



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26652/2016

THE IMMIGRATION ACTS

Heard at Field House
On August 17, 2018

Decision & Reasons Promulgated
On August 28, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JAYESHKUMAR DIPAKBHAI PATEL
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Kiss, Senior Home Office Presenting Officer
For the Respondent: Mr Richardson, Counsel, instructed by Sangat Advice Centre

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. No anonymity direction is made.
3. The appellant is a national of India and on December 10, 2012 he married an Indian citizen who had indefinite leave to remain in the United Kingdom.
4. The appellant applied for leave to remain as a spouse (in 2012) but his application was refused and the appellant lodged grounds of appeal but subsequently withdrew

his appeal. In support of this application the appellant relied on an ETS test he had taken at Elizabeth College.

5. On August 29, 2013 his wife gave birth to a son who is a British citizen by reason of his mother's settled status.
6. Prior to the birth of their son the appellant voluntarily left the United Kingdom he returned to India in June 2013 and he then submitted an application for entry clearance as a spouse which was granted and on February 8, 2014 the appellant entered the United Kingdom with leave to remain as a spouse of a person present and settled in the United Kingdom until October 16, 2016.
7. On October 5, 2016 the appellant lodged an application for further leave to remain but this was refused by the respondent on November 24, 2016 with the respondent referring firstly to a conviction the appellant had for assault in October 2015 and on the basis he had undertaken an invalid ETS test at Elizabeth College in 2012. This test had been used in support of the 2012 application referred to in paragraph 4 above.
8. The appellant lodged grounds of appeal on December 5, 2016 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. The appellant argued that his appeal should be allowed under article 8 ECHR and he disputed the fact that he had taken a fraudulent TOEIC test.
9. His appeal came before Judge of the First-tier Tribunal Widdup (hereinafter called "the Judge") on March 16, 2018 and the Judge allowed the appellant's appeal on human rights grounds in a decision promulgated on March 26, 2018.
10. The respondent appealed this decision on March 29, 2018 on the grounds that the Judge had erred by finding the fact the fraudulent certificate had not been used in the current application meant the appellant was not liable to be excluded on grounds of suitability under Appendix FM of the Immigration Rules. The respondent further argued the article 8 assessment was therefore flawed and the decision should be set aside.
11. Permission to appeal was granted by Judge of the First-tier Tribunal Doyle on June 21, 2018 who found it was arguable the Judge's conclusion at paragraph 40 was not adequately reasoned and the Judge appeared to conflate consideration of the Immigration Rules with a freestanding article 8 consideration.

SUBMISSIONS

12. Ms Kiss relied on the grounds of appeal and submitted that there had been a material error when the Judge failed to have regard to the "invalid" test. Whilst ultimately the outcome may have been the same the Judge should not have overlooked the test as he did.
13. Mr Richardson submitted that this had been an unusual case because whilst the 2012 ETS result had been raised in the decision letter both representatives felt there was no need for oral evidence when the matter appeared before the Judge. He submitted

that there was an acceptance that the alleged behaviour in 2012 was not sufficient to justify the suitability refusal under section S-LTR 1.6 of Appendix FM of the Immigration Rules. However, if an error was found he submitted that the appeal should still be allowed under article 8 ECHR because the appellant had entered the country lawfully, was married and they had a British child. He submitted no weight should be attached to the conviction for assault as this had not been appealed and the weight to be attached to the "invalid result" was insufficient to counter the presumption that it would be unreasonable for the British child to have to leave the United Kingdom.

FINDINGS

14. In allowing the appeal the Judge noted that this appeal was based solely on human rights grounds but added that if the requirements of the Immigration Rules were met there would be no public interest in removing the appellant. Although genuineness and subsistence of the marriage had been raised in the decision letter no issue had been taken during the hearing and the Judge accepted that the appellant and his wife were in a genuine and subsisting relationship.
15. The respondent had also raised the appellant's conviction for assault but the Judge concluded that this conviction was minor and was not sufficient to be relevant. The grounds of appeal do not take issue with this finding.
16. In considering whether the Immigration Rules were met the Judge had to make a decision with regard to the TOEIC certificate that was issued in 2012. The certificate had been used in an application that had been refused by the respondent although it had been accepted that the appellant had withdrawn his appeal and voluntarily returned to India. When he submitted a fresh application he used a different English language certificate.
17. Miss Kiss argued that the Judge should have dealt with this issue when considering suitability and the fact he failed to do so amounted to an error in law. The importance of this issue is that of paragraph 40 of the Judge's decision the appeal was allowed on the basis that as the Immigration Rules were met there was no longer any public interest in his removal.
18. I am satisfied that any attempt to defraud the system is a factor that would be relevant when considering suitability under Appendix FM of the Immigration Rules. The fact the appellant withdrew that application is to his credit but Mr Richardson's submission overlooks the fact that the appellant used the test result to make the application in the first place. The fact he submitted a fresh application using a new test result adds force to Ms Kiss's argument that he knew he was in the wrong.
19. The Judge was therefore wrong to disregard this behaviour. No findings were made on the test result and no oral evidence had been taken at the hearing.
20. I therefore set aside the Judge's decision.

21. I raised with the representatives where this left the case. I reminded Ms Kiss that the only adverse issue against this appellant was this “invalid” test result. Whilst I was satisfied this prevented the appellant succeeding under Appendix FM of the Immigration Rules it would simply be a factor to take into account when assessing the claim outside of the Immigration Rules. Given the background to this case I suggested to the representatives that oral evidence may not be necessary and that crucially in this case the following factors applied:
- (a) Although an invalid test result had been used in an earlier application the appellant had withdrawn his appeal and any subsequent leave was not based on this flawed test.
 - (b) The appellant had obtained lawful entry clearance as a spouse. He had complied with the Immigration Rules since and but for this test result would have met the Immigration Rules.
 - (c) The appellant had a British child and a British wife.
22. Both representatives agreed that the case could proceed without further evidence and that the issue I would have to decide, taking the respondent’s evidence at its highest, was whether the fraudulent test result was sufficient to outweigh the positive factors under section 117B of the 2002 Act.
23. There was a British child and applying section 117B(6) of the 2002 Act I find it would be unreasonable to expect the children to leave the United Kingdom and in doing so I have also had regard to the respondent’s policy as set out in “Family Migration-Appendix FM, Section 1.0 Family life as a Partner or Parent and Private Life, 10 year Routes”.
24. The only reason to refuse the appellant’s application would be if his conduct gave rise to public interest considerations of such weight as to justify his removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain.
25. In this case there had been, taking the respondent’s case at its highest, a deception but the appellant had voluntarily left the United Kingdom and lodged a fresh entry clearance application using a valid English language test. He satisfied the entry clearance requirements and had lived in the United Kingdom lawfully. In all other respects, apart from suitability, the Immigration Rules had been met.
26. The question I have to ask is whether his conduct gave rise to public interest considerations of such weight as to justify his removal.
27. If he had obtained entry clearance using this fraudulent test result then I would have concluded that the public interest would justify his removal but as this test was not used and he has neither committed significant or persistent criminal offences, falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules, nor does he have a very poor immigration history where he has repeatedly

and deliberately breached the Immigration Rules I conclude that there are no adverse factors which would outweigh the presumption set out in section 117B(6) of the 2002 Act.

28. In the circumstances, I am satisfied there is family life and that removal would breach those rights.

DECISION

29. There is an error in law and I set aside the decision.
30. I have remade the decision and allowed the appeal under article 8 ECHR.

Signed

Date 17/08/2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award as I have allowed the appeal outside of the Immigration Rules.

Signed

Date 17/08/2018



Deputy Upper Tribunal Judge Alis