



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25061/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 6 March 2019

Decision & Reasons Promulgated
On 25 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

BADSHA [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed, Counsel, instructed by Eurasia Legal Services
(Birmingham Office)
For the Respondent: Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Bangladesh who applied for leave to remain as the partner of Ms [SB] on 26 January 2016, having married her on 14 November 2015. A daughter was born to the couple on 28 January 2016.
2. The Appellant had first arrived in the UK as a Tier 4 (General) Student on 19 September 2009 with entry clearance valid to 31 January 2012. The application was refused on the basis that the Secretary of State asserted that the Appellant did not

meet the suitability requirements of Appendix FM because ETS had confirmed that his TOEIC speaking test certificate taken on 16 November 2011 had been fraudulently obtained by use of a proxy test taker.

3. The Appellant's appeal came before Judge of the First-tier Tribunal Pacey for hearing on 2 October 2017. In a Decision and Reasons promulgated on 9 October 2017 the judge dismissed the appeal. Permission to appeal was sought in time on the basis that the judge materially erred in law: in failing to take into consideration that the Appellant satisfied the requirements under Appendix FM of the Rules. This is in relation to the fact that whilst the judge dismissed the appeal she found at [26] that the Respondent had not established that the Appellant had fraudulently utilised a proxy test taker and thus the burden of proof had not been discharged.
4. The second ground of appeal is that the judge had misdirected herself in law in her assessment of the proportionality exercise, given that as a result of the judge's findings the Appellant satisfied all the requirements under Appendix FM, including the suitability requirements.
5. Permission to appeal was granted by First-tier Tribunal Judge Pedro in a decision dated 3 April 2018 on the basis that the grounds disclosed a material error of law.

Hearing

6. At the hearing before the Upper Tribunal, I asked Ms Aboni for the Secretary of State's position when she stated that she accepted that as a result of the judge's finding at [26] that the Immigration Rules were met. However, the judge found that the requirements of Section 117B of the NIAA 2002 were not met and thus Ms Aboni did not accept there was a material error of law in her decision.
7. In his submissions on behalf of the Appellant, Mr Ahmed sought to rely on his skeleton argument. He submitted in light of the decision in TZ (Pakistan)[2018] EWCA Civ 1109 at [34] where the Rules are satisfied that is positively determinative of the appeal. He submitted this was clearly a relevant consideration in respect of Section 117B(1) of the NIAA 2002 and that if the Appellant satisfies the Rules then the public interest cannot be utilised against him. Any issues of his immigration history had to be considered in light of the fact that the Appellant qualifies for leave to remain under Appendix FM of the Rules. He submitted that the Secretary of State has not made out the main case that the suitability requirements were not met and the decision in SF [2017] UKUT 00120 applies as the child is a British citizen.
8. Mr Ahmed submitted that, in light of the fact that the requirements of the Rules are met, there is a material error of law in the judge's decision to dismiss the appeal with regard to Article 8. He asked for a decision allowing the appeal. He informed the Upper Tribunal that there were now two children, the second one having been born on 10 March 2018.
9. I found a material error of law in the decision of Judge Pacey and I announced my decision at the hearing. I now give my reasons.

10. It is apparent that, in light of the Judge's finding at [26], that, even if someone with the Appellant's details sat the test that in itself cannot serve to discharge the burden placed on the Secretary of State and that the Respondent has not established that the Appellant's details were not fraudulently given to someone else, that as a consequence, the Appellant was able to meet the suitability requirements of Appendix FM of the Immigration Rules. Given that the Appellant's purported inability to meet the suitability requirements was the only reason put forward by the Respondent in the refusal decision for refusing his application for leave to remain as a partner, I find that the Judge should have gone on to consider the appeal on the basis that the requirements of Appendix FM of the Rules were met. However, she failed so to do and that is a material error of law.
11. The parties agreed, having found an error of law, that I should remake the decision, which I now do. The Judge dismissed the appeal on the basis that the Appellant was unable to meet the requirements of section 117B(2), (3) and (4) of the NIAA 2002. In TZ (Pakistan) [2018] EWCA Civ 1109 the Senior President held at [34]:
- "... where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."*
12. Given the acceptance by both the Respondent and the First tier Tribunal Judge that the Appellant had established family life with his wife and British child, the fact that the Appellant is able to meet the requirements of Appendix FM of the Rules [R-LTRP 1.1.(d)] is I find determinative of the appeal, *"because that formulates the strength of the public policy in immigration control 'in the case before it', which is what the Supreme Court in Hesham Ali (at [50]) held was to be taken into account."* In these circumstances it is unnecessary to go on to consider sections 117A & B of the NIAA 2002. Even if it were necessary, I find in light of the Senior President's judgment, that the fact that the Appellant meets the requirements of the Rules outweighs his inability to satisfy the public interest requirements set out in section 117B of the NIAA 2002 such that the public interest does not require his removal, which would be disproportionate.

Notice of Decision

The appeal is allowed

No anonymity direction is made.

Signed *Rebecca Chapman*

Date 21 March 2019

Deputy Upper Tribunal Judge Chapman

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason.

Signed *Rebecca Chapman*

Date 21 March 2019

Deputy Upper Tribunal Judge Chapman