



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17615/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 18 December 2017

Decision & Reasons Promulgated
On 05 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MS SYEDA ANJUM HASHMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Singh, Greater Manchester Immigration Aid Unit
For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision and reasons of First-tier Tribunal (“FtT”) Judge Lawrence promulgated on 13th March 2017 in which the Judge allowed the appellant’s appeal to the limited extent that the respondent had not made a lawful decision with regard to the best interests of the appellant’s child, and thus remitted the matter to the respondent.

The background

2. The appellant is a national of Pakistan. She entered the UK as a student on 17th March 2011 with leave valid until 12th October 2013. It would appear that the appellant made an application for leave to remain as a student that was subsequently withdrawn on 28th October 2013. She also appears to have made an application for leave to remain as the victim of domestic violence, that was rejected on 15th April 2014. The date upon which those two applications were made, is not clear. In any event, on 13th March 2015, the appellant made an application for leave to remain on private and family life grounds. That application was refused for the reasons set out in a decision dated 6th July 2016 and it was that decision that was the subject of the appeal before the FfT Judge.
3. The respondent claimed that at an interview conducted on 19th January 2016, the appellant had confirmed that she had obtained a TOEIC certificate from ETS. In reaching the decision, the respondent noted that ETS had undertaken a check of the test that the appellant had claimed to have taken on 27th November 2013 at the BIETTEC test centre, and the scores from that test had been treated as invalid. On the basis of the information provided to the respondent by ETS and the appellant, the respondent was satisfied that the test certificate relied upon by the applicant previously was fraudulently obtained, and that the appellant had used deception in doing so. In the circumstances, the respondent concluded that the appellant's presence in the UK is not conducive to the public good because the appellant's conduct makes it undesirable to allow her to remain in the UK. The respondent concluded that the appellant cannot meet the suitability requirements set out in the Immigration Rules, and her application was refused under S-LTR1.6 of Appendix FM of the Immigration Rules.
4. Nevertheless, the respondent noted that the appellant is the parent of a British child born on 12th October 2014, and considered whether the appellant should be granted leave to remain. The respondent concluded that the appellant is unable to meet the

requirements of paragraph EX.1. of Appendix FM or paragraph 276ADE(1) of the Immigration Rules. Having considered and rejected the application under the Immigration Rules, the respondent concluded that the applicant's application does not raise any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 ECHR, might warrant a grant of leave to remain outside the requirements of the Immigration Rules.

The decision of the FtT Judge

5. The Judge rejected the submission made on behalf of the appellant that the respondent was wrong to find that the appellant does not meet the suitability requirements since she has not been convicted on any criminal offence. The Judge states, at [9], without any elaboration, that the submission is "ill-founded".
6. The Judge also rejected the appellant's account that she had in fact taken a test at PTE Academic, and found, for the reasons provided at paragraphs [9] to [12], that the appellant had claimed to have taken a TOEIC test previously, and that the respondent had discharged the evidential burden that rested on the respondent to establish that the appellant did not take the TOEIC test on 27th November 2013. The Judge found that the appellant had failed to discharge the burden that had then shifted to her, to provide an explanation. The Judge found that the appellant could not satisfy the suitability requirement under the rules, and went on to address whether the appellant could satisfy the requirements of paragraph EX.1 of Appendix FM, and to consider the best interests of the child. The Judge noted that paragraph EX.1.(i)(cc)(ii) of Appendix FM required him to consider whether or not it would be reasonable to expect the appellant's child, a British Citizen, to leave the UK.
7. The Judge referred to the decision of the Supreme Court in MM (Lebanon) -v- SSHD [2017] UKSC 10 and at paragraph [16] of his decision, found that the respondent has not made a lawful decision insofar as the 'best interests' of the appellant's child is concerned. At paragraph [17], the Judge referred to the decision in MK (section 55 – Tribunal options) [2015] UKUT 223 (IAC) and concluded that there was insufficient information provided to the Tribunal for it to make an informed decision as to the best

interests of the child. The Judge concluded that it is therefore in the interests of justice, that the matter be remitted to the respondent for the respondent to consider as the 'primary decision maker', the best interests of the child and the appeal was allowed to that extent.

8. The appellant advances a number of grounds of appeal that are framed in a manner that is unnecessarily discourteous to the Judge of the FfT, and are themselves very difficult to follow and in places, incoherent. Permission to appeal was granted by FfT Judge Hodgkinson on 3rd August 2017, and the matter now comes before me to determine whether the decision of the FfT Judge contains a material error of law, and if so, to re-make the decision.
9. Mr Singh submits that the appellant has always maintained that on 4th October 2013, the appellant completed a test at PTE Academic. The score report of that test is to be found at page [3] of the appellant's bundle. He submits that the appellant has always maintained that she never took an ETS test on 27th November 2013, and she had not said in the interview that was completed on 19th January 2016, that she had sat an ETS test on 27th November 2013. He submits that having completed and passed an English language test on 4th October 2013, there would be no reason for the appellant to rely upon the ETS test that the respondent claims was completed on 27th November 2013.
10. Mr Singh submits that the Judge erred in his understanding that the appellant admitted during the interview on 19th January 2016 that the appellant had taken a TOEIC test on 27th November 2013. He submits that in her witness statement of 15th February 2017, the appellant confirmed that when she was asked during interview whether she had taken an ETS language test, she had stated that she hadn't, but she had taken a PTE test. Mr Singh submits that the Judge failed to engage with that explanation, and proceeds throughout his decision in the mistaken belief that the appellant admitted during her interview that she had taken a TOEIC test on 27th November 2013.
11. Mr Singh submits that in reaching the decision that the appellant cannot satisfy the suitability requirements of the immigration rules, the Judge erred in his conclusion

that the submission made on behalf of the appellant that the respondent was wrong to find that the appellant does not meet the suitability requirements since she has not been convicted on any criminal offence is “ill-founded”, without any explanation or reason. He submits that the respondent’s guidance set out in “Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes” published in August 2015, expressly provides, at Section 5, that in considering all applications for leave to remain in the UK on the basis of a person’s family life as a partner, parent or child, in the addressing suitability criteria under paragraphs S-LTR.1.2 to S-LTR.1.6 of Appendix FM, a decision maker must refer to the criminality guidance in ECHR cases. Furthermore, the guidance expressly provides, at 11.2.3, that “*Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child...*”. Finally, the Immigration Directorate Instructions, “Chapter 13: criminality guidance in Article 8 ECHR cases” version 5.0 published on 28th July 2014 sets out factors relevant to an assessment of suitability and the duty under section 55 with regard to the need to safeguard and promote the welfare of children who are in the UK. Mr Singh submits that the Judge failed to have any regard to the published guidance and his decision that the suitability requirement is not met, is perverse and irrational.

12. In reply, Mr Bates submits that the application of the suitability requirement does not require a criminal conviction in this context, where it is alleged that the appellant has used deception, and the respondent concludes the appellant’s presence in the UK is not conducive to the public good because the appellant’s conduct makes it undesirable to allow her to remain in the UK. She is not a criminal offender but that is not to say that it is not open to the respondent or the Tribunal to conclude that the appellant’s presence in the UK is not conducive to the public good, because the appellant’s conduct makes it undesirable to allow her to remain in the UK. He submits that the Judge had to decide on the evidence before him whether the appellant had in fact sat the TOEIC test in November 2013, and it was open to the Judge to find that the respondent had discharged the evidential burden that rested on the respondent to establish that the appellant did not take the TOEIC test on 27th November 2013. He

submits it was also open to the Judge to find that the appellant had failed to discharge the burden that had then shifted to her, to provide an explanation. Mr Bates was unable to provide me with a copy of the record of the interview of the appellant, that took place on 16th January 2016 and accepted that a copy of the interview record was not before the FfT.

13. In reaching my decision I have had careful regard to the account of events relied upon by the appellant. The respondent stated in the decision of 6th July 2016 that “..In a recent interview conducted with yourself by UKVI on 19th January 2016, you confirmed that you obtained a TOEIC certificate from the Educational Testing Service (ETS).”. The appellant states at paragraph [9] of her statement dated 15th February 2017 that when asked at the interview whether she had taken an ETS language test, she stated that she hadn’t, and said that she had taken a PTE test. There was plainly an issue as to what the appellant had said during the interview on 19th January 2016. There was evidence before the FfT Judge of a PTE Academic test score following a test taken on 4th October 2013, but that is not referred to by the Judge. What the appellant stated at interview should have been capable of being resolved swiftly by looking at the record of interview but it does not appear to have been provided to the FfT. Mr Bates was unable to provide a copy at the hearing before me. It may also have been useful for the FfT to have had clearer information about the appellant’s immigration history. As I have set out previously, it would appear that the appellant made an application for leave to remain as a student that was subsequently withdrawn on 28th October 2013. The date upon which that application is not known. I can only assume that the appellant relied upon an English language test in support of that application, but if that is correct, the appellant could not have relied upon an ETS test completed in November 2013 in support of that application, which, as I say, appears to have been withdrawn on 28th October 2013.
14. I accept that there was evidence before the FfT Judge of ETS test scores referred to in a certificate issued by the BIETTEC Test Centre, to an individual using the name of the appellant and the same date of birth, using a passport issued to the appellant, relating to tests completed on 27th November 2013, being treated by ETS as invalid. The Judge

found, at [9], that in an interview the appellant admitted she took a TOEIC test. In my judgement, notwithstanding the evidence relied upon by the respondent, the Judge fell into error is his failure to engage with the account of the interview given by the appellant in her witness statement, particularly when a transcript of the interview was not before the *FtT*.

15. Furthermore, having noted at paragraph [15] of his decision that he must consider whether or not it would be reasonable to expect the child, a British Citizen, to leave the UK, the Judge did not in fact address that issue. The Judge simply concluded that insofar as the 'best interests' of the appellant's child is concerned, the respondent has not made a lawful decision.
16. Finally, in my judgement, the Judge failed to give adequate reasons for rejecting the appellant's claim that the respondent was wrong to find that the appellant does not meet the suitability requirements since she has not been convicted on any criminal offence. The Judge states, without any elaboration, that the submission is "ill-founded", despite the respondent's published guidance providing that save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child, where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. A complete copy of the guidance had not been provided by the appellant and I did not therefore hear detailed submissions as to the effect and application of the guidance to this appeal. I do not for the purposes of this appeal, need to decide whether the application of the suitability requirement requires a criminal conviction. For present purposes, I am satisfied that the Judge failed to give adequate reasons for rejecting the claim made by the appellant.
17. In my judgement, for the reasons given I am satisfied that the decision of the *FtT* is infected by a material error of law and the decision of the *FtT* should be set aside. The decision needs to be re-made and I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. Although the Upper

Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, I am satisfied that the effect of the error has been to deprive the appellant of a fair hearing or opportunity for her case to be put to and considered by the *FtT*. Furthermore, the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective, it is appropriate to remit the case to the *FtT*.

18. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

19. The decision of the First-tier Tribunal is set aside.

20. The matter is remitted to the First-tier Tribunal for rehearing.

Signed

Date

15th March 2018

Deputy Upper Tribunal Judge Mandalia