Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00208/2016

THE IMMIGRATION ACTS

Heard at : UT(IAC) Birmingham
On : 12 June 2017

Decision & Reasons Promulgated
On : 14 June 2017

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NOMAN KHURRAM

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr S Woodhouse of SH & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Heatherington allowing Mr Khurram's appeal against the respondent's decision to refuse his human rights claim.

2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as the respondent and Mr Khurram as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

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3. The appellant is a citizen of Pakistan born on 7 June 1990. He first entered the United Kingdom on 30 December 2010 with leave to enter as a Tier 4 student until 21 December 2012 and was subsequently granted a further period of leave as a Tier 4 student until 21 June 2014. On 11 February 2014 he made an FLR(M) application for leave to remain as a spouse. His application was refused but his appeal against that decision was allowed to a limited extent for the decision to be reconsidered in relation to a TOEIC certificate produced by the appellant. The application was then refused again on 21 December 2015.

4. The respondent refused the appellant’s application under the suitability requirements in paragraph S-LTR.2.2(a) of Appendix FM of the immigration rules on the basis that he was considered previously to have obtained his TOEIC English language certificate through deception by using a proxy test taker for the language test, as confirmed by the Educational Testing Service (ETS). The respondent considered further that the appellant could not meet the eligibility criteria under the five-year partner route as he did not meet the financial requirements in paragraph E-LTRP.3.1(a) and (b) in relation to his partner’s income and savings. It was considered that the appellant could not meet the criteria under the 10-year partner route as there were no insurmountable obstacles to family life continuing in Pakistan for the purposes of paragraph EX.1(b), that he could not meet the requirements of paragraph 276ADE(1) on the basis of private life and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

5. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Heatherington on 15 September 2016 and was allowed in a decision promulgated on 24 October 2016. The judge refused to admit the respondent’s evidence which was produced only at the hearing, in breach of the Tribunal’s directions, and found that the respondent had failed to discharge the legal burden of proving dishonesty and that the suitability grounds were not made out. The judge went on to find that the appellant met the financial requirements under the five-year partner route and that there were insurmountable obstacles to family life continuing in Pakistan. He allowed the appeal under the immigration rules and on human rights grounds.

6. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had acted unfairly by refusing to admit the respondent’s evidence which identified the appellant as an individual who had exercised deception and that the appellant did not meet the suitability requirements of Appendix FM. The judge did not give any consideration to the possibility of the appellant returning home to apply for entry clearance.

7. Permission to appeal was granted on 5 April 2017.

8. The appeal came before me on 12 June 2017. Mr Woodhouse raised a timeliness issue, in that the respondent’s permission application had been made out of time and the grant of permission had not addressed the matter.

He asked that the respondent's application be struck out. Both parties made submissions in the alternative.

9. I advised the parties that I was extending time and admitting the application. An application to extend time had been made by the respondent. The reason provided by the respondent for the delay was not particularly persuasive but the grounds had strong merit and raised a question of importance, namely deception on the part of the appellant. In all the circumstances, and considering the period of the delay which, albeit not trivial, was not significant, it seemed to me that it was in the interests of justice for time to be extended. I also advised the parties that, in my view, the judge had made significant errors of law such that his decision could not stand, and my reasons for so concluding are as follows.

10. Whilst Mr Woodhouse submitted that the judge had been entitled to refuse to admit the documents as it was unfair for an unrepresented appellant to be ambushed with a large bundle of evidence, it seems to me that the judge's approach in excluding the evidence and proceeding with the appeal was procedurally unfair. The majority of the evidence was generic evidence in ETS cases and was in the public domain and had been considered in detail in relevant case law including SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 and MA (ETS - TOEIC testing) Nigeria [2016] UKUT 450. The evidence relating specifically to the appellant was minimal and could easily have been considered without undue delay. The judge ought to have been aware from those cases that the generic evidence was sufficient to discharge the initial evidential burden of proof upon the respondent and it was incumbent upon him to then invite oral evidence from the appellant to ascertain whether he had an "innocent explanation". Alternatively the judge could have adjourned the proceedings to enable the appellant to consider the respondent's evidence. Although he recorded that neither party applied for an adjournment, it is not clear from his decision if such an opportunity was provided to the respondent once it was made clear that the evidence was to be excluded.

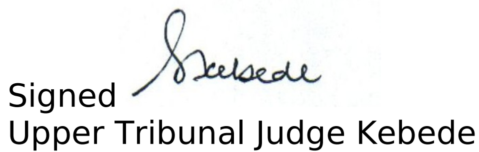
11. In the circumstances it was procedurally unfair for the judge to exclude the evidence which formed the basis of the respondent's case and to then dismiss the appeal on the basis that the respondent had failed to make out her case. As such the judge's decision on the suitability provisions in Appendix FM was materially flawed. That in turn impacted upon the decision under the immigration rules, although separate errors arose in that regard. As Mr Mills submitted the judge appeared to have accepted that the required evidence of adequate maintenance or savings was not available at the time of the application, yet allowed the appeal under the immigration rules on the basis that it had been made available for the appeal. Clearly that was wrong. Likewise the judge's decision outside the immigration rules was flawed in that it failed to take into account the appellant's inability to meet the requirements of the immigration rules and included no consideration of section 117B of the Nationality, Immigration and Asylum Act 2002 Act.

12. For all of these reasons the judge's decision is unsustainable and must be set aside in its entirety and re-made afresh with no preserved findings. The appropriate course, as accepted by the parties, is for the matter to be remitted to the First-tier Tribunal to be heard afresh.

DECISION

13. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

14. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Heatherington.

Signed  Date: 13 June 2017
Upper Tribunal Judge Kebede