Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35659/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 28 April 2015	**On 30 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Muhammad Shafique
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr Gill, of Gill Law Chambers
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Muhammad Shafique, date of birth 1.9.98, is a citizen of Pakistan.

2. This is his appeal against the determination of First-tier Tribunal Judge Herwald promulgated 7.1.15, dismissing his appeal against the decision of the Secretary of State, dated 27.8.14, to refuse his application made on 15.7.14 for leave to remain in

the UK as a spouse of a person present and settled in the UK, pursuant to Appendix FM of the Immigration Rules. The Judge heard the appeal on 22.12.14.

3. First-tier Tribunal Judge Shimmin granted permission to appeal on 23.2.15.

4. Thus the matter came before me on 28.4.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Herwald should be set aside.

6. At §11 of the decision the judge accepted that pursuant to section 84 of the 2202 Act the Tribunal could consider evidence about any matter relevant to the decision, including evidence concerning a matter arising after the date of decision. However, at §18(d) the judge noted that the requirement to produce an acceptable English language test certificate is 'specified evidence' which must be provided at the time of the application.

7. The grounds of permission to appeal to the Upper Tribunal argue that the First-tier Tribunal Judge erred in law in failing to admit post-decision evidence, namely a recently obtained English language test certificate, obtained after the date of decision.

8. In granting permission to appeal, Judge Shimmin found it was arguable that because this was not a Points Based System application, the judge should not have excluded the evidence.

9. However, whilst section 85(4) permits the Tribunal to 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 decision," that does not mean that the Tribunal is able to consider circumstances appertaining after the date of decision. Section E-LTRP 4.1 of Appendix FM requires the appellant to provide an acceptable English language test certificate. This is described as specified evidence. Appendix FM-SE D provides that the Secretary of State will only consider specified documents submitted with the application and will not consider such documents submitted after the application unless one of the (evidential flexibility) provisions set out under D are met. It has not been submitted that the late production of the English language certificate should have been admitted under any of these evidential flexibility provisions. It was produced at the appeal hearing, having been served on the Secretary of State only a few days earlier and thus there had been no time to consider the validity of the certificate, though it appears to have been accepted that this new certificate met the requirements for such certificates.

10. Thus section 85(4) could only assist the appellant if he could demonstrate by post-decision evidence that at the date of application he met the requirements. The evidence in question, the English language certificate, does not fulfil that role.

11. I note that the grounds of application for permission to appeal did not seek to challenge the apparent failure of the judge to expressly consider whether the appellant met the alternative requirements under section R-LTRP1.1(d), where EX1 applies. In such circumstances, compliance with either the English language or financial requirements is not required; the appellant only has to show compliance with E-LTRP1.2-1.12 & E-LTRP2.1.

12. Neither does the grounds challenge the judge's findings in relation to article 8 ECHR set out between §20 and §23 of the decision.

13. In any event, even if there was an error of law in not considering the EX1 alternative route, the Secretary of State has given cogent reasons for finding that the appellant could not meet the test of insurmountable obstacles to family life continuing with his partner outside the UK under EX1(b), as defined by EX2, namely, very significant difficulties which could not be overcome or would entail very serious hardship for the appellant or his partner. Nothing in the evidence before me suggests that the appellant would be able to meet that high threshold.

14. Neither would I have found, if I had conducted an article 8 ECHR assessment outside the Rules, that the decision of the Secretary of State was disproportionate. In addition to those factors considered by Judge Herwald, including section 117B of the 2002 Act, I would add that if the appellant considers that he can meet the requirements of Appendix FM, it is open to him to make a fresh application, taking care to ensure that he has all the necessary evidence to meet the requirements. For that reason it cannot sensibly be said to be disproportionate to require the appellant to comply with the Rules. Article 8 is not a shortcut to compliance with the Rules and to merely allow the appeal because he can effectively show that he would have been able to meet the Rules if only he had obtained and submitted an English language test certificate prior to making the application, would be to apply a near miss approach to compliance with the Rules, which is not a principle of law open to the Tribunal.

15. In the circumstances, the appeal to the Upper Tribunal must fail.

Conclusion & Decision:

16. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup