Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31283/2014

THE IMMIGRATION ACTS

Heard at Taylor House	**Determination Promulgated**
On 22 April 2015	**On 5 May 2015**

Before

UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MARIE CHRISTINE YVETTE BERTRAND
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Unrepresented

DECISION AND REASONS

1. The respondent, Marie Christine Yvette Bertrand, is a citizen of Mauritius and her date of birth is 7 April 1967. I will refer to the respondent as the appellant as she was before the First-tier Tribunal.

2. On 19 May 2014 the appellant made an application for leave to remain in the UK as the spouse of a person present and settled. Her application was refused by the Secretary of State in a decision of 17 July 2014. The application was refused under the Immigration Rules (Appendix FM).

3. The appellant appealed against the decision of the Secretary of State and her appeal was allowed by judge of the First-tier Tribunal A Khawar, in a

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decision that was promulgated on 12 December 2014, following a hearing at Hatton Cross on 5 November 2014. Judge Khawar allowed the appeal under the Immigration Rules (Appendix FM). He dismissed the appeal under paragraph 289A of the Immigration Rules (relating to victims of domestic violence) and under Article 8 of the 1950 Convention on Human Rights.

4. The Secretary of State appealed against the decision of Judge Khawar and permission was granted by judge of the First-tier Tribunal Lambert in a decision of 9 February 2015. Thus the matter came before me.

The Decision of the First-tier Tribunal

5. The judge heard evidence from the appellant who had applied for further leave to remain as the spouse of British citizen, Mr Louis Harry Navarre, the sponsor who is a British citizen and settled in the UK. It was agreed by the parties that the appellant and Mr Navarre were married on 31 March 2014.

6. The appellant lawfully came to the UK on 29 December 2008 as Mr Bertrand's (her first husband) dependent spouse. The judge heard that the marriage broke down as a result of his violence against her. A decree absolute was granted on 30 August 2013 She was then granted discretionary leave to remain in the UK post her divorce until 30 May 2014.

7. The application was refused as the appellant had not met the requirements of Appendix FM in relation to the English language test. The appellant had raised Section 289A of the Immigration Rules having been served with a one-stop notice under section 120 of the 2002 Act.

8. At the hearing before the First-tier Tribunal the appellant submitted an English language test certificate. She maintained that the same had been served and filed some time ago (the certificate was not on the Presenting Officer's file.)

9. The judge found that the appellant had not discharged the burden of proof in relation to the cause of the breakdown of her first marriage. In relation to Article 8 the judge recorded in his determination that the appellant's husband was present at the hearing but was not called to give evidence and there was no witness statement from him. The judge found that he had little option but to conclude that it had not been established that there were insurmountable obstacles for family life to be enjoyed in Mauritius and recorded that the appellant's appeal must fail under Article 8 whether it was considered under the Immigration Rules or outside them (see [18]). The judge went on to make findings in relation to the English language certificate which was produced by the appellant and which was issued on 25 July 2014 and he made the following findings:

"In relation to the respondent's refusal under the partner-five year route, the appellant had submitted English language certificates issued on 25 July 2014 (Pearson Edexcel entry level certificate (in ESOL – skills for life) speaking and listening) – these indicate she attained entry level 3 for speaking and listening. During his submissions the Home Office Presenting Officer Mr Shane indicated that he was not sure whether the certificates meet the requirements under Appendix O of the Immigration Rules and they have not been considered by the caseworker in question because they were only served with the grounds of appeal.

20. The appellant's representatives submitted that the grounds of appeal were filed some considerable time ago, on 4 August 2014. The Home Office had clearly not considered them as the respondent's bundle dated 16 September 2014 makes no reference to English language certificates. As the conclusion of submissions I indicated to both representatives that I would remit this particular issue to the respondent for further consideration as neither party was able to provide the Tribunal a copy of Appendix O applicable as at the date of the decision in this case. Upon further reflection however I am satisfied that the English language certificates, submitted by the appellant, albeit submitted after the respondent's decision dated 17 July 2014, meet the requirements of E-LTRP.4.1(b) – i.e. a minimum level of A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State. There is no evidence to suggest that Pearson is not an approved provider. The appellant has clearly obtained entry level 3 in relation to both speaking and listening. There is no evidence that this is not equivalent to level A1 of the CEFR. Accordingly I am satisfied that the appellant meets the requirements of the aforesaid Immigration Rule and that she is entitled to succeed in this appeal under the partner-five year route."

The Grounds Seeking Permission to Appeal and Oral Submission

10. The grounds maintain that the judge erred in taking into account the certificate that was produced post the date of the decision and the judge erred in the assessment of paragraph 117B of the 2002 Act and in respect of Article 8 generally.

The Immigration Rules

11. R-LTRP.1.1:

"The requirements to be met for limited leave to remain as a partner are –

(a) the applicant and their partner must be in the UK;

(b) the applicant must have made a valid application for limited [or indefinite] leave to remain as a partner; and either

(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2 – 1.12. and E-LTRP.2.1.; and

(iii) paragraph EX.1 applies."

12. E-LTRP.4.4.:

"If the applicant has not met the requirement in a previous application for leave as a partner [or parent], the applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;

(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the [Secretary of State];

(c) have an academic qualification recognised by [UK NARIC] to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or

(d) are exempt from the English language requirement under paragraph E-LTRPT.4.2.; unless paragraph EX.1. applies."

13. Mr Tufan submitted Appendix FM-SC which specifies the following at D(a):

"In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ('the decision-maker') will consider the documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies."

14. At paragraph 27 of Appendix FM-SC contains the evidence of English language requirements and reads as follows:

"Evidence of passing an English language test in speaking and listening must take the form of either:

(a) A certificate and/or other document(s) for the relevant test as specified in Appendix O that:

(i) is from an English language test provider approved by the Secretary of State for these purposes as specified in Appendix O of these rules;

(ii) is a test approved by the Secretary of State for these purposes as specified in Appendix O of these rules;

(iii) shows the applicant's name;

(iv) shows the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference); and,

(v) shows the date of the award.

or

(b) A printout of the online score from a PTE (Pearson) Test which:

(i) is a test approved by the Secretary of State for these purposes as specified in Appendix O of these Rules;

(ii) can be used to show that the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference); and,

(iii) is from an English language test provider approved by the Secretary of State for these purposes as specified in Appendix O of these Rules."

15. Appendix O indicates that the Pearson Test of English academic (PTE academic) awarded by Pearson is approved by the Home Office and the levels recorded by the test are A1 – C2. The test validity is for a period of two years and the documents required with the application are a printout of online school report. In addition Appendix O requires that the scores are sent to the Home Office online and it is stated that Pearson does not issue paper certificates.

Error of Law

16. The appellant attended the hearing unrepresented. She had been represented before the FtT when she gave evidence in French through an interpreter. There was no interpreter at the hearing before me; however, I

was satisfied that the appellant understood the issues at the hearing and I gave her the opportunity to address me. There was no need for the appellant to give evidence in order for me to decide whether or not the FtT had made an error of law. No further evidence had been submitted in accordance with the directions of the Tribunal.

17. The document submitted by the appellant is a Pearson Edexcel entry level certificate and it indicates that the test was a ESOL – skills for life (speaking and listening) and that the level attained is entry 3 and that the appellant had completed an approved programme at East London Skills for Life. The certificate was awarded in July 2014.

18. The appeal was dismissed under article 8, but allowed under the rules because the judge accepted that the appellant had satisfied the English language requirement of the rules. The certificate indicated that the appellant had completed not a Pearson Test of English academic (PTE academic), but a skills for life test which is not a test that features in Appendix O. The judge made an error of law when he found that the appellant had satisfied the English language requirement of the Rules. In any event, having found that the appellant had not established that there are insurmountable obstacles to family life with her husband continuing outside the UK, it was not open to the judge to allow the appeal under the Rules. The judge made a material error of law in allowing the appeal under the Immigration Rules.

19. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. I remake the decision and dismiss the appeal under the Rules pursuant to Section 12(2)(b)(ii).

20. Mr Tufan argued that it was not open to the judge to admit the evidence in relation to the English language certificate. Section 85 of the 2002 does not apply in this case because it is a specific requirement of the Rules that specified documents must be provided (subject to exceptions which do not apply in this case). He referred me to Appendix FM-SE (see above). Mr Tufan also relied on SSHD and Pankina [2010] EWCA Civ 719 specifically at [39]. However, I do not need to determine this issue as it is not material to the outcome of this appeal.

21. I set aside the decision of the FtT to allow the appeal under the rules pursuant o section 12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007 and remake the appeal under section 12 (2) (b) (ii) of the 2007 and dismiss the appeal under the Rules.

Signed Joanna McWilliam Date 1 May 2015

Upper Tribunal Judge McWilliam