



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

Appeal Number: IA/46532/2013  
IA/46533/2013

**THE IMMIGRATION ACTS**

**Heard at Glasgow**

**On 18 July 2014**

**Determination  
Promulgated**

**On 9 September 2014**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE DEANS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR WAQAR AHMED  
MRS MARIA TAJ**

Respondent

**Representation:**

For the Appellant: Mrs M O'Brien, Home Office Presenting Officer  
For the Respondent: Mr M Iqbal, Muzaffar Associates Ltd

**DETERMINATION AND REASONS**

- 1) This appeal is brought with permission against a decision by Judge of the First-tier Tribunal Fox. The Judge of the First-tier Tribunal allowed appeals by a husband and wife, Mr Waqar Ahmed and Mrs Maria Taj (hereinafter referred to as "the applicants". The first named applicant was appealing against refusal of leave as a Tier 1 (Entrepreneur) Migrant under the Points Based System and the second applicant was appealing against a refusal of leave as his dependant. The applications were made on 3 October 2013 and

the refusal decisions were dated 30 October 2013. The reason for the refusal decision was that the first applicant could not satisfy the English language requirement under the Immigration Rules.

- 2) The Judge of the First-tier Tribunal found that the first applicant had not provided the appropriate English language test certificate with his application for a variation of leave. However, a certificate showing English language ability to the required standard was before the judge by the date of the hearing before the First-tier Tribunal. The judge recorded that he was able to accept this as evidence because he was “allowed to engage flexibility” in making his determination. The judge further recorded that the first applicant was advised by his original solicitors that he did not need an English language certificate in order to make his application. If he did need one, then the respondent would contact him to ask for it. The judge found that the applicant was badly advised by his original solicitors. The judge further found that the refusal to vary leave was disproportionate under Article 8.
- 3) The Secretary of State submitted a number of grounds in the application for permission to appeal. The first of these was that the judge was not entitled to take into account additional evidence not submitted with the application, in terms of the restrictions on additional evidence in section 85A of the Nationality, Immigration & Asylum Act 2002. The judge was not entitled to make an adverse finding against the applicants’ former legal advisers in the absence of evidence that a complaint had been made and the advisers had had a chance to respond, in accordance with BT (Former solicitors’ alleged misconduct) Nepal [2014] UKIAT 00311. It was further submitted that the judge erred in finding that Article 8 was engaged. It was not open to the judge to reach the decision on Article 8 which he did and there was inadequate reasoning for the decision. Permission was granted on all these grounds.
- 4) At the hearing Mrs O’Brien, for the Secretary of State, relied upon the grounds in the application. The judge had accepted evidence which was not submitted with the application, contrary to section 85A. It was not clear what concept of “flexibility” the judge had in mind. The judge had accepted that a mistake had been made by the applicants’ previous advisers without the maligned party having had the chance to make any comment. There were no grounds to support the judge’s decision under Article 8. The judge’s decision was flawed and should be re-made dismissing the appeals on all grounds.
- 5) For the applicants, Mr Iqbal submitted that the first applicant had passed the required language test before submitting the application. Appropriate reasons were given by the judge at paragraph 12 for admitting the certificate. If the Secretary of State had sent a letter to the first applicant asking for the certificate it would have been provided. The judge had properly applied evidential flexibility in accordance with the case of

Rodriguez, which had not yet been overturned at the time of the hearing before the First-tier Tribunal.

- 6) Mr Iqbal confirmed that he had not obtained the comments of the applicants' previous advisers in relation to the inappropriate advice the applicants said they had been given. Mr Iqbal sought to explain that he had not filed the appeal to the First-tier Tribunal but had only been instructed after the appeal was listed.
- 7) Section 85 of the 2002 Act sets out the general rule that in an appeal the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision. This general rule is, however, subject to exceptions set out in section 85A, inserted by the UK Borders Act 2007, section 19. Exception 2 in section 85A applies to an appeal under the Points Based System, which these appeals were. Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it was submitted in support of, and at the time of making, the application to which the immigration decision related (subject to certain limited exceptions which are not relevant to these appeals). Accordingly, in terms of section 85A the judge was not entitled to consider as evidence the English language test certificate adduced by the appellant after the application was made. Although the judge referred to the concept of "flexibility", no authority was put before us which would have entitled the judge to consider this evidence, even under the case law at that time. Accordingly we are satisfied that the judge erred in law by considering as evidence the English language test certificate.
- 8) We are further satisfied that the judge erred in relation to Article 8 by not giving adequate reasons for his decision. The judge further erred in his treatment of the criticism made by the applicants' of their previous legal advisers.
- 9) The decision of the Judge of the First-tier Tribunal is flawed and as such it is set aside. Without evidence to show that he satisfied the English language test requirement, the application by the first applicant could not succeed under the Immigration Rules. The first applicant was not entitled to the necessary points for knowledge of the English language under Appendix B of the Immigration Rules. Accordingly his appeal could not succeed. The appeal by his wife as his dependant could not succeed where his appeal was unsuccessful.
- 10) There was no adequate basis for allowing the appeals under Article 8. The first applicant came to the UK in 2008 with leave as a student. In 2011 he was granted leave as a Tier 1 (HS Post Study) Migrant. At no point did the first applicant have anything other than limited leave and there was no expectation that he and the second applicant would be allowed to remain indefinitely in the UK. The refusal decisions do not constitute an interference with their family life and, to the extent that they interfere with

the applicants' private life, there are no grounds for finding that that interference is disproportionate, given the length of time they have been in the UK and the reasons for their stay. The decision the First-tier Tribunal should have made was to dismiss both appeals and this is the decision we now make.

## **Conclusions**

- 11) The making of the decision of the First-tier Tribunal did involve the making of errors on points of law.
- 12) We set aside the decision.
- 13) We re-make the decision in the appeals by dismissing the appeals.

## **Anonymity**

- 14) The First-tier Tribunal did not make any order or direction for anonymity. We have not had any application made to us for such an order and we see no reason for making one.

Signed

Date

Upper Tribunal Judge Deans

## **Fee Award**

Note: this is not part of the determination

As the appeals are dismissed, no fee award can be made.

Signed

Date

Upper Tribunal Judge Deans