Bachelors degree from Cardiff Metropolitan University with honours in Business Studies which may have satisfied the requirement.

40. In any event, on the evidence presented it was certain that she would be granted leave to enter where the only outstanding requirement was the English language requirement.

41. As at the date of the decision as well as at the date of hearing, the Judge found that the couple were involved in a relationship of marriage. Both of them would wish to live together. Her husband was settled in a job here.

42. There were no other factors militating against her being granted leave to enter from abroad. The Judge was obliged to consider therefore whether, in these circumstances, there was any public interest in her removal.

43. As she was bound to succeed in an application made from Bangladesh for leave to enter, there was no public interest in her removal.

44. I find that the decision of the First-tier Tribunal accordingly involved the making of an error on a point of law. I accordingly set the decision aside and re-make it.

45. For the reasons already given, I find that if required to make an application from Bangladesh for entry clearance to join her husband in the UK, the appellant would be certain to be granted leave to enter as the only issue which prevented a successful application was her failure to produce evidence of passing the necessary English language speaking and listening test at Level A1 of the Common European Framework. She had in fact obtained a Bachelors degree from Cardiff Metropolitan University with honours in Business Studies.

46. It has not been contended that there were any current issues militating against a grant of entry clearance.

47. In the circumstances I find that there is no public interest in her removal.

48. The contemplated decision is accordingly a disproportionate interference with her right to respect for her family life under the Human Rights Convention and is accordingly unlawful under s.6 of the Human Rights Act 1998.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law and it is set aside.

Having re-made the decision, I allow the appellant's appeal.

Anonymity direction not made.

Signed Date 8 March 2019

Deputy Upper Tribunal Judge Mailer