Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02109/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 October 2018	**On 5 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J F C
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Tan, Senior Home Office Presenting Officer For the Respondent: Mr Holmes, Counsel, instructed by Adriana Immigration Services

DECISION AND REASONS

1. The Appellant is the Secretary of State for the Home Department. JFC is the Respondent. I shall retain the designations of the parties as they were before the First-tier.

2. The Respondent appeals against the decision of Judge of the First-tier Tribunal Henderson dated 26 October 2017 allowing the Appellant's appeal against the Respondent's decision of 23 January 2017 refusing him leave to remain and refusing his human rights application.

3. The Appellant has previously had leave to remain in the United Kingdom as a student, although that leave was at one time curtailed. He was later granted a period of leave to remain under Appendix FM of the Immigration Rules (ten year route) on the basis of his marriage to Ms S, and being a parent to their two children, born December 2013 and June 2015 respectively, both British citizens. That grant of leave to remain was from 18 August 2014 until 18 February 2017. Before the judge there was produced a minute of the Respondent's reasons for granting that leave to remain, being found at page 94 of the Appellant's bundle as follows:

> "EX.1(a)
>
> DNA evidence proves that applicant is father for (MZFC). Child's passport provided to prove he is a Brit cit. Applicant has a genuine and subsisting parental relationship with a Brit cit. child who is under the age of 18, living in the UK and it will be unreasonable to expect this child to leave".

4. The Appellant made a further application for leave to remain on 23 January 2017 on the same basis.

5. In the Respondent's decision of 23 January 2017 the Respondent refused the application on the grounds that the Appellant did not satisfy the suitability requirements of Section S-LTR.1.6 of Appendix FM. The Respondent alleged that the Appellant had used a proxy test taker for an English language test taken on 15 November 2011, and that the Appellant had used this fraudulently obtained certificate in an application for entry clearance from Islamabad dated 9 January 2012. The Respondent formed the following view:

> "In fraudulently obtaining a TOEIC certificate in the manner outlined above, you willingly participated in what was clearly an organised and serious attempt, given the complexity of the test centre itself, to defraud the SSHD and others. In doing so, you displayed a flagrant disregard for the public interest, according to which migrants are required to have a certain level of English language ability in order to facilitate social integration and cohesion, as well as to reduce the likelihood of them being a burden on the taxpayer.
>
> Accordingly I am satisfied that your presence in the United Kingdom is not conducive to the public good because your conduct makes it undesirable to allow you to remain in the UK. Your application is therefore refused under S-LTR.1.6 of the Immigration Rules".

6. The Respondent considered the Appellant's potential entitlement to leave to remain as a partner but held that he was not entitled to leave to remain under that route because of the finding on grounds of suitability already set out. Further, the Appellant was not entitled to leave to remain on private life grounds under paragraph 276ADE(1), again on the basis that he did not meet the suitability requirements under S-LTR.1.6. Additionally, it was held that there would not be very significant obstacles to his integration into Pakistan.

7. The Appellant appealed against that decision to the First-tier Tribunal, the matter coming before the judge on 5 October 2017.

8. The Appellant gave evidence. The judge set out in some detail the nature of the evidence which was relied upon by the Respondent to support the proposition that the Appellant had used a proxy test taker. At paragraphs [30]–[40] of the decision the judge noted a number of shortcomings in that evidence. However, at the end of paragraph [40] the judge held as follows:

> "40. On balance bearing in mind the standard of proof my conclusion is that the Appellant has not been straightforward and that he relied upon an additional test taken by a proxy in November 2011".

9. The judge then considered what the consequences of that finding would be, as follows:

> "41. The further issue is whether the dishonesty is such that the Appellant should have been refused under the suitability requirements in paragraph S-LTR.1.6. The Respondent's analysis of the Appellant's conduct was that he had willingly participated in an organised and serious attempt to defraud the SSHD and others. The reasoning refers to migrants needing to have a certain level of English to facilitate social integration and cohesion and to reduce the likelihood of them being a burden on the taxpayer. The current position is that the Appellant speaks excellent English. He has also provided a certificate from Trinity College London showing that he has been awarded a grade 5 distinction in an examination in spoken English which is at CEFR level B1.1. This result was not questioned by the Respondent. It is also the position that the Appellant has now been resident for five years after he entered in June 2012 and has been working. His English knowledge is not a basis for refusal with reference to his suitability or on public interest grounds.
>
> 42. The reference to the attempt to 'defraud' the SSHD indicates an assumption by the Respondent of criminal activity. My conclusion is that the Appellant has deceived or attempted to deceive the authorities. The IDIs for considering the eligibility criteria SLTR.1.6 note that the criminality provisions must be considered. I am not aware of the Appellant facing any criminal proceedings or having been convicted of any offence. I have indicated that there are difficulties with the evidence provided by the Respondent which mean that whilst there is sufficient evidence for me to find that the civil standard of proof is met, the evidential requirements for a criminal conviction would appear to be much more difficult to meet given the obvious difficulties of the Respondent in their recordkeeping. S-LTR.1.6 requires an assessment of the Appellant's conduct, character and associations. The evidence points to one serious incident of dishonesty which the Appellant has sought to distance himself from. I have no evidence to suggest that he has been involved in any other dishonest activities or that his character or associations are such that his presence is not conducive to the public good. The weight of the evidence provided points to a conduct which is

> governed primarily by his efforts to provide for his wife and two young children and that his primary associations are with his family and his wife's family in the United Kingdom. My conclusion is that the use of S-LTR.1.6 was not an appropriate reason for refusal. A more appropriate provision may have been S-LTR.2.2 but this was not considered".

10. The judge then considered the position of the Appellant and his family in the United Kingdom, reminded herself at [51] that she had not considered that the Respondent had given sufficient reasoning for refusing the Appellant leave to remain on the grounds of suitability criteria; noted at [52] that both children are to be regarded as "qualifying children" for the purposes of both Section EX of Appendix FM and under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, and directed herself, correctly, that the "remaining question is whether it would be reasonable for them to leave the United Kingdom"; the judge directed herself at [53] that a relevant authority was MA (Pakistan) and Ors [2016] EWCA Civ 705 and MM (Uganda) [2016] EWCA Civ 450; she noted that the question of reasonableness could take account the position of the child and the conduct and the immigration history of the parents facing removal; and that in accordance with MA (Pakistan) there needed to be "strong reasons" for proceeding with the removal once the qualifying requirement is satisfied; at [55] the judge again directed herself that the question before her was whether it was reasonable for the children to leave the United Kingdom to travel to Pakistan; she noted that the older child was now in nursery; she noted at [56] that the Appellant's wife had spent a portion of her life and education in the United Kingdom, and that her two brothers and one sister lived in the United Kingdom, that at [57] the Appellant's wife's mother was ill with cancer and that the Appellant's wife considered it vital to live in close proximity to her mother; at [58] the judge held that it was not reasonable for the children to remain here with their mother whilst the Appellant returned to Pakistan; they had close emotional ties to their father and the judge did not accept that the full benefits of that relationship and the development of their family life in future could be sustained simply by modern means of communication and visits; the judge ultimately found at [60] that the decision to refuse the Appellant leave to remain and to require his removal would not strike a fair balance between the private rights and the interests of the Appellant, his wife and their two children on the one hand and the public interest on the other. The judge allowed the appeal.

11. The Respondent applied for permission to appeal against that decision in grounds dated 26 April 2018 which argue, in summary, as follows:

> "(i) the judge misdirected herself in law in failing to adequately consider that the Appellant has a poor immigration history given her finding that deception had been used; obtaining leave to remain by deception is a criminal offence and is evidence of criminality, even if there is no conviction as yet; accordingly there are powerful reasons in this case to render it reasonable for family life to continue abroad;

(ii) the judge failed to identify compelling circumstances to justify consideration of whether the decision amounted to a breach of Article 8".

12. The Respondent initially applied for permission to appeal to the First-tier Tribunal resulting in a refusal of permission dated 6 April 2018, but renewed his application on 26 April 2018. Permission to appeal was granted by Upper Tribunal Judge Allen in a decision dated 12 June 2018.

13. Mr Holmes for the Appellant had provided a Rule 24 reply which although Mr Tan did not have, a copy was made available to him.

14. I heard submissions from Mr Tan who adopted the grounds of appeal. His essential argument was that the judge had failed to have adequate regard to the dishonest behaviour of the Appellant when determining that the requirements of paragraph S-LTR.1.6 of the Immigration Rules were not met. Mr Tan argued that the positive finding that the Appellant had used deception in obtaining the ETS certificate was to be treated seriously, representing as it did part of a co-ordinated effort at the time to subvert immigration control by the use of proxy test takers for English language tests.

15. Questioned by me, Mr Tan agreed that paragraph S-LTR.1.6 fell within the category of suitability criteria which are said within Appendix FM to be mandatory, but also accepted that S-LTR.1.6 also included conditions which involved value judgments. I opined, for example, that some requirements for the invocation of some of the paragraphs in S-LTR involved the consideration of simple precedent facts, e.g. at S-LTR.1.2 the condition is that the applicant is currently the subject of a deportation order; that condition is either met, or not met, and can clearly be established one way or the other. However, and Mr Tan agreed with me, the assessment as to whether or not a person's presence in the UK is not conducive to the public good because of their conduct, character, associations or other reasons making it undesirable to allow them to remain in the UK, involves an evaluative exercise. Mr Tan agreed that the Tribunal, whether First-tier or Upper Tribunal, has a role in determining for itself whether the conditions of S-LTR.1.6 are met. It was not simply a matter to review on public law grounds the opinion of the Secretary of State.

16. However, Mr Tan argued that even though the judge was able to substitute her own view as to whether or not S-LTR.1.6 should have been invoked, and whether its conditions were satisfied, he argued that the judge had nonetheless failed to have adequate regard to the seriousness of the Appellant's deceptive behaviour.

17. For his part, Mr Holmes defended the judge's decision. I did not need to hear very much from him in relation to the judge's decision as to S-LTR.1.6.

18. However, I required some assistance from Mr Holmes in explaining to me on exactly what basis the judge had purported to allow the appeal, as

there did not appear to be a statement in explicit terms whether the Appellant satisfied the Immigration Rules, for example, whether there were insurmountable obstacles to family life as between the Appellant and his partner continuing outside of the UK, or whether Section EX.1(b) of Appendix FM was satisfied, i.e. that it was not reasonable to expect the children to leave the United Kingdom.

Discussion

19. I am persuaded by Mr Holmes' submission that the Respondent had accepted that it would not be reasonable to expect the older child to leave the United Kingdom when making the decision to grant leave to remain in 2014. Further, it was clear from the structure of the judge's decision, and the manner in which she directed herself in law, that the judge was considering whether it would be reasonable to expect the Appellant's children to leave the United Kingdom, and that her ultimate conclusion that the decision did not strike a fair balance between the private rights and interests of the Appellant and family, versus the public interest, did ultimately represent a finding that it would not be reasonable to expect the Appellant's children to leave the United Kingdom.

20. Although it would have been preferable to see within the judge's decision a finding in terms that it was not reasonable for one or both his children to be expected to leave the United Kingdom, I find that such a finding has been made by the judge, reading the decision as a whole, and in light of the history of the proceedings.

21. I find that S-LTR.1.6 does involve an evaluative exercise on the part of the judge as to whether or not in their own opinion the requirements of that paragraph are met such as to prevent leave to remain being granted to an applicant within the Rules. I find in relation to the present decision, the judge was entitled to make the decision she did on this issue. The judge rightly observed that the Appellant had not been convicted of any criminal offence. The judge clearly had in mind the fact that the Appellant had exercised deception, describing it as one serious incident of dishonesty. The judge did not leave anything material out of account in her assessment. I find that the only basis on which the Secretary of State can challenge the judge's decision is on grounds of perversity. Such a challenge is simply not made out.

22. I find that the judge was entitled to come to the decision she did on the basis of the evidence before her, and in the light of the findings of fact that she had made.

23. I find that there was no error in law in the judge finding that the requirements of S-LTR.1.6 were not met, and that provision should not have been invoked by the Respondent. Therefore, in the absence of any other relevant challenge by the Respondent against the judge's decision, I find that the judge did not materially err in law in making her decision.

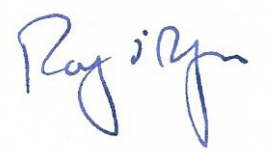
Notice of Decision

24. The making of the decision did not involve the making of any material error of law.

25. The Respondent's appeal is dismissed.

26. The decision of the First-tier Tribunal Judge is maintained.

Signed Date 25.10.18



Deputy Upper Tribunal Judge O'Ryan

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The appeal concerns a human rights claim and the interests of minor children. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 25.10.18