



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

Appeal Numbers: HU/06893/2016
HU/06897/2016
HU/06899/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 6 February 2018**

**Decision & Reasons
Promulgated
On 7 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**(1) PARVEEN SIDDIQUE
(2) MUHAMMAD SHOAIB SIDDIQUE
(3) Zohaib Siddique
(ANONYMITY DIRECTIONS NOT MADE)**

Respondents

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer

For the Respondents: Mr T Mahmood of Counsel instructed by Aman Solicitors
Advocates (Luton)

DECISIONS AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Ghani promulgated on 22 May 2017.

2. Although before me Mrs Parveen Siddique, Mr Muhammad Shoaib Siddique, and Mr Zohaib Siddique are the Respondents, and the Secretary of State for the Home Department is the Appellant, for the sake of consistency with the proceedings before the First-tier Tribunal I shall refer to the Secretary of State as the Respondent and the Siddiques as the Appellants.
3. The Appellants are citizens of Pakistan born respectively on 1 January 1966, 7 February 1995 and 20 October 1996. The First Appellant is the mother of the two other Appellants. The Appellants entered the UK on 12 January 2012 pursuant to entry clearance granted on 1 November 2011 conferring leave until 1 February 2014. The First Appellant secured entry clearance as the spouse of Mr Mohammed Sadiq Malik (date of birth 17 May 1947). Mr Malik had by that time acquired British citizenship. The Second and Third Appellants were admitted as dependants.
4. The Appellants were later each granted a variation of leave to remain until 31 January 2016. On 20 January 2016 the Appellants applied for further leave to remain using form FLR(M). I pause to note that by this stage the Second and Third Appellants had reached their majority, being 20 years old and 19 years old respectively.
5. The Appellants' applications were refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 23 February 2016.
6. Much of the focus before the Upper Tribunal has been in respect of the requirement - or otherwise - for the First Appellant to take an English language test. In this context it is to be noted that in a covering letter dated 19 January 2016 submitting the instant application reference was made in the following terms to the circumstances of the First Appellant:

"Our client's [sic.] entered the UK on 12th January 2012 and completed the mandatory two years in the UK in the spouse category. However, despite completing mandatory 2 years in the UK to make applications for Indefinite leave to remain, since the main applicant had not yet attained the required English Language Certificate and Life in the UK, they were unable to make an application for Indefinite leave to remain. Therefore, their applications for further leave to remain in the same category (spouse) were granted on 31st January 2014. Our clients were granted 2 years extension in spouse category. Our clients current 2 years leave to remain expires on 31st January 2016."

7. I pause to note that having completed the two years' initial period of leave as a spouse the option for the First Appellant under the Immigration Rules was either to apply for indefinite leave to remain as a spouse pursuant to paragraph 287 of the Rules, or to apply for a further period of limited leave to remain under paragraph 284. As identified in the application covering letter, an application for indefinite leave to remain under paragraph 287 would have required the First Appellant to demonstrate adequate knowledge of life in the UK and competency in the English language. In contrast, paragraph 284 - which provides for an application to be made for a limited period of further leave - does not require demonstrating knowledge of life in the UK. Nonetheless it does include a provision in respect of English language.

8. The covering letter goes on to say the following:

"Although our client can make applications for indefinite leave to remain if the KoLL requirements are met, since they have not yet obtained KoLL to make indefinite leave to remain applications, our clients make this application for another 2 years extension in the spouse category to enable them to obtain English Language certificates and Life in the UK to apply for indefinite leave to remain. Therefore, since there is sufficient and adequate maintenance and accommodation available to her and her family, you are requested to grant our client and her two sons another 2 years extension under old Immigration Rules."

It is thereby again apparent that the Appellants were electing not to apply for indefinite leave to remain because they were not in a position to satisfy the requirements of the Rules, but instead were applying for a further period of limited leave to remain.

9. The letter also contains the following:

"Moreover, in relation to the Language requirements, our client's application falls in line with her application for entry clearance. Therefore, our client or her both sons do not need meet the requirement for this application. Since our client has met the time scale for ILR applications by completing mandatory 2 years in the UK, they require extension of their visas for another 2 years to enable them to obtain the English language Certificate and the Life in the UK Certificates."

10. The Respondent saw matters differently. In the RFRL, with reference to paragraph 284 of the Immigration Rules, the Respondent refused the application because of the absence of any suitable evidence of English language competency. The RFRL states:

“You have not provided any evidence to show that you have passed an English language test in speaking and listening at a minimum of level A1 with a provider approved by the Secretary of State. You are not from a majority English speaking country as listed in paragraph 284(ix)(b). You have not provided any evidence to show that you have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor’s or Master’s degree or PhD in the UK, which was taught in English. You do not qualify for any of the exemptions listed above therefore you do not meet the requirements of 284(ix).”

11. The Respondent therefore refused the First Appellant’s application under paragraph 284. The decision-maker then went on to consider the applicability of Appendix FM. It is also to be noted in this regard in respect of paragraph EX.1 the Respondent stated, amongst other things, this:

“Whilst it is acknowledged that you entered the United Kingdom as a spouse, and did not require evidence of meeting the English language, when applying for an extension in the same category the requirement now must be met.”

12. Accordingly it was apparent that the Secretary of State’s position was in terms that notwithstanding what might have happened on the occasion of the First Appellant’s entry to the United Kingdom the application for variation of leave to remain was required to satisfy the applicable Rule - paragraph 284; further in the particular circumstances of the case the Appellant did not meet the Rule because there was no English language certificate.

13. Before the First-tier Tribunal Judge the Appellants argued the English language issue in terms of a legitimate expectation. It may be seen in the Decision of the First-tier Tribunal that the Appellant’s evidence included an assertion that she had a legitimate expectation that she would be granted a further extension without an English language certificate because that is what had happened previously: see paragraph 10. Indeed, under the heading ‘My Findings’ the Judge reached just such a conclusion at paragraph 20:

“She was then granted further extension until 31st January 2016 and with that application she was not required to provide English language certificate. However, with the current application, Respondent declined on the basis that an English language certificate was not provided. She clearly had a legitimate expectation that she was not required to provide the basic English language certificate.”

14. The Judge nonetheless acknowledged that the Appellant did not satisfy the requirements of paragraph 284 and that *“the Respondent’s decision is in accordance with the Immigration Rules”*.
15. The Judge went on to consider Article 8: it is clear that the finding in respect of legitimate expectation influenced the Judge’s evaluation of the Article 8 case. At paragraph 23 a number of disparate matters are listed including the following:

“I also find that the Appellant did have legitimate expectation that as she was not required to submit an English language certificate with the prior application for extension, she was not required to submit one with this current application.”

The fact that this was influential and material is apparent from the immediately following sentence, *“When all these factors are considered cumulatively...”*.

16. In my judgment, the First-tier Tribunal Judge has not offered any clear or adequate reasoning in respect of the conclusion in respect of legitimate expectation. Indeed Mr Mahmood, on behalf of the Appellants, very fairly and frankly acknowledged that he is in some difficulty in defending the Judge’s decision in this regard.
17. In the first instance there was nothing before the First-tier Tribunal - and indeed there is nothing before the Upper Tribunal presently - by way of materials demonstrating by what possible mechanism the First Appellant may have been exempted from any English language requirement in the past. The best that it is possible to ascertain is that paragraph 282 of the Immigration Rules provided an exemption in an entry clearance application for certain applicants who had been in a relationship for a period of time specified thereunder. In the absence of details of the initial entry clearance application - which was made on 29 November 2010 thereby coinciding with the day on which the English language requirement came into effect - and without sight of the successful appeal decision overturning the refusal of entry clearance, it is not transparent on what basis the Appellant was not required to provide an English language certificate in the context of the entry clearance application. The mere fact that there existed a provision that allowed for an exemption does not mean that such a provision was applied to the First Appellant’s case: there was nothing before the First-tier Tribunal to show that any such exemption had been applied - and more particularly the Judge made no such finding. If such a provision did not apply, it may be that there were some transitional provisions that were in play; or it may be that there was some applicable Home Office policy - but again it appears that there were no evidential materials before the First-tier Tribunal to suggest such possibilities, and more particularly the Judge did not identify any basis by

which the First Appellant had not been required to demonstrate adequate language skills in order to secure entry clearance.

18. Similarly there does not appear to have been any materials in respect of, or any exploration in the Judge's reasons and findings concerning, the basis for any exemption from the English language requirements at the time of the grant of variation of leave to remain in 2014.
19. In the absence of more detailed exploration of these matters, and in the absence of clear reasons from the First-tier Tribunal Judge, I conclude that the issue of legitimate expectation was not dealt with adequately, and the First-tier Tribunal's findings in this regard have not been adequately reasoned.
20. In the first instance – as explored above – there is no proper assessment as to the basis or foundation of the supposed expectation. It is not apparent that there was any clear or obvious representation to the First Appellant, explicit or implicit, upon which she may have relied.
21. Moreover, in the context of this latter regard – reliance – I note that there does not seem to have been any explanation offered as to why the First Appellant had not in the period that she had been in the United Kingdom sought to acquire a level of English and indeed a knowledge of life in the UK such that she might have been able to apply for indefinite leave to remain, or at the very least that she might have been able to bring herself within the wording of paragraph 284. In particular there is nothing to suggest that the First Appellant decided not to pursue such matters because of an understanding that it was not necessary. As I say, it is difficult to see that she has acted in any particular way in consequence upon – or in reliance upon – any representation or action inherent in the circumstances of her entry clearance application, the grant of entry clearance, or the grant of variation of leave to remain.
22. In the circumstances in my judgement the Decision of the First-tier Tribunal is in error of law in that it is inadequately reasoned. As I have identified above the error is clearly material because it was taken forward into a consideration of Article 8.
23. I should also add that the Judge concluded that the appeal should be allowed under Appendix FM of the Immigration Rules. That in itself was a conclusion without jurisdiction: the Tribunal did not have jurisdiction to determine the appeal under the Rules but only on human rights grounds.

This would not in itself inevitably be a material error if the decision under the Rules was sound.

24. However, it is clear that the Judge factored the unfounded findings in respect of legitimate expectation quite illogically into an evaluation of obstacles to establishing family life in Pakistan: *"I also find that the Appellant did have legitimate expectation that as she was not required to submit an English language certificate with the prior application for extension, she was not required to submit one with this current application. When all these factors are considered cumulatively, I find that this will establish very significant difficulties which would be faced by the Appellant and her partner in continuing their family life outside the UK in Pakistan..."* (paragraph 23).
25. Moreover, in this context it appears that almost the entire focus of the Judge's Decision was on the relationship between the First Appellant and her husband to the exclusion of any individual consideration of the circumstances of the Second and Third Appellants. To that extent it is not apparent that the human rights of the Second and Third Appellants have been given any individual consideration - and more particularly the proportionality or otherwise of removing them from the United Kingdom has not been duly adjudicated upon. I note in this regard that the Judge states in her concluding paragraph *"Although the dependent applicants are now adults, I find that they are still a family unit and are residing as such. To split the family would not be proportionate"* (paragraph 23). However, there is no suggestion inherent in the Respondent's decisions under appeal that the family should be split - but rather that the Appellants should be removed to Pakistan and that the family need not be split because the sponsoring *paterfamilias* can accompany them. It seems to me again that the Judge has not fully and adequately focused on the correct issues in the appeal.
26. In all such circumstances I find material error of law and I set aside the decision of the First-tier Tribunal Judge.
27. It is common ground between the parties that the appeal should be re-made before the First-tier Tribunal with a more thorough fact-finding exercise in respect of each of the Appellants and their respective private and/or family lives. It is also common ground that it will be necessary to give much more detailed consideration to both the factual and legal elements of any legitimate expectation argument. To that end I issue the following guidance and Directions:

Directions

- (1) Both parties are to file and serve legal submissions with regard to the issue of legitimate expectation to be supported by materials as appropriate - be they copies of case law, archived Rules, relevant policy or any other materials.
 - (2) Both parties, so far as they have them in their possession, are to file and serve the details of the initial entry clearance application made on 29 November 2010, the decision on that application, and the appeal decision that followed.
 - (3) Both parties, so far as they have them in their possession, are to file and serve any materials relevant to the application for variation of leave to remain that was granted on 1 November 2011.
 - (4) The directions apply to both parties. It is not appropriate for either party to assume that the other party will be in possession of such documents. Both parties should use their best endeavours to provide whatever is available.
 - (5) All materials pursuant to the Directions above are to be filed and served within 4 weeks of the date shown as the promulgation date on this document.
28. The parties should be aware that some further consideration will likely need to be given to certain factual aspects of the appeal not hitherto focussed upon. In particular the Judge tasked with remaking the decision in the appeal may be assisted by evidence and argument in respect of the following matters:
- (i) I have noted above that the sponsor, Mr Malik, is a British citizen. On the FLR(M) application it is indicated that he has held citizenship of Pakistan. It would be helpful for there to be clarification as to whether he holds dual citizenship or whether he now only holds British citizenship.
 - (ii) The Appellant and Mr Malik were married for something approaching 15-20 years prior to the Appellant's application for entry clearance. It follows that the marriage was conducted for a very considerable period by the sponsoring husband visiting Pakistan: indeed it is in Pakistan that his sons were born and grew up. In such circumstances it may be informative to explore to what extent it may sustainably be said, as seems to be the case, that Mr Malik has no meaningful contact or ties with Pakistan. Indeed it may be necessary to evaluate the nature and extent of any interference with family life if the overall effect of the Respondent's decisions requires the Appellant and sponsor again to conduct their married life in a manner essentially similar to that which pre-dated the Appellants' entry to the UK and had been extant for a substantial period of time.

(iii) I have already noted above that very little consideration was given by the First-tier Tribunal to the individual circumstances of the Second and Third Appellants. That will now be necessary.

(iv) It also seems to me to be of some relevance to have some clarification or explanation as to why it is that the Appellants have not, as it were, 'put their case in order' in respect of the English language requirements in the period between their initial arrival and their most recent application for variation of leave to remain. In this context it is to be recalled that it is one of the public interest considerations under section 117B of the 2002 Act that applicants have a command of the English language. If there is any particular or good reason why the First Appellant has not sought to reach the level of competency such that she could make an application that satisfied the requirements of paragraph 284, or indeed paragraph 287, then it would be helpful to have some understanding and explanation as to what that might be.

29. Ultimately, however, it will be a matter for the next Judge who re-makes the decisions in the appeals to have regard to such matters as he or she thinks appropriate. I only raise the above matters by way of approximate guidance; nothing therein should be considered as prescriptive or binding.

Notices of Decision

30. The decisions in each of the appeals are vitiated for material error of law. The decisions are set aside.
31. The decisions in the appeals are to be re-made before the First-tier Tribunal, before any Judge other than First-tier Tribunal Judge Ghani with all issues at large.
32. No anonymity directions are sought or made.

Signed:

Date: **5 March 2018**

Deputy Upper Tribunal Judge I A Lewis