



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

Appeal Number: IA/31277/2014

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 5 June 2015**

**Decision and Reasons Promulgated
On 17 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**HASINA USMAN PATEL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bloomer counsel instructed by ASK Solicitors

For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. I have referred throughout to the parties as they were before the First-tier Tribunal.
3. The Appellant is a citizen of India born on 26 June 1958. The Appellant is appealing against the decision of the Respondent made on the 21 July 2014 to refuse to extend her leave to remain in the United Kingdom under paragraph 284 of the Immigration Rules as the spouse of a person present and settled in the United Kingdom. The Appellant was refused because she did not produce an original English Language Certificate as required by Paragraph 284 (ix)(a). The appeal against the refusal was allowed and at a hearing on 9 April 2015 I heard the Respondent's appeal against that decision. I found that the Judge made a material error of law in relation to the decision under the Rules and also made no findings in relation to Article 8 and adjourned the matter for the appeal to be re heard.
4. Mr Bloomer in preliminary discussions conceded that the Appellant could not meet the requirements of the Rules as the Appellant did not produce a language certificate with her application and because the language provider that had provided the certificate that she produced dated 6 May 2011 was no longer on the approved list of providers. Both he and Mr Harrison agreed that the Appellant could not meet the requirements of Appendix FM, EX.1 or paragraph 276 ADE and therefore he would be limiting his submissions to Article 8 outside the Rules as he would argue that there were compelling reasons why the Appellant should be granted leave.

The Law

5. The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability.
6. As the Appellant is in the United Kingdom, I can take into account evidence that concerns a matter arising after the date of the decision in accordance with Section 85(4) Nationality, Immigration and Asylum Act 2002.
7. The Appellant's appeal is pursuant to Section 82 of the 2002 Act.
8. The appeal must be allowed if I find that the decision against which the appeal is brought was not in accordance with the law or with the Immigration Rules or if the decision or action involved an exercise of discretion by the Respondent, which should have been exercised differently. Otherwise, I must dismiss the appeal.

9. In relation to claims under Article 8 these are addressed by Appendix FM and paragraph 276ADE of the Rules and the Secretary of State's Guidance. If an applicant does not meet the criteria set out in the Rules then guidance issued by the Secretary of State in the form of instructions provides in effect, that leave to remain outside the rules could be granted in the exercise of residual discretion in 'exceptional circumstances' which are defined in the guidance and must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2.

10. It is now generally accepted that the new IRs do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

"30. ... if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

11. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

"64. ... there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

12. More recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in

Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. "

13. I am obliged if making a 'free standing' Article 8 assessment to take into account Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) which sets out the public interest considerations that I must have regard to in determining proportionality.

14. In relation to what constitutes insurmountable obstacles R(on the application of Agyarko) [2015] EWCA Civ 440 it was held that the phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. ...The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by **Jeunesse v Netherlands** (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so). However, "although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way". Moreover, the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8. The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-

locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so.

Evidence

15. On the file I had the Respondents bundle. I had a copy of the reason for refusal letter. The Appellant put in an appeal and there were statements from the Appellant and her husband.

16. Mr Bloomer tendered both the Appellant and her husband as witnesses and Mr Harrison did not seek to cross examine them.

Final Submissions

17. On behalf of the Respondent Mr Harrison relied on the reason for refusal letter dated 21 July 2014.

18. He submitted that the Appellant could return to India and re-apply for entry clearance with a language certificate from a provider that meets the requirements of the Rules.

19. He submitted that the basis of the refusal was a technical one and in those circumstances it might be considered that there were 'overwhelming' reasons not to require the Appellant to be removed and re apply for entry clearance.

20. On behalf of the Appellant Mr Bloomer submitted in essence;

(a) Family life was engaged and the relationship would be severed if the Appellant were removed.

(b) The background against which the decision was made was that the Appellant's husband had been in the United Kingdom for 30 years.

(c) The Appellant had produced a language certificate in accordance with the Rules or she would not have been granted entry clearance.

(d) The Rules operated harshly in that someone who had done things correctly where there was no criminality or malpractice were affected by the language provider no longer being approved. If EMD had remained on the list the Appellant's application would have succeeded. Where someone acquires a qualification and that is officially accepted the fact that sometime later the institution loses its status should not invalidate the fact that an applicant had met the standard particularly where it was not known why the test provider was no longer on the list. They may have chosen to go off the list we simply don't know.

- (e) The continuing changing nature of the Immigration Rules puts in jeopardy almost anyone no matter how legitimately they have been in the United Kingdom.
- (f) The Appellant would not have been able to re do her test as the Respondent has her passport and she is required to provide it to do the test.
- (g) This was all relevant to the issue of proportionality. Where an applicant had demonstrated that they had achieved a language standard they were entitled to be presumed to have maintained that standard unless the contrary was shown. The Appellant has lived in the United Kingdom since her arrival and had the opportunity day in and day out to maintain her language skills and there was no reason to doubt that was the case.
- (h) He acknowledged that I was bound to consider s 117 B of the Nationality Immigration and Asylum Act 2002 but submitted that Article 8 allowed those who may not technically comply with the Rules but there were strong compassionate circumstances to remain together. There was no immigration purpose undermined by allowing her the opportunity to remain in the United Kingdom and reapply based on a fresh certificate.

Findings

21. On balance and taking the evidence as a whole, I have reached the following findings
22. The Appellant is a 56 old citizen of India who was refused an extension of stay as a spouse under paragraph 284. There is no dispute that the Appellant cannot meet the requirements of this Rule. I am satisfied that the only reason that the Appellant could not succeed under the Rules was that the English Language provider in relation to the certificate she relied on for entry clearance in 2012 was no longer on the approved list.
23. The refusal letter also considered the application by reference to Appendix FM. She could not succeed under the provisions governing leave to remain as a partner because she did not have a language certificate from a provider on the approved list and therefore the letter went on to consider EX.1. I am satisfied, and indeed there was no argument that there were insurmountable obstacles to family life continuing in India. The Appellant had lived the majority of her life in India and while her husband has lived in the United Kingdom for 30 years they had apparently chosen to conduct their marriage in this way until 2012. There was no reason placed before me why, other than preference, why the Appellant's

husband couldn't live with her in India. There was no argument that the Appellant could benefit from 276ADE in view of her ties to India and the period she had spent in the United Kingdom.

24. I accept, and Mr Harrison conceded, there is no threshold of arguability for consideration of an application outside the Rules but SS suggests that there would have to be compelling reasons for such a grant of leave.

25. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

26. I am satisfied that the Appellant and her husband, children and grandchildren have a family life in the United Kingdom.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

27. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

28. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate her conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

29. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy her private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

30. In making the assessment I have taken into account those public interest factors set out in section 117B of the Nationality Immigration and Asylum Act 2002. There I acknowledge that the maintenance of immigration control is in the public interest. The Appellant's status has not been precarious she has been in the United Kingdom with leave as a spouse and no doubt anticipated her leave being extended as there could have been no reason for her to anticipate that her English Language test provider would not remain on the register .

31. I acknowledge that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. I accept that the Appellant's ability to speak English was tested when she applied for entry clearance and she met the required standard with a certificate from a provider that was on the list of approved providers at that time. Since then I accept that she has been living in an English speaking community with all of the opportunities that this presented to maintain and indeed improve her standard of English. There was nothing before me to suggest that her language ability acquired when she was not living in an English speaking community had been lost since living in one where English was the common language. She appeared to me to be able to understand English at the start of the hearing in conversation with Mr Bloomer about the use of the interpreter and she had to be encouraged to use her. I can understand why someone who speaks English as a second language would choose to use an interpreter in court as the atmosphere and nature of the proceedings might undermine their ability to understand and communicate effectively where they might be able to do that perfectly well in a shop for example.

32. I have considered what was said in R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) that there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the

Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. I am satisfied that given that the only reason the Appellant cannot meet the requirements of the Rules relates in reality to the issue of the maintenance of her ability to speak English rather than the initial testing of a standard for entry clearance in circumstances where there is, in fact, no evidence that she has lost that ability and positive practical evidence that she can speak it that requiring her to return to India to retake a test and re apply is disproportionate. I find that these are compelling reasons to allow the appeal.

33. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

Conclusion

34. I find that the Appellant has failed to discharge the burden of proof on her to show that the terms of Appendix FM and paragraph 276 ADE of the Rules are met.

35. On the facts as established in this appeal, there are substantial grounds for believing that the Appellant's removal would result in treatment in breach of ECHR.

36. I therefore find that the decision of the Respondent appealed against is not in accordance with the law and the applicable Immigration Rules.

Decision

37. The appeal is dismissed under the Rules and allowed under Article 8 ECHR.

Signed

Date 13.6.2015.

Deputy Upper Tribunal Judge Birrell

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as the basis

on which the appeal was allowed were arguments and evidence that was not before the Respondent

Signed

Date 13.6.2015

Deputy Upper Tribunal Judge Birrell