



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33360/2015

THE IMMIGRATION ACTS

Heard At Manchester Civil Justice Centre
On 4th September 2018

Decision & Reasons Promulgated
On 17th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MKB

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer

For the Respondent: Mr R Ahmed of Counsel instructed by Walker Prestons Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Brunnen (the judge) of the First-tier Tribunal (the FtT) promulgated on 6th February 2018.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant. He is a national of Pakistan born in November 1987.

3. The Claimant on 13th June 2014 applied for leave to remain in the UK as the partner of a British citizen. His application was refused on 9th October 2015. The Secretary of State refused the application because the Claimant had obtained an ETS English language certificate by deception, as he had employed a proxy to undertake the test for him. The FtT heard the Claimant's appeal on 5th December 2017. The appeal was allowed.
4. The judge found that the Claimant had employed deception in order to obtain the English language certificate, as contended by the Secretary of State, and the Secretary of State was justified in invoking paragraph S-LTR.1.6. Therefore the Claimant could not succeed with reference to Appendix FM in relation to family life, or paragraph 276ADE(1) in relation to private life.
5. The judge went on to consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) and considered section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). In particular, the judge considered section 117B(6) and found that it would not be reasonable to expect the Claimant's stepson, as a British citizen, to live outside the UK.
6. The Secretary of State applied for permission to appeal to the Upper Tribunal. Permission to appeal was initially refused by Judge Nightingale of the FtT who found no arguable error of law disclosed in the FtT decision. A renewed application was made to the Upper Tribunal, and permission to appeal was granted by Upper Tribunal Judge Kebede on 13th July 2018. Judge Kebede found;

“Arguably the judge's decision with respect to the reasonableness of the family relocating to Pakistan was against the weight of the evidence, as the grounds assert at [4]”.
7. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

8. Mr Bates relied upon the grounds contained within the application for permission to appeal. It was contended that the judge had materially misdirected himself in law. The judge had found that the Claimant had obtained an English language certificate by deception and that the Secretary of State was correct to refuse the application with reference to S-LTR.1.6.
9. It was submitted that the judge failed to adequately consider that the Claimant has a poor immigration history, given the finding that deception had been used. It was submitted that the deception amounted to powerful reasons so as to render it reasonable for family life to continue abroad. It was submitted that no detailed evidence had been submitted in relation to the medical conditions of either the Claimant's wife or her son, the Claimant's stepson. No evidence was submitted to indicate that any treatment needed would not be available in Pakistan.

10. It was submitted that there was nothing to prevent the Claimant returning to Pakistan in order to apply for the correct entry clearance, and any separation would be temporary and proportionate.
11. Mr Ahmed submitted that the judge had not materially erred in law and had produced a detailed decision. The judge had accepted that the Claimant had carried out deception and taken this into account. Thereafter, the judge had carried out a proportionality assessment, and had not lost sight of the fact that the Claimant had used deception to obtain an English language certificate.
12. It was submitted that the judge at paragraph 50 had been entitled to take into account the medical evidence, which confirmed that the Claimant's wife was fully dependent on him for daily activities due to problems with her eyesight. The judge was also entitled to take into account that the stepson has moderate learning difficulties. It was submitted that the judge had taken all relevant matters into account and provided adequate reasons for his decision.

My Conclusions and Reasons

13. I find that the judge did not misdirect himself in law. The decision of the FtT discloses no material error of law.
14. The judge identified the issue to be decided at paragraph 15 noting that the only ground of appeal available to the Claimant was that the Secretary of State's decision was unlawful under section 6 of the Human Rights Act 1998. The Claimant could not succeed simply by establishing that he qualifies for leave to remain under the Immigration Rules.
15. The judge found that the Claimant had exercised deception in order to obtain an English language certificate, and the Secretary of State was correct to find that S-LTR.1.6 was applicable. The judge therefore concluded that the Secretary of State had been correct to refuse the application with reference to Appendix FM and paragraph 276ADE. Those findings were not challenged and are unimpeachable.
16. The judge was correct to find at paragraph 30, that having made findings in relation to the deception carried out by the Claimant, and his failure to satisfy the Immigration Rules, the judge then had to consider whether the Secretary of State's decision breached Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
17. The judge recognised that family life existed and this is not the subject of any dispute. The judge also recognised that the issue to be decided in relation to Article 8 related in the main to proportionality, and again this is not in dispute.
18. It is accepted that the judge had a duty to have regard to the considerations contained in section 117B of the Nationality, Immigration and Asylum Act 2002.

19. The judge proceeded to take into account those considerations and considered in particular section 117B(6) despite recording that neither representative thought it appropriate to make submissions on this point. The judge was clearly correct to consider section 117B(6) which for ease of reference I set out below;
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.
20. Section 117B confirms that a qualifying child is a child under the age of 18 and who is either a British citizen or has lived in the UK for a continuous period of seven years or more.
21. The judge found that the Claimant has a genuine and subsisting parental relationship with his stepson who is under 18 years of age. This finding is not the subject of challenge. The judge found that the stepson is a qualifying child by reason of his British citizenship. This finding is not the subject of challenge.
22. The judge then had to make a finding as to whether it would not be reasonable to expect the child to leave the UK. In considering reasonableness, the judge was obliged to take into account not only the best interests of the child, but the conduct and immigration history of the Claimant and it is evident from paragraph 53 that the judge did this, and referred to the appropriate case law. I am satisfied that the judge has demonstrated that he followed the correct legal approach. Perhaps the leading authority is MA (Pakistan) [2016] EWCA Civ 705 to which the judge referred. At paragraph 49 of that decision guidance is given that the fact that a child has been in the UK for seven years needs to be given significant weight in the proportionality exercise for two related reasons, first because of its relevance to determining the nature and strength of the child's best interests, and second, because it establishes the starting point that leave should be granted unless there are powerful reasons to the contrary. In my view a child who is a qualifying child by reason of British citizenship, is analogous to a foreign national child who has accrued seven years' residence. The legal position is therefore that leave should be granted in such a case, unless there are powerful reasons to the contrary.
23. The judge records at paragraph 57 that;
- “There is a substantial public interest in removing the Appellant, since, as I have found, he participated in and took advantage of a serious attack on the integrity of the UK immigration controls and his continued presence in the UK is not conducive to the public good”.

I can ascertain no error of law in this finding.

24. The judge also had to take into account the personal circumstances of the Claimant's stepson and at paragraph 54 notes that the stepson and the Claimant's wife are British citizens, and also notes that the stepson has some learning difficulties, and the Claimant's wife has health problems. At paragraph 55 the judge concludes that it would not be reasonable to expect the stepson, who is British, and has lived all his life (he was 15 years of age at the date of hearing) in the UK, and who has moderate learning difficulties, to leave the UK and go to Pakistan.
25. I do not accept the Secretary of State's contention that the judge has erred in law in reaching this conclusion. It may be that another judge might have reached a different conclusion but that is not the test. The judge has taken into account the appropriate case law, and taken the correct legal approach to considering the issue. The judge's decision cannot be described as irrational or perverse. The judge has taken into account all the material evidence and not attached weight to any immaterial evidence.
26. The judge has been faced with a difficult question, and had to take into account the serious nature of the Claimant's deception, but also had to consider in the proportionality exercise, the issue of whether it would be reasonable to expect a British child, in these circumstances, to leave the UK. The judge has not misdirected himself in law and has given adequate reasons for his conclusion. The judge has taken the view that the Claimant's deception does not amount to powerful reasons for finding it reasonable for the stepson to leave the UK. I note the Secretary of State's current guidance on this point, which came into force on 22nd February 2018, after the FtT hearing, but which is in similar form to the guidance in force at the date of the hearing. The current guidance indicates that if a child is a British citizen, it will not be reasonable to expect the child to leave the UK with a parent or primary carer facing removal. There are particular circumstances where it may be appropriate to refuse leave to remain, for example where the Claimant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules, or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules. It is not the case in this appeal that the Claimant has been convicted of any criminal offence. It could not be said that he has repeatedly and deliberately breached the Immigration Rules, as his immigration history discloses one serious breach of the rules, that being the exercise of deception. It was however, in my view, open to the judge to find in these circumstances that it would not be reasonable to expect the stepson to leave the UK. I therefore conclude that the appeal of the Secretary of State must be dismissed.

Notice of Decision

The decision of the FtT does not disclose a material error of law. I do not set aside the decision and dismiss the appeal of the Secretary of State.

Anonymity

The FtT made an anonymity direction because the appeal involved considering the best interests of the Claimant's stepson. I continue that direction. Unless and until a Tribunal

or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date 4th September 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The FtT made no fee award. This is because the Claimant's appeal was allowed on the strength of matters not raised with the Secretary of State before the decision was made. It is appropriate to make no fee award.

Signed

Date 4th September 2018

Deputy Upper Tribunal Judge M A Hall