Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45973/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 October 2015	**On 16 October 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Amran Ahmed
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr N Biggs, instructed by Universal Solicitors
For the respondent: Mr Staunton, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Amran Ahmed, date of birth 20.10.84, is a citizen of Bangladesh.

2. This is his appeal against the decision of First-tier Tribunal Judge Khan promulgated 3.6.15, dismissing his appeal against the decision of the Secretary of State dated 30.9.14 to refuse his application for leave to remain in the United Kingdom outside the Immigration Rules, on the basis of compassionate circumstances and article 8 ECHR private and family life. The Judge heard the appeal on 14.5.15.

3. First-tier Tribunal Judge Nicholson granted permission to appeal on 1.9.15.

4. Thus the matter came before me on 15.10.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below I find no material error of law in the making of the decision of the First-tier Tribunal such as would require the decision of Judge Khan to be set aside.

6. It is clear from the grant of permission that Judge Nicholson considered there to be arguable merit in the principle ground of appeal that the decision of Secretary of State relying in part on the suitability requirement of S-LTR 2.2(a) of Appendix FM of the Immigration Rules was in error for the reasons set out in §24 of the grounds of application for permission to appeal. The application had been refused under Appendix FM because, according to §9 of the refusal decision, the appellant did not meet the suitability requirements by submitting a false document, a TOIEC English language certificate, in relation to the application. Mr Biggs submitted that as the certificate had been submitted not in relation to the application the subject of the appeal but a previous application, S-LTR2.2(a) could not apply to this application. However, as Mr Staunton was able to explain, the application was made on 23.9.13 and the covering letter cited at section B the TOEIC certificate. As the appellant only retook the English language test in 2014, the only certificate in existence at the date of the application was that issued resulting from the test of 20.10.11, which had been invalidated because of anomalous test results. It follows that he had submitted a certificate with the present application, which the Secretary of State considered had been obtained by deception. It was, therefore, entirely open to the Secretary of State to rely on S-LTR2.2(a) in refusing the application. In consequence of Mr Staunton's submissions, Mr Biggs accepted that that ground of appeal fell away. Mr Biggs also accepted that if the appellant fails under the suitability requirements Appendix FM proceeds no further and he cannot meet the requirements of the Rules for leave to remain as a spouse.

7. For the reasons set out below, I also find that the remaining grounds of appeal have no merit and disclose no material error of law.

8. It is argued that the judge erred by failing to apply the correct burden and standard of proof in relation to the allegation of falsity in the submitted test certificate. It is common ground that the Secretary of State bore the burden of proving on the balance of probabilities, and with cogent evidence, that the appellant used deception in either obtaining the certificate or in submitting it with his application. Mr Biggs submitted that the judge failed to mention the correct burden and standard of proof. However, at §35 the judge adopted a standard of proof which, whilst erroneous, was more favourable to the appellant, stating that he found on the "higher balance of probabilities" that the Secretary of State had established that the appellant provided a false TOEIC certificate. It is obvious that the judge was well aware that the burden of proof lay on the Secretary of State. In the circumstances, and having regard to the decision taken as a whole, I reject the submission that there is any material error in the burden and standard of proof adopted.

9. I also reject the submission that the judge failed to provide adequate reasons for rejecting the appellant's evidence that he had genuinely taken the English language test and finding in favour of the Secretary of State on this issue. However, any fair reading of the decision discloses extensive reasons why the judge reached the conclusions he did, rejecting the evidence of the appellant and his wife as extremely vague and evasive, noting that he knew very little about the nature and the content of the test and that his standard of spoken English was very weak.

10. Mr Biggs also complained that the evidence relied on by the Secretary of State was generic and that the judge failed to take into account the expert evidence submitted on behalf of the appellant to the effect that there can be false positives in the analysis of the testing. This is now a very well worn path familiar to the Upper Tribunal and it has been held on numerous occasions that the now-familiar evidence of Ms Collings and Mr Millington is admissible. Mr Staunton also pointed to the recent Upper Tribunal's Judicial Review decision of R (on the application of Gazi) v SSHD (ETS – judicial review) IJR [2015] UKUT 327 (IAC), in which, at §35, the President concluded that the evidence "was sufficient to warrant the assessment that the Applicant's TOEIC had been procured by deception and, thus, provided an adequate foundation for the decision made under section 10 of the 1999 Act." Whilst accepting that the evidence may not be infallible, the impugned decision of the Tribunal under challenge in Gazi, relying on that evidence, was made with the hallmarks of care, thoroughness, underlying expertise and sufficient reliability. In fact, the expert report relied by the appellant was more generic than the evidence relied on by the Secretary of State at the First-tier Tribunal, which included the witness statement of Mr Michael Sartorius, dated 11.5.15, drafted specifically with reference to this appellant's English language certificate. Taken together the evidence adduced by the Secretary of State amounted to cogent evidence, more than justifying the conclusion of the First-tier Tribunal Judge that the appellant had exercised deception, as claimed by the Secretary of State. It is perhaps also significant that the appellant had used the invalidated certificate obtained in 2011 in both an application made in October 2011 and the present application made some two years later in September 2013.

11. Considering the decision as a whole, bearing in mind the judge's statement at §30 that all the evidence and submissions had been taken into consideration before making the decision in the appeal, I find nothing to demonstrate that the decision was perverse, irrational, or based on inaccurate, inadmissible or irrelevant evidence. Mr Biggs could point to no factual errors. The conclusions of the judge were ones which the Tribunal was entitled to reach and for which cogent reasoning has been provided. In essence, the grounds amount to disagreement with those conclusions. However, I find that it was open to the judge to disbelieve the appellant's evidence and to prefer and find persuasive the evidence relied on by the Secretary of State. In the circumstances, no error of law is disclosed.

12. Despite the considerable length of the grounds of application for permission to appeal, none of the other grounds of appeal have any merit and amount to a disagreement with the findings and conclusions of the judge. Some of those grounds and submissions run contrary to decided case law. For example, in respect of the proportionality of the decision to remove the appellant to Bangladesh §28 of the

grounds seeks to rely on the appellant's English language ability and the couple's financial circumstances. Whilst the public interest considerations of section 117B of the 2002 Act state that it is in the public interest that a person seeking to enter or remain in the UK can speak English and is financially independent, for obvious reasons, those factors cannot be prayed in aid to the appellant's credit in any proportionality balancing exercise, as held in AM (S 117B) Malawi [2015] UKUT 0260 (IAC).

13. I find that the article 8 ECHR private and family life proportionality balancing exercise conducted by the First-tier Tribunal Judge properly took all relevant factors into account, as set out in particular between §36 and §42 of the decision. In particular, the judge was required to and did consider that the appellant came to the UK as a student and thus his status at all times was entirely precarious so that little weight should be given to any private life he established in the UK. Furthermore, he sought to remain in the UK by the use of deception. The judge considered the best interests of the child, 2 years of age, and reached the conclusion that it was not unreasonable to expect the child alleged to be British by birth, to accompany his parents to Bangladesh, or for the appellant to make a proper application for entry clearance from outside the UK.

Conclusions:

14. The making of the decision of the First-tier Tribunal did not involve the making of any material error of law such as to require the decision to 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

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. 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.

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 against the decision of the First-tier Tribunal has been dismissed and the appellant's appeal against the decision of the Secretary of State remains dismissed.

Signed

Deputy Upper Tribunal Judge Pickup