



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25423/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1st August 2018

Decision & Reasons Promulgated
On 17th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR AH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Syed-Ali, instructed by Immigration Aid (King Street, Luton)

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 3rd November 2016 to refuse his application for leave to remain on the basis of his private and family life. First-tier Tribunal Judge V A Cox dismissed the appeal in a decision dated 4th February 2018. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Scott-Baker on 4th June 2018.

2. The background to this appeal is that the Appellant was granted entry clearance as a student and arrived in the UK on 15th February 2010. His leave to remain as a student was extended until 22nd December 2014. The Appellant was served with a removal notice in July 2014 and permission to apply for a Judicial review of the removal notice was refused. On 9th November 2014 the Appellant married a British citizen and submitted an application for leave to remain under private and family life on 22nd May 2015. That application was refused but the Appellant made a further application on 18th December 2015. The Appellant has two children, a son born on 5th August 2016 and another son born on 9th September 2017. Both are British citizens.
3. The Secretary of State considered the application under the Immigration Rules and concluded that the Appellant did not meet the suitability requirements of S-LTR 2.2(a) because the Educational Testing Service (ETS) reported that the test score obtained by the Appellant in the TOEIC English language test was obtained through deception. The Secretary of State considered the Appellant's application under paragraph 276ADE of the Immigration Rules and concluded that it had not been established that there would be very significant obstacles to the Appellant's reintegration into Bangladesh and that he did not therefore meet the requirements of the Rules. The Appellant's first child was born by the date of the decision. The Secretary of State took into account the best interests of the Appellant's son and concluded that there were no exceptional circumstances in the case and refused to grant leave to remain outside of the Immigration Rules.
4. In considering the appeal the First-tier Tribunal Judge considered the allegation that the Appellant had obtained the TOEIC results by deception and found that the evidence produced by the Secretary of State was sufficient to discharge the evidential burden upon the Secretary of State. The judge considered the explanation put forward by the Appellant in accordance with the guidance in **SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229**. The judge concluded that the Appellant had obtained the English language certificate by deception [68]. The judge therefore concluded that the Appellant could not meet the suitability requirements under Appendix FM of the Immigration Rules. The judge considered that the Appellant had not established that there were very significant obstacles to his reintegration into Bangladesh under paragraph 276ADE (1)(vi). The judge went on to consider the appeal outside of the Rules and considered the best interest of the children concluding that it is in the best interests of the children to be with both of their parents [73]. The judge reminded herself that the public interest does not require the Appellant's removal as the children are British citizens in accordance with Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 [81]. The judge went on to undertake a proportionality exercise on the basis that the Respondent's decision would mean that the family would be separated. The judge noted that strong or powerful reasons are required to outweigh a child's best interests and that this does not equate to blaming the child to make a decision that means the father will leave the United Kingdom and the mother and children may choose to remain [84]. The judge reminded herself that the children are both British citizens. The judge noted at paragraph 86 that the wife was aware that the Appellant did not have leave to remain when she met and subsequently married him but accepted that this was no fault of the children. The

judge noted that the wife did not consider her family life being out of the UK or the Appellant being apart from her but again accepted that this is not the fault of the children. The judge took into account that the Appellant is not able to meet the Rules on the grounds of suitability and the fact that the Appellant has used deception [87-88]. Taking all of this into account the judge concluded that the Respondent's decision is proportionate and that the best interests of the children are outweighed by the cumulative effect of the other factors [89].

Error of law

5. The Grounds of Appeal put forward two grounds. It is firstly contended that the judge erred in assessing the reasonableness of the "innocent explanation" put forward by the Appellant in response to the allegation that he exercised deception in relation to his TOEIC tests.
6. In putting forward his submissions in relation to the first ground Mr Syed-Ali relied on the case of **Majumder [2016] EWCA Civ 1167**. At paragraph 18 the Court of Appeal said:

"I have stated that the UT decided that the Secretary of State had discharged the evidential burden that lay on the Secretary of State so there was a burden, again an evidential one, on Mr Majumder and Mr Qadir of raising an innocent explanation. The UT accepted (at [69]) the submission on behalf of the Secretary of State, that in considering an allegation of dishonesty the relevant factors included the following: what the person accused had to gain from being dishonest; what he had to lose: what is known about his character: the cultural environment in which he operated: how the individual accused of dishonesty performed under cross-examination, and whether the Tribunal's assessment of that person's English language proficiency is commensurate with his or her TOEIC scores; and whether his or her academic achievements are such that was it unnecessary or illogical for him to have cheated. There was no criticism in this court by Mr Kovats of that approach."
7. Mr Syed-Ali contended that in this case the judge had made insufficient findings of fact or given insufficient reasons for finding that the Appellant had not put forward an innocent explanation. He contended that the judge failed to consider the relevance of the IELTS English test result and had failed to consider whether the Appellant would have any motivation not to undertake the English language test. In her submissions Ms Willocks-Briscoe contended that the judge followed the exact process set out in the case of **SM and Qadir** firstly assessing the evidence from the Secretary of State. She relied on the cases of **MA (ETS- TOEIC testing) [2016] UKUT 00450** and **R (on the application of Nawaz) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 00288 (IAC)**.
8. The proper approach to cases involving an allegation of fraud in relation to the ETS English test was set out in the case of **SM and Qadir**, considered by the Court of Appeal in **SSHD v Shehzad and Another [2016] EWCA Civ 615** and confirmed in the case of **R (on the application of Nawaz)**. It is clear from these cases that the burden is initially on the Secretary of State to provide evidence sufficient to discharge the

evidential burden on the Secretary of State. As pointed out at paragraph 22 of the decision in **Shehzad**, if that evidential burden is satisfied, it is then incumbent on the Appellant to provide evidence in response raising an innocent explanation.

9. The judge set out the Appellant's oral evidence in relation to the TOEIC test at paragraphs 18 to 21. The judge looked at the evidence submitted by the Secretary of State at paragraphs 46 to 49 concluding that the evidence was capable of discharging the burden on the Secretary of State and that the burden then shifted to the Appellant to provide an innocent explanation. The judge considered the evidence noting at paragraph 51 that the Appellant did not require an interpreter to give evidence, that he had previously obtained an English language certificate in order to enter the UK as a student, that there was no challenge to the English language certificate dated 20th September 2014. The judge further took into account the fact that the Appellant did not provide specific information about the test centre, he was unable to remember the precise fee he had paid and did not give details of the invigilator and related matters. The judge noted that there was no evidence that the Appellant participated in any English language programme prior to the TOEIC test. The judge considered a number of general credibility issues in relation to the Appellant noting that the Appellant and his wife gave inconsistent evidence regarding their relationship with his wife's parents. The judge found that the Appellant and his wife exaggerated the difficulties his wife has noting that there was no medical evidence to support the claimed difficulties and concluding that they had exaggerated back the back pain she suffers. The judge took into account that the Appellant's English was good in his oral evidence and that his English language abilities had improved since he had taken the test [62]. The judge took into account in the Appellant's favour the fact that the test centre was local to his home address [64], and the fact that the Appellant identified that the test would have taken place on two separate days. As against that the judge took into account that although invited to explain how what had gone on the Appellant had given no detail as to the length of the tests. The judge concluded that the Appellant had obtained the English language certificate by deception.
10. In my view it is clear that the judge undertook a thorough examination of all of the evidence before her and took into account all of the evidence before reaching a conclusion that the Appellant had practised deception in relation to the TOEIC test. Accordingly the judge has looked at all of the evidence and reached a conclusion open to her on the evidence that the Appellant had not put forward an innocent explanation. This finding was open to the judge on the evidence.
11. The second ground contends that the judge erred in considering the appeal under Article 8 outside the Rules in that she appeared to consider that the TOEIC issue was fatal in the proportionality assessment. It is contended that the judge failed to apply the principle set out in **SF and Others (Guidance, post-2014 Act) [2017] UKUT 00120** and the case of **Ngouh [2010] EWHC 2218 (Admin)**. Reliance is placed on paragraph 120 where Foskett J said:

“As I have observed previously (...), in some instances the offence may be so serious that little by way of explanatory justification for relying on this paragraph may be required: the answer may be obvious. Where, however, the offence is in a

different part of the criminal spectrum, certainly if very much at the lower end, then far greater justification would be required, particularly if it is the only occasion where the person concerned has broken the law.”

12. Mr Syed-Ali submitted that this Appellant had not been convicted of any criminal offences. He submitted that there was no finding that this Appellant had participated in any criminal activities in relation to the conduct of these tests in the test centres or that he had had any personal responsibility in relation to conduct of these tests.
13. Ms Willocks-Briscoe submitted that it is clear from the decision that the judge was aware of the fact that the children were British citizens that the judge noted the submission in relation to **SF (Albania)** at paragraph 45 and returned to this issue at paragraph 69. In her submission the judge firstly considered the best interests of the children correctly noting that the best interests of the children could be outweighed by other factors. The judge was aware that strong and powerful reasons would be required to outweigh the best interests of the children. In her submission it is clear that the judge was aware of the competing factors and took into account the presumption in the policy as set out in **SF (Albania)**. She referred to paragraph 7 of **SF (Albania)** and submitted that the list therein is not exhaustive. In her submission it was open to the judge, having considered all of the evidence and the credibility of the two witnesses, to conclude that the balance was tipped in favour of the public interest in this case.
14. In **SF (Albania)** the Upper Tribunal set out the contents of Home Office Guidance at paragraph 7 as follows:

“7. Mr Wilding, however, has with the fairness which Presenting Officers always attempt to apply, drawn our attention to an important guidance document. It is the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) “Family Life as a Partner or Parent and Private Life, 10 year Routes”. It is the edition of August 2015 and therefore not in force at the date of the decision under appeal, but it was in force at the date of the First-tier Tribunal hearing and decision, and is still in force. It contains important guidance about the following topic at 11.2.3: *Would it be unreasonable to expect a British Citizen Child to leave the UK?* We will set out the relevant parts, they are as follows:

“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. This reflects the European Court of Justice Judgment in Zambrano.

...

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.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

We were not specifically referred to any other part of this document and we do not need to set any more out. "

15. At the hearing Mr Syed-Ali sought to argue that the judge had erred in failing to consider whether the Appellant should be required to leave the UK in order to apply for entry clearance in accordance with the principles in **Chikwamba v SSHD [2008] UKHL 40**. He submitted that this was an error. However Mr Syed-Ali had represented the Appellant in the First-tier Tribunal and I drew his attention to paragraph 46 of the decision where it is noted that he had accepted that the Appellant could not meet all of the requirements of the Rules and therefore the **Chikwamba** points did not come into play. Mr Syed-Ali accepted that this had been the position at the time of the hearing in the First-tier Tribunal albeit in his submission it was no longer the position in that the Appellant would now meet the requirements of the Rules. However it has not been established that the First-tier Tribunal Judge erred in her approach to this matter in light of Mr Syed-Ali's concession and his acceptance that the Appellant did not meet the requirements of the Immigration Rules at the date of the hearing.
16. In this appeal the judge made a number of adverse credibility findings in relation to the Appellant's evidence about his wife's pregnancy and health difficulties concluding that there was no medical evidence to support the claimed difficulties and concluded that the Appellant and his wife had exaggerated the back pain she claims to have suffered from. The judge considered the children's best interests noting at paragraph 77 that the children are in general healthy children and, while there has been some infant illness including a hospital admission that would have been very stressful for the Appellant and his wife, there are no serious health issues. In considering proportionality the judge took into account against the Appellant the fact that he did not meet the Immigration Rules and that he has used deception. It is clear to me that in so doing the judge was aware of the best interests of the children. The judge was

aware that strong or powerful reasons are required to outweigh a child's best interests [84]. The judge was aware of the immigration history but noted that this could not be used to blame the children. It is clear from the decision [83, 85] that the judge took into account that the British children would remain in the UK with their mother and accordingly the decision would not lead to the children being required to leave the UK.

17. The judge clearly took into account Section 117B(6) but that is not determinative of the public interest considerations. It is clear that the judge took into account the other considerations in Section 117B. The judge clearly weighed in the public interest the fact that the family life was developed whilst the Appellant's leave to remain was precarious [86]. I find looking at the decision as a whole that, having taken into account all relevant factors, the judge reached a conclusion open to her on the evidence that the decision to refuse the application is a proportionate interference with the Appellant's right to private and family life in the UK.

Notice of Decision

The decision of the First-tier Tribunal Judge does not contain a material error of law.

The decision of the First-tier Tribunal Judge shall stand.

An anonymity direction is made.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 8th August 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and there can be no fee award.

Signed

Date: 8th August 2018

Deputy Upper Tribunal Judge Grimes