



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number HU/01647/2018
HU/01649/2018
HU/01650/2018
HU/01651/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3rd December 2018

Decision and Reasons Promulgated
On 19th December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

MOHAMMED [H]

TANYA [S]

[A H¹]

[A H²]

(ANONYMITY DIRECTIONS NOT MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr M Biggs (Counsel, instructed by Universal Solicitors)
For the Respondent: Ms A Everett (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants appeal against the refusal of their human rights claims were dismissed by First-tier Tribunal Judge N M Paul in a decision promulgated on the 13th of August 2018. The Judge found that the First Appellant had used deception in her TOEIC test. In addition the

Judge found that the family could be expected to live in Bangladesh and that that would not be contrary to the best interests of the children having regard to their having been born in the UK and the length of residence.

2. The grounds of appeal argue that the Judge erred in respect of the approach taken to the First Appellant's TOEIC test and the finding of deception. It is also argued that the Judge erred in respect of the finding that the Second Appellant had used deception in obtaining a work permit. It is also asserted that the Judge did not adequately address the issue of reasonableness under section 117B(6).
3. The submissions are set out in the Record of Proceedings. Both parties maintained their respective positions. For the Appellants it was submitted that the approach of the Judge to the shifting burdens was unclear with particular reference to paragraphs 34 and 35 of the decision. There was no analysis of the First Appellant's oral evidence on the issues and no evidence of continuity linking the First Appellant to the voice recording.
4. The finding against the Second Appellant was not coherent. There had been no information on the obtaining of the work permit and no basis for the finding made which had not been explained. It was argued that the errors fed into the findings in respect of the best interests of the children under section 117B(6). It was accepted that the third ground was weaker but there were problems, the children were born when the adults were entitled to access NHS services by virtue of their leave.
5. For the Home Office it was maintained that the findings on the TOEIC were sustainable. In paragraph 35 it was clear that the Judge had in mind where the burden lay and rejected the evidence in relation to taking the test, paragraph 29 was relevant. The Home Office had more reservations on the work permit issue and tacitly accepted that more reasons should have been given.
6. This appeal raises unusual points in terms of consequences. Following from KO (Nigeria) [2018] UKSC 53 how the Appellants came to be without leave is not relevant to the assessment to be made under section 117B and section 55. However, findings of dishonesty can have different consequences. Firstly, a finding of deception by an Appellant may legitimately affect the assessment of the credibility of claims made about the situation that an Appellant and their family may face on return. Secondly such a finding in relation to an immigration matter will affect any future application for leave to enter the UK that an Appellant may wish to make. For those reasons it is incumbent on a Judge to make sustainable findings on the proper legal footing.
7. The most significant error in this decision is the approach of the Judge to the Second Appellant's work permit. The burden was on the Secretary of State to show that that had been obtained by deception. If the Judge wished to raise this as an issue, and the Judge would have been entitled to do so, then the parties ought to have been given an opportunity to address the issue calling evidence if it was felt appropriate. That could have led to an adjournment but the parties do not appear to have been given an opportunity to consider the point. In any event the reasoning in the decision is unclear and it is not obvious that the correct standard or burden had been applied.
8. With regard to the TOEIC test whilst it appears that the Judge had the appropriate test in mind and there was evidence that would clearly cause concern and call for an explanation the analysis of the First Appellant's oral evidence was lacking. This is perhaps less clear cut than

the work permit issue but it is no less significant for the Appellants. Given the lack of analysis of the evidence overall I am satisfied that the approach set out in the decision was flawed and cannot stand.

9. On the basis of the above findings the decision has to be remitted to the First-tier Tribunal for re-hearing. The above findings are aggravated by the Judge's approach in paragraph 41. The Appellants were entitled to access NHS services when the children were born and the points made against them in this part of the case have no merit. The findings in paragraph 40 are not erroneous – the cost of education in Bangladesh is not a factor that would make return unreasonable. The test to be applied is whether there are circumstances in the UK that would make the child Appellants removal unreasonable. The guidance in KO will have to be applied having regard to what is relevant given that the starting point is that the adult Appellants have no independent right to remain in the UK and the children's best interests are to remain with their parents in the family unit. The case of NS (Sri Lanka) considered as part of KO makes that clear.
10. In the circumstances I find that the decision of the First-tier Tribunal contains a number of legal errors which make the decision unsustainable. The Appellants are entitled to proper and sustainable findings on the issues where deception was found. Independently of those issues the adults have no basis to remain in the UK and so the focus is on the children's circumstances and the consequences of their removal and those will have to be assessed in the light of the current guidance.

CONCLUSIONS

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

I set aside the decision.

The appeal is remitted to the First-tier Tribunal at Taylor House to be heard by a Judge other than Judge N M Paul. No findings are preserved and the decision is to be remade de novo.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing these appeals I make no fee award.



Signed:
Deputy Judge of the Upper Tribunal (IAC)

Dated: 17th December 2018