



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

Appeal Number: IA/44733/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination & Reasons  
Promulgated**

**On 12<sup>th</sup> August and 28<sup>th</sup> October  
2015**

**On 23<sup>rd</sup> November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR RAJA MUHAMMAD NAZAM KHAN**

Claimant

Representation:

For the Appellant: Mr S Walker, Senior Presenting Officer

For the Respondent: Unrepresented

**DETERMINATION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Grant Hutchison allowing the Claimant's appeal under the Immigration Rules and on human rights grounds with reference to Appendix FM.
2. In a Refusal Letter dated 27 October 2014, the Secretary of State refused the Claimants' application in relation to his application for an extension of his leave as the spouse of Ms Sidra Begum, a British citizen and present and settled person. The Appellant simultaneously issued removal

directions pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006 setting removal for Pakistan. The sole reason for refusal was that the Claimant failed to meet paragraph 284(ix) of the Immigration Rules as the English language certificate he had provided (an "ESOL" certificate) from EMD Qualifications ("EMDQ") was not an English language test provider approved by the Secretary of State for the purposes of leave to remain, as detailed in Appendix O to the Immigration Rules. The Appellant went on to consider Appendix FM and private life under paragraph 276ADE(1) of the Immigration Rules, however the refusal was maintained on those rules also.

3. The First-tier Tribunal promulgated its decision allowing the Claimant's appeal against those decisions on 16 February 2015. The First-tier Tribunal allowed the Claimant's appeal under the Immigration Rules and on human rights grounds with reference to Appendix FM, due to the insurmountable obstacles that the couple would face if they were to relocate to Pakistan.
4. The Appellant appealed against that decision. The grounds may be summarised as a broad challenge of failing to give reasons or adequate reasons for findings on a material matter, namely the success under Appendix FM EX.1(b). The Appellant was granted permission to appeal by First-tier Tribunal Judge Lambert.
5. I was not provided with a Rule 24 response from the Claimant. At the first hearing on 12 August 2015, the Claimant was represented by Mr A Slatter of counsel. At the second hearing on 28 October 2015, the Claimant was unrepresented but had sought the assistance of a family friend, a Ms Khan, whom was permitted to act as a McKenzie friend (given that she had done so without any remuneration being promised or given to her for her role). Consequently, I was addressed by the Claimant whom made basic oral submissions on his own behalf. I asked Mr Khan if he was happy to proceed with the hearing without a legal representative and he confirmed that he was content to do so.
6. At the close of submissions, I indicated that I found that there was a material error of law and set aside the decision, with the result that the appeal would be allowed on an alternate basis. I however reserved my reasons, which I shall now give.

### **Submissions**

7. From the outset, I openly express my thanks to Mr Walker who appeared on behalf of the Secretary of State and was of exemplary assistance in ensuring the just disposal of the appeal before the Upper Tribunal.
8. In essence, Mr Walker submitted that EMDQ in fact appeared to be qualified providers, even though they were not reflected as such in Appendix O. It was highlighted by the parties that Box 8.4 of the Claimant's Form FLR(M) submitted with the application (see page 43 of that form) confirmed the position that the provider was said to be

approved by Ofqual. To assist me in contextualising the Claimant's English speaking ability historically, Mr Walker produced a printout of the Home Office's spouse pre-assessment printout from its database (marked VAF 1673667) which confirmed that at the time of his entry clearance application the Claimant had produced an evidence that he had passed the Level A1 English language requirement with an approved provider. This was the only document that the Home Office had retained on its database and no further information was available. I accepted this new evidence even though late served in the interests of justice in accordance with my case management powers under rule 5(3) of the Tribunal Procedure (Upper Tribunal) Procedure Rules 2008.

9. Mr Khan also asked to provide new evidence in relation to the English language issue and given that there should be equity in arms, I permitted this evidence to be produced also. Mr Khan relied on a bundle containing 18 pages (unfortunately without a contents page) which included:
  - (i) evidence from the Home Office website concerning how to "Prove knowledge of English for citizenship and settling",
  - (ii) evidence of "Changes to knowledge of language and life in the UK",
  - (iii) printouts concerning Gatehouse Awards Ltd,
  - (iv) printouts for EMD (Qualifications) Ltd,
  - (v) a copy of a previous letter from EMDQ of 25 June 2014 (already sent with the Claimant's application and which confirms their presence on the Ofqual register at the relevant time),
  - (vi) a letter from BSGS College concerning the Claimant's passing the ESOL Skills for Life test at Level B1 of the CEFR, and
  - (vii) the Claimant's EMDQ Certificates through BSGS College for 5 April 2014.
10. Mr Walker continued his submissions and stated that from the documentation produced, it appears that EMDQ was an approved provider. He directed my attention to pages 14-15 of the new evidence from Mr Khan, which showed that EMDQ was Ofqual accredited. Mr Walker confirmed that EMDQ needed to be Ofqual accredited and did not necessarily need to appear as an approved test provider in the Appendices to the Immigration Rules. Mr Walker submitted that the Judge was right to state that the college was not on Appendix O but was wrong to find that the college needed to be listed on Appendix O but given that it was accredited with Ofqual.
11. Mr Khan agreed with this submission and confirmed that he had completed his course with EMDQ. Mr Khan clarified the appearance of Gatehouse Ltd, a new test provider, amongst the evidence by confirming that EMDQ Ltd transformed into Gatehouse Ltd and that Gatehouse Ltd is an Ofqual accredited test provider. Therefore, he asked me to note that his ESOL certificate should have been accepted.

12. Mr Walker then concluded his submissions by stating that it was agreed that there was an error in law as the appeal should have been allowed under the Immigration Rules, however not on the basis of Appendix FM, but due to the ESOL requirement being met.

### **Error of Law**

13. The sole basis of refusal as stated above is the failure to meet paragraph 284(ix) of the Immigration Rules. Paragraph 284 (ix)(a) of the Immigration Rules (as at 27 October 2014) states as follows:

‘Requirements for an extension of stay as the spouse or civil partner of a person present and settled in the United Kingdom

284. The requirements for an extension of stay as the spouse or civil partner of a person present and settled in the United Kingdom are that:

(ix) (a) 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:

(i) the applicant is aged 65 or over at the time he makes his application; or

(ii) the applicant has a physical or mental condition that would prevent him from meeting the requirement; or;

(iii) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement’

14. The only relevant portion of that paragraph for the Claimant’s purposes is the first paragraph within 284(ix)(a). The rule clearly requires the Claimant to produce an English language test certificate from an English language test provider approved by the Secretary of State for these purposes.

15. Mr Walker accepts that the English language provider, EMDQ, is an approved provider. This acceptance appears to stem from the fact that the excerpt from the Home Office’s website states that a qualification will be accepted for settlement and naturalisation purposes, if the qualification is:

“...listed as an ESOL qualification on the Register of Regulated Qualifications and have been taken in England, Wales or Northern Ireland. The register is available at: <http://register.ofqual.gov.uk/2>”

16. It is not disputed that EMQD was such a provider nor that its current incarnation as Gatehouse Ltd is also a provider registered with Ofqual. This is indeed confirmed by the evidence that Mr Khan produced which Mr Walker drew to my attention. I accept Mr Walker’s submission that EMDQ

only needed to be an Ofqual-accredited provider and did not necessarily need to appear as an approved test provider in Appendix O, or any of the other Appendices to the Immigration Rules. This is because the website publicises that Ofqual registered test providers *are* approved by the Secretary of State. This approval is not reflected in Appendix O, however, if the public policy statements of the Appellant on her website are more relaxed than the Rules, it is only fair and just that those policy statements are honoured by her.

17. For my part, I find it is troubling that Appendix O describes itself as a “List of English language tests that have been approved by the Home Office for English language requirements for limited leave to enter or remain under the Immigration Rules”. That description clearly does not explicitly purport to provide a comprehensive list of approved test providers, but only goes towards approved tests or qualifications. Nonetheless, given my findings above, I do not need to delve further into this topic.
18. In conclusion, although I was not addressed on the matter explicitly, I find that there was a material error of law in the Determination by the First-tier Tribunal; however, not based upon its Article 8 ECHR assessment (which to my mind is immune from criticism), but on the basis that the Tribunal materially erred in failing to find that an English language test by an approved provider had been provided. I should say that this finding is in no way the fault of the First-tier Judge given that the judge was making this decision on the papers and did not have the benefit of the submissions from Mr Walker for the Secretary of State as I have had. Therefore, the decision is set aside.

### **Remaking the Decision**

19. The standard of proof is the civil standard and that of the balance of probability. It is for a party that makes any assertion to discharge the burden of proof in establishing their assertion, for example, in relation to the reliability of documentation. I have considered all the evidence in the appeal, including the appellant’s and respondent’s bundles. I heard submissions from both parties which are set out in full in my record of proceedings.
20. In remaking the decision, I therefore only need consider whether the Claimant had provided *“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)”*.
21. I find that the Claimant had produced such an original English language test certificate from EMDQ, an English language test provider that was implicitly approved by the Secretary of State because the provider was itself approved and registered with Ofqual, which is a status that renders

that provider as approved according to the Home Office's publicised policy statements on her website.

22. It is common ground before me that the Claimant meets paragraph 284(ix) of the Immigration Rules. In light of that agreement and my findings and analysis of the evidence above, I find that the Claimant provided an appropriate original English language test certificate from an English language test provider approved by the Secretary of State. The appeal therefore falls to succeed under the Immigration Rules. I therefore, do not propose to deal with Article 8 ECHR nor Appendix FM nor paragraph 276ADE.
23. For the above reasons I set aside the judge's decision and remake the decision allowing the appeal under the immigration rules.

### **Decision**

24. I allow the Appellant's appeal against the Respondent's decision to refuse further leave to remain as the spouse of a present and settled person.

### **Fee Award**

25. The First-tier Tribunal did not make a fee award and I also do not see fit to make such an award given that new evidence was presented before me at this appeal which was not before the First-tier Tribunal.

Signed

Date

Deputy Upper Tribunal Judge Saini