



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/31557/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 7 July 2017**

**Decision & Reasons Promulgated
On 20 September 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SAEED AHMED SAHAF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ilahi, Counsel instructed by Abbott Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born in 1980. He came to the UK as a Tier 4 Migrant on 27 August 2011.
2. He applied for further leave to remain as the spouse of a British national but that application was refused in a decision dated 9 September 2015. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge V C Dean ("the FtJ") at a hearing on 17 November

2016. The appeal was dismissed with reference to the Article 8 Immigration Rules and otherwise under Article 8 of the ECHR.

The decision of the Ftj

3. In summary, the Ftj's decision is as follows. At [12] she identified the documentation that she had before her and noted that the appellant had attended to give evidence. She also noted that his spouse, KP, had not attended. She stated that she had indicated to the appellant that his wife's witness statement and that of any witness whose statement was unsupported by the attendance of the witness, had more limited weight unless objectively supported.
4. She referred generally to the relevant paragraphs of the Rules that were in play. She considered the issue of the suitability requirements of the Rules in the light of the fact that the respondent's decision included the rejection of the application for further leave to remain on the basis that the appellant did not meet the requirements of S-LTR.1.6, i.e. that his presence in the UK was not conducive to the public good because his conduct made it undesirable to allow him to remain. This was because he had, in an application dated 20 July 2012, relied on a fraudulently obtained ETS (Educational Testing Service) certificate of English language. She concluded that the respondent was entitled to decide that the appellant did not meet the suitability requirements of the Rules in that respect. She set out her reasons in full with reference to relevant authority.
5. At [23] she said that "It is not a disputed fact" that the appellant met KP, a single mother, in February 2013 and they began a friendship. She referred to their marriage and cohabitation. She also referred to the appellant's wife having a daughter, ZS, who was born in May 2003.
6. She referred to a number of statements from friends of the appellant, and a statement from his wife. She stated at [24] that none of those witnesses other than the appellant had attended to give evidence and be questioned at the hearing before her. She noted that notice of the hearing was given in May 2016 but also that it was said by the appellant that his wife was unable to obtain leave from work to attend and give evidence. She stated in the following paragraph that the respondent had been deprived of the opportunity to raise questions in relation to KP's income and in relation to the assertion that the appellant has a genuine and subsisting relationship with her daughter, a British citizen, as well as the assertion that KP had concerns about relocating to Pakistan with the appellant.
7. She noted that KP's witness statement was dated 24 June 2016 and had not been updated, although the bundle included photocopies of additional financial information in relation to her employment, including pay advice slips.
8. In relation to the financial eligibility requirements of the Rules, she referred to the fact that the appellant had not produced any of the original

documents, only copies having been provided to the respondent in support of the application.

9. At [26] she stated that “There is no dispute as to the genuineness of the marriage between the appellant and his sponsor”. However, she stated that KP’s statement at the time that it was signed, 24 June 2016, referred to the appellant having a father-daughter relationship with his wife’s daughter, ZS, who at the time was 13. She stated however, that in the absence of evidence in person from the appellant’s spouse to answer questions from the respondent, and indeed from the FtJ herself, to clarify her account of the appellant’s genuine and subsisting relationship with her daughter “in an historic account”, she was unable to find on the basis of the appellant’s account alone that he had developed such a genuine and subsisting parental relationship with her.
10. At [27] she said that absent a contemporary account of her relationship with the appellant and of his genuine and subsisting parental relationship with ZS, his spouse’s daughter from a previous relationship, she would go on to consider the issue of his return to Pakistan.
11. She concluded that the provisions of EX.1 did not apply in terms of the appellant having a genuine and subsisting parental relationship with a child under the age of 18, in the UK and a British citizen. Likewise, in the absence of “contemporary evidence” from KP, she did not find that the relationship with KP was genuine and subsisting.
12. She referred to the fact that original documentation had not been provided (a matter raised in the decision letter). She said that the absence of the critical ‘in-person’ evidence of KP was significant, and she did not accept the appellant’s assertions in relation to the relationship.
13. Referring again to the financial requirements of the Rules, she noted, amongst other things, that original documents had not been provided, either at the hearing, or indeed to the respondent at the time of the application.
14. She found that the respondent was entitled to decide the question of ‘suitability’ under the Rules against the appellant for the reasons that were given. She did not find that the appellant had a parental relationship with ZS, or parental responsibility for her. She said that the marital status between the appellant and KP was not sufficient to establish that. She concluded that the appellant’s removal would not amount to a disproportionate interference with his Article 8 rights, noting that the appellant had failed to meet the financial requirements of the Rules. KP had not attended and was not present to enable “contemporary enquiries” to be made as to their relationship and the impact of the appellant’s removal. She noted that the appellant continued to have family, his parents and siblings, living in Pakistan.

The grounds and submissions

15. The grounds in support of the appeal against the Ftj's decision, notwithstanding their length, can be distilled quite succinctly. It is argued that the evidence of the appellant's spouse's daughter would have been crucial in assisting the Ftj in determining whether the appellant had a genuine and subsisting relationship with her as a British citizen child. It is pointed out in the grounds that the Ftj accepted that the appellant had lived with ZS since he moved in with her mother after 13 August 2014. At the time of the hearing therefore, the appellant would have been living with his wife's daughter for some two years.
16. It is asserted that the Ftj and the respondent failed to take into account the views of the "other family members" and had failed to give effect to the appellant's Article 8 rights and the rights of the other family members who might be affected. It is further said that, in the alternative, there had been a failure on the part of the Ftj and/or the respondent to make any or any adequate enquiries which "could lead them to conduct a test of proportionality" in relation to the appellant and his family's Article 8 rights. It is contended that the Ftj made an error of law in finding that the appellant did not have a genuine and subsisting parental relationship with a British citizen child.
17. Various authorities are referred to and various aspects of Article 8, the proportionality exercise and the need to give effect to the Article 8 rights of the appellant and others, are cited.
18. In submissions before me on behalf of the appellant, it was said by Mr Ilahi that his instructions were that the appellant and KP are still in a relationship. She had not attended the hearing before me because it was the appellant's understanding that the hearing was only to determine, initially at least, whether there was an error of law in the Ftj's decision. It was said that thereafter, further evidence would be produced.
19. The grounds upon which permission was granted were referred to. It was submitted that the Ftj had made contradictory findings in stating that the evidence of the relationship was not disputed but then going on to find that she did not accept that they were in a genuine and subsisting relationship.
20. Submissions were then made on the Ftj's conclusions in terms of the suitability requirements of the Rules. It was submitted for example, that the Ftj had not considered that when giving evidence before the Ftj the appellant did not use an interpreter, and furthermore, the appellant already had an IELTS certificate (and so presumably, did not need to rely on any deception). It was contended that the Ftj's findings in terms of the appellant's deception in relation to the English language test certificate were therefore flawed.

21. However, it was accepted that no such argument appears in the appellant's grounds of appeal in relation to the Ftj's decision, and there had been no application to amend the grounds. It was nevertheless submitted that the suitability requirements of the Rules were relevant to the proportionality assessment under Article 8. It was contended that this issue was the very foundation of the proportionality assessment.
22. In reply, Mr Jarvis agreed that the evidence of KP's daughter would have been crucial, but the point is that neither she nor KP were called to give evidence. At [12] the Ftj had put the parties on notice as to her concerns about the absence of the appellant's spouse. There was no application for an adjournment on the day of the hearing before the Ftj in the light of her having expressed concerns about the absence of the appellant's spouse. This, it was submitted, was a "litigation strategy" on behalf of the appellant to allow the appeal to proceed.
23. It was submitted also, that it was significant that there was no further evidence from the appellant's spouse in relation to the hearing before the Ftj.
24. Although the Ftj had referred to the fact that the respondent had not disputed the genuineness of the relationship between the appellant and his spouse, the Ftj had herself nevertheless alerted the parties to her own concerns about his wife's absence.

Conclusions

25. In relation to the criticism of the Ftj's assessment of the suitability requirements of the Rules, this is not a matter that features in the grounds of appeal to the Upper Tribunal, and therefore not a matter upon which permission was sought or granted. There has been no application to amend the grounds and accordingly, I decline to entertain the argument.
26. However, even if I considered that this was a matter that was before me, the argument has no merit. The Ftj undertook a thorough assessment of this issue between [14] and [21], taking into account the appellant's evidence and explanations on the issue.
27. In relation to the Ftj's assessment of the appellant's relationship with his spouse, and his spouse's daughter, the argument on behalf of the appellant essentially boils down to a question of whether the Ftj was entitled to conclude that the appellant was not in a genuine relationship with KP and did not have a parental relationship, or anything like it, with her daughter.
28. It is true that the Ftj said at [26] that there was no dispute "as to the genuineness of the marriage" between the appellant and the sponsor. Here, I take her reference to the marriage as being a reference to the relationship.

29. What is said in the grounds at [11] about the evidence of KP's daughter being crucial in determining the 'parental relationship' issue is rather puzzling in the context of there having been no witness statement from ZS, and no apparent effort to call her as a witness. It is, it seems to me, a moot point as to whether her evidence would have been crucial, as is suggested, but the fact is no attempt was made to adduce evidence from her. At least, no such suggestion is made on behalf of the appellant.
30. Whilst the Ftj identified the fact that the respondent had not disputed the genuineness of the relationship between the appellant and KP, that does not mean that the Ftj was debarred from undertaking an assessment of that issue herself, particularly bearing in mind the fact that KP did not attend the hearing. Furthermore, a judge may decide that an issue that is not disputed can be resolved in favour of the party seeking to establish the particular fact, but that does not mean that a judge is bound to resolve that fact in that party's favour. Fairness would demand that the judge put the parties on notice that this was an issue about which he or she had concerns, giving the party relying on the fact the opportunity to address those concerns.
31. This, it seems to me, is precisely what the Ftj did in this case, as can be seen from [12] of her decision. It does not appear, and has not been suggested, that there was any application for an adjournment on behalf of the appellant in order to ensure the attendance of the appellant's spouse on a future occasion. Indeed, I was not referred to any evidence which actually established the reason for KP's non-attendance, apart from what seems to have been an assertion by the appellant that she was unable to obtain leave from work. It seems to me that there is some merit in the proposition advanced on behalf of the respondent before me to the effect that this was a "litigation strategy" on the appellant's behalf, to proceed with the hearing.
32. The hearing before the Ftj was in November 2016. The witness statement from KP, as the Ftj noted, is dated June 2016. The Ftj referred to the lack of a "contemporary account" of the relationship or "contemporary evidence" of it. It was not just that KP did not attend the hearing, but that her written evidence was some months out of date. It is not apparent that there was any up-to-date witness statement from her explaining her inability to attend the hearing. No such witness statement was drawn to my attention.
33. I am satisfied that the Ftj was entitled to conclude as she did in terms of the lack of genuineness of the relationship between the appellant and KP; likewise, in relation to what is said to have been a father-daughter relationship with ZS. Having alerted the parties to her concerns about the absence of KP, she was entitled to take into account the absence of KP from the hearing and thus the inability of either the respondent, or the Ftj herself, to test not only the appellant's relationship with her, but also with her daughter, by way of questions.

34. It is not even as if it has been sought on behalf of the appellant to adduce evidence from KP to demonstrate that the Ftj's conclusions were based on a mistake of fact, as envisaged in the decision in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, and with reference to any further evidence from KP.
35. Although it was said that it was understood that the initial hearing before the Upper Tribunal was an error of law hearing only, the assumption being that no evidence would be required, apart from that being an erroneous assumption to make, it is nevertheless surprising that what is said to be a genuine relationship between the appellant and his spouse and against the background of the Ftj's findings, is not supported by any evidence since June 2016. Indeed, it also has to be borne in mind that both the appellant and KP would know that her evidence would be important in helping to establish that he should be permitted to remain in the UK so that they could continue their relationship, as opposed to his being required to leave the UK and their being separated.
36. The Ftj found, and was entitled to find, that there was no genuine and subsisting relationship between the appellant and KP, or her child. In the light of that conclusion, the other aspects of the grounds in terms of the Ftj's proportionality assessment, fall away.

Decision

37. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek

19/09/17