Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: OA/04285/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 March 2014	**On 2 May 2014**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

SAMSUNNAHAR KERON

(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Mr Hasan

For the Respondent: Mr Tarlow

DETERMINATION AND REASONS

1. The Appellant is a citizen of Bangladesh born in 1984. She appealed against a decision of the Respondent made on 23 December 2012 to refuse her entry clearance as the spouse of Moatahar Hossein.

2. The Appellant stated that she was exempt from the English language requirement as she is joining her spouse who is serving in the Armed Forces. However, the Respondent's position was that such applied to Sponsors of foreign or Commonwealth citizens. As her spouse is a British citizen the application fell to be considered under paragraph EC-P1.1 of Appendix FM of the Rules. She was not exempt from the English language requirement for any of the reasons stated in ECP4.2. The Respondent also considered the Appellant's rights under Article 8 of ECHR but considered that refusal was justified and proportionate.

3. She appealed stating that she met the requirements of the Rules; she relied on policy guidance which stated that the language requirement does not apply to her as the spouse of a member of the Armed Forces applying under Part 7 of the Rules. Further she is exempt from the requirement as there are exceptional circumstances which would prevent her from being able to meet the requirement prior to entry.

4. Following a hearing at Taylor House on 10 January 2014 Judge of the First-tier Tribunal Suchak allowed the appeal under the Rules.

5. He noted the history, which is not in dispute. The Sponsor joined the army in December 2007. At that time he was a Bangladeshi citizen. He is now a dual Bangladeshi and British citizen. He became a British citizen in 2009/2010.

6. In his conclusions the judge stated (at [16]) *'It seems to me that the Respondent ignored the fact that the Sponsor is a dual national and went on to consider the Appellant's application under Appendix FM'.*

7. And at [19]

'I have considered the Guidance in SET 17 which provides the language requirement will not apply

to Sponsors of members of Armed Forces applying under Part 7 of the Rules specifically where the Sponsor falls into one of the groups specified in SET 17.9.1. The Appellant is a serving foreign or Commonwealth national who has completed five years service in the army. He is also a British citizen but remains a Bangladeshi national and there is no reason why he cannot be considered to be a Commonwealth national who is able to benefit from the exemption of the English language requirement'.

He also noted that '*the Appellant has now provided evidence to show that she does meet the English language requirement*'. He allowed the appeal under paragraph 276S.

8. The Respondent sought permission to appeal which was granted by a judge on 31 January 2014.

9. At the error of law hearing Mr Tarlow submitted that the Sponsor on joining the army as a Bangladeshi citizen came within the provisions of s8(4)(a) of the Immigration Act 1971 a consequence of which was that his spouse did not need to satisfy the English language requirement and could succeed under paragraph 276S. However, on becoming a British citizen s8(4)(a) no longer applied. His spouse was not exempt under Appendix FM.

10. Mr Hasan submitted that there was no error. As a dual national there was no reason why he could not take advantage of s8(4)(a). In any event it was clear that she had now satisfied the requirement. Although post decision that evidence was admissible.

11. Paragraph 276S under which the appeal was allowed reads:

'A person seeking leave to enter the UK as the spouse … of a person present and settled in the UK or being admitted on the same occasion for settlement in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4) (a) of the Immigration Act 1971 and has at least 5 years' continuous service may be granted indefinite leave to enter provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival'.

12. Section 8(4) of the 1971 Act reads:

'The provisions of this Act relating to those who are not British citizens, other than the provisions relating to deportation, shall also not apply to any person so long as either -

(a) he is subject, as a member of the home forces, to service law …'

13. I do not consider it necessary to construe section 8 (4) because the Tribunal referred to guidance SET 17.9.1. It was not suggested that the guidance were not in force at the time. It states:

'The language requirement will not apply to the Sponsors and partners of members of the Armed Forces applying under Part 7 of the Immigration Rules specifically where the Sponsor falls into one of the following groups:

is a member of the Armed Forces exempt from immigration control under section 8(4) of the Immigration Act 1971 or is a Gurkha granted indefinite leave on discharge from the British Army or is a foreign or Commonwealth national given indefinite leave on discharge from HM Forces or is a serving foreign or Commonwealth national who has completed 5 years' service.'

14. The guidance explains the purpose of the rule and the context in which it is intended to operate.

It appears that the guidance may be more generous than the rule in that it does not only refer to those exempt under s 8 (4) but specifically includes *'a serving …Commonwealth national who has completed 5 years' service.'* It is not disputed that the Sponsor is a serving soldier who has completed 5 years. He is a Commonwealth national as well as a British national. A British national is also a Commonwealth national. I conclude that the First tier judge was entitled to find '*there is no reason why he cannot be considered to be a Commonwealth national who is able to benefit from the exemption to the English language requirement.'* [19]

15. If the judge erred it was in not allowing the appeal to the extent that it was not in accordance with the law as the policy had not been applied. However, I do not find such to be a material error. The terms of the policy are clear. The only outcome could be that the matter is allowed. I note that in any event the Appellant has subsequently passed the English language test.

16. I conclude that the First-tier Tribunal's decision does not show material error and that decision allowing the appeal stands.

Decision

The decision of the First-tier Tribunal does not contain a material error of law and its decision allowing the appeal under the Immigration Rules stands.

Signed Date

Upper Tribunal Judge Conway