Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04407/2012

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 17 September 2013	**On 11 October 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

WONDIMU WAKEWOYA UMTEA

Appellant

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellant: Ms L Fenney of Duncan Moghal Solicitors & Advocates
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Ethiopia who was born on 12 September 1971. On 6 February 2012, the appellant made an application for entry clearance to join his spouse in the United Kingdom, Meskerem Mengistu Feyssa, who is also an Ethiopian citizen and who has been recognised as a refugee in the UK. The appellant and sponsor married on 27 August 2011 in Kenya. The sponsor has limited leave to remain in the United Kingdom

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until 25 February 2014. On 15 February 2012 the Entry Clearance Officer in Nairobi refused the appellant's application under para 319L of the Immigration Rules (HC 395 as amended).

2. The appellant appealed to the First-tier Tribunal. It was common ground before the judge that the only requirement under para 319L that was in issue was the English language requirement in para 319L(i)(b). That provides as follows:

> "The requirements to be met by a person seeking leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection, are that:
>
> (i)(a) .....
>
> (b) 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) ..."

3. Paragraph 319L(i)(b) sets out a number of exceptions to that requirement but none are relevant in this appeal.

4. The appellant relied upon the International English Language Testing System (IELTS) and a certificate provided by Cambridge ESOL. That certificate set out the following:

> "Listening 3.5
>
> Reading [illegible]
>
> Writing [possibly] 5
>
> Speaking 6.0
>
> Overall band score 4.5"

5. I take that extract from para 15 of Judge Hart's determination.

6. The difficulty for the appellant was that there was no official equivalence of an IELTS score on the CEFR. That was clearly set out in a letter dated 11 July 2012 from the UKBA addressed to Mr C M G Ockelton, Vice President of the Upper Tribunal (Immigration and Asylum Chamber) which is set out at para 24 of the judge's determination as follows:

> "A does not meet the requirements because an IELTS score below 4.0 is not a test from an approved provider which meets or exceeds level A1. The IELTS has indicated to UKBA (and confirmed again recently that they are not in a position to score tests below 4.0 for UKBA and although there is a wealth of information on the website which attempts to align IELTS scores below 4.0 to a score on the Common European Framework of Reference, a score below 4.0

is not equivalent to any scale on the Common European Framework of Reference."

7. The judge rejected the argument made on behalf of the appellant that his mark of 3.5 in the "listening" part of the test was sufficient. At para 44, Judge Hart noted that the Secretary of State had provided Guidance (although he does not set it out) which accepted a qualification under the IELTS scheme but only provided an equivalence on the CEFR scale for a score of 4.0 on the IELTS test at CEFR level B1. Noting that a number of websites relied upon by the appellant provided differing views in comparing IELTS scores to CEFR levels, the judge was not satisfied that the score of 3.5 on the IELTS test was the equivalent of level A1 on the CEFR.

8. Ms Fenney, who represented the appellant, acknowledged that she was in some difficulty in challenging Judge Hart's decision in the light of the Upper Tribunal's decision in Akhtar (CEFR; UKBA Guidance and IELTS) [2013] UKUT 00306 (IAC). In that case, the Upper Tribunal (Mr C M G Ockelton, Vice President, and UTJ Grubb) concluded that an applicant who relied upon an IELTS test score awarded by Cambridge ESOL had to rely upon the UKBA's Guidance in order to establish an equivalence with CEFR levels. The italic words of Akhtar are as follows:

> *"1. Where, under the Immigration Rules, it was required that, as an English language requirement, an individual must achieve a certain level by reference to the Common European Framework Reference (CEFR) (i.e. A1, B1, B2 etc) and the individual relies on an International English Language Test System (IELTS) test result awarded by Cambridge ESOL, that individual must necessarily rely on the relevant UKBA's Guidance to succeed because the Rules do not state an equivalence between the IELTS test results and the levels of the CEFR.*
>
> *2. The UKBA's Guidance does not attribute any mark less than level B1 to any IELTS score and so, in practical terms, equivalence to at least B1 must be established even where the level to be achieved is A1.*
>
> *3. In order to achieve a particular CEFR level, it is not enough simply to look at the individual's overall score: The Guidance requires that at least each of the individual modules in 'speaking' and 'listening' has been assessed at the level required."*

9. On the face of it, therefore, this appellant's appeal must fail as the score in "listening" of 3.5 has no equivalence on the CEFR and, in order to succeed, the appellant must obtain a score equivalent to level B1, namely 4.0 in both "listening" and "speaking". It is only in the latter element of the test that he has acquired a score at at least level B1.

10. Nevertheless, Ms Fenney (who also represented the appellant in Akhtar) sought to argue that the appellant should succeed. First, she relied upon the decision of the decision of the Supreme Court in R(Alvi) v SSHD [2012] UKSC 33 in which it was held that the Secretary of State's Guidance could not impose a requirement, the effect of which was that an individual could

not succeed under the Rules. Any such requirement was a "rule", and as such had to be included in the Immigration Rules.

11. The difficulty with this submission is that without the Guidance this appellant cannot hope to succeed. There is no stated equivalence for level A1 of the CEFR apart from the Secretary of State's Guidance. In any event, as the letter referred to in paragraph 5 above makes plain, the Guidance merely reflects the position of the IELTS that their test does not provide a score which can be equated directly to level A1 of the CEFR. It is not the Secretary of State's Guidance which sets the limit on the value of the IELTS score when assessed against the CEFR, rather it is the IELTS itself. Thus, I am unable to accept Ms Fenney's submission that the Guidance is unlawful and that the appellant is entitled to succeed despite its terms.

12. Secondly, Ms Fenney relied upon an email dated 10 February 2011 from the Public Enquiries Customer Services, Visa Services Directorate of the UKBA. That email states as follows:

> "Thank you for the follow on enquiry.
>
> An IELTS test score of 3.5 is equivalent to a B1 level which exceeds the basic A1 level of English required for a settlement visa application. Your spouse may therefore lodge her IELTS test score as evidence of her English language competence."

13. Ms Fenney accepted that this email was not generated in relation to this appellant. She indicated that she had received it from another immigration lawyer and that it related to a different individual from the appellant.

14. There are a number of difficulties in the appellant seeking to rely on this email. First, as Mr Richards pointed out in his submissions, this email was not before the First-tier Tribunal and could not therefore demonstrate that the judge had erred in law in reaching his decision. That, in my judgment, is entirely correct.

15. Secondly, in any event, the email is not directed to the appellant and has never been, until the hearing before me, any part of the appellant's case. It both contradicts the Secretary of State's Guidance and also the position of IELTS on its own test. The email states that the score of "3.5" is the equivalent of level B1. Ms Fenney, of course, seeks to argue that a score of 3.5 is the equivalent of level A1. IELTS itself does set an equivalent for level B1 and that is a score of 4. It is difficult, therefore, to understand upon what basis the writer of this email asserts that a score of 3.5 is the equivalent to level B1. As I have said, this email was not addressed to the appellant or his representatives and can give rise to no legal basis or expectation that an IELTS score of 3.5 will be accepted as the equivalent of level A1, let alone (as it appears to claim) level B1.

16. Finally, I would simply add that the various websites to which Judge Hart was referred cannot assist to establish an equivalence between an IELTS score and the CEFR which is not recognised by IELTS itself as reflected in the Guidance. As Judge Hart noted at para 40, the various websites contain "differing material" but even if it did not, that material could not remove the lacuna deliberately inserted in the equivalence scales set by IELTS itself.

17. For these reasons, and applying the Upper Tribunal's decision in Akhtar, the judge did not err in law in finding that the appellant had failed to meet the English language requirement in para 319L(i)(b) because he could not establish that his IELTS score in "listening" of 3.5 was the equivalent of at least level A1 of the CEFR.

18. Ms Fenney additionally submitted that the judge had erred in law in also dismissing the appeal under Art 8.

19. Ms Fenney submitted that the judge's decision was tainted by his view that the ECO had not been satisfied of the remaining requirements of para 319L, in particular that the appellant's marriage was a genuine one. Ms Fenney submitted that the judge should have approached the appellant's Art 8 claim on the basis that the only requirement of para 319L which was not met was the English language requirement. She submitted that as the point was not directly taken, the ECO must have accepted the genuineness and subsistence of the marriage. Ms Fenney reminded me that the sponsor was a refugee and would be unable to live with the appellant in Ethiopia.

20. Judge Hart dealt with the appellant's claim under Art 8 at paras 49-59 of his determination.

21. First, at para 49 he set out the submission made by Ms Fenney on behalf of the appellant as to the basis on which the appellant should succeed under Art 8 on the basis that he had "failed by a narrow whisker" to succeed under the Rules:

> "49. Ms Fenney therefore seeks to argue that, having failed by a narrow whisker and on a technical point to meet the strict requirement of the Rules, he should nonetheless be allowed entry clearance though discretionary leave to enter under Article 8. A practical result, of course, is that any discretionary leave which might be granted to him ought not to be longer than the period for which he would have been granted leave under the Rules, namely the equivalent period granted to the sponsor."

22. The judge dealt with the nature of the appellant's relationship with the sponsor at paras 50-53 as follows.

> "50. Evidentially, I have difficulty in reaching an assessment of Article 8. Firstly there is no witness statement as such from the appellant or sponsor about the nature of their relationship. Secondly the respondent has apparently reached no decision on whether the marriage is subsisting and therefore there exists a family life.

> 51. The sponsor's travel document shows a re-entry stamp as 21 September 2011, the date of entry into Kenya is unclear but was in July. The entries in the appellant's passport for Kenya suggest that he entered on 16 August 2011 and left on 21 September. The marriage took place on 27 August 2011. There is no indication before me that the appellant and sponsor have met again following the marriage. The sponsor's travel document was issued in February 2009 but, describing the appellant as her long-term boyfriend, neither she nor he had made arrangements for the marriage until May 2011.
>
> 52. It is therefore not possible to assess the strength of their relationship.
>
> 53. The visit surmises that the sponsor can travel again to Kenya to meet the appellant and spend time there with him."

23. Mr Richards submitted that the judge had accepted that the appellant's marriage was a genuine one but had merely gone on, on the basis of the limited evidence before him, to comment that it was not possible to assess the "strength" of the relationship. In my judgment, that is correct. I do not accept Ms Fenney's submission that the judge doubted the genuineness of the relationship. At para 50, he refers to the fact that the respondent had apparently not made any decision on the nature of their relationship but, it is clear, that thereafter the judge accepted that it was a genuine marriage but, in the absence of a witness statement from the appellant or sponsor, it was not possible to assess the strength of their relationship. At paras 54-56, the judge, having made that latter finding, went on to conclude that the refusal was not a "serious interference" with their family life as follows:

> "54. If the issue is whether or not the respondent's refusal is a serious interference with the supposed family life, I find that it would not be a serious interference. They have lived their separate lives for many years and delayed their marriage.
>
> 55. As I pointed out at the hearing, it is open to the appellant to make a fresh application based upon either a qualifying IELTS certificate, with a better score for the two required aspects, or that he takes the CEFR equivalent examination and achieves success. It was briefly mentioned at the hearing that he has already taken another examination but the result was not known. In any event my decision must be based upon the circumstances at the date of the decision and a subsequent successful result would not assist the appellant. The downside is, of course, that since July more stringent and realistic levels of maintenance have been set and (without knowing the details) the appellant may be in some difficulties in meeting that requirement.
>
> 56. Nonetheless, I would find that the refusal of entry clearance by the respondent on the one basis set out in the decision does not represent a serious interference with the family life of the appellant and the sponsor. It is plainly in accordance with the law and the Immigration Rules, as they have been interpreted."

24. Then, having set out the Court of Appeal's decision in SSHD v Miah [2010] EWCA Civ 261 that there was no "near-miss" principle, the judge continued at para 58 as follows:

> "58. With that and other decisions on Article 8 in mind, notably those of **Huang** and the stepped approach in **Razgar**, which I have applied, I find that the respondent's decision is not in breach of the appellant's and sponsor's right to private and family life under Article 8. It is clear that the appellant has nearly missed reaching the required qualification under the Immigration Rules for proficiency in English. It is open to him, as he may have already done, to resit the examination and therefore qualify. It is yet to be shown that the appellant meets the other requirements of the Immigration Rule. It would be entirely wrong to allow the appeal under Article 8, thereby not only excusing the appellant from strict compliance with the Immigration Rule by possibly affording him a grant of discretionary leave without meeting many of the requirements of the Immigration Rule and in particular that with regard to the length of the leave. Although the appellant fails in this appeal on a small technical point, he nonetheless fails but has the opportunity to make good that failure by resitting the examination or taking the correct test. It cannot be the purpose of Article 8 to relieve the appellant of the duty of meeting the now more stringent requirements of the amended Rules relating to entry clearance by family members."

25. Consequently, the judge found in para 59 that the respondent's decision did not breach Art 8.

26. As I have already pointed out, Ms Fenney's principal submission (which is the basis for the challenge to the judge's decision under Art 8 set out in paras 3-4 of the grounds) was that the judge approached the appeal on the erroneous basis that it had not been established that the appellant met the requirements of para 319L with the exception of the English language requirement. It is clear on reading the judge's reasons that he did not fall into that error. Although the judge stated in para 58 of his determination that the appellant has not yet shown that he meets the other requirements of the Immigration Rules, he nevertheless clearly approached the appellant's appeal on the basis that he was married as claimed; it was a genuine but one which, on the basis of the limited evidence, he was not able to assess the strength of that relationship. In the absence of statements from the appellant and sponsor or oral evidence from the sponsor that was a finding properly open to the judge. He took into account that the appellant did not presently meet the English language requirement of the Rules. The appellant had the option of resitting the test, and the judge noted at para 55, that the appellant had already taken another exam but the result was not known. Ms Fenney was unable to confirm what, if any, result had been obtained.

27. In my judgment, the judge gave adequate reasons for his finding that the respondent's decision did not breach Art 8. The basis upon which that decision is now challenged is, for the reasons I have given above, rejected. I see no other basis upon which it could be argued that the judge erred in law in reaching his decision to dismiss the appeal under Art 8. It was a conclusion properly open to him on the evidence.

Decision

28. For these reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal under the Immigration Rules and Art 8 did not involve the making of an error of law. Those decisions stand.

29. This appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal