



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05386/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 August 2018

Decision & Reasons Promulgated
On 31 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

INDIRA RAI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker of the Specialist Appeals Team
For the Respondent: Mr D Coleman of Counsel instructed by Kothala & Co, solicitors

DECISION AND REASONS

The Respondent

1. The Respondent, Indira Rai (the Applicant) is a subject of Nepal born on 20 March 1989. On 30 January 2010 she was given leave to enter as a Tier 4 (General) Student migrant. Her leave was extended several times, eventually expiring on 12 September 2016. On 18 January 2014 she married Himal Singh Rai a British citizen. They have a child born in 2017 and she is expecting their second child.

The SSHD's Original Decision

2. On 12 September 2016 the Applicant applied for further leave to remain as the wife of Himal Singh Rai. On 21 March 2017 the SSHD refused the application because the Appellant did not meet the relevant suitability requirements of the Immigration Rules and she had used in connection with a previous application a TOEIC certificate from Educational Testing Service (ETS) which had been fraudulently obtained.
3. The Applicant did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and there were no very significant obstacles to her re-integration into Nepal where she had lived for some twenty years before coming to the United Kingdom. Her husband had been born in Nepal and there were no exceptional circumstances to warrant the grant of leave under Article 8 of the European Convention outside the Immigration Rules.

Proceedings in the First-tier Tribunal

4. On 6 April 2017 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are generic referring to the Applicant's private and family life in the United Kingdom and versing the SSHD had not made out the case based on the use of deception to obtain a TOEIC certificate.
5. By a decision promulgated on 23 May 2018 Judge of the First-tier Tribunal Devittie allowed the appeal.
6. On 25 June 2018 Judge of the First-tier Tribunal Grimmett granted the SSHD permission to appeal on the ground that it was arguable the Judge had erred in his finding in paragraph 14 of his decision that the SSHD had discharged the evidential burden of proving the Applicant's TOEIC certificate had been obtained by deception and then going on at paragraph 16 to find the Applicant had not practised deception. Further, in allowing the appeal the Judge had failed to consider the factors referred to in s.117B of the 2002 Act.

Proceedings in the Upper Tribunal

7. The Applicant's husband attended and explained that his wife was unable to attend because she was heavily pregnant and their baby was due very soon.
8. I explained the purpose of the hearing to him. Mr Coleman for the Applicant confirmed that no transcript of the interview of 10 July 2015 referred to in the Judge's decision had yet been made available and Mr Walker confirmed he did not have a copy in his file.
9. I enquired if either party was able to supply a copy of the proceedings for judicial review which had been settled by consent. Neither party had the pleadings. I enquired if the SSHD accepted that the subsequent English language test certificate from Trinity College had been considered adequate and Mr Walker informed me that it had.

10. He also informed me that there was no challenge to paragraph 7 of the Judge's decision that the Applicant had re-taken the English language test at Trinity College at the suggestion of the SSHD. He also confirmed attendance note of the hearing made by the Presenting Officer before the Judge stated that her submissions had simply relied on the reasons for refusal and that the Judge had allowed the appeal at the end of the hearing.
11. I noted that at paragraph 11 of his decision the Judge had quoted from the head note of *SM and Qadir (ETS – evidence – Burden of Proof) [2016] UKUT 00229 (IAC)* and at paragraphs 12-15 he had clearly distinguished between the evidential burden and the legal burden of proof. Mr Walker quite properly and rightly conceded that he would have an uphill struggle to show an error of law in the Judge's treatment of the different burdens of proof on the SSHD to establish deception.
12. The other ground upon which permission to appeal was granted referred to the factors identified in s.117A-D of the 2002 Act. The SSHD's grounds for permission do not refer to any omission by the Judge to address the factors listed in s.117A-D. The Judge found the Applicant spoke fluent English. There was no challenge to the ability and capacity of the Applicant's husband to maintain and accommodate his family or challenge that he did not satisfy the earnings or other requirements of the Immigration Rules including Appendix FM.
13. Indeed, the only reason for refusal of leave as a spouse under the Immigration Rules was the allegation of deception employed by the Applicant in obtaining a TOEIC certificate. The Judge was satisfied the Applicant could speak English fluently as is acknowledged by the SSHD in the grounds for permission to appeal. The Applicant had worked as a nursery assistant before her first child was born. The SSHD accept that the Appellant was advised to take another TOEIC test and have accepted her Trinity College certificate submitted to support the application for grant of further leave which expired on 12 September 2016: see paragraph 10 of her statement of 12 April 2018 which also detailed what happened when she attended to sit the TOEIC test.

Conclusion

14. At the end of the hearing I said that I found the Judge's decision contained no material error of law for the reasons to be given in this decision and which are given above. On the basis of the application for permission to appeal and the grounds upon which permission to appeal was granted, the Judge did not make an error of law such that his decision should be set aside.
15. The fact that he allowed the appeal under the Immigration Rules rather than on human rights grounds is an error of law but one which in all the circumstances is not an error of sufficient materiality to justify a re-making of the decision.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain an error of law and shall stand. The consequence is that the appeal of the SSHD is dismissed and the Applicant's original appeal has been allowed.

No anonymity direction is made.

Signed/Official Crest

Date 21. viii. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal