Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08191/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2018	**On 26 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ABDULLAH [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Shah of Taj Solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Watson promulgated on 2 August 2018 dismissing the Appellant's appeal against a decision of the Respondent dated 19 March 2018 to refuse leave to remain in the United Kingdom.

2, The Appellant is a citizen of Bangladesh born on 15 October 1988. He entered the United Kingdom on 10 March 2010 with entry clearance as a student valid until 30 June 2013. On 28 June 2013 he made an application for further leave to remain as a Tier 4 Migrant. The application was granted on 29 November 2013 with leave until 31 July 2015. On 31 July 2014 the Appellant made an application for an EEA residence card on the basis of a marriage to an EEA citizen. The application was

refused on 23 June 2015. The Appellant lodged an appeal against the latter decision which was later withdrawn by him on 19 September 2016.

3. On 12 October 2016 the Appellant made an application for leave to remain on Article 8 grounds. The application was in due course refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 19 March 2018.

4. The Appellant's application of 12 October 2016 was made on the basis that he claimed to have been cohabitating from 15 November 2015 with Ms Fateha [M] (d.o.b. 10 March 1983), a British citizen. In his application it was said that he was in a parental relationship with Ms [M]'s two British citizen children (born 7 January 2002 and 9 February 2006) – as a step-parent, being the partner of their mother - and also that Ms [M] was expecting the Appellant's child. Ms [M] was delivered of a son on 28 March 2017. It has not been disputed that the Appellant is the father of the latter British citizen child.

5. The Respondent refused the application on the basis that the Appellant did not satisfy the suitability requirements because he had, in the Respondent's view, submitted in support of his application for further leave to remain in June 2013 a false English language test certificate dated 15 March 2013 from the Queensway College. The Respondent also considered that the Appellant did not meet the definition of a partner under GEN.1.2 of Appendix FM because even on his claim he had not been cohabiting with his partner for at least two years prior to the application. In those circumstances paragraph EX.1 of Appendix FM was considered to be of no application and therefore not to avail the Appellant.

6. The RFRL also gives consideration to the Appellant's application outside the Immigration Rules under the heading 'Exceptional Circumstances'. In this regard it is pertinent to note the following:

> *"You have applied for leave to remain on the basis of your family life with your British partner and child as well as her children from a previous relationship. However, due to your application falling for refusal in regards to your use of deception by obtaining a fraudulent TOEIC certificate this outweighs your right to family life in regards to your British child."*

7. The Appellant appealed to the IAC.

8. The appeal was dismissed for the reasons set out in the 'Decision and Reasons' of First-tier Tribunal Judge Watson.

9. The First-tier Tribunal Judge found in the Appellant's favour in relation to the English language certificate.

10. The allegation against the Appellant was in respect of the speaking component of the English language test. In substance it was said that the voice that appeared on the tape recording of the candidate taking the speaking test did not match the voice of the Appellant.

11. The First-tier Tribunal Judge recognised the force of the Respondent's generic evidence pursuant to the case of **SM and Qadir**, and that such evidence was sufficient to satisfy the evidential burden; indeed the Appellant's representative before the First-tier Tribunal conceded that the Respondent had discharged the evidential burden. (See paragraphs 6 and 8. The Judge also necessarily reached this conclusion.

12. However the Judge decided that the Appellant had not knowingly submitted a false test certificate: *"I have found that the Appellant has submitted a false test in his application made in 2013 but that he did not do that knowingly"* (paragraph 10).

13. Having found in the Appellant's favour on this point, the Judge went on to consider Article 8. The Judge found that the Appellant was in a genuine and subsisting relationship with Ms Fateha but did not accept that there had been a period of cohabitation for as long as the Appellant had claimed.

> *"I find that the Appellant entered into a relationship which is a genuine and subsisting relationship sometime in 2015 with Ms Fateha. The Respondent does not put into issue the genuine nature of the relationship. I find that they have not shown that they lived together prior to March 2017."* (paragraph 35).

14. The Judge noted that the Respondent did not challenge the paternity of the child born on 28 March 2017 and accordingly found that *"the Appellant is the father of a British citizen child"* (paragraph 36). In respect of the relationship between the Appellant and the other children of his partner, and the family unit more generally, the Judge stated:

> *"I find that the Appellant had not played a major role in the lives of the elder children of Ms Fateha for any significant period of time. … I have found that the Appellant has not shown that he has lived with the children for a lengthy period. … I find that the five persons now live together as a family and that for the*

> *Appellant to leave will necessarily involve disruption to the family unit of some sort."* (paragraph 40).

15. The Judge ultimately determined that on an overall consideration of the case, including having regard to the best interests of the children, that the removal of the Appellant would be proportionate. Accordingly the Judge dismissed the appeal on human rights grounds.

16. The Appellant applied for permission to appeal, which was granted by First-tier Tribunal Judge Grimmett on 5 September 2018. So far as is material the grant of permission to appeal is in these terms:

> *"It is arguable that the Judge failed to give appropriate consideration to the appeal in light of the claimed number of inaccuracies in the factual findings".*

17. The Respondent has filed a Rule 24 response dated 10 October 2018. Included in the response is a cross-challenge to the Judge's approach to the issue of the ETS English language certification. It has not been disputed before me that it is open to the Respondent to raise such matters by way of the Rule 24 response - as indeed was pleaded in the Rule 24 response with reference to **EG and NG (UT Rule 17: withdrawal; Rule 24: scope) Ethiopia [2013] UKUT 143**.

18. Accordingly, before me the Appellant submits that the First-tier Tribunal Judge fell into error in respect of the issue of proportionality; the Respondent resists that submission, but in any event submits in the alternative that the First-tier Tribunal Judge fell into error in respect of the ETS test. Ultimately I have concluded that there is substance in both parties' challenges – albeit in respect of the Appellant's challenge not specifically by reference to the matters identified in the grant of permission to appeal.

19. In this latter regard it is convenient at this juncture to comment briefly upon the inaccuracies referenced in the grant of permission to appeal.

> (i) In the opening paragraph of the Decision it is wrongly stated that the Appellant applied for indefinite leave to remain on the basis of family life; he actually applied for further limited leave to remain on the basis of family life.
>
> (ii) The paragraphs of the Immigration Rules identified in paragraph 1 as forming the basis of the Respondent's refusal are also inaccurately stated.

(iii) At paragraph 2 the Judge wrongly states the date of hearing as 18 April 2018 rather than 13 July 2018.

(iv) At paragraph 3 the Judge sets out a brief chronology of the Appellant's immigration history and other pertinent events. Nothing specifically is suggested to be in error in respect of that chronology. However, at paragraph 4 – inconsistently -he Judge refers to the Appellant coming to the UK as a student in 2013 rather than in 2010, and renewing his Tier 4 visa on 31 July 2015 when in fact 31 July 2015 was the date upon which his Tier 4 visa expired.

These are indeed errors of fact. However, it seems to me that there is nothing specific in any of the errors, or in any other part of the First-tier Tribunal's decision, that suggests anything material turns upon such inaccuracies – which have the appearance of being mere slips rather than revealing fundamental misconceptions as to the nature of the case and issues.

20. The Judge has appropriately set out the key chronology at paragraph 3, and in engaging with the substantive issues in the appeal does not seem to fall into any other error of facts - save perhaps in one respect. The Judge otherwise engages with the facts and evidence appropriately.

21. The one exception appears at paragraph 40, where the Judge refers to the school records of Ms Fateha's older children having been updated to include the Appellant as a contact, and finds that they "*arranged this after the appellant had made his application for leave and with a view to this being supportive of his leave application*". The grounds plead that one letter from the school dated 7 September 2016 suggests that the amendment to the records had been made prior to the application (12 October 2016). However, it seems to me that it was so closely prior to the application that the substance of the Judge's observation that it appeared to be done with a view to being supportive of the application still carries weight. I am not persuaded that anything material turns on this matter.

22. In the circumstances I do not consider that there is any real substance to the submission that the decision is unsafe by reason of the Judge's lack of attention to detail.

23. However, in my judgement the First-tier Tribunal did err in its approach to Article 8 and proportionality in seemingly failing to acknowledge that the basis upon which the Respondent sought to justify the interference with the Appellant's Article 8 protected private and family life was limited to the circumstance of having used deception by obtaining a fraudulent TOEIC certificate. I have quoted from the RFRL

the passage in which the Respondent sets out his case in this regard – see paragraph 6 above.

24. The Judge found in the Appellant's favour on the issue of deception. Having so found, without more it is difficult to see why the Judge did not then reach the conclusion that the Respondent had failed to demonstrate that the decision to refuse leave, and the Appellant's consequent prospective removal from the United Kingdom, was justified and proportionate. It seems to me that the Judge's failure to recognise the exact terms of the Respondent's case, and in turn to recognise that on his findings the Appellant had met the Respondent's case, amounts to a material error of law.

25. There are further aspects of the Judge's analysis of the family life, and the interference with it that might result in consequence of the Respondent's decision, that give cause for concern.

26. At paragraph 43 the Judge found that it was in the Appellant's child's best interests to be with one or both parents, noting also "*the best possible environment for a child is to be brought up by two parents living together in a loving relationship.*" Although the Judge went on - uncontroversially – to state that that could be in any country, and also to observe that the welfare of many children is protected by single parents, in the premises the Judge found that it was in the Appellant's child's best interests to be with both parents. So far as the other two children were concerned the Judge found - it seems to me sustainably - that the nature of the relationship with the Appellant was not such that they themselves would be unduly affected by his removal.

27. At paragraph 48 the Judge continued this theme in these terms.

> "*I find that the Appellant does not have a parental relationship with Ms Fateha's two elder children. He is not their stepfather in UK law and is not their guardian. He has no rights or responsibilities in law towards these two children. I have found that he is part of the family unit from 2017 but this does not make a genuine and subsisting parental relationship in such a short period. As such I do not consider whether it is reasonable for these two children to leave the UK. If I am wrong in that I find that it is reasonable for the family to make a decision about whether the children should relocate, whether Ms Fateha should sponsor the Appellant's application for entry clearance in the normal way or whether the children remain in the UK with relatives.*"

28. Then at paragraph 49 the Judge states this

> *"With regard to the youngest child the Appellant is the father of this child. The child is very young and it is reasonable for him to leave the UK if that is what the family decide."*

29. Paragraph 50 similarly goes on to discuss the possible decisions that the family might make. It is said *"the situation is entirely of the couple's making"*; and *"the couple have some hard choices to make but the situation is of their own making"*. However, the Judge does not expressly state that the situation was not of any of the children's making.

30. The Judge essentially concludes that it is not unreasonable to expect the adults of the family unit to make a decision as to how the unit might be structured in the event of the Appellant's removal. In my judgment that is incomplete and not adequate; it was incumbent upon the Judge to give consideration to the different scenarios that might result, and to consider whether any interference inherent in the re-arrangement of the family could be justified as being proportionate. It was not enough to say – as was the substance of paragraph 49 – that *if* the family decided the Appellant's child should leave the UK, then that was reasonable. It was the Judge's task to make such an evaluation.

31. The Judge should have 'played out' the scenarios likely in consequence of the Respondent's decision to evaluate the circumstances in which it might or might not be reasonable to expect the child to leave the UK – the country of his nationality. One scenario would be for the child to accompany the Appellant whilst his mother remained in the UK with her two other children – the child's half-siblings. This would separate the child from the mother and his siblings. Another potential scenario would be for the child to leave in the company of both mother and father – but that would then require an evaluation of the circumstances of the other British citizen children, of 16 and 12 years of age: would it be reasonable for them to quit the UK, or would it be a proportionate interference with their family life for them to remain in the UK without their mother?

32. The Judge in substance concluded that any such option was ultimately a matter for the Appellant and his partner, and it was reasonable to expect them to make the choice. It seems to me that that was to abdicate the responsibility for making a decision on the proportionality of the Respondent's decision.

33. Accordingly I find that the decision in respect of Article 8 must be set aside for error of law.

34. I am also persuaded that the Judge erred in his approach to the allegation of using a false English language certificate in a previous application. Necessarily this means that this aspect of the case also requires to be revisited, and in the circumstances it is inappropriate to proceed to remake the decision in the appeal on the premise of the Judge's favourable finding on deception.

35. The evidential burden as to the use of a false test certificate was conceded. Accordingly what was required was for the Appellant to offer an 'innocent explanation' for how he came to submit a false document in support of his earlier application for leave to remain. Necessarily that innocent explanation had to be an explanation of how, without his knowing, somebody else's voice had got to be on the tape for the test he supposedly took himself.

36. Having reviewed the case law and the generic evidence, and having noted that the evidential burden issue had been conceded, the Judge then poses the wrong question:

> *"The question for me to decide is whether the Appellant has been wrongly identified as submitting a fraudulent test."* (paragraph 8).

37. The question thus posed runs contrary to the concession that it had been shown that the Appellant had submitted a false test. and the question was in fact whether he had done so innocently.

38. This error is potentially ameliorated in that the Judge implies that he took the correct approach when he later states that he was satisfied that the Appellant had submitted a false test *"but that he did not do that unknowingly"* (paragraph 10). However, in my judgement there are in any event errors in the approach of the Judge to the key question.

39. The Judge's reasons and conclusion as to the Appellant's lack of knowledge are set out at paragraph 9:

> *"The Appellant's bundle does not have any documents which indicate that the Appellant made any contact with either the college or ETS to find out details as to why his test had been cancelled after he received a decision letter which notified him of the allegation that he had been involved in fraud and his test cancelled. He however claims that he was unaware of the allegation regarding the false test until the decision letter of 19 March 2018 was served upon him and he then entered his appeal. I find this a reasonable explanation. He has produced various certificates of prior tests including a IELTS one for his first visa, and higher level exams from Bangladesh. He gave evidence consistent with attending at the centre, indicating*

> *the number of people attending and the location. Whilst of course this could all be gleaned from the Respondent's bundle I find that the Appellant did not knowingly participate in fraud. His English was excellent at the hearing and whilst obviously five years has passed since the disputed test it shows a real aptitude for the language and is entirely consistent with his partner's evidence that whilst his English has possibly improved a little over the years that he has known her (since 2012) he has always been fluent. His explanation as to why he chose this test and centre was reasonable. I find that the Respondent his not shown that this Appellant knowingly participated in fraud. The description of the 'secret room' in the Project Façade document is consistent with some test takers being unaware of the widespread cheating."*

40. The first section of paragraph 9 addresses the Appellant's explanation for not having raised matters directly with ETS upon learning of the allegation of fraud. In substance the Judge accepted the Appellant's explanation to the effect that he thought he was in substance dealing with the matter by entering his appeal. Indeed, Mr Shah suggested that in his very considerable experience of such matters little would have been forthcoming if the Appellant had sought to raise the matter directly with either the college or ETS. The Judge's approach in this regard is uncontroversial. However, the satisfactory explanation as to why no action was taken directly can be no more than a neutral factor in seeking the necessary 'innocent explanation'.

41. The Judge refers to the Appellant's competence in English, by reference both to various certificates and qualifications and his use of English at the hearing. In so doing the Judge appears not to have had regard to what was said by the Upper Tribunal in **MA (ETS – TOEIC testing) Nigeria [2016] UKUT 450** in particular at paragraph 57

> *"...in the abstract of course there was a range of reasons why persons proficient in English may engage in the TOEIC fraud. These include inexhaustively lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. These reasons could conceivably overlap in individual cases and there is scope for other explanations for deceitful conduct in this sphere."*

42. I acknowledge that competence is not irrelevant to the issue; but plainly neither is it determinative in favour of any particular individual's offered 'innocent explanation'. The Judge, in failing to identify the guidance in **MA** and the non-determinative impact of these matters, is in error - bearing in mind, as will be seen, there are no other positive factors in the reasons offered by the Judge for his conclusion.

43. The remaining reasons set out by the Judge relate to the Appellant's choice of test centre and seeming familiarity with the test centre - its location and the procedures at

the location. However, the fraudulent exam taker nonetheless is just as likely to attend the test centre as the genuine applicant. The difference is that the fraudulent applicant once he or she has presented his personal details will stand aside to allow the proxy tester to take over. As such being able to explain why a particular test centre was chosen, and being able to demonstrate familiarity with the test centre does not distinguish the genuine from the fraudulent.

44. In this context I fail to understand the Judge's reasoning in respect of the possible use of a 'secret room' which would allow fraudulent activity to take place away from the eyes of other innocent candidates. The possibility that cheating was going on behind closed doors in no way begins to explain how it is that a different voice came to be on the tape recording of the Appellant's speaking test. In the circumstances I do not understand this to add anything to the Appellant's explanation.

45. In all such circumstances I find that the Judge has not demonstrated adequate analysis of the issues, and his reasons are unsustainable to an extent that they constitute an error of law.

Notice of Decision

46. The decision of the First-tier Tribunal Judge contained material errors of law and is set aside

47. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Watson with all issues at large.

48. No anonymity direction is sought or made.

Signed: Date: **22 November 2018**

Deputy Upper Tribunal Judge I A Lewis