



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

Appeal Number: IA/16816/2013

THE IMMIGRATION ACTS

Heard at Newport

On 28 November 2013

**Determination
Promulgated
On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

**NOMSA MARIA NXELE
(ANONYMITY DIRECTION NOT MADE)**

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Unrepresented

For the Respondent: Mr Irwin Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a female citizen of South Africa born 15 May 1963. She entered the United Kingdom in December 2011 with entry clearance as a spouse valid until March 2013. In March 2013 she made application for further leave to remain as the spouse of a British national. On 1 May 2013

a decision was made to refuse to vary leave to enter the United Kingdom and to remove the appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant sought to appeal that decision.

2. The appellant's appeal came before Judge of the First-tier Tribunal Beach on 19 August 2013. The appellant had not requested an oral hearing and the appeal was dealt with "on the papers". In a determination dated 10 September 2013 Judge Beach dismissed the appellant's appeal under the Immigration Rule and found that the decision under Section 47 was "not in accordance with the law". For reasons set out in the determination the judge declined to deal with the appellant's human rights appeal.
3. The respondent's original decision, and the judge's determination, were based on a failure by the appellant to provide an original English language test certificate as required by the Immigration Rules.
4. The appellant sought leave to appeal the decision and on 30 September 2013 Judge of the First-tier Tribunal Chambers granted leave upon the basis that the judge was wrong in failing to consider the appellant's human rights.
5. In a response lodged under Rule 24 of the Procedure Rules the respondent does not oppose the application as it was considered that Judge Beach's decision not to consider Article 8 was an error of law.
6. Hence the matter is now before me in the Upper Tribunal. Mr Richards stood by the views expressed in the Rule 24 notice and I indicated that I agreed with that position. Through no fault of her own Judge Beach did err in law in failing to consider the appellant's human rights. It was not a matter that should be "postponed" to some later date. However Judge Beach's determination in respect of the appeal "under the Rules" and in respect of the Section 47 decision should hold good. There is no direct challenge to those parts of the decision. They are preserved but I must now go on to make a decision in respect of the appellant's human rights appeal as I note such rights figured in the appellant's original grounds of appeal.
7. In deciding to make a decision in respect of the appellant's human rights I see no reason not to preserve the findings of Judge Beach as they are clearly uncontroversial and not in dispute. Equally not in dispute is the fact that the appellant had not provided the required test certificate. However subsequent to the decision of Judge Beach the appellant has now obtained such a certificate.
8. I note the appellant's evidence that she married her husband, a British citizen, in a ceremony in Bristol in April 2010. The only issue before Judge Beach had been the non-existence of the English language certificate. That clearly was not in existence at the date of the decision but may have

been at the date of Judge Beach's determination. It is dated "September 2013".

9. I note the evidence given by the appellant, and her husband (as set out in the Record of Proceedings).
10. There now exists the necessary certificate. It is therefore the case that if fresh application were now made such application would be successful. However it would be necessary for such an application to be made out of the United Kingdom.
11. In considering an Article 8 claim I am assisted in the step by step approach identified in the case of **R (Razgar) v SSHD [2004] 2 AC 368**. In working through those steps I reach the question as to whether or not the interference with this appellant's family life would be proportionate to the legitimate public end. If the appellant had to leave the United Kingdom to make an application that clearly would be an interference with the family life that she has established in the United Kingdom with her husband. I also note there is other decided cases and in particular **Chikwamba v SSHD [2008] 1 WLR 1420** and the Administrative Court decision in **R (on the application of Zhang) v SSHD [2013] EWHC 891 (Admin)**.
12. In the circumstances of this case taking particular notice of the likely cost and the level of interference with the appellant's family life I consider it would be disproportionate to require her to leave the United Kingdom to make an out of country application which in all likelihood would succeed.
13. Accordingly I make a decision. The appellant's appeal in respect of Article 8 ECHR is allowed.
14. No application was made for anonymity and I do not consider it appropriate to make such a direction.

Signed

Date

Upper Tribunal Judge Poole