Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36429/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 August 2015	**On 28 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZAHEER-U-DIN OMMER
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms A. Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Ms C. Bexson, Counsel instructed by Chauhan Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of Mr Zaheer-u-Din Ommer, a citizen of Pakistan against the respondent's decision to refuse his application for leave to remain as the spouse of a settled person and to remove him from the UK as a person subject to administrative removal under section 10 of the Immigration and Asylum Act 1999. For the purposes of this decision I refer to the parties as they were in the First-tier Tribunal.

2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I do not make an anonymity order. No order was made by the First-tier Tribunal and there were no issues before me that might require such an order.

Background

3. The appellant is a citizen of Pakistan born on 26 October 1984. He entered the United Kingdom on 21 December 2009 as a Tier 4 (General) Student under the Points Based System. Further extensions of leave to remain were granted, the last until 2 January 2015. The appellant then made a further in-time application on 16 July 2014 as the spouse of a settled person, having married Uzma Naz Ahmed on 25 April 2014.

4. The respondent's letter dated 3 September 2014 refused the application on the grounds that the appellant did not meet the suitability requirements under the immigration Rules, Appendix FM S-LTR.2.1, in particular S-LTR.2.2(a) as it was considered that the appellant was a person who has sought leave to remain in the UK by deception. The respondent asserted that the language testing results from tests taken on 17 July 2012 and the scores given had been cancelled due to an anomaly which had suggested that the test was taken by a proxy test taker rather than by the appellant. Secondly the respondent considered the other issues under the Immigration Rules but considered the appellant did not meet all of the requirements.

5. The appeal came before First-tier Tribunal Judge Davies on 20 March 2015. The judge, in a decision promulgated on 9 April 2014, concluded that the respondent had failed to show that the appellant had used deception in his attempt to stay in the UK and that he did not therefore fail the suitability test under Appendix FM as alleged. In addition although the respondent accepted that the respondent met the eligibility requirements in respect of E-LTRP 1.2-1.12 and 201 the respondent was not satisfied that the appellant qualified under EX.1. Judge Davies considered EX.1 in the alternative and was satisfied that there was a genuine and subsisting parental relationship with a British citizen minor child or in the alternative that there was a genuine and subsisting relationship with a British citizen partner and there were insurmountable obstacles to family life continuing outside the UK.

6. Permission to appeal to the Upper Tribunal was sought firstly on the basis that the judge failed to give adequate reasons for findings on a material matter and in particularly in relation to the finding that the Secretary of State had not discharged her burden of proof in demonstrating that this appellant used deception. The second ground alleged that the judge materially misdirected himself in his consideration of reasonableness in assessing EX.1 under the immigration rules.

7. Although permission to appeal to the Upper Tribunal was granted on the sole basis that the judge had arguably erred in law by having no regard to the public interest considerations set out in s117B of the Nationality, Immigration & Asylum Act 2002, Ms Fijiwala conceded before me that this was clearly incorrect as the judge had only considered Article 8 under the Immigration Rules, where no separate section 117B consideration is required; **Bossade (ss 117A-D – interrelationship with Rules) [2015] UKUT 415** applied. However, as the grounds generally were considered arguable, I proceeded to consider both of the contentions made on behalf of the Secretary of State.

Ground 1

8. Ms Fijiwala relied on the written ground of appeal and made no further submissions. Ms Bexson submitted that the judge had engaged with the relevant witness statements provided by the respondent in respect of the alleged deception. She argued that the judge made clear findings in relation to the witness statements and the largely generic nature of the evidence provided by the respondent. She relied on the obiter comments of the President of the Upper Tribunal in the judicial review case of **R (on the application of Gazi) [2015] UKUT 327,** as to the cogency of the evidence relied on by the respondent in cases where deception was alleged in the procurement of English language test results (although said case ultimately turned on the separate issue (unrelated to this appeal) of an improper purpose challenge).

9. It is clear in my findings that the judge carefully evaluated, at paragraph 6 to 12 the respondent's evidence in relation to the alleged deception. There was nothing inherently wrong in his analysis of the evidence produced by the respondent and I do not accept the respondent's contention that the judge disregarded any element of the witness statements before him. Although the grounds argued that the First-tier Tribunal should have had due consideration to the specific evidence which identified this appellant as an individual who exercised deception, it is clear to me that he did including at paragraph 7 and paragraph 9 of the decision and reasons where the judge considered the specific evidence in Annex A of one of the respondent's witness statements which named the appellant. However the judge, in rejecting that evidence, noted there was no other detail in relation to the appellant's English language test at Education Testing Services (ETS) other than the date and place of the test, that might relate to that test or any irregularity. He noted that there was no detail as to what caused concern with the appellant's test results. The judge also noted that the annex provided did not indicate whether the appellant's test was considered invalid as a result of matching testing or disqualification on the basis of where he took the test (and the judge at paragraph 8 considered in some detail the evidence provided by the respondent in relation to fraud in

language testing and the use of voice recognition technology to identity proxy test taking).

10. In finding that the judge gave adequate reasons for his findings I have also considered that the judge made further findings at paragraphs 11 and 12 of his decision and reasons in relation to the appellant's evidence, including his previous English language tests, his reasonable English at his appeal and his finding that the appellant had no incentive to resort to a proxy test taker.

11. I am satisfied that the judge reached a conclusion open to him on the evidence before him and gave detailed, adequate reasons for his findings. I do not find any merit in this ground.

Ground 2

12. It was Ms Fijiwala's submission that the judge had not fully engaged with the relevant requirements of EX.1 under Appendix FM including that the judge had not considered that the appellant's status was precarious in the UK. Ms Fijiwala relied on the recent Court of Appeal decision in **R (on the application of) Agyarko & Ors [2015 EWCA Civ 440,** in particular paragraphs 21 which reminds that the phrase 'insurmountable obstacles' clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the immigration rules and is 'significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. Ms Fijiwala also referred me to paragraphs 28 to 31 of the same decision and the Court's discussion on Article 8 outside of the immigration rules and that the relevant consideration is whether the case is exceptional for some reason. She relied in particular on the last sentence of paragraph 31 of Lord Justice Sales judgement which found that: 'in a case involving precarious family life, it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion'.

13. Ms Fijiwala also relied on the respondent's Immigration Directorate Instructions (IDIs) Family Migration, Appendix FM Section 1.0b. On page 26 of the IDIs Ms Fijiwala pointed to the guidance on 'insurmountable obstacles' being a stringent assessment and she pointed to the example given where a British Citizen partner who has lived all their life in the UK and speaks only English may not want to relocate half way across the world and it may be difficult for them to do so. However a significant degree of hardship or inconvenience does not amount to insurmountable obstacles.

14. Ms Fijiwala submitted that the judge's consideration in paragraph 20 of his decision and reasons, that it would not be reasonable for the child to relocate was not adequate and that the judge had not considered the full range of factors.

15. I do not share Ms Fijiwala's conclusion that the judge did not consider the precariousness of the appellant's leave to remain when considering EX.1. In paragraph 17 of his decision he clearly recorded the appellant's wife's evidence that 'she knew of her husband's immigration status from 2010 when they met'. The judge considered a range of factors including that the appellant is a carer for her adult brother (although this was incorrectly recorded in the judgment as 'mother' it was not argued by either party that this was anything other than a slip of the pen. Although much of Ms Fijiwala's argument and reliance on **Agyarko** related to Article 8 outside of the rules, which is not applicable here, nevertheless in clearly considering all the factors including Ms Fijiwala's caring responsibilities and the impact thereof, together with his finding that it would be an insurmountable obstacle for the appellant's wife to leave her son in the UK with his biological father who has had no contact with his son, I am satisfied that the judge properly directed himself as to the more stringent (than a mere test of reasonableness) nature of the test of insurmountable obstacles.

16. There was no error therefore in the judge's finding on insurmountable obstacles as he made findings that were reasonably open to him. On this basis alone the secretary of state's second ground cannot succeed.

17. In addition however, the judge made findings in relation to the appellant's wife's child.

18. Section EX.1. provides as follows:

> 'This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least 7 years immediately preceding the date of application; and
>
> (ii) it would not be reasonable to expect the child to leave the UK;…'

19. The judge noted in paragraph 17 of his decision and reasons, that the evidence that the appellant carries out a parental relationship for his wife's son, a British citizen, born on 24 December 2009 with no contact with his biological father, had not been challenged. The

judge also referred in paragraph 15 of his decision and reasons to being directed to take into consideration the best interests of the child, as he refers to section 55 of the Borders, Citizenship and Immigration Act 2009. Although the judge's conclusion at paragraph 20 that the child is a British citizen and that it is not reasonable to expect him to relocate and that the 'secretary of state's own guidance endorses that' is brief, it is clear from the totality of his decision that he took into consideration all the factors. This included, at paragraph 17 of his decision and reasons, the appellant's wife's evidence that her son has a close relationship to her family in the UK and has friends and that it would be very disruptive for him to move to Pakistan. The judge subsequently found, at paragraph 18 that there has 'been little challenge to the evidence of the appellant's wife'. I am satisfied that when considered in its entirety the judge made alternative findings properly open to him. The second ground of appeal therefore also has no merit in my findings.

Decision:

20. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall stand.

Signed: Dated: 26 August 2015

Deputy Upper Tribunal Judge Hutchinson