Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43217/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 19 April 2016 **On 19 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

SAIQA FARHAT
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Ms A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr P Turner, Counsel, instructed by Law Lane Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal. The Secretary of State is therefore the Respondent and Mrs Farhat is once more the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Wilson (the judge), promulgated on 12 October 2015, in which he allowed the Appellant's appeal. That appeal was against the

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Respondent's decision of 10 November 2014, cancelling her leave to remain and in turn refusing leave to enter the United Kingdom.

3. The Appellant had been in possession of leave to remain as a Tier 4 student. She travelled back to Pakistan. Upon return to this country she was stopped by Immigration Officers and questioned. In due course the Respondent concluded that her English language test certificate had been fraudulently obtained. Thus, paragraph 321A(2) of the Immigration Rules applied.

The judge's decision

4. The judge finds that the test certificate was in fact irregularly obtained on account of what certainly appears to have been very obvious evidence: the Appellant had stated that she sat the test modules on the same day, whilst the certificate itself stated that these had been done on two separate days. The judge makes it clear that his findings were made irrespective of any voice recognition evidence (paragraph 4). Reliance could no longer be placed on the certificate and the Respondent was justified in cancelling the Appellant's leave (paragraph 5). The judge goes on to find that the test certificate was improperly obtained by a third party acting dishonestly. He states that the Appellant apparently only became aware of the problem with the dates on the certificate during cross-examination at the hearing (paragraph 7). Factors counting against the Appellant are highlighted in paragraph 8. In paragraph 10 the judge correctly states that the burden of proving dishonesty rested with the Respondent. In paragraph 11 the finds that although a third party had been dishonest in obtaining he certificate, the Appellant herself had not been when she made the application to the Respondent. The judge then states that the Respondent was correct to have cancelled the leave, but that the Appellant's case should be viewed in light of the fact (as he found it to be) that the Appellant was not herself dishonest.

5. The judge then moves onto the Appellant's family circumstances. He notes the Appellant's marriage to a British national. On 29 May 2015 the Appellant had a baby. The judge took the view that because the Respondent had failed to consider section 55 of the Borders, Citizenship and Immigration Act 2009 when making her decision (despite the fact that the child was not born then), the decision under appeal was not otherwise in accordance with the law (paragraph 14). The appeal was therefore apparently allowed on this limited basis (paragraph 15).

The grounds of appeal and grant of permission

6. The grounds set out passages from the generic evidence submitted by the Respondent in all ETS cases. In addition to this, a reasons challenge is

mounted. It is said that the judge failed to give adequate reasons for concluding that the Appellant had no knowledge of the deception. It is also asserted that the judge erred in concluding that section 55 of the 2009 Act applied to an unborn child.

7. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 11 March 2016. He comments that the judge's conclusion on the deception issue may be perverse.

The hearing before me

8. The Appellant did not attend the hearing. Mr Turner was content to proceed in her absence, as was I.

9. A copy of the English language test certificate referred to by the judge could not be found in anyone's papers. Notwithstanding this, both parties were content to proceed on the basis that the certificate was in evidence before the judge (he specifically mentions this in his decision).

10. I pointed out to the representatives that the judge appeared to have misdirected himself as to the correct application of paragraph 321A(2) of the Rules: third party dishonesty would engage the provision even in the absence of the Appellant's knowledge. Mr Turner pointed out that this was not in the grounds of appeal. Ms Fijiwala did not seek to apply to amend the grounds. Instead she maintained the reasons challenge as regards the deception issue. Although the recent decision of the Presidential panel in SM and Qadir (now reported as SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)) went against the generic evidence relied on by the Respondent in ETS cases, here the judge had found there to be deception quite apart from that now discredited evidence. She submitted that there were inadequate reasons as to why the Appellant would not have known about the false certificate. There was no evidence that she had used an agent to make the application to the Respondent. In addition, the judge was wrong on the section 55 point.

11. She informed me that the Appellant made an application under Appendix FM to the Rules on 19 September 2014. This was on hold pending the outcome of this appeal.

12. Mr Turner noted that the allegation of the two dates had not been put to the Appellant in interview. She did not know about the discrepancy in the dates until the hearing before the judge.

Decision on error of law

13. Whilst the apparent misdirection by the judge as to the scope of paragraph 321A(2) rather jumped out at me when reading his decision, the Respondent has not taken the point either in the original grounds or by way of attempted amendment. That is a matter for her.

14. Reliance on the generic evidence takes the Respondent's case no further in light of SM and Qadir.

15. Notwithstanding this, I find that the judge did err in relation to the deception issue, as asserted in paragraph 7 of the grounds. My reasons for this are as follows.

16. First, the judge clearly found that the certificate was fraudulently obtained, and did so quite separately from the generic evidence. The basis upon which the judge found the certificate to be improperly obtained was clear on the face of the document: it related to tests sat over two days, not the single day asserted by the Appellant in her evidence.

17. Second, we know from SM and Qadir that ETS cases remain fact-sensitive.

18. Third, the judge found that deception had been used by a third party.

19. Fourth, there was no evidence before the judge (and he did not find) that the Appellant used some unscrupulous agent to make her application to the Respondent.

20. Fifth, the fraudulent certificate was used in the application to the Respondent.

21. Sixth, the judge notes several adverse indictors in paragraph 8 which on the face of it pointed very much towards her complicity in the deception.

22. Seventh (leaving aside the proper scope of paragraph 321A(2) for the moment), in light of the numerous factors weighing in the Respondent's favour as regards the discharging of the burden of proof, it was incumbent on the judge to provide clearly expressed reasons for concluding that the Appellant was completely innocent/ignorant of the use of the certificate in her application.

23. Eighth, there is nothing, at least nothing adequately expressed, in paragraphs 7, 10, and 11 to indicate to the reader why the judge was finding that the Appellant was completely unaware of what the certificate itself stated. What is said about the cross-examination simply does not explain how the Appellant could not have seen the certificate at any stage despite making the application herself (in the absence of a finding by the judge that an agent did it). If the Appellant had seen the certificate previously, there is no reasoning as to why the Appellant could not have comprehended the discrepancy in dates. There is no reasoning as to how the language test itself could have been taken by a proxy, a certificate issued, and yet the Appellant have no idea of any of this.

24. The lack of adequate reasoning on this crucial issue fatally undermines the judge's decision. I would add that the apparent finding by the judge that the Respondent was justified in making the decision she did (i.e. cancelling leave) does not sit happily with the concurrent conclusion that the Respondent should look again at the Appellant's case. Either the decision under appeal was lawful or it was not.

25. There is a further material error. Section 55 of the 2009 does not apply to an unborn child. Mr Turner did not seek to persuade me otherwise. Thus, the Respondent's decision, at the time it was made (that being the operative date), was lawful in this regard.

26. The judge's decision is set aside.

Remaking the decision

27. Mr Turner initially suggested that I should allow the appeal to the limited extent that the Respondent's decision was not otherwise in accordance with the law. This was, as I understood his position to be, on the basis that the Respondent had failed to consider the circumstances of the Appellant's child. However, such an argument could only properly succeed if there was a failure to act lawfully on the facts known to the Respondent as at the date of her decision, not on subsequent developments. The decision was made in November 2014; the child was born in May 2015. I reject Mr Turner's first point.

28. Alternatively, he asked me to determine the appeal on the evidence before me.

29. Ms Fijiwala submitted that I could remake the decision but perhaps not reach findings on the Article 8 claim given that there was an Appendix FM application pending.

30. I have decided that I should determine the merits of both the paragraph 321A(2) and Article 8 issues on the evidence before me. There is no sound reason why this should not be the case. The evidence I have consists of: the Respondent's evidence contained in various documents; the Appellant's bundle, indexed and paginated 1-42.

The paragraph 321A(2) issue

31. Paragraph 321A(2) states:

> Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom
>
> 321A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply;

> ...
> (2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third party required in support of the application or,

32. Dishonesty must be proven by the Respondent.

33. Every case depends upon its own facts.

34. Although I have not had the certificate before me, it was before the judge (see his record of proceedings) and neither representative has suggested that it (the certificate) did not in fact show that the modules were completed on two separate days. I find that they were. In sharp contrast, the Appellant has asserted that she did all parts of the test on the same day (see Q15 of interview 1, conducted on 21 August 2014). I note too that the Appellant could not even recall the name of the college at which she claimed to have sat the tests (Q11).

35. I find that the Appellant has not obtained any qualifications since being in the United Kingdom and that the licence of her previous sponsor was suspended. The first point in particular is indicative of a person who either did not intend to study or was incapable of doing so. On either scenario, there is an incentive to seek to obtain further leave by nefarious means.

36. The educational certificates from Pakistan, produced by the Appellant, do not in my view materially undermine the Respondent's case. As far as I can tell, the results in English were poor.

37. The evidence from the Appellant's brother takes her case little further. He, like the Appellant herself, did not attend the hearing before me. In any event, I cannot see how he could directly attest to the Appellant having in fact sat the language test, and his naming of the college does not explain why the Appellant did not know it.

38. Taking the evidence as a whole, and of course directing myself that the burden rests with the Respondent, I find that the contents of the certificate are reliable and are to be preferred to the evidence of the Appellant. In turn, I find that the Respondent has proved that the English language test certificate was obtained by deception. This finding is not dependent upon any of the generic evidence considered in detail in SM and Qadir.

39. It is highly likely, I find, that the test was in fact sat by a proxy on the two days shown on the certificate. Deception was used by a third party. There is no dispute that the certificate in question was used in making the application to the Respondent. Thus, even if the Appellant did not have knowledge of the deception by the third party, paragraph 321A(2) bites.

40. However, I find that the Appellant did in fact know of the deception when making the application. I find that she made the application herself and did not use an agent - there has been no suggestion that she did. I find that it is inconceivable that she did not see the certificate before it was submitted. It is inconceivable that she would not have been aware of the fact that a proxy sitter took the tests. Thus, I find that the Appellant was herself complicit in the deception.

41. Paragraph 321A(2) applies and the appeal is dismissed on this basis.

The Article 8 claim

42. I accept that the Appellant is married to a British citizen and that they have lived together since their marriage in 2014. I find that there is a genuine and subsisting relationship.

43. I find that the couple have a son, born on [ ] 2015. He is British too.

44. The Appellant cannot succeed under Appendix FM to the Rules for the following reasons. First, S-LTR.4.2 applies and there are no compassionate or other factors which would justify the exercise of discretion in the Appellant’s favour.

45. Second, I have no evidence of the couple’s financial affairs, or compliance with Appendix FM-SE. I cannot be satisfied that the financial requirements are met.

46. Third, in relation to EX.1 I have no evidence as to why it would be unreasonable for the Appellant’s son to go to Pakistan, and why there would be any insurmountable obstacles to the family life established by the marriage continuing outside of the United Kingdom. British citizenship is not a trump card. The statements from the Appellant and her husband in the bundle are brief in the extreme. There is no evidence of ill-health or any other compelling circumstances in this case. The burden is on the Appellant and I find that EX.1 is not satisfied.

47. In terms of Article 8 outside the Rules, I find that there is a distinct absence of any compelling or exceptional circumstances pertaining to the Appellant’s case.

48. I have no evidence about the child and I find that his best interests and welfare rest entirely with remaining with his parents. They do not necessarily also rest with him remaining in the United Kingdom.

49. The Rules cater for all facets of the Appellant’s case that I can conceive of, and those Rules have not been met. This counts against the Appellant.

50. The public interest weighs heavily against the Appellant too. The fact that she has practised deception only adds to the public interest.

51. I am not satisfied that she speaks English to a reasonable degree. In terms of financial support, I will accept that the husband provides this (although the requirements of the Rules are not met). However, the Appellant had used the NHS already in respect of her pregnancy.

52. As I have already found, it would not be unreasonable to expect the child to go to Pakistan.

53. The claims fails outside of the Rules.

Anonymity

54. No direction has been sought and none is appropriate.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
I set aside the decision of the First-tier Tribunal.
I re-make the decision by dismissing the appeal on all grounds.

Signed Date: 17 May 2016

H B Norton-Taylor

Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 17 May 2016

Judge H B Norton-Taylor

Deputy Judge of the Upper Tribunal