



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29031/2015

THE IMMIGRATION ACTS

Heard at Field House
On 30th April 2018

Decision & Reasons Promulgated
On 25th May 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

NAZIA NAZ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr A N Janjua of Counsel, instructed by Morden Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Metzger promulgated on 5 May 2017, in which Ms Naz's appeal against the decision to refuse her application for leave to remain as a spouse dated 10 August 2015 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Ms Naz as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Pakistan born on 15 June 1979, who entered the United Kingdom on 25 March 2012 with entry clearance valid to 20 October 2014. However, the Appellant's leave to remain was curtailed on 4 September 2013 to expire on 3 November 2013 as she had stopped studying. The Appellant then made an application for leave to remain as a spouse on 3 March 2015.
3. The Respondent refused the application on 10 August 2015 for four main reasons. First, the application was refused under paragraph S-LTR.2.2 of Appendix FM on suitability grounds, that the Appellant's presence in the United Kingdom was not conducive to the public good as she had fraudulently obtained an English language test certificate by the use of a proxy test taker, using deception in an application for leave to remain made on 30 October 2013. Secondly, the Appellant did not meet the definition of 'partner' in Appendix FM because she was not married, nor had she cohabited with her sponsor for the required period of time. Thirdly, there was insufficient evidence that the Appellant's sponsor satisfied the maintenance requirements in paragraph E-LTRP.3.1 of Appendix FM. Finally, the application was refused under paragraph E-LTRP.4.1 of Appendix FM as the Appellant failed to meet the English language requirements.
4. The Respondent also considered the Appellant's private life under paragraph 276ADE of the Immigration Rules, but she did not meet any of the requirements therein as she had not resided in the United Kingdom for long enough and there were no very significant obstacles to her reintegration in to Pakistan where she had spent the majority of her life. There were no exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules.
5. Judge Metzger allowed the appeal in a decision promulgated on 5 May 2017, under paragraph 287 of the Immigration Rules. The findings on the appeal are contained in a single paragraph which found as follows:

"Mr O'Monaghan on behalf of the Respondent accepted that most of the documents to support the alleged deception were generic although there was reference to invalid tests in respect of the Appellant. The generic evidence suggests that there has been widespread fraud in relation to the TOIEC certificate from Educational Testing Service (ETS). However, there was no evidence that the Appellant had used a proxy test taker and I accept the evidence of the Appellant that she did attend the interview and undertook the test in the way that she described. Although it is not determinative at the hearing that she spoke fluent English, it is a good indicator that she would have been able to pass the tests at the relevant time and I accept the Appellant's evidence that she did indeed attend and passed as she claimed. In the circumstances, I find the Respondent has failed to establish to the relevant standard that the Appellant obtained the TOIEC certificate by deception. In respect of the financial evidence, I accept the evidence of the sponsor that he is employed as he sets out and clearly met the threshold of £18,600 per year as required at the time of the application and continues to meet the financial eligibility requirement."

The appeal

6. The Secretary of State appeals on two grounds. First, that the First-tier Tribunal has failed to deal with all of the issues in the appeal, making no findings at all on the

reason for the refusal that the Appellant could not meet the definition of ‘partner’ in Appendix FM of the Immigration Rules. In the absence of a positive finding that the requirement was met, the appeal could not have been allowed under the Immigration Rules.

7. Secondly, that the First-tier Tribunal materially erred in law in relation to the use of deception, failing to correctly assess the burden of proof in accordance with SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229; with findings that the generic evidence was sufficient to discharge the initial evidential burden of proof on the Respondent and the burden then shifts to the Appellant to provide an innocent explanation, if so, the burden reverts to the Respondent to discharge the legal burden. The First-tier Tribunal did not give sufficient reasons for finding that the Respondent had not discharged the final legal burden and no account was taken of MA (ETS – TOIEC testing) Nigeria [2016] UKUT 450 that there are a range of reasons why a person proficient in English may nonetheless engage in TOIEC fraud.
8. Permission to appeal was granted by Judge Frankish on 29 November 2017. At the time of consideration of the application for permission to appeal, the file had been lost and permission was granted on the basis that it was not possible to say that there was no arguable error of law. The Respondent complied with the directions for the file to be reconstituted for the purposes of the appeal before the Upper Tribunal.
9. At the oral hearing, Mr Tufan relied on the written grounds of appeal, emphasising that the determination was very short and did not contain adequate reasons. In particular, there was no reference to any significant documents or evidence and no reference to any of the applicable authorities on the use of deception in ETS/TOIEC cases.
10. Further, although not included in the original grounds of appeal, it was submitted that there was an additional error of law in that the First-tier Tribunal allowed the appeal under paragraph 287 of the Immigration Rules, which no longer exists. The application and decision was expressly under Appendix FM and the appeal should have been determined by reference to those provisions.
11. Mr Janjua, on behalf of the Appellant accepted that there were difficulties with the findings made by the First-tier Tribunal and that the reasoning was very short. However, he submitted that in relation to the ETS and deception point, the findings reflected how the case was put on behalf of the Respondent to the First-tier Tribunal. In addition, there was a previous appeal decision which considered the Appellant’s English language ability and she had previously passed the entry clearance requirements in this regard. Mr Janjua therefore submitted that the findings in relation to ETS should be preserved, with only the issues in relation the relationship to be remitted.

Findings and reasons

12. I find that the First-tier Tribunal materially erred in law on all grounds identified by the Respondent. The very short determination with a single paragraph of findings is

wholly inadequate. First, the decision fails to deal at all with the reason for refusal that the Appellant did not meet the definition of 'partner' in Appendix FM and as such could not meet the main requirements for leave to remain nor the alternative in paragraph EX.1. That was a clear reason for refusal and an issue in the appeal which required express determination by the First-tier Tribunal. Secondly, the appeal is allowed under paragraph 287 of the Immigration Rules which was no longer in force and not applicable at all to the Appellant's application and in any event could not have been satisfied without an express finding as to the Appellant's relationship. Thirdly, the mere statement that the sponsor's evidence as to earnings was accepted fails to engage at all with the reason for refusal or the evidence before the First-tier Tribunal upon which such a finding is based.

13. Finally, I find that the First-tier Tribunal has failed to identify any of the applicable case law in relation to deception around ETS/TOIEC English language tests and has not set out fully the burden of proof on this point, referring only to the burden being on the Respondent without any reference to what has been referred to as the ping-pong burden in cases such as this where the initial evidential burden is on the Respondent (where the generic evidence has been found to be sufficient), switching to the Appellant to give a plausible innocent explanation and finally back to the Respondent to discharge the legal burden. The reasons given do not show that this process has been applied nor considered and instead dismissed the Respondent's evidence in the main because of its generic nature. No account is taken of the reasons why a person may engage in fraud aside from their English language ability. There is also therefore a material error in law in failing to give adequate reasons for the decision.
14. For these reasons, the decision must be set aside and no findings of fact can be preserved. The appeal is therefore remitted to the First-tier Tribunal to be remade de novo. It is not appropriate for the appeal to be remade in the Upper Tribunal due to the extensive fact finding required to determine the appeal on all grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit it to the First-tier Tribunal (Taylor House hearing centre) for a de novo hearing before any Judge except Judge Metzger.

No anonymity direction is made.



Signed

Date

24th May 2018

Upper Tribunal Judge Jackson