



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number:
HU/03190/2018

THE IMMIGRATION ACTS

**Heard at: Field House
On: 3 October 2018**

**Decision & Reasons Promulgated
On: 16 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KABUL [B]

(anonymity not direction made)

Claimant

Representation

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Claimant: Mr G Mavrantonis, Counsel instructed by Legis
Chambers

DECISION AND REASONS

1. This is an appeal against the decision of Judge Povey in which he allowed the appeal of the Claimant against the decision of the Secretary of State to refuse his application, with his wife and daughter as his dependants, for leave to remain in the United Kingdom on human rights grounds.
2. The application under appeal was refused on 9 January 2018. The Claimant exercised his right of appeal to the First-tier

Tribunal. The appeal came before Judge Povey on 4 June 2018 and was allowed on human rights grounds. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Chamberlain on 23 August 2018 in the following terms

The grounds assert that the Judge failed to assess correctly the burden of proof in line with the case of SM and Qadir (ETS-Evidence-Burden of Proof) [2016]. Further he had elevated the best interests of the child to “the” rather than “a” primary consideration.

I have carefully considered the decision. It is arguable that the Judge has erred in finding that the Respondent had not met the evidential burden. He finds that there was nothing specific to the Appellant, but at G1 to G2 of the Respondent’s bundle is evidence relating to the Appellant. Although he finds that even if the Respondent had shifted the burden, he found the Appellant’s evidence compelling, it is arguable that inadequate reasons have been given for this finding given the caselaw. The finding that deception was not used will inevitably affected consideration of paragraph 276ADE(1)(iv) in relation to the Appellant’s child.

Background

3. The history of this appeal is detailed above. The Claimant (the Appellant in the appeal to the First-tier Tribunal) is a citizen of India born on 13 January 1981. He arrived in the United Kingdom on 5 November 2009 with a visa valid until 11 August 2010 and this was subsequently extended until 30 July 2016. This leave was curtailed to expire on 21 May 2016. The curtailment was issued because the licence of Appellant’s sponsor, [~] Sikh Temple, had been revoked. On 19 May 2016 the Claimant submitted an application for further leave to remain on human rights grounds. This application was refused on 9 January 2018 and is the subject of this appeal.
4. The basis of the refusal was, essentially, two-fold. Firstly, the Secretary of State considered that the Claimant had fraudulently used a proxy during a TOEIC speaking test on 18 June 2013 in connection with a previous application to extend leave to remain. The Secretary of State considered that as a result he therefore failed the suitability requirement of the Immigration Rules. Secondly the Secretary of State considered that the requirements of paragraph 276ADE of the Immigration Rules was not met since neither the Claimant or his dependent wife and child met the residence requirements. At the time of the decision the Claimant’s child had been living in the United Kingdom for 6 years and 10 months.

5. The appeal came before Judge Povey and was allowed. The Judge found firstly that the Claimant did not use a proxy during the English language test and did take and pass all of the TOEIC tests. Secondly, he found that the Claimant's daughter, 10 years old at the time of the hearing, had been living in the United Kingdom for more than seven years and that it would not be reasonable to expect her to leave the United Kingdom and that her best interests lay in remaining in a family unit with her parents.

Submissions

6. At the hearing before me Mr Tarlow appeared on behalf of the Secretary of State and Mr Mavrantonis represented the Claimant. No rule 24 response was filed.
7. Mr Tarlow relied on the grounds and referred to a supplementary bundle containing a statement from Mr Hibbs which referred to the Home Office 'look up tool' which he said contained more specific information than that contained in annex G of the Secretary of State's bundle before the First-tier Tribunal. There was no copy of this bundle on the court file and Mr Mavrantonis did not have a copy.
8. I did not ask Mr Mavrantonis to address me. I said that I was satisfied that the Judge had taken account of all relevant evidence, including the public interest, and had reached a sustainable conclusion on the facts before him and I gave an extempore decision dismissing the Secretary of State's appeal.

Decision

9. This is a TOEIC decision where the Judge has clearly identified the issues. He self-directed in a quite painstaking manner throughout the initial parts of this decision. In particular he self-directed to SM and Qadir (ETS - Evidence - Burden of Proof) [2016] UKUT 229 (IAC). He has looked at the Appellant's immigration history. He has looked at the evidence as provided by the Respondent. Whereas the Judge did not find that this evidence passed the initial threshold he, in any event, went on to consider the Claimant's innocent explanation and the Judge found the Claimant to be a plausible, credible and reliable witness whose evidence stood up to cross-examination.
10. Dealing with the grounds of appeal the Secretary of State firstly asserts that the First-tier Tribunal failed to correctly assess the burden of proof. It is suggested that the witness statements and spreadsheet extract provided met the initial

burden and that thereafter the Tribunal relied upon the Claimant's English language ability to reach the finding that he had not used deception.

11. In my judgment this assertion is flawed in three ways. Firstly, the Judge gives clear reasons in paragraphs 26 and 27 for finding that the initial burden was not met. SM and Qadir does not prevent a Judge making his own findings on the evidence that was before him. In my finding the supplementary bundle was not before the First-tier Tribunal but even if it had been it would not in my judgement have made any difference to the Judge's decision. Secondly and in any event the Judge has gone on to consider the Claimant's innocent explanation making any error that there may have been in finding that the initial burden had not been satisfied immaterial. Thirdly the Judge has not 'relied' upon the Claimant's English language ability and other English qualifications to reach his conclusion that the Claimant took and passed the test. This was only one factor. The Judge notes that the Claimant was able to recall the location and nature of the tests and, most importantly, that his evidence stood up to cross examination before reaching his finding that the Appellant was a plausible, credible and reliable witness.
12. Secondly it is asserted that the First-tier Tribunal elevated the best interests of the child from "a" primary consideration to "the" primary consideration.
13. In my judgement this assertion cannot be sustained. The Judge very clearly self directs to MA (Pakistan) [2016] EWCA Civ 705 and, at paragraph 19, notes that whilst a primary consideration the best interests of the child will not always be determinative. He assesses the child's best interest at paragraph 36 onwards noting that being in the country for seven years "*establishes a starting point that leave should be granted unless there are powerful reasons to the contrary*" and finds that there are no such powerful reasons.
14. In all these circumstances there is in my judgment on error of law material to the decision to allow the appeal and therefore the Secretary of State's appeal is dismissed.

Summary

15. Appeal dismissed. The decision of the First-tier Tribunal stands.

Signed:

Date: 8 October 2018

A handwritten signature in black ink, appearing to read 'John Phillips', written in a cursive style.

J F W Phillips
Deputy Judge of the Upper Tribunal