Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25600/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 August 2015	**On 1 September 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Mashahed Husain
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr I Khan, instructed by Hamlet Solicitors
For the respondent: Ms A Weller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Mashahed Hussain, date of birth 25.10.80, is a citizen of Bangladesh.
2. This is his appeal against the decision of First-tier Tribunal Judge Finch promulgated 9.3.15, dismissing his appeal against the decision of the Secretary of State, dated 4.6.14, to refuse leave to remain in the UK as a spouse, and on 10.6.14 to remove him from the UK. The Judge heard the appeal on 11.2.15.
3. First-tier Tribunal Judge Macdonald granted permission to appeal on 11.5.15.
4. Thus the matter came before me on 28.8.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out herein, I find that there was no material error of law in the making of the decision of the First-tier Tribunal so as to require the decision of Judge Finch to be set aside.

6. In essence, the grounds of application for permission and as amplified in Mr Khan's submissions to me, challenge the judge's conclusion that deception was used in his 2011 ETS test, on the basis that there was a lack of specific evidence relating to this appellant. It is further complained on this issue that at §12 the judge misdirected herself by comparing the scores on two different tests.

7. In relation to the comparison between the two tests at §12, I find that the judge was fully entitled to take the rather stark discrepancy into account. Mr Khan was unable to demonstrate why the comparison was a misdirection and could not assist me with what the difference between the two tests is. The first test from 2011 was for the purpose of a PBS student application, and involves a higher threshold requirement at level 8 in speaking and level 7 in writing in the assessment of competence in English. The appellant scored an impressive 200 points, which Judge Finch pointed out was a perfect score. However, two years later on the lower level 1 test for the purpose of Appendix FM, he scored only 16 from 21 in speaking and listening. As Ms Weller pointed out from objective information about the first test, it required highly intelligible use of English with complex use of grammar and precise speech. It is hardly likely that the appellant's standard of English would have declined after two further years of living in the UK. In the circumstances, I find no error in the judge's reliance on this evidence, which is very specific to the appellant to confirm the finding made earlier in the decision that on the available evidence the appellant had used deception in his 2011 application.

8. Mr Khan points out that the Home Office was unable to provide specific evidence naming this appellant in any list of names, but the evidence on which the refusal is based is entirely objective and it is clear that this appellant's score was identified, amongst others, by ETS as having been obtained by deception. It further follows that ETS reviewed his score and invalidated his test result, because on 14.12.11 an anomaly with his speaking test indicated the presence of a proxy test taker. How this is arrived at is set out clearly in the evidence of Mr Millington and Ms Collins and it is clear that it involves an individual check once an anomaly in the result had been identified. The standard of proof is on the balance of probabilities and, taking the evidence as a whole, I find it was entirely open to the judge to reach the conclusion that the appellant had used deception in his application. In essence, the grounds on this issue are no more than a disagreement with the findings of the judge.

9. It follows that the appellant cannot meet the requirements of Appendix FM and his application failed at the suitability requirement stage.

10. In granting permission to appeal, Judge Macdonald observed that there was little merit in the grounds of application for permission to appeal in relation to the insurmountable obstacles test, finding that the judge had given clear reasons for her findings.

11. As the application failed at the suitability requirement, the appellant could not meet the requirements of EX1 in any event. Neither had he complied with the specified evidence requirements of Appendix FM-SE. To that extent, consideration of EX1 was theoretical only, though the prism of the Rules for leave to remain as a partner would be highly relevant to any consideration of family life outside the Rules on the basis of article 8 ECHR.

12. However, applying EX2 definition of insurmountable obstacles, as meaning very significant difficulties in continuing family life outside the UK which could not be overcome or would entail very serious hardship for the application or partner, to the facts as summarised at §14 of the decision, the judge concluded that the evidence "goes nowhere near" meeting the test. There can be no doubt that such a conclusion was entirely open to the judge on the facts of the case.

13. Mr Khan relies on the British nationality of the appellant's spouse, but all of the matters raised were taken into account by the judge. Further, in Agyarko v SSHD [2015] EWCA Civ 440, the Court of Appeal pointed out that the mere fact that the spouse is a British citizen and had lived all his life in the UK with employment, and hence might find it difficult and might be reluctant to relocate outside the UK to continue family life, could not constitute insurmountable obstacles to his doing so.

14. The appellant's spouse is not required to leave the UK, that is matter for her to decide. However, it is relevant to note that in every EX1 case the spouse or partner is necessarily either a British citizen or settled in the UK and yet the applicant has to demonstrate that there are insurmountable obstacles to continuing family life outside the UK. I find that the judge has given careful consideration to all relevant factors and reached a conclusion fully open on the evidence and for which cogent reasons were provided in the decision.

15. Further, where an appellant's status is precarious, as in the present case, and there are no children involved, in order to succeed outside the Rules on the basis of article 8 ECHR, the appellant would have had to demonstrate exceptional circumstances. In SS (Congo), after reviewing the authorities, the Court of Appeal stated, "It is clear, therefore, that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional cases. However, in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious: see Nagre, paras. [38]-[43], approved by this court in MF (Nigeria) at [41]-[42]."

16. The claimant is not even in as strong a position as that outlined above. It follows that there is no merit in this ground of appeal.

Conclusion & Decision

17. 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 on all grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

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 the Asylum and Immigration Tribunal (Procedure) Rules.

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.

Signed

Deputy Upper Tribunal Judge Pickup

Dated