Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/12311/2017
HU/12313/2017
HU/12314/2017
HU/12316/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2018	**On 5 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIRALKUMAR [J]
[J J]
[S J]
HETALBEN [J]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr Khan, Counsel instructed by Sadozai Solicitors

DECISION AND REASONS

1. The respondent in these proceedings was the appellant before the First-tier Tribunal. From hereon I have referred to the parties as they were in the First-tier Tribunal so that for example reference to the respondent is a reference to the Secretary of State for the Home Department.

2. The appellants are Indian nationals. The first and fourth-named appellants are husband and wife.

3. On May 19, 2009 the first-named appellant entered the United Kingdom as a working holidaymaker.

4. On August 1, 2009 the fourth-named appellant entered the United Kingdom as a working holidaymaker with the second-named appellant as her dependent.

5. The first, second and fourth-named appellants returned to India on May 4, 2011 and they subsequently re-entered the United Kingdom as student and dependents on July 11, 2011. Their leave to remain was subsequently extended until December 6, 2014.

6. The third-named appellant was born in the United Kingdom on October 25, 2012 and on August 20, 2013 he was granted leave in line with the other appellants.

7. On September 2, 2014 they submitted applications on family and private life grounds but this was refused with a right of appeal.

8. On August 31, 2016 the appellants applied for leave to remain on human rights grounds. The respondent refused their applications on October 4, 2017 under both Appendix FM of the Immigration Rules and paragraph 276ADE HC 395.

9. The respondent refused the first-named appellant's application under Section S-LTR 1.6 of Appendix FM of the Immigration Rules because he was satisfied that the first-named appellant had fraudulently taken a TOEIC test on April 17, 2012. With regard to paragraph 276ADE(1)(vi) HC 395 the respondent submitted there were no "very significant obstacles to his integration" into India.

10. The respondent refused the fourth-named appellant's application on the basis that she did not satisfy the requirements of Appendix FM of the Immigration Rules because the first-named appellant was not a qualifying person and there were no "very significant obstacles to her integration" into India under paragraph 276ADE(1)(vi) HC 395.

11. The respondent refused the second and third-named appellants' applications under the Immigration Rules because their parents did not meet the requirements of Appendix FM and as the second-named appellant had not been in the United Kingdom for a continuous period of seven years he submitted it was not

unreasonable to expect either child to return to India with their parents.

12. The respondent considered their appeals under article 8 ECHR and had regard to section 55 of the Borders, Citizenship and Immigration Act 2009 but concluded that it was both reasonable and section 55 compliant for the second and third-named appellants to accompany their parents back to India in light of the fact the first-named appellant had fraudulently obtained a TOEIC certificate. The public interest outweighed their wishes to remain in the United Kingdom.

13. The appellants appealed these decisions on October 16, 2017 and their appeals came before Judge of the First-tier Tribunal Place on April 24, 2018. In a decision promulgated on May 4, 2018 the Judge found that the first-named appellant was a credible witness and had taken the TOEIC test himself.

14. The Judge placed weight on the fact that the second-named appellant had almost accrued seven years continuous residence in the United Kingdom and that for all practical purposes the United Kingdom was her home as she had family and friends here and had been educated here. The Judge accepted evidence that she could neither speak nor write Hindi or Gujarati. The Judge therefore took a pragmatic view that whilst the second-named appellant was not a qualifying child under Section 117B(6) of the 2002 Act she should be treated as a qualifying child and the Judge allowed all appeals on the grounds it would be unreasonable to require the second-named appellant and her sibling to leave the United Kingdom.

15. The respondent lodged an application for permission to appeal on May 10, 2018 challenging both the Judge's approach to the TOEIC test, the Judge's approach to section 117B(6) of the 2002 Act and the proportionality assessment.

16. Permission to appeal was granted by Judge of the First-tier Tribunal O'Keeffe on August 8, 2018. In finding an arguable error in law the permission stated that the Judge made no reference to any law when considering the issue of deception and made no clear finding on whether the respondent had discharged the initial burden that there was a deception and that this assessment affected the overall assessment of proportionality.

17. No anonymity direction is made.

SUBMISSIONS

18. Mr Whitwell adopted the grounds of appeal and submitted that the Judge had made errors in law in both her approach to the issue of whether the respondent had satisfied the burdens placed on her by the Tribunal in the cases of SM and Qadir v SSHD (ETS-Evidence-Burden of Proof) [2016] UKUT 000229 (IAC) and SM and Qadir and SSHD [2016] EWCA Civ 1167. He submitted that the Judge had not considered the case law and had wrongly stated that there was only generic evidence before her when in fact there was the actual test result and an article on the specific education

provider. The Judge failed to take into account that the court had recognised that people used a proxy taker for a variety of reasons and the fact the first-named appellant had given a correct immigration history and had had leave did not mean he was telling the truth. Additionally, when considering article 8 the Judge wrongly took a "pragmatic" view when considering section 117B(6) of the 2002 Act because it was accepted at the hearing that neither child was a qualifying child. This error and the fact the Judge wrongly concluded that no proxy taker had been used undermined the article 8 assessment.

19. Mr Khan opposed the application and submitted that whilst there could be criticisms raised regarding the Judge's approach in paragraph 17 of her decision nevertheless he submitted that the Judge had followed the approach recommended in SM and Qadir. The Judge had concluded the respondent had not proved his case and the finding was therefore open to her. With regard to article 8 the Judge had given detailed reasons why the appeal had been allowed and whilst he accepted neither child satisfied the "seven year rule" at the date of hearing the Judge was entitled to take into account that the eldest child had spent the majority of her life in the United Kingdom and had been in this country for almost seven years at the date of hearing.

FINDINGS

20. Having considered the submissions put forward I concluded that there had been an error in law in this case.

21. The Judge failed to identify any case law in her decision and that is of particular importance when that case law provided a structure for cases involving allegations of fraudulently obtained education certificates.

22. At paragraph 17 the Judge wrongly stated that she only had generic information before her. In addition to the standard witness statements the Judge also had been provided with a Project Façade report on the appropriate educational establishment and that report demonstrated that between March 20, 2012 and February 5, 2014 Premier Language Training Centre undertook 5055 tests of which 75% were found to be invalid. The Judge attached no weight to this document and also attached no weight to the "Look up Tool" which identified the appellant's test is an invalid test.

23. The Tribunal and Court of Appeal made it clear that the generic evidence (witness statements) was sufficient to satisfy the initial burden of proof placed on the respondent and the appellant thereafter had to present an explanation and the Judge was then required to consider whether that explanation was outweighed by the evidence produced by the respondent. The Judge erred by finding a good immigration history meant he had not "cheated" because she failed to consider other material evidence that was before her. This finding subsequently infected the article 8 assessment.

24. The article 8 assessment was also flawed because the Judge wrongly accepted that the second-named appellant was a qualifying child. The Judge was entitled to give

weight to the fact the child had been in this country for a considerable period of time but the Judge erred by accepting she was a qualifying child.

25. I therefore find that there had been errors in law and both representatives agreed that this matter would have to be remitted back to the First-tier Tribunal.

26. Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 sets out the procedure where a case is to be remitted back to the First-tier Tribunal. I am satisfied that as there was a procedural unfairness that this is a case that will have to be remitted back to the First-tier Tribunal to be heard by a Judge other than Judge of the First-tier Tribunal Place.

Notice of Decision

27. There is an error of law. I set aside the original decision and I remit the matter back to the First-tier Tribunal under Section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

Signed Date 22/10/2018

Deputy Upper Tribunal Judge Alis