



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/43851/2014

THE IMMIGRATION ACTS

Heard at Field House
On 19 July 2017

Decision & Reasons Promulgated
On 09 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

FOYSAL AHAMMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Hossain, Counsel, instructed by Liberty Legal Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge C M Phillips (the judge), promulgated on 3 September 2016, in which he dismissed the Appellant's appeal. That appeal was against the Respondent's decision of 21 October 2014, refusing an application under Appendix FM to the Immigration Rules made on

25 June 2014. The application was for leave to remain as the partner of a Thai national resident in the United Kingdom with indefinite leave to remain.

The hearing before the judge

2. The Appellant's application had been refused by the Respondent under Appendix FM on, in effect, a single ground. It was said that the Appellant had fraudulently obtained an English language test certificate following a test taken in August 2012. This certificate had been used by the Appellant in seeking further leave to remain as a Tier 4 Student in respect of an application made in 2013. In essence, it is said that the concerns relating to the well-documented ETS issue applied to this particular Appellant. As a result of this the Respondent had concluded that S-LTR.2.2 of the suitability requirements under Appendix FM applied. In respect of the five-year partner route under Appendix FM, no other issues were taken against the Appellant. In light of this the judge initially deals with the issue of suitability (from paragraphs 43 to 68). Having referred to the evidence before him and relevant case law, the judge finds (at least implicitly) that the Respondent had discharged the evidential burden resting upon her. He then goes on to take a number of adverse credibility points against the Appellant and concludes ultimately that the Appellant had failed to provide a credible account to rebut the Respondent's evidence. In light of this the judge then concludes that the Respondent had discharged the legal burden and that she had shown the Appellant to have used deception in respect of the 2012 English language test and the certificate submitted thereafter. Finally, the judge goes on to deal with other Article 8 related matters (paragraphs 69 to 90). A number of factors are considered and ultimately the judge concludes that removal would be proportionate.

The grounds of appeal and grant of permission

3. It must be said that the grounds of appeal are not particularly well-drafted. They raise matters relating to the judge's general assessment of Article 8, but also make reference to the conclusions on suitability under Appendix FM. Permission to appeal was refused by the First-tier Tribunal. On granting permission in a decision dated 12 June 2017, Upper Tribunal Judge Bruce comments that it was arguable that the judge's use of the term "unconvinced" at various stages of his decision raised a concern that too high a standard of proof may have been applied. In addition, it is noted that S-LTR.2.2 is a discretionary ground for refusing an application, not a mandatory ground. It was arguable that the judge had failed to appreciate this distinction.

The hearing before me

4. At the outset of the hearing I raised an issue with the representatives that had not apparently been appreciated previously. Both representatives confirmed that the

disputed English language test certificate related to the tests sat in August 2012. This test certificate had been used by the Appellant when applying for further leave to remain as a Tier 4 Student in 2013. The certificate had *not* been used in respect of the Appendix FM application made in June 2014. In light of this I indicated that the wording of S-LTR.2.2 suggested that this provision was not applicable to the Appellant's case because the disputed document (the English language test certificate) had not been submitted in relation to "the application", namely the 2014 Appendix FM application.

5. This point had not been in the Appellant's grounds of appeal, and although neither representative had spotted the point before I raised it, it appeared to me as though this matter was of real significance: on the face of it a suitability provision had been applied to the Appellant which should not have been, and the judge had proceeded to consider a provision that should not have required consideration. Mr Hossain agreed with my observation as to the applicability of S-LTR.2.2. In addition he submitted that even if it did apply, it was a discretionary ground and the judge had failed to appreciate this; he had failed to consider whether or not any discretion should have been exercised in the Appellant's favour. Mr Hossain also submitted that if S-LTR.2.2 did not apply at all, the Appellant's case should have been allowed outright under Appendix FM given that no other requirements under the five-year partner route had ever been in dispute. It was also submitted that the judge had made errors in respect of credibility findings on the ETS issue. Finally, Mr Hossain submitted that the judge was wrong in respect of the wider Article 8 issues.
6. Mr Nath accepted that S-LTR.2.2 may not be applicable in this case in view of its particular wording. He made the fair observation that he had not had any time to consider this issue prior to it being raised by myself at the outset of the hearing. He also noted that it was not included in the grounds of appeal. Taking matters overall Mr Nath suggested that I could find an error of law in respect of the judge's decision and then remake the decision by allowing the appeal to the limited extent that the Respondent's original decision was not otherwise in accordance with the law. The Respondent could then reassess the case as a whole and the Appellant would have the opportunity of submitting any further evidence. At the end of the hearing I reserved my decision.

Decision on error of law

7. I conclude that there are material errors of law in the judge's decision. My reasons for this conclusion are as follows.
8. First, I fully appreciate that the applicability of S-LTR.2.2 was not raised in the grounds of appeal. I acknowledge that there has been no application to amend those grounds of appeal. However it seems to me, with all due respect, that the judge was bound to apply the law correctly (as is the Respondent), and that on the facts of this case the particular suitability provision in question had no application to the Appellant's circumstances. The disputed test certificate was submitted only in

respect of the Tier 4 application made in 2013. It was not submitted in respect of the 2014 Appendix FM application. S-LTR2.2 reads as follows:

“Whether or not to the applicant's knowledge –

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application...)”.

9. The clear words used in this provision are “the application”. Giving the terminology its natural and ordinary meaning I conclude that the representations or documents relied upon by the Respondent must have been submitted together with the latest application, namely that giving rise to the decision which is under appeal. On this interpretation, S-LTR.2.2 simply could not have applied to the Appellant’s case. The Respondent was wrong in relying upon it when making her decision, and the judge was wrong in considering it in his decision. This basic error is clearly of real significance to the Appellant’s case because all other elements of Appendix FM had been accepted. Therefore, absent the suitability issue the Appellant may well have succeeded under the five-year partner route. The error is material.
10. Second, even if one were to leave aside the applicability point I have set out above, there is a further material error in the judge’s decision. S-LTR.2.2 is a discretionary ground for refusal. The Respondent appears to have overlooked this when making her decision. I can see no reference whatsoever to a discretion or the exercise thereof in the reasons for refusal letter. Moreover, I see no reference by the judge as to the discretionary nature of this provision. I appreciate that I must read the decision as a whole, and clearly a number of points are taken against the Appellant generally and in relation to wider Article 8 issues in particular. However, the specific issue of the discretion under S-LTR.2.2 has simply not been addressed, as it should have been. It is not a foregone conclusion that the exercise of discretion would have gone against the Appellant (whether that discretion had been considered by the Respondent or the judge). Thus, the error is material.
11. In light of the above I set aside the judge’s decision.

Disposal

12. There was some discussion at the hearing as to whether I should remake the decision and allow the Appellant’s appeal outright on the basis that S-LTR.2.2 did not apply to the Appellant’s case (Mr Hossain’s position), or whether I should allow the appeal to the limited extent that the Respondent’s decision was fundamentally flawed and was not otherwise in accordance with the law, as urged on me by Mr Nath. I have decided to take the latter course.

13. I note that because of the timing of the Appellant's application (25 June 2014) I still have jurisdiction under the old statutory regime to allow the appeal on the limited basis that the Respondent's decision was not otherwise in accordance with the law.
14. Having regard to the Respondent's decision, it is quite apparent that she applied a suitability provision that on the face of it had no application to the Appellant's circumstances (even if there had been deception practised previously). Alternatively, it is also apparent that the Respondent failed to consider the exercise of any discretion in relation to S-LTR.2.2. For these reasons the Respondent's decision was, at the time it was made, unlawful.
15. I am not acquiescing to Mr Hossain's submission because the issue of the applicability of S-LTR.2.2 to the Appellant's case has not been raised by the Appellant during the appellate process: it has only come to light through my intervention. This is combined with the fact that I have found there to be an alternative error of law in relation to the discretion point, and this requires the Respondent to apply her mind to the consideration of all relevant matters in the first instance.
16. I therefore allow the Appellant's appeal only to the limited extent that the decision of 21 October 2014 was unlawful and that the Appellant's application, made on 25 June 2014 remains outstanding before the Respondent, awaiting a lawful decision.

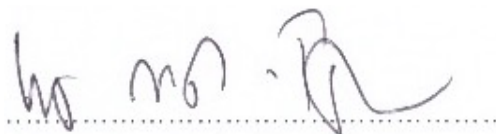
Notice of Decision

The decision of the First-tier Tribunal contained material errors of law.

I therefore set it aside.

I remake the decision by allowing the Appellant's appeal to the limited extent that the Respondent's decision of 21 October 2014 was not otherwise in accordance with the law. The Appellant's application made on 25 June 2014 remains outstanding before the Respondent, awaiting a lawful decision.

No anonymity direction is made.



Signed

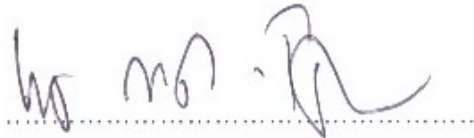
Date: 6 August 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00. The Respondent's original decision has been found to be unlawful, and the Appellant has succeeded in his appeal on this basis.

A handwritten signature in black ink, appearing to read 'Ms Norton-Taylor', written over a horizontal dotted line.

Signed

Date: 6 August 2017

Deputy Upper Tribunal Judge Norton-Taylor