



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16536/2016

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals
Liverpool on 2 May 2018

Decision & Reasons Promulgated
on 2 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MUHAMMAD SHEHZHAD
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Chowdhury, Counsel, instructed by Greenhall Solicitors.

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 This is an appeal against the decision of Judge of the First tier Tribunal Tobin dated 3 May 2017 dismissing the appellant's appeal against the respondent's decision of 17 June 2016 refusing the appellant's human rights claim.
- 2 The Appellant is a national of Pakistan, and entered the United Kingdom in March 2011 with entry clearance as a Tier 4 general student. His leave to remain was

extended, but later curtailed so as to end on 15 April 2014 because, it would appear, his college's Tier 4 sponsor license was revoked. The Appellant made a further application for leave to remain on that date, but this was refused in or around June 2014 on the grounds that it was discovered that the results of an English language test the appellant had taken at the Innovative learning Centre, Manchester, on 19 September 2012 had been invalidated by ETS on the grounds that the Appellant had used a proxy test taker.

- 3 The appellant appealed against that decision, initially succeeding before the First tier Tribunal, and Upper Tribunal, but in a judgement of the Court of Appeal dated 29th June 2016, the Court of Appeal held that the First tier Tribunal had lacked jurisdiction to entertain the Appellant's appeal in country.
- 4 In July 2013, the appellant had met Ms Shereen Bibi ('the Sponsor') and they entered into a relationship. Their respective witness statements state that they met in Peterborough, and then lived together initially in Leeds, and then later Manchester. They have two sons, born in November 2014, and February 2016 respectively. The Sponsor has had indefinite leave to remain since 14 May 2013, and their sons are therefore British nationals. The Respondent's refusal letter of 17 June 2016, referring only to the first child, accepted that that child was British. The appellant clearly asserts in his witness statement dated 5 April 2017 that both sons are British Nationals.
- 5 The appellant made an application for leave to remain, resulting in the decision of 17 June 2016. The respondent considered the appellant's potential entitlement to leave to remain as a parent under Appendix FM, and also in relation to his private life in the UK under paragraph 276ADE(1) of the immigration rules. In relation to his entitlement to leave to remain under Appendix FM, the respondent referred at page 3 of 9 to the appellant's use of deception in obtaining his ETS certificate in September 2012, and held that paragraph S-LTR 1.6 of the suitability requirements applied to the appellant, on the grounds that the appellant's presence in the UK was not conducive to the public good because of his conduct.
- 6 However, it is to be noted that otherwise in relation to Appendix FM, the respondent accepted that the appellant met the eligibility requirements of R-LTRP .1 .1 (d)(ii), i.e. that the eligibility requirements of E-LTRP 1.2 - 1 .12, and 2.1 - 2.2 were met. It is also to be noted that in relation to whether the appellant met the requirements of section EX1 in Appendix FM, the respondent stated that it was accepted that the appellant had a qualifying relationship as contained in EX1, and therefore met the requirements of R-TRP .1 .1 (d)(iii). Although not discussed before the Judge, this appears to amount to an acceptance on the part of the respondent that the appellant is in a subsisting relationship with his partner, who is settled in the UK, and there are insurmountable obstacles to their family life continuing outside the UK.

- 7 However, leave to remain was refused under Appendix FM because of the appellant's non-satisfaction of the suitability requirements, and refused under paragraph 276ADE (1), on suitability grounds, and on the ground that there would not be very significant obstacles to his integration into Pakistan. Considering the appellant's entitlement to leave to remain outside of the rules, it was noted that despite the Sponsor being pregnant at the date of decision, no medical evidence had been provided to indicate that she was unable to travel or preventing her from returning to Pakistan where she may give birth. In relation to an asserted fear of harm to the Sponsor in Pakistan (because of having a child outside of wedlock) the respondent stated that the Sponsor could remain in the UK whilst the appellant returned to Pakistan, and he would be able to communicate with his child from Pakistan and she could visit him there.
- 8 On appeal, the Judge admitted into evidence further evidence regarding the appellant's alleged use of deception at the Innovative Learning Centre, being a witness statement from Home Office Presenting Officer Lesley Singh dated 11 April 2017, together with a table of data showing details of the cancellation of the appellant's test result, a report of Professor Peter French regarding the methodology of the ETS investigation into use of proxies, and a copy of a report of the Home Office criminal investigations into proxy testing at the Innovative Learning Centre in Manchester.
- 9 The Judge ultimately held that the appellant had used deception in his earlier application for leave to remain [25]. The Judge found that the decision did not amount to a disproportionate interference with the appellant's right to family life.
- 10 Grounds of appeal dated 18 May 2017 are with respect, somewhat unfocused and discursive, but argue, in summary, that the judge erred in law as follows:
- (i) failing to give reasons which were adequate in law for finding that the respondent's evidence as to the use of deception was 'credible and convincing' (Grounds, para 4);
 - (ii) failing to have regard to relevant evidence given by the appellant as to why he took the test in Manchester (Grounds, para 5);
 - (iii) failing to take into account evidence of the appellant's proficiency in English such that he had no reason to take a proxy test (Grounds, paras 6 and 7);
 - (iv) failing to give adequate reasons for finding that the appellant had used deception (Grounds, para 9);
 - (v) failing to take into account evidence of the appellant's cohabitation with the Sponsor in Leeds (at pages 160-164 of the appellant's bundle) (Grounds, para 1);

- (vi) failing to give adequate reasons for finding the Sponsor's evidence incredible (Grounds, para 12);
- (vii) failing to give adequate reasons for the finding that the appellant's removal would not be in breach of Article 8 ECHR (Grounds, para 14);
- (viii) failing to give proper consideration to the best interests of the children (Grounds, para 18);
- (ix) failing to take into account relevant considerations in the assessment of the public interest in removing the appellant (Grounds, para 20).

11 Permission to appeal was granted by Judge of the First tier Tribunal Pedro on 24 November 2017 on the basis that the grounds disclosed arguable errors.

12 Before me, Ms Chowdhury argued that the Judge had failed to properly direct himself in law in relation to the guidance given in the case of SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC) that:

- “(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.
- (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
- (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.”

Further, Ms Chowdhury referred to various documents within the appellant's bundle establishing that the appellant and partner cohabited in Leeds in or around November 2013 October to November 2013.

13 Mr Bates, for the respondent, argued that the Judge's decision was sustainable, the Judge had not misdirected himself in law, and had taken all material considerations into account.

Discussion

- 14 In relation to the Judge's decision that the appellant had employed deception in taking the English language test of September 2012, I find that it is not a material misdirection in law for the Judge to have failed to make direct reference to the case of SM and Qadir. The Judge appears to treat the respondent's evidence as establishing, *prima facie*, use of deception, in his finding at [16] that the evidence of the Secretary of State was 'credible and convincing'. Further, as this evidence was the usual table in such cases of ETS's cancellation of the test result, I find that the Judge was not required to give any further reasons for accepting the Respondent's evidence, at this first stage. The Judge thereafter considers the appellant's explanation for the circumstances surrounding the taking of the test, at paras [17]-[20] of the decision. The judge later finds at [25] that the appellant did employ deception. The structure of the Judge's decision making was consistent with relevant authority, whether referred to or not.
- 15 However, I find that the Judge has erred law in his assessment of the appellant's explanation as to whether he employed deception, in finding at [17] and [21] that the evidence of the appellant and Sponsor was inconsistent, on the basis that the appellant had not mentioned living in Leeds. The documentary evidence within the appellant's bundle establishes that they lived in Leeds together in the latter part of 2013. Also, the appellant asserts in his witness statement signed on 12 April 2017, (although this seemingly prepared for the 2014 proceedings referred to above).
- 16 I find the Judge's omission of this evidence from his decision material for two reasons. Firstly, the Judge does not appear to appreciate that when being asked in evidence (see para [17]) about where he was living and studying at the time he took the test, he would not in fact have had any reason to refer to Leeds at all - because the test was taken in September 2012, whereas it was the evidence of the appellant and Sponsor that they only met in July 2013, and *after* that, lived in Leeds, before moving to Manchester. There was therefore no logical reason for the appellant to refer to his living in Leeds when being asked about the circumstances of the taking of the English language test. The Judge does not appear to appreciate the distinction to be made between the two time frames.
- 17 Further, the supposed discrepancy about whether or not the couple lived in Leeds appears to me to be the sole issue on which the Judge finds that he did not believe anything that the Sponsor said.
- 18 Although there are other reasons given at paras [17] - [20] to support the Judge's ultimate finding at [25] that the appellant had used deception, the Judge appears to have treated the apparent discrepancy regarding the Leeds address as being a significant issue. I find in the circumstances that the Judge's decision that the appellant had used deception in obtaining his English language certificate of September 2012 is unsafe.
- 19 Further, I accept the appellant's submission that the Judge has failed to give adequate reasons for disbelieving the evidence of the Sponsor. She had asserted in

her witness statement that she worked part time; the appellant acted as carer for her children; and she expressed a number of reasons why she would find it difficult to continue to remain in the United Kingdom in the absence of the appellant. I find that no adequate reasons have been given by the Judge for rejecting the Sponsor's witness evidence.

20 Furthermore, I find there is a fundamental error approach by the Judge to the appeal as a whole. As noted above, the respondent's decision letter of 17 June 2016 approached the issue of the appellant's entitlement to leave to remain in the United Kingdom on the basis that there were insurmountable obstacles to the family life continuing outside the UK. This approach is not reflected in the Judge's decision at all.

21 Further, there is no consideration within the Judge's decision that the appellant's children are British citizens. As per Lord Hope at para 41 of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4:

"The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood."

It is not clear to me that the citizenship of the two children was a factor that was present in the Judge's mind when making a decision.

Decision

22 I find that the decision involved the making of an error of law.

I set aside the Judge's decision.

I remit the appeal to the First tier Tribunal for fresh hearing, on the basis that the extent of the findings of fact that will be needed in this appeal are such that a remittal is warranted in accordance with the relevant practice direction.

Signed:

Date: 28.7.18



Deputy Upper Tribunal Judge O'Ryan