



IAC-AH-DP-V1

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

Appeal Number: OA/02230/2015

THE IMMIGRATION ACTS

Heard at Bradford

On 21st March 2016

**Decision & Reasons
Promulgated
On 13th April 2016**

Before

UPPER TRIBUNAL DEPUTY JUDGE ROBERTS

Between

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ON BEHALF OF THE ENTRY CLEARANCE OFFICER ISLAMABAD)**

Appellant

and

**FARHAN RASHEED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Mrs Anisa Yasmein (the Sponsor)

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department on behalf of the Entry Clearance Officer Islamabad (the ECO) against the decision of a First-tier Tribunal allowing the appeal of Farhan Rasheed against the Entry Clearance Officer's decision of 31 December 2014 to

refuse him entry clearance to the UK as the spouse of Anisa Yasmein (the Sponsor).

2. For the purposes of this decision I shall hereinafter refer to the Secretary of State and the ECO as “the Respondent” and Farhan Rasheed as “the Appellant” reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The Appellant is a citizen of Pakistan born 23rd May 1994. He applied to enter the UK as the spouse of his Sponsor Anisa Yasmein. The ECO refused the application on the sole ground that the Appellant was unable to satisfy the relevant parts of the Immigration Rules relating to the English language test requirement (Appendix FM E-ECP 4.1).
4. In refusing the application the ECO noted that the Appellant had submitted an ETS TOEIC score report in support of his application. The application was dated 3rd October 2014. However as of 22 July 2014 ETS TOEIC was no longer designated as an approved provider of the English language test. Accordingly the Entry Clearance Officer could not be satisfied that the Appellant had passed an English language test (A1 level of Common European Framework) with a provider approved by UKBA. Accordingly he refused the application because the Appellant could not show that at the date of decision, he met the requirements of Appendix FM of the Immigration Rules.

The First-tier Tribunal Hearing

5. When the Appellant’s appeal came before the First-tier Tribunal, Judge Grimshaw said the following:
 - “14. The single issue in this case is whether or not the Appellant met the English language requirements at the time of the decision taken by the Entry Clearance Officer. I have seen the English language certificate produced by the Appellant to support the application. The certificate was issued by City and Guilds on 4 March 2015, some two months after the date of the decision.
 15. I accept that the certificate submitted by the Appellant with the application had been issued by an English language test provider that had lost its accreditation in July 2014. However, the Appellant was unaware that ETS TOEIC was no longer an approved provider. Indeed he had been allowed to take his English language test without being alerted to the loss of accreditation. It was only when he received the refusal notice that he realised he had taken the test with a provider who was no longer approved by UKBA. In these circumstances it is only fair that he should be given an opportunity to supply a fresh English language certificate from an approved provider.

16. I am satisfied the Appellant acted diligently when he was alerted to the concerns raised by the Entry Clearance Officer. The Appellant has now submitted an alternative English language certificate issued by City and Guilds which is an approved provider. I have seen the test certificate in the original. It confirms that the Appellant has achieved a standard equivalent to Level A1. The authenticity of the certificate was accepted by Mr Sobowale at the hearing.”
6. The judge then allowed the appeal. The Respondent sought, and was granted, permission to appeal Judge Grimshaw's decision in the following terms:
 - “1. In a Decision promulgated on 31 July 2015 Judge of the First-tier Tribunal Grimshaw allowed the Appellant’s appeal under the Immigration Rules against the Respondent’s decision to refuse him entry clearance as a partner.
 2. The Respondent refused the entry clearance application because the Appellant had not produced evidence that he had passed an English Language test with an approved provider.
 3. The Judge accepted that the test certificate produced by the Appellant was not from an approved provider but held that as the Appellant had not been told that this provider was not approved he should be permitted to demonstrate his proficiency in English at the time of the Respondent’s decision by relying on a test certificate from an approved provider obtained after the date of the Respondent’s decision.
 4. The grounds on which permission to appeal is sought submit that the Judge erred in law in that the Appellant had not satisfied the requirement to “have passed an English language test ... with a provider approved by the Secretary of State.” This is arguable. It is arguable that the Judge was not entitled to have regard to the later test certificate. Arguably it did not form part of the circumstances appertaining at the time of the Respondent’s decision. Arguably the Judge focussed on whether the Appellant was sufficiently proficient in English at the date of the decision rather than on whether he had, at that date, passed a test with an approved provider.”

Thus the matter comes before me to determine whether the FtT’s decision involved the making of an error of law such that the decision must be set aside and remade.

The UT Hearing

7. Mr Diwnycz appeared on behalf of the Respondent. The Appellant’s Sponsor appeared on his behalf. Mr Diwnycz outlined the reasons why,

the FtT had materially erred. He kept to the lines of the grounds seeking permission and said that as this matter is an out of country appeal, it is settled law that the judge should have confined herself to evidence which was in existence at the date of decision. She had mistakenly tried to circumvent this by relying on **DR (ECO: postdecision evidence) Morocco [2005] UKAIT 00038**. That case of course confirms that evidence which is supplied after the date of decision can be taken into account provided the evidence relates to circumstances pertaining at the time of the decision to refuse. The judge had stretched this point to say that the Appellant had done everything that can be reasonably expected of him because he had now produced to her a certificate issued by an approved English language provider. Mr Diwnycz submitted that clearly the Entry Clearance Officer could not have taken this later certificate into account nor could it be reasonably foreseeable that the Appellant would, postdecision, provide an acceptable English language test certificate. Mr Diwnycz submitted that if the Appellant now meets the relevant requirements, then the appropriate course is to make a fresh application for entry.

8. I asked the Sponsor was there anything she wished to say on the Appellant's behalf. She said that she felt it was unfair that the Entry Clearance Officer was maintaining his refusal. This was because her husband had now completed the English language test. It was not their fault that the first test provider was not acceptable. They had only been made aware of this when they got the refusal notice.

Consideration

9. I find force in Mr Diwnycz's submissions. What is before me is a narrow point. I find that there was no evidential basis for the FtT to conclude that at the date of decision it was reasonably foreseeable to the ECO, that the Appellant would supply a fresh English language certificate from an approved provider. It is quite clear that at the date of decision the Appellant failed to provide the relevant specified evidence and the ECO had no alternative but to refuse the application. I cannot see any basis for the judge finding that she was entitled to have regard to the later test certificate. The judge appears to have become distracted by focusing on the Appellant's position at the date of hearing rather on the date of decision. That is a material error and I find that the decision must be set aside and remade.

Re-Making the Decision

10. There was no further evidence to put before me. I was therefore in a position to remake the decision. Accordingly I am satisfied that the evidence shows that at the date of decision made by the ECO the Appellant did not meet all the requirements for entry clearance as a spouse, contained in Appendix FM of the Immigration Rules. He did not provide an English language test certificate from an approved test provider. Accordingly for those reasons, the Appellant's appeal against the

ECO's decision of 31st December 2014 refusing him entry clearance to the UK, must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 31st July 2015 is set aside for legal error. I remake the decision.

The appeal of Farhan Rasheed against the Entry Clearance Officer's decision of 31st December 2014 is hereby dismissed.

No anonymity direction is made.

No fee award made.

Signed

Date

Upper Tribunal Deputy Judge Roberts