



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12353/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3rd August 2018

Decision & Reasons Promulgated
On 21st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ZAINAB TARIQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Azhar of Counsel, instructed by Goodwill Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Plumptre (the judge) of the First-tier Tribunal (the FtT) promulgated on 13th September 2017.
2. The Appellant is a female citizen of Pakistan who on 7th February 2016 made a human rights application for leave to remain in the UK on the basis of her family and private life with her spouse, Tosif Qasir to whom I shall refer as the Sponsor, and their son

who was born in the UK on 7th July 2015. The Appellant and Sponsor married on 28th November 2015. The Sponsor has indefinite leave to remain in the UK and the son is a British citizen.

3. The application was refused on 26th April 2016. The Respondent noted that the Appellant had undertaken an ETS test at Universal Training Centre on 26th June 2013 and had used the certificate to apply for leave to remain in an application dated 27th January 2014. The Respondent was satisfied that the ETS certificate was fraudulently obtained by the use of a proxy test taker. The Respondent therefore refused the application for leave to remain with reference to S-LTR.1.6 of Appendix FM, which provides that the presence of an applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.
4. The Respondent concluded that because the Appellant failed the suitability requirements she could not satisfy Appendix FM in relation to family life or paragraph 276ADE(1) in relation to private life. The Respondent did not find that the application disclosed any exceptional circumstances which would warrant granting leave to remain pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules.
5. The appeal was heard by the FtT on 31st August 2017. The judge declined to consider Article 8, indicating that she would only consider whether or not the ETS certificate had been fraudulently obtained.
6. The judge heard oral evidence from the Appellant and Sponsor and found that the ETS certificate had been obtained by deception. Therefore, the Appellant had not established that she met the suitability requirements for leave to remain as a partner and the appeal was dismissed.
7. The Appellant applied for permission to appeal to the Upper Tribunal relying upon four grounds. Firstly it was contended the judge materially erred in law by applying an incorrect approach to the burden of proof and appeared to have decided the case on the basis the legal burden was on the Appellant.
8. Secondly it was contended that the judge erred in law and committed a serious procedural irregularity in refusing to consider any issues other than the allegation of fraud in relation to the ETS certificate. It was submitted that the judge was wrong in law to refuse to consider Article 8.
9. Thirdly it was contended that the judge erred in law by failing to make any findings on the credibility of the Sponsor who gave evidence which corroborated the Appellant's account.
10. Fourthly it was contended that the judge erred in law by failing to provide sufficient reasons for concluding that the Appellant used deception in order to obtain the ETS certificate.

11. Permission to appeal was granted by Judge Osborne of the FtT.

Error of Law

12. On 19th June 2018 I heard submissions from both parties in relation to error of law. On behalf of the Respondent it was conceded that the judge had materially erred in law in failing to consider Article 8, but it was not accepted that the judge had erred in considering deception and the ETS certificate.
13. I found a material error of law disclosed in the FtT decision which I set aside. I did not however find any error of law in relation to the conclusion by the judge that the Appellant had used deception and a proxy test taker to obtain an ETS certificate. Those findings were therefore preserved.
14. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 19th June 2018, promulgated on 27th June 2018.
15. The hearing was adjourned for further evidence to be given with reference to Article 8 of the 1950 European Convention on Human Rights. While the findings made in relation to fraud and the ETS certificate were preserved, I directed that it would be open to the Appellant to make submissions as to whether the finding of fraud engaged S-LTR.1.6.
16. I further directed that it was not appropriate to remit this appeal back to the FtT to be remade, but it was appropriate to have a further hearing at the Upper Tribunal and it would be open to the Appellant to call further evidence if that was thought appropriate.

Remaking the Decision – Upper Tribunal Hearing 3rd August 2018

17. At the commencement of the hearing I indicated that I had all documentation that had been before the FtT, and a further bundle of documents from the Appellant comprising sixteen pages. Mr Kotas confirmed that he had received this bundle.
18. Ms Azhar explained that the Appellant had changed solicitors following the error of law hearing. She had been instructed on the basis that the hearing before the Upper Tribunal was to decide whether an error of law had been made by the FtT. She had only received my error of law decision when arriving at the hearing centre this morning, and it was only then that she appreciated that an error of law had already been found, and the purpose of this hearing was to remake the decision.
19. Ms Azhar applied for an adjournment to consider whether further evidence was required, and to enable her to further prepare the case.
20. Mr Kotas indicated that he had only received the error of law decision the day prior to the hearing, but submitted that the issue was somewhat narrow and it would be appropriate to proceed.

21. Having considered the submissions, and the duty to ensure a fair hearing I decided that it was not necessary to adjourn the appeal. The issue to be decided was whether or not the preserved finding of deception in relation to the ETS certificate fell within S-LTR.1.6, and whether it would be reasonable to expect the Appellant's British child to leave the UK.
22. I declined to adjourn the hearing but put the case back to enable Ms Azhar to prepare.
23. When the hearing resumed both representatives indicated they were ready to proceed and there was no further application for an adjournment.
24. Ms Azhar indicated that no further evidence would be called and it was intended to proceed by way of submissions.
25. I firstly heard submissions from Ms Azhar who submitted that it would not be reasonable to expect the Appellant's son to leave the UK. He is now 3 years of age and attends nursery. The Appellant and Sponsor live together. The Sponsor is in full-time employment. The best interests of the child would be to remain with both parents.
26. I was asked to find that the deception exercised by the Appellant in having a proxy test taker did not fall within S-LTR.1.6. There was no criminal conduct. I was asked to find that even if S-LTR.1.6 is engaged, the appeal should still be allowed on the basis that it would not be reasonable to expect a British child to leave the UK. I was asked to find that the Appellant could not be described as having a very poor immigration history.
27. I then heard oral submissions from Mr Kotas who submitted that the deception did fall within S-LTR.1.6. On that basis I was asked to find the Appellant cannot satisfy the Immigration Rules. Therefore section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) would need to be considered. I was asked to find that significant weight should be placed upon the fact that the Appellant cannot satisfy the Immigration Rules.
28. It was accepted that apart from obtaining the ETS certificate by deception the Appellant had a good immigration history. The family are financially independent and the Appellant speaks English. It was accepted that it would be in the best interests of the child to remain in the UK.
29. In the circumstances Mr Kotas suggested that it would not be unreasonable for the child to leave the UK with the Appellant.
30. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

31. The finding made by the FtT that the Appellant used deception in employing a proxy test taker to obtain an ETS certificate is preserved. I therefore must consider whether this behaviour falls within S-LTR.1.6. The Appellant took part in a calculated and

planned act of deception to obtain an ETS English language test certificate. This seriously undermines effective immigration control and is rightly regarded as serious.

32. The Respondent must however prove on a balance of probabilities that the presence of the Appellant in the UK is not conducive to the public good, because her conduct, character, associations or other reasons makes it undesirable to allow her to remain in the UK. On the facts of this case I do not find that the burden has been discharged. On one side of the scales, there is the calculated and planned act of deception which seriously undermines immigration control. On the other side of the scales, I have to accept that this was an isolated incident. I place significant weight upon the fact that there have been no further breaches of the Immigration Rules and five years have now elapsed since the act of deception. The Appellant does not have any criminal convictions or cautions. It was conceded by Mr Kotas that other than the one act of deception, she has a good immigration history.
33. I therefore find, placing significant weight upon the time that has elapsed, and the lack of any further breaches of Immigration Rules, that the act of deception does not in fact mean that the Appellant's presence is not conducive to the public good.
34. The Respondent did not go on to consider EX.1 in refusing the Appellant's application because of the conclusion that S-LTR.1.6 applied. It seems to me, that because I find that S-LTR.1.6 does not apply, that it is incumbent to consider EX.1 in relation to the Appellant's family life, and I set out below EX.1 and EX.2;

EX.1 This paragraph applies if

- (a) (i) the applicant has a genuine and subsisting parental relationship with a child who -
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
- (ii) taking into account their best interests is a primary consideration, it would not be reasonable to expect the child to leave the UK; or
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2 For the purposes of paragraph EX.1.(b) insurmountable obstacles means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

35. Dealing firstly with EX.1(b) it is accepted that the Appellant has a genuine and subsisting relationship with her partner, who has indefinite leave to remain in the UK.

It has not however been proved that there are insurmountable obstacles to family life with that partner continuing outside the UK. I appreciate that the Sponsor has indefinite leave to remain in the UK, and that he has established a business in this country and is seeking to expand that business. That, without more, does not amount to insurmountable obstacles to family life continuing outside the UK. I do not find that adequate evidence has been submitted to prove that very significant difficulties would be faced by the couple in continuing their family life outside the UK, which could not be overcome or which would entail very serious hardship.

36. I then turn to EX.1(a) which considers the same test as is contained in section 117B(6) of the Nationality, Immigration and Asylum Act 2002.
37. It is common ground that the Appellant has a genuine and subsisting parental relationship with her son who is a British citizen. I accept that the Appellant is the primary carer of her son.
38. It was not disputed on behalf of the Respondent, that the best interests of the son would be to remain with both parents in the UK.
39. The fact that a child is British is a weighty consideration and was described in ZH (Tanzania) [2011] UKSC 4 as being of particular importance.
40. At paragraph 49 of MA (Pakistan) [2016] EWCA Civ 705 guidance is given that in relation to a qualifying child by reason of having in excess of seven years' residence, the residence must be given significant weight in the proportionality exercise for two related reasons. Firstly because of its relevance in determining the nature and strength of the best interests of a child, and secondly because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. I find that this guidance applies to the Appellant's son, as he is a qualifying child by reason of his British citizenship, as opposed to having seven years' residence.
41. I also take into account SF and Others (Albania) [2017] UKUT 00120 (IAC) which indicates that a Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. In this case I find it is appropriate to take the Respondent's guidance into account. I refer specifically to page 76 of that guidance. In summary the guidance is that it will not be reasonable to expect a British citizen child to leave the UK with an applicant parent or primary carer facing removal. That is the general position. The guidance goes on to state that in appropriate circumstances it may be appropriate to refuse to grant leave to a parent or primary carer if their conduct gives rise to public interest considerations of such weight as to justify removal if the British citizen child could remain in the UK with another parent or alternative primary carer. Those circumstances would be where an applicant parent has committed significant or persistent criminal offences falling below the threshold for deportation set out in paragraph 398 of the Immigration Rules, or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.

42. I have also taken into account MT and ET Nigeria [2018] UKUT 00088 (IAC). In that case the president of the Upper Tribunal considered a parent who had committed a criminal offence and received a community order for using a false document to obtain employment, had overstayed having been granted entry clearance as a visitor, and had made an asylum claim that was found to be false. The parent had then made a number of attempts to obtain leave to remain in the UK. It was found that the parent's immigration history was "not so bad as to constitute the kind of powerful reason that would render reasonable the removal of ET to Nigeria."
43. In summary, I do not find it can be said that the Appellant has committed any criminal offences, so it cannot be said that she has committed significant or persistent criminal offences falling below the threshold for deportation. I do not find that it can fairly be said that the Appellant has repeatedly and deliberately breached the Immigration Rules. What she has done is committed a serious act of deception in 2013 in an attempt to obtain leave to remain. On balance, given that that was an isolated incident, I do not find that it can be said that the Appellant has a very poor immigration history. I therefore conclude that it would not be reasonable to expect the Appellant's child to leave the UK. She therefore satisfies EX.1(a) and is entitled to leave to remain on that basis.
44. My decision would have been the same had I found that S-LTR.1.6 was engaged by the Appellant's deception. This would have meant that EX.1 could not have been considered. I would then have had to consider section 117B(6) which applies the same test of reasonableness as is in EX.1(a). There are other considerations within section 117B which are neutral factors in the balancing exercise, those being that the Appellant can speak English, and the family are financially independent. I place little weight on the Appellant's private life on the basis of her precarious immigration status, but that is not the main issue in this appeal, which relates to whether or not it is reasonable to expect a British child to leave the UK. As I conclude that it would not, this appeal is allowed.

Notice of Decision

The decision of the FtT involved an error of law such that it was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

Anonymity

The FtT made no anonymity direction and there has been no request for anonymity made to the Upper Tribunal. I see no need to make an anonymity direction.

Signed

Date 6th August 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

Because I have allowed the appeal I have considered whether to make a fee award. I make no fee award. Although the appeal is allowed, the Appellant has been found to have committed a serious act of deception. Evidence was considered by the Tribunal that was not before the initial decision maker.

Signed

Date 6th August 2018

Deputy Upper Tribunal Judge M A Hall