IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33701/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 July 2017	**On 12 July 2017**
Prepared 6 July 2017	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GAGANPREET SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr K Khan, Legal Representative instructed by GK Associates

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal Maxwell who in a determination promulgated on 23 November 2016 allowed the appeal of Mr Gaganpreet Singh against a decision of the Secretary of State to refuse him leave to remain.

2. For ease of reference I will refer to the Secretary of State as the respondent in this decision as she was the respondent in the First-tier Tribunal. Similarly I will refer to Mr Gaganpreet Singh as the appellant as he was the appellant in the First-tier.

3. The appellant's human rights application was made on 24 March 2015. It was for leave to remain because of his relationship with Manmeet Gulati, an Afghan born on 1 January 1990 who had been granted leave to remain until 22 December 2017. The application was been refused because the Secretary of State considered that he had used deception when he had taken an English language test in 2012: the reasons for refusal stated that he did not meet the requirements for leave to remain as a partner because he had submitted a TOEIC certificate from ETS which was fraudulently obtained because a proxy test taker had been used. It was considered therefore that his presence in the United Kingdom was not conducive to the public good.

4. The determination is unusual in that in the first paragraph the judge missed out the country from which the appellant came and merely said that he was "born on" . He also stated that the appeal had been decided without a hearing under the provisions of Rule 25 of the Tribunal Procedure Rules. That in fact was incorrect as it appears that the appellant did give evidence although that is not entirely clear from the determination. The judge, who appears to have used a number of pro forma paragraphs relating to those who had been refused leave to remain because it was considered they had used fraudulent English language tests, set out his findings and conclusions in paragraphs 15 onwards of the determination. He stated following the judgment in **Gazi (ETS – JR) [2015] UKUT 00327** the issue of whether or not a test had been obtained fraudulently was fact-sensitive. Having then referred to the determination **SM & Qadir (ETS – evidence – burden of proof) [2016] UKUT 229 (IAC)** he stated that he had been provided with evidence from the respondent in the form of a report commissioned from Professor French which considered in detail the issue of suspect fraudulent tests. He then said that on the evidence the respondent had discharged her evidential burden. However he went on to say that he had to look at the totality of the evidence and in paragraphs 19 onwards he said as follows:

> "19. In the present instance, I note the appellant undertook further testing about 15 months after the suspect TOEIC was undertaken. It is not suggested that this was in any way obtained fraudulently and, in any event, the certificate bears photographic likeness of the appellant. Added to this is my own assessment of the appellant's command of English which I would describe as colloquial. He gave his evidence unhesitatingly and without any apparent difficulty in understanding some relatively complex question or in expressing himself idiomatically when answering.

20. I note the respondent was unable to adduce any evidence other than the generic evidence ordinarily relied on in cases such as this. This is not intended as a criticism as the reality is that it is most unlikely such evidence would be available in the ordinary course of events. The fact remain however that the evidence adduced by the appellant gives rise to a number of significant factors that have the effect of making the respondent's burden of proof more difficult to discharge to the required standard, that is on the balance of probabilities. I find that the generic evidence relied on in the present instance is insufficient to discharge the burden of proving, on a balance of probabilities, the TOEIC was obtained by fraudulent means.

21. Given that this was the sole issue taken by the respondent, the appellant does meet the suitability requirements of Appendix FM and ought therefore to have been granted leave to remain under the Immigration Rules. I must however look at this appellant in terms of an appeal limited to Article 8 grounds."

5. Having said that it would be difficult to envisage circumstances wherein an applicant who met the requirements of Appendix FM could not be regarded as someone whose Article 8 rights have been interfered with disproportionately he said that he found that the appellant then succeeded under Article 8 "whether within or outside the Immigration Rules".

6. Having briefly mentioned the public interest in the appellant's removal he referred to Section 117B before stating that he found that the appellant's circumstances were such the decision to allow his appeal would not have the effect of undermining the public interest as the appellant would have "an entitlement" under the Rules as the appellant had demonstrated both his command of English and his ability to be self sufficient and not a drain on the state. He went on to say that:

> "He is a party to a stable marriage with children who were born in the United Kingdom and a degree of responsibility in respect of his step-daughter. Although his life here has been established whilst his immigration leave has been precarious, the diminution in weight this attracts does not so undermine his case as to render the interference proportionate."

He therefore stated that the decision caused the United Kingdom to be in breach of the law and its obligations under the ECHR. He therefore allowed the appeal.

7. The grounds of appeal on which Mr Whitwell relied argued that the judge had failed to give adequate reasons for a finding upon a material matter in that he had not properly considered the report by Professor French and the ETS SELT source data – this is a reference to the "look up tool". That had shown that the appellant's test result was "invalid". Having set out the way in which the test results were considered the grounds went on to

state that the judge had erred in his consideration of the appeal under Article 8 of the ECHR.

8. Mr Whitwell relied on the grounds of appeal. He referred to the look up tool which was in the bundle and to the determination of the Tribunal in **MA (ETS – TOEIC testing) [2016] UKUT 00450 (IAC)** where the importance of the evidence put forward by the Secretary of State was emphasised as was the integrity of the test-taking procedures and systems established by ETS. Mr Whitwell argued that the evidence did not show that the Secretary of State had not discharged the burden of proof and that he had erred in stating that the evidence before him was merely generic as the evidence did include the look up tool. Moreover he argued that the Article 8 assessment was inadequate.

9. In reply Mr Khan having referred to the terms of Section 117B stated that this was a case where the balancing exercise had properly been undertaken by the Immigration Judge and that he was correct to find that the removal of the appellant would be disproportionate. He argued that the appellant's leave to remain in Britain had not been precarious. Furthermore, he stated that it was not a material error that the judge had not considered the "look up tool" evidence in the bundle and suggested that it was for the Secretary of State to produce the tapes on which the evidence and conclusions of ETS were based. He stated that the applicant must have gone through relevant procedures and indeed he had given evidence in that regard at the hearing. He argued moreover that the appellant was entitled to switch from being a student to being a husband and the fact that the application had only been refused on suitability grounds and that the appellant had shown that it was wrong to raise that ground as he had not committed an offence by producing a false ETS case and that therefore that meant that the appellant fulfilled the requirements of the marriage Rules and was entitled to remain as a husband.

Discussion

10. I consider that there are material errors of law in the determination of the Immigration Judge. Given the evidence submitted by the Secretary of State which included the look up tool the decision of the judge that, although the respondent had discharged the evidential burden somehow that the further evidence put forward by the appellant had discharged the burden upon him and that therefore the burden on the Secretary of State had not been discharged, was plainly wrong.

11. The statement by the judge at paragraph 20 that the respondent had been unable to adduce any evidence other than the generic evidence ordinarily relied on was wrong in that the look up tool, which specifically referred to the appellant, was not generic evidence.

12. Moreover although it appears that the judge did hear the appellant give evidence the reality is that he has not recorded what evidence was given

and his statement that he had determined the appeal without a hearing appears to be wrong.

13. As I consider that the judge was wrong to consider that the Secretary of State had not discharged the burden of proof and therefore was wrong to reach the conclusion that therefore the suitability criteria was met.

14. Moreover Mr Khan's argument that because the Secretary of State did not refuse on any basis other than that the suitability requirements were not met it was implied that all the other matters required of an applicant for leave to remain as a spouse were met, is clearly wrong. There was no evidence whatsoever that the appellant would have met the criteria for leave to remain as a husband, not least because of the lack of financial information and the fact that Ms Gulati is not settled here .

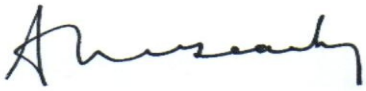
15. Moreover the evidence before the judge is not set out in the determination and it is difficult to understand on what basis he can have reached his conclusions regarding the private and family life of the appellant.

16. It is clear law that the appellant's status under the immigration law was precarious and that that is a factor which should be taken into account when considering the provisions of Section 117B. Moreover, it does not appear that there are any British children involved in this case. It appears that the appellant and his partner have two children. They are clearly not British as neither the appellant nor his wife is a British national and his wife does not have indefinite leave to remain here. The judge moreover does not go into any factors which would indicate that there would be any insurmountable obstacles to the appellant and his wife living together in India. Although Mr Khan indicated that the appellant's wife would not be able to live in India there was no evidence to show that that is the case. I therefore cannot see any basis upon which the judge was entitled to allow the appeal on human rights grounds.

12. I consider therefore it is appropriate to set aside the decision of the First-tier judge. The reality is that there are no findings of fact which are sustainable in this case and I therefore remit the appeal for a hearing afresh by the First-tier Tribunal. I therefore set aside the decision of the Judge in the First-tier.

Notice of Decision

The appeal of the Secretary of State is allowed. The appeal is remitted to the First-tier for a hearing afresh on all grounds.
No anonymity direction is made.

Signed  Date: 11 July 2017

Upper Tribunal Judge McGeachy