



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

Appeal Number: OA/03358/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court

**Determination
Promulgated**

On 9 June 2014

On 17 June 2014

Before

**UPPER TRIBUNAL JUDGE COKER
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY**

Between

ENTRY CLEARANCE OFFICER (ECO), ISLAMABAD

Appellant

and

AMJAD MAHMOOD

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr N Khan, BRM Legal

DETERMINATION AND REASONS

1. The Entry Clearance Officer appeals against the determination of First-tier Tribunal Judge Graham that was promulgated on 28 March 2014. Judge Graham allowed Mr Mahmood's appeal against the immigration decision of 19 December 2012 refusing entry clearance to him to join his wife who is present and settled in the UK.
2. As the application for entry clearance was made on 4 July 2012, the immigration rules that apply to this appeal remain those in force on 8 July 2012 (as per paragraphs A277 and A280(c) of the immigration rules).

3. Judge Graham cited the relevant provisions of paragraph 281 in her determination, identifying that the reasons for refusing entry clearance were limited to: (i) whether Mr Mahmood's spouse was present and settled in the UK and (ii) whether the English language requirements were met and (iii) whether the marriage was subsisting and whether the parties to the marriage intended to live together permanently.
4. The Presenting Officer who represented the ECO at the hearing conceded that the first issue was resolved in Mr Mahmood's favour as his wife's passport showed she had been granted indefinite leave to remain in the UK. Regarding the third issue, Judge Graham found that the relationship between Mr Mahmood and his wife was subsisting and that the couple intended to live together permanently as husband and wife. Judge Graham gave detailed and cogent reasons for making that finding and it is unchallenged on appeal to the Upper Tribunal.
5. It is the second issue that is the focus of the ECO's appeal to the Upper Tribunal. Judge Graham recorded that there was a dispute as to whether Mr Mahmood could rely on an English test certificate from EMD International English Language Assessment dated 20 December 2010.
6. For convenience, we set out the immigration rules that we have to consider in light of the disputed issue in the annex to this determination.
7. Before hearing from Mr Mills and Mr Khan, we thought it appropriate to give our views on some of the issues arising in this appeal.
8. At the hearing in the First-tier Tribunal, the Presenting Officer argued that at the date of decision EMD was not on the approved list of English test providers. Judge Graham recorded this submission and also noted that the Presenting Officer was unable to say whether or not EMD had been on the approved list when the test was taken and the certificate issued. The Presenting Officer conceded that had EMD been an approved test provider at the date of application then transitional arrangements would have applied and entry clearance would have been granted.
9. Judge Graham took into consideration what she was told by the presenting officer, that it was impossible to obtain a copy of the approved list as at the date of application. She found this undermined the reasons for refusal insofar as the wrong law had been applied to Mr Mahmood. In addition, Judge Graham took into consideration the fact that in a previous application for entry clearance as a spouse there had been no dispute as to whether Mr Mahmood met the English language requirements of the immigration rules even though the same rules were in force and the refusal was appealed.
10. The grounds of appeal to the Upper Tribunal argue that Judge Graham erred in law in a number of ways. First, that she reversed the burden of proof in that she required the Secretary of State (sic) to provide evidence that Mr Mahmood did not satisfy the immigration rules. Of course, this was an appeal against the ECO and not the Secretary of State and we presume that the reference to the Secretary of State in the grounds of appeal is merely an administrative error.

11. In any event, this argument misreads the determination. Judge Graham merely points out that the Presenting Officer could not provide the law as it was at the date of application and therefore could not show that EMD was not on the approved list of English test providers. This did not reverse the burden of proof. It simply identified that the Presenting Officer could not assist and thought that the law as it was at the date of application was not traceable.
12. The second ground of appeal is of more substance. It argues that the relevant date is the date of decision and that it was for Mr Mahmood to show that at that date he met the English language requirement by producing a certificate from an approved test provider. This ground also alleges that the list of approved test providers as at the date of application was available and a copy was provided.
13. We mention that the grounds of appeal describe the date of application as being 12 July 2012 whereas it was in fact 4 July 2012. Nothing can turn on this point because the immigration rules were not amended insofar as they applied to Mr Mahmood between these dates. As we have indicated, because his application was made on 4 July 2012, it was to be decided in accordance with the immigration rules in force on 8 July 2012. The transitional provisions also mean that neither the ECO nor Judge Graham nor the Upper Tribunal can have regard to any of the changes made to the immigration rules after that date.
14. In this regard we begin our consideration by noting that the immigration rules did not contain a list of those English language tests that had been assessed as meeting the Home Office requirements. Such a list was first introduced into the immigration rules on 20 July 2012 when the Statement of Changes to Immigration Rules (Cm 8423) inserted appendix O.
15. Prior to those changes, the list of approved testers was contained in a policy document. We do not have to rehearse the status of such a policy document; it was not possible for the Secretary of State to bring into effect immigration rules via policy (see R (Alvi and others) v SSHD [2012] UKSC 33, [2012] Imm AR 998). But this general point is not of relevance to the appeal before us.
16. The issue for us is whether Judge Graham erred on a point of law by accepting that it was not possible to obtain a list of approved testers. The ECO has now provided various lists of approved test providers. The only relevant list is the one that existed prior to 9 July 2012 and which was in place on 8 July 2012. As we have indicated, it is in the form of a policy document. The other lists all refer to amendments to the immigration rules that cannot apply in this appeal because of the transitional provisions.
17. We note that EMD (English Management Direct) is listed in the policy document as an approved tester. The entry is as follows:

Test	Awarded by	Level	Grade required	Countries where test is available	Contact details
EMD International	English Management	C1	Pass	Applicants should contact test provider	Contact Name: Stuart Matthew Hanson

English Language Assessment	Direct			for details	Position: Lead Consultant English Management Direct (EMD UK Ltd) The Gatehouse Mansion Gate Leeds LS7 4RF Tel: +44 (0) 845 5332 786 Mobile: +44 (0) 113 262 6835 Email: info@emduk.com Website: www.emduk.com
		B2	Pass	Applicants should contact test provider for details	
		C1	Pass	UK, Bangladesh, Brazil, China, Ghana, Hong Kong, India, Israel, Malaysia, Nepal, Nigeria, Pakistan, Philippines, South Africa, Sri Lanka, Thailand, United Arab Emirates, Zimbabwe, Kenya, Ethiopia, Albania	

18. There is no explanation as to why the policy document was not provided to Judge Graham. Nor is there any explanation why the Presenting Officer conceded that such a list was not available. In such circumstances we are of the view that Judge Graham was entitled to find that the wrong law had been applied at the date of decision. The fact that the ECO now seeks to withdraw a concession is immaterial to the issue before us as the matter has been the subject of adjudication and we can only interfere if there is legal error.
19. Even if we are wrong, it follows from all we have discussed and considered that at the date of decision the ECO had to have regard to the immigration rules as they were at 8 July 2012. At that date, EMD was an approved tester, EMD being listed in the Secretary of State's policy document. As such, any legal error would be immaterial to the outcome.
20. Mr Mills accepted that policy cannot be used as a requirement. He continued to argue that the relevant date should be the date of decision but acknowledged the transitional provisions we identified. Mr Khan reverted to his skeleton argument, which we noted was in similar terms to what we had discussed.
21. In light of our discussion, we are satisfied that the grounds of appeal are not made out and the ECO's appeal must fail. In so doing we uphold Judge Graham's decision that the refusal of entry clearance was not in accordance with the immigration rules.

Decision

The determination of Judge Graham does not contain an error on a point of law and is upheld.

Signed

Date

Deputy Judge of the Upper Tribunal

ANNEX: APPLICABLE IMMIGRATION RULES

A277 from 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280.

....

A280 The following provisions of Part 8 apply in the manner and circumstances specified:

(a)

(b)

(c) The following provisions of Part 8 continue to apply to applications made on or after 9 July 2012, and are not subject to any additional requirement listed in (b) above;

(i) By persons who have made an application before 9 July 2012 under Part 8 which was not decided as at 9 July 2012; and

(ii)

281-289

.....

281. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse or civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:

(i)

(ii) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly show the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:

....