



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

Appeal Number: OA/00985/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 1 November 2013

**Determination
Promulgated**

On 23 January 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

RASHID MAHMOOD

Respondent

Representation:

For the Appellant: Mr Diwncyz, a Senior Home Office Presenting Officer
For the Respondent: Mrs Shazia Bibi (Sponsor)

DETERMINATION AND REASONS

1. The respondent, Rashid Mahmood, was born on 3 January 1980 and is a male citizen of Pakistan. He had applied for entry clearance to the United Kingdom as the spouse of Shazia Bibi (hereafter referred to as the sponsor). His application was refused by the Entry Clearance Officer (ECO) in Islamabad by a decision dated 18 December 2012. The respondent appealed to the First-tier Tribunal (Judge Kelly) which, in the determination

promulgated on 11 September 2013, allowed the appeal in respect of the Immigration Rules. The Entry Clearance Officer now appeals, with permission, to the Upper Tribunal.

2. I shall refer to the respondent in these proceedings as the “appellant” (as he was before the First-tier Tribunal) and to the Entry Clearance Officer as the “respondent”.
3. The appeal turns on a single issue. The respondent was not satisfied that the appellant met the requirements of paragraph 281(ii) of HC 395 (as amended):
 - (ii) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:
 - (a) the applicant is aged 65 or over at the time he makes his application; or
 - (b) the applicant has a physical or mental condition that would prevent him from meeting the requirement; or
 - (c) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement;
4. Judge Kelly recorded at [4] that the factual background to the appeal was not in dispute:
 4. The parties were married in the United Kingdom on the 7th September 2005 and the appellant subsequently sought leave to remain on the basis of his marriage to the sponsor. When this was refused he returned to the United Kingdom on the 27th April 2011. Prior to his leaving, he had studied with the ‘Solange Robinson Consultancy’. On the 18th June 2011, a company called ‘Edexcel’ issued him with a certificate to confirm that he was now qualified at level E1 of ESOL – Skills for Life (Speaking and Listening). At that time EDEXCEL had been assessed as meeting the UK Border Agency’s requirements for testing spouses in the English language. However, on the 18th July 2011 (i.e. a month after the appellant had been issued with his certificate) the Agency issued a new list of approved English language test providers. EDEXCEL was not on it. Therefore, by the time the appellant submitted his certificate in support of the application he made on the 6th July 2012, the issuing body was no longer approved for the purposes of paragraph 281 of the Immigration Rules.
5. The judge was not satisfied that either Section 85 of the Nationality, Immigration and Asylum Act 2002 nor a common law duty of fairness assisted the appellant. EDEXCEL had ceased to be an approved test-provider some twelve months before the appellant had made his

application for entry clearance. The judge considered that “the answer [in this appeal] can only be found in the Rule itself.” [6].

6. The judge’s analysis of the issues is brief and I set it out below in full:

7. Ms Faryl submitted that Rule required only that the test-provider should be approved for the purpose at the time when it undertook the assessment of the appellant’s ability to speak and listen to the English language. Mr Barrow, on the other hand, submitted that the Rule required that the test-provider should be approved for this purpose at the date of the visa application and/or at the date of the decision.

8. The starting point in the construction of paragraph 281 of the Immigration Rules is the natural and ordinary meaning of the words that are used to express the requirement in question. However, the Rule is silent as to the stage at which the issuing body of a test certificate is required to be approved by the Secretary of State for the purpose of the Immigration Rules. It is thus permissible to adopt a purposive construction.

9. I am satisfied that it was not the Secretary of State’s purpose in introducing the English language requirement to ensure that the applicant had been recently assessed as possessing the necessary skills. This is because that purpose could easily have been achieved by the simple expedient of including a requirement that the relevant certificate should have been issued within a prescribed period preceding the date of the application. There is however no such requirement within this paragraph of the Immigration Rules.

10. It follows that the only sensible reason why the Secretary of State required the assessing body to be approved by her was in order to ensure that it was ‘fit for purpose’ at the time when it undertook its assessment of the applicant. Mr Barrow was right to point out that whilst the standards of the Common European Framework may be immutable, it does not follow that those standards will be applied consistently over time by the various assessing bodies. However, I am satisfied that the Secretary of State intended to guard against a possible decline in the quality of assessment by reserving the right to de-list any organisation that was no longer considered to meet the appropriate standard. There is no logical reason, however, why the de-listing of the assessing body should act retrospectively so as to deprive an applicant of recognition of their achievement in meeting the relevant standard at a time when that body was still considered competent to assess it.

11. I am therefore satisfied that the requirement in paragraph 281 is for the applicant to submit a certificate that shows that he met the specified standard for speaking and listening as assessed by a body that was approved for that purpose at the time of the assessment. As the appellant met this requirement, it follows that a decision to refuse entry clearance on the ground that he had failed to do so was not in accordance with Immigration Rules.

7. The grounds of appeal assert that it,

must be the date of application at the earliest, if not the date of decision, which is the relevant date in these circumstances. The appellant must ensure that an application applies with the Immigration Rules at the date

they apply. It does not matter if they met some previous drafting of the Rules.

8. The problem for the respondent is that Judge Kelly has found that the appellant met the requirements of the Rules in force at the date of his application, not a “previous drafting”. The question is whether Judge Kelly was right to construe the immigration rule as detailed in his analysis.
9. It is not disputed the appellant has provided with his application an original English language test certificate in speaking and listening. The question is whether he has provided such a certificate “from an English language test-provider approved by the Secretary of State for these purposes.” On the date the appellant passed his test, EDEXCEL was a test-provider approved by the Secretary of State for the purpose of conducting such tests. The Entry Clearance Officer’s case is that the appellant’s certificate was, in effect, rendered invalid retrospectively when EDEXCEL ceased to appear on the list of approved test-providers. I agree with Judge Kelly that such a proposition does not make logical sense. Such an argument would indicate that, during periods when the test-provider appeared on the Secretary of State’s list, the appellant’s certificate was valid but that, at any time when the provider did not appear on the list, it became invalid. It would also mean that a valid certificate would be rendered useless if, for whatever reason, the approved provider subsequently ceased trading. I find that Judge Kelly was right to hold that the immigration rule was intended to provide that a test certificate issued to an applicant by a test-provider approved by the Secretary of State as at the date the test was passed by that applicant would meet the requirements of paragraph 281; that was the quality standard which the provision existed to meet. It makes no sense that a valid certificate might drift in and out of validity depending on the vagaries of the Secretary of State’s registration system.
10. It follows that I should find that the judge has construed paragraph 281 correctly, that the appellant met the requirements of paragraph 281(ii) and that he should, as a consequence, be granted entry clearance as the spouse of the United Kingdom sponsor.

DECISION

11. This appeal is dismissed.

Signed

Date 12 December 2013

Upper Tribunal Judge Clive Lane

