Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09506/2017

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunal Liverpool	**Determination Promulgated**
On 17.9.18	**On 03.10.18**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

SUHAG [M]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Warren, Counsel, instructed by J.S. Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1 The Secretary of State appeals against the decision of Judge of the First tier Tribunal McCall dated 13 January 2018, allowing the applicant's appeal against the decision of the Secretary of State dated 16 August 2017 refusing the applicant's human rights claim. I will retain the designation of the parties as they were before the First tier.

2 The appellant is a national of Bangladesh. On 6 May 2017 the appellant had made an application for leave to remain on the basis of Appendix FM and his right to family life under Article 8 ECHR. The appellant is married to a British national, MB, and they have a daughter, AB, born in October 2017 and who was two months old at the date of the hearing on 10 January 2018. AB is also a British national.

3 The appellant had previously made applications for leave, one such application resulting in a decision of 13 August 2015 refusing leave to remain. The appellant appealed against that decision, such appeal coming before Judge of the First-tier Tribunal Malik, resulting in her decision of 16 June 2016. The appellant relied upon his family life with MB, but Judge Malik dismissed the appeal on the grounds that the decision did not amount to a disproportionate interference with their family life. This was of course before AB was born.

4 However in the decision of 13 August 2015, the respondent had also alleged that in an application for further leave remain that the appellant had made on 31 October 2012, he had relied upon a TOEIC English language test result from ETS which was said to have been obtained fraudulently, by the appellant using a proxy test taker. In her decision, Judge Malik stated as follows in relation to that matter:

> '25 Regarding the refusal under the suitability requirements of the rules, there is no evidence from the respondent before me regarding their contention the appellant submitted a fraudulently obtained TOEIC certificate from ETS. In the absence of any evidence regarding this limb of the refusal, I have found it without basis."

5 The respondent raised the same issue in the present decision of 16 August 2017.

6 In deciding the subsequent appeal, Judge McCall directed himself in relation to SM Qadir v SSHD (ETS - Evidence - Burden of proof) [2016] UKUT 00227 at [23]. Given that the matter had already been considered by judge of the first-tier tribunal on a previous occasion, Judge McCall also directed himself as to the application of Devaseelan [2002] UKIAT 00702*. The judge ultimately found at [35], applying the principles in Devaseelan, that the appellant did not use a proxy test taker to obtain the ETS certificate, and it followed that he did not use deception when making his application for further leave to remain in his application of October 2012

7 The judge then considered at [36] onwards the potential application of Appendix FM to the appellant's application for leave to remain. The judge accepted at [43] that MB met the definition of 'partner' for the purposes of Appendix FM, but held that as the appellant did not satisfy the immigration status requirements, it was necessary to consider the application of section Ex1(b) of Appendix I FM. The judge held that there

were no insurmountable obstacles to family life continuing outside of the UK [47].

8 However, the judge considered the position of the appellant's daughter AB. Notwithstanding the fact that the judge was of the view that the child, being very young, was able to adapt to life in Bangladesh the judge considered the application of section 117B(6) NIAA 2002, and whether it would be reasonable to expect AB to leave the United Kingdom. The judge referred to the respondent's Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) 'Family Life as a Partner or Parent and Private Life, 10 year routes'. There was no dispute before me today that that was the relevant policy for the judge to have considered. The judge sets out the terms of paragraph 11.2.3 of the policy at [57]:

> "11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:
>
> * criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
>
> * a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

9 The judge concluded the decision as follows:

> "58 The appellant in this appeal has not been convicted of any crimes does not have a criminal record. The appellant's immigration history is poor and had I found against him in regard to the deception allegation it would have been found to be 'very' poor. One of the questions in this case is whether the appellant's

conduct gives rise to considerations of such weight to justify separation and following my findings of fact I find that it does not. In SF and others [2017] UKUT 00120 (IAC) the Tribunal said at paragraph 12:

> "On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

59 Having regard to the IDI in my findings of fact I am not satisfied that it is reasonable to expect the child to leave the UK and in those circumstances I am not satisfied that it is in the public interest to remove the appellant. Under article 8, and adopting the test referred to by Lord Bingham in Razgar, I find the respondent's decision is not proportionate and would therefore be Article 8"

10 The judge therefore allowed the appeal.

11 In grounds of appeal dated 6 February 2018 the respondent challenges the judge's decision on two grounds:

(i) Failing to resolve a conflict of fact or opinion on a material matter.

It was argued in this ground *inter alia* that the judge had failed to make a clear finding on whether the respondent had met the initial evidential burden of proof in line with cases SM and Qadir.

(ii) Failing to give adequate reasons findings on a material matter

It was argued that the judge had failed to give adequate reasoning for accepting that the appellant had not use deception (Grounds, para 9). The judge erred in law in giving certain factors too much or too little weight (Grounds, para 9 and 10).

Further, in light in particular of the judge's claimed errors (above) regarding the appellant's use of deception, the judge's article 8 assessment was flawed (Grounds, paragraph 12-14).

12 Permission to appeal was initially refused but granted on renewed application, by Upper Tribunal Judge Kekic on 26 July 2018.

Discussion

13 I heard submissions from Mr. Whitwell for the respondent. He informed me that he did not seek to rely upon the first ground of appeal. I find that this is appropriate position to take.

14 I had observed to Mr. Whitwell that the way that the respondent's first ground of appeal was framed (indeed the whole document) pays no attention at all to the history of this particular appeal, and the finding that had been made by Judge McCall that the starting point in his assessment of whether the appellant had used deception in his application of October 2012 had been Judge Malik's finding from 2016 that the respondent had not made out that allegation.

15 Given that history, and Judge McCall's careful reference to Davaseelan (see further below), I find that the judge was not obliged to make discreet findings on the three stages as set out in SM and Qadir, determining (i) whether the respondent has met the evidential burden to adduce sufficient evidence to raise the issue of deception; (ii) whether the appellant then discharges the evidential burden falling on him to raise an innocent explanation as to the matters in dispute, and (iii) whether the respondent has ultimately satisfied the burden to establish on the balance of probabilities that the appellant's prima facie innocent explanation is to be rejected. The respondent's first ground is also largely generic.

16 In considering the respondent's second ground of appeal, I set out here the evidence that was before Judge McCall on the issue of deception: a witness statement from Home Office Presenting Officer Leslie Singh; a report from Professor Peter French dated 20 April 2016; and the standard witness statements from Rebecca Collins and Peter Millington which are relied upon by the respondent in ETS appeals of this nature.

17 Mr. Whitwell argued that in applying the Devaseelan principle and in finding that the appellant had not employed deception in his application of 31 October 2012, Judge McCall had erred in law in failing to acknowledge that he had been unclear what evidence had been relied upon by the respondent in the previous proceedings before Judge Malik. Judge McCall had stated at [24] that he did not know whether the witness statement of Leslie Singh was before Judge Malik or not, and suggested that it would be unfair for him to speculate on exactly what evidence was or was not before Judge Malik [35].

18 However, these references in Judge McCall's decision do not disclose any error of law. Firstly, the respondent has not argued in the grounds of appeal that a lack of clarity on Judge McCall's part as to what evidence on deception was before Judge Malik, amounted to an error of law. Secondly, and in any event, Judge McCall held specifically at [34] that:

> "I do find that there is no evidence from the respondent in regard to the ETS and the TOEIC before me that was not available to the

> respondent at the first appeal and it could therefore have been before IJ Malik ...".

And see further at [35]:

> "The respondent must be aware that it is open to her to argue that IJ Malik had reached his findings on evidence that is different to the evidence that has been placed before me, but, however she did not adopt that approach. Taking all of the evidence in the round I find it will be unfair for me to speculate on exactly what evidence was or was not before IJ Malik. As I have said I do know from the dates that the evidence before me was available at the first hearing so it may well have been relied upon."

19 Therefore, Judge McCall noted that the Presenting Officer before him did not make out a case that the evidence relied upon in this appeal was in some way different from the evidence relied upon before Judge Malik. I find that if a finding of fact has been made on a particular issue in previous proceedings, and a party to a second appeal wishes to invite the second Tribunal to arrive at a different finding of fact on that issue, then the application of the principles set out in Devaseelan would require that party to make clear what new evidence there was, not considered by the first Tribunal, which spoke to that issue. This was not done.

20 Further, I note that para 39(4) of Devaseelan suggests that new evidence which could have been relied upon in previous proceedings, but which was not, ought to be treated with circumspection. I find that some explanation would be needed to explain why such evidence, which could have been placed before the first Judge, was only now being relied upon. No such explanation was provided to Judge McCall in this appeal.

21 In any event, as I observe above, the respondent's written grounds of appeal do not seek to argue a misapplication of the Devaseelan principles in any event.

22 The remaining paragraphs of the respondent's second ground are with respect somewhat generic, and represent a mere disagreement with Judge McCall's decision.

23 Mr. Whitwell also accepted that the respondent's grounds of appeal did not successfully raise any discrete arguments challenging Judge McCall's decision on article 8 ECHR, aside from the suggestion that the judge had erred in law on the deception point; a point which I have rejected.

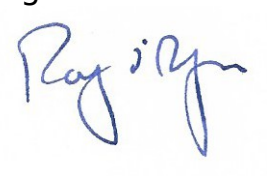
24 I therefore find that there is no material error in the judge decision.

Decision

The judge's decision did not involve the making of any material error of law

I dismiss the Secretary of State's appeal.

Signed: Date: 18.9.18



Deputy Upper Tribunal Judge O'Ryan