Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16903/2014

THE IMMIGRATION ACTS

Heard at City Tower, Birmingham
On the 30th June 2015

Decision & Reasons Promulgated
On 24th July 2015

Before:

UPPER TRIBUNAL JUDGE J PERKINS
UPPER TRIBUNAL C J HANSON
DEPUTY JUDGE OF THE UPPER TRIBUNAL R F MCGINTY

Between:
HIRABEN HASMUKH VADHER
(Anonymity Direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hasmukh Vadher (Sponsor)
For the Respondent: Mr N Smart (Senior Home Office Presenting Officer)

DECISION AND REASONS

Background

1. The Appellant is a citizen of India who was born on the 12th September 1955. The Appellant entered the United Kingdom on the 27th November 2011 with leave to enter as the spouse of Mr Hasmukh Vardon. She applied on form FLR (M) for an extension of her stay in the UK as the partner of a person present and settled in the UK on the 21st January 2014, before expiry of her leave on the 24th January 2014. However, her application was rejected by the Respondent as being invalid, due to the Appellant's failure to complete the payment page

and the Appellant was told that she would have to resubmit her application, ensuring that the payment page was completed. The Appellant, through her then representatives Messrs Rakkani Solicitors, resubmitted the application together with a cheque for the requisite fee on the 11th February 2014, after the Appellant's leave to remain had expired on the 24th January 2014. The Respondent issued a Notice of Decision refusing to grant leave to remain under paragraph 286 of the Immigration Rules with reference to paragraph 284 (iv) and under paragraph D-LTRP 1.3 with reference to paragraph R-LTRP 1.1 (d) and under paragraph 276 ADE (iii)-(vi) on the 29th March 2014.

2. She purported to appeal to the First Tier Tribunal against what was considered by the First Tier Tribunal to be an Immigration Decision refusing her application. First-Tier Tribunal Judge Crawford, in a determination promulgated on the 18th July 2014, dismissed her appeal on the basis that he found that the Appellant did not have an English language test certificate that complied with the requirements of paragraph 284 (viii) of the Immigration Rules and that she had not produced any medical evidence to show that she was incapable of taking the relevant English language test. He further found that there were no insurmountable obstacles stopping the Appellant and her husband could not settle in India. First-Tier Tribunal Judge Crawford went on to consider the appeal under Article 8 outside of the Immigration Rules and applied the five stage Razgar test, but concluded that to remove the Appellant to India was a proportionate response by the United Kingdom commensurate with the U.K.'s right to control immigration and would not amount to a breach of the Appellant's or her husband's Article 8 rights. He therefore dismissed the appeal under both the Immigration Rules and under Article 8 of the ECHR.

3. Permission to appeal to the Upper Tribunal was granted by First Tier Tribunal Judge Page on the 12th September 2014, on the basis that:

> "The Grounds of Appeal contend that the Judge was wrong to find that it was proportionate to remove the Appellant to India so she could obtain the pre-requisite English language certificate to meet the Respondent's requirements. At paragraph 18 of the determination the Judge noted that the Appellant would be removed from the UK possibly seven weeks later, if the appeal was dismissed. The Judge said she had time to study for the relevant English language test before she was removed and could, if necessary, study for the test in India. The Grounds of Appeal referred to a letter from the Appellant's doctor which the Judge did consider at paragraph 9 of the determination. The letter from the Appellant's doctor said that the Appellant was not able to sit the examination but did not give any health grounds as to why. The Grounds of Appeal argued that the Judge should have considered allowing the appeal to enable the Appellant to have sufficient time to pass the test rather than assume she would be able to pass the test in the seven weeks before she was due to be removed. This point appears arguable so permission to appeal is granted".

4. Prior to the commencement of the appeal hearing we were handed a fax from the Appellant including a letter from her dated the 25th June 2015, but received by the Upper Tribunal at 4:47 p.m. on the afternoon of the 29th June 2015, indicating that she had withdrawn her instructions from her representatives Messrs Rakkani Solicitors. In that fax it was argued that before the previous appeal heard by First-Tier Tribunal Judge Crawford, she had submitted a letter from her doctor to confirm that she was not in a position to secure the English language certificate and that she had in fact secured the English-language certificate on the 3rd October 2014 and submitted the same to the Respondent on the 18th November 2014, asking that she be granted further Leave to Remain in the United Kingdom. It was said that the Appellant did not receive any response to that letter, but it was submitted that she had now passed the English-language test. It was argued that such new evidence should be admitted under section 85 (4) of the Nationality, Immigration and Asylum Act 2002. It is argued that the requirement of an English language test was unreasonable and unlawful as at the point of entry clearance application she did not have to meet any English-language test. It was further submitted that the proportionality test was not properly carried out by First-Tier Tribunal Judge Crawford and that her husband has been working for over 32 years in the UK and they do not have any house or source of income in India.

Submissions

5. At the start of the appeal hearing we ensured that the Appellant Mrs Vadher was able to understand us fully in English and she confirmed that this was the case. She asked for permission for her husband and her sponsor Mr Hasmukh Vadher to represent her. No objection was raised to this by Mr Smart on behalf of the Respondent, and so, in the interest of justice, we gave permission for Mr Vadher to represent the Appellant.

6. Given that the Appellant was not legally represented at the appeal hearing before us, in the interests of justice we asked Mr Smart to outline the circumstances of the appeal and his submissions before hearing from the Appellant. The Appellant and her husband were happy for us to take this course.

7. Mr Smart submitted that there was in fact no right of appeal to the First-tier Tribunal in this case. He submitted that within the letter of refusal, the contents of which were repeated by First-Tier Tribunal Judge Crawford at paragraph 2 of his determination, it was stated that “Your application for Leave to Remain in the UK has been refused and you no longer have any known basis of stay here. There is no right of appeal against this refusal.” He submitted that the First-Tier Tribunal Judge was therefore wrong to go on to consider the appeal at all and that as there was no right of appeal, the decision of First-Tier Tribunal Judge Crawford is void for want of jurisdiction. He submitted that there was

no removal decision in this case and that the Appellant's valid application for leave to enter was made on the 11th February 2014 after her leave had expired on the 24th January 2014 and that she did not have leave to enter or remain at the time of her application. He submitted that the Appellant would now be in a position to make a fresh application, now that she had secured her English-language certificate and that it was only if a removal decision was made that this would give rise to an appealable decision for the purposes of Section 82 of the Nationality, Immigration and Asylum Act 2002.

8. Mr Vadher referred us to the letter that had been written by the Appellant dated the 25th June 2015, and argued that his wife had now passed the English-language test and that she had brought the original certificate to court.

9. We reserved our decision.

Error of Law

10. In the case of Kaur (Entry Clearance - date of application) [2013] UKUT 00381 (IAC) was held that an application for entry clearance that does not comply with the requirement in Regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 of being accompanied by payment of a fee is a nullity and is not an application for the purposes of the Immigration Rules or any statutory provision, and that the application is only made on the date on which payment of the relevant fee is made. In such circumstances, although the Appellant initially sought to make her application on the 21st January 2014, before the expiry of her Leave to Remain on the 24th January 2014, that application having been rejected by the Respondent because of the failure to complete the payment page and pay the requisite fee, we find that the original application was invalid and a nullity. We find that it was not therefore until the properly completed application together with the requisite fee was submitted on the 11th February 2014, that the application was in fact validly made. The Respondent was therefore correct within the Notice of Decision to state that the Appellant did not have valid leave to enter or remain, as at the date of her application.

11. As a valid application was not submitted prior to the expiry of her leave, the Appellant's leave would not have been extended by virtue of Section 3C of the Immigration Act 1971. This was therefore not a case in which the refusal to vary a person's leave to enter or remain in the United Kingdom resulted in a person having no leave to enter or remain, for the purposes of Section 82 (2) (d) of the Nationality, Immigration and Asylum Act 2002, as the Appellant no longer had valid leave to remain as at the date of her application. It is also significant in this case that no removal directions have been issued in respect of the Appellant, whether under Section 10 (1) of the Immigration and Asylum Act 1999 or otherwise. In such circumstances, we find that no immigration decision has been made in respect of the Appellant, which

she would have been entitled to appeal to the First Tier Tribunal under Section 82 of the Nationality, Immigration and Asylum Act 2002.

12. We have borne in mind that the Court of Appeal in the case of Rashid Anwar and Prosper Adejo v Secretary of State for the Home Department [2010] EWCA Civ 1275 held that in respect of questions of constitutive jurisdiction, as to whether or not the Appellant had any right of appeal at all under Section 82 (1) of the Nationality, Immigration and Asylum Act 2002, that if there was no appealable immigration decision, as in Mr Adejo's case, then the question as to want of jurisdiction could be raised in the Upper Tribunal, even though the point was not taken on appeal at the First Tier Tribunal.

13. We further bear in mind that it would not have been open to either the Duty Judge or First-tier Tribunal Judge Crawford, to have granted a right of appeal, if there was in fact no appealable decision, as this was not a matter of discretion, it is a matter of jurisdiction. The fact that the case proceeded to an appeal hearing before First-tier Tribunal Judge Crawford did not in fact confer jurisdiction on him to hear it.

14. In such circumstances the decision of First-Tier Tribunal Judge Crawford in this case was erroneous in purporting to determine the appeal when there was no jurisdiction to do so. This amounts to a material error of law. Accordingly, the decision of the First Tier Tribunal must be set aside. Having set the decision of the First-tier Tribunal aside, there is no appeal before us that we have jurisdiction to determine.

Signed Rob McGinty

Deputy Judge of the Upper Tribunal McGinty Dated 1st July 2015