Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09707/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 9th March 2018	**On 22nd March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAHID [H]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mrs H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr N Ahmed of Counsel instructed by Eurasia Legal Services

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appealed against a decision of Judge Gurung-Thapa of the First-tier Tribunal (the FTT) promulgated on 16th March 2017.

2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him at the Claimant.

3. The Claimant is a citizen of Bangladesh born 5th November 1980. On 22nd June 2015 he applied for indefinite leave to remain in the UK. The application was made on the basis that he entered the UK on 25th November 2009 with a Tier 4 Student visa valid to 22nd March 2011. Further leave as a student was granted until 28th June 2014, but this was curtailed on 2nd April 2012 to expire on 1st June 2012.

4. On 28th May 2012 he applied for leave as a spouse of a person present and settled in the UK which was granted from 19th February 2013 to 19th February 2015. On 17th February 2015 he applied for further leave as the spouse of a person present and settled in the UK, which was granted from 28th March 2015 to 28th March 2017.

5. The Claimant married [TA] (the Sponsor) on 7th January 2015. She is a British citizen. The couple have a son born in the UK on [ ] 2015 who is a British citizen.

6. The application was refused on 23rd March 2016 with reference to paragraph 322(5) of the Immigration Rules, which states that leave to remain should normally be refused if it is undesirable to permit the person to remain in the UK in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security. Reliance was placed on this paragraph on the basis that the Claimant had fraudulently obtained a TOEIC certificate. The Secretary of State's case was that the Claimant had used a proxy to undertake the speaking test with Educational Testing Service (ETS) on 17th April 2012. As a result of enquires made by ETS those test results had been cancelled.

7. The application for leave to remain was also refused with reference to paragraph 287(a)(v) on the basis that the Claimant would not be able to maintain himself and his dependants adequately without recourse to public funds, and (vii) his application fell for refusal under the general Grounds for Refusal.

8. The Secretary of State went on to consider family life with reference to Appendix FM finding that the Claimant failed on suitability grounds with reference to S-LTR.1.6. as his presence in the UK was not conducive to the public good. This was because he had used deception to obtain his TOEIC certificate. The Secretary of State went on to consider EX.1. of Appendix FM noting that the Claimant's spouse and son are British citizens, but taking the view that there were no insurmountable obstacles to family life with the Claimant's spouse continuing outside the UK, and it would be reasonable to expect his child to leave the UK.

9. The Secretary of State did not accept that the Claimant was entitled to remain in the UK by relying upon his private life pursuant to paragraph 276ADE(1), and in considering Article 8 outside the Immigration Rules did not consider that the application disclosed any exceptional circumstances.

10. The appeal was heard by the FTT who found that the Claimant had exercised deception in his TOEIC test, notwithstanding that the evidence indicated that his test result was found to be questionable as opposed to invalid. The FTT found that the

Claimant had proved that he could adequately financially support himself and his dependants.

11. The FTT considered paragraph 322(5) and found the Secretary of State's decision to be unlawful, and allowed the appeal to the extent that because the decision was unlawful, a lawful decision needed to be made by the Secretary of State. The finding that the decision was unlawful was made because the FTT found that the Secretary of State had failed to take into account all relevant material facts, and in the alternative, ought to have exercised discretion differently under paragraph 322(5). The FTT found that it was not necessary to consider the Article 8 claim outside the Immigration Rules.

12. The Secretary of State was granted permission to appeal to the Upper Tribunal. The Secretary of State contended that the FTT had erred in law in considering paragraph 322(5) and failed to give adequate reasons for concluding that the Secretary of State had not considered all relevant matters or should have exercised discretion differently. It was also contended that the FTT had erred by making no findings in relation to the Claimant's human rights.

Error of Law

13. At a hearing before me on 24th November 2017 I heard submissions from both parties regarding error of law. Full details of the application for permission, the grant of permission, and the submissions, are contained in my error of law decision promulgated on 12th December 2017. I set out below my conclusions and reasons for finding an error of law and setting aside the decision of the FTT;

> "20. The human rights application made by the Appellant was made on 22nd June 2015 and refused on 23rd March 2016. Although the Appellant's application was for leave to remain, it is treated by the Respondent as a human rights claim, and it is clear that the Appellant had a right of appeal against that decision and the appeal fell to be decided under the appeal regime brought in by the Immigration Act 2014.
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> 21. Because the appeal is against refusal of a human rights claim, the only Ground of Appeal available to the Appellant is set out in section 84(2) of the Nationality, Immigration and Asylum Act 2002. That states;
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> (2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.
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> 22. The Appellant based his appeal upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
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> 23. The FTT erred by failing to consider Article 8. The FTT having conclude that the Secretary of State's decision was unlawful, recorded at paragraph 75 that it was therefore not necessary to consider Article 8 outside the Immigration Rules. The FTT did not consider Article 8 within the Immigration Rules.

24. While consideration of the Immigration Rules is necessary and relevant when considering the public interest in a human rights appeal, involving Article 8, it is an error of law to decline to consider Article 8.

25. The FTT made reference to the Upper Tribunal decision in Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC), taking the view that this case was authority which enabled the FTT to make a finding that the Secretary of State's decision was not in accordance with the law. In my view, with respect, that is incorrect. The decision in Greenwood related to the previous appeal regime, not the appeal regime brought in by the Immigration Act 2014. With reference to the appeal regime now in force, my view is that the FTT has no power to find that the decision is unlawful and not in accordance with the law because discretion and the Immigration Rules should have been exercised differently.

26. In my view the FTT had to decide, in this appeal, whether removal of the Appellant from the UK would be unlawful under section 6 of the Human Rights Act 1998 and therefore had to consider Article 8 of the 1950 Convention.

27. I therefore conclude that although the FTT considered this appeal with care, an erroneous approach was taken which means the decision is materially wrong in law and must be set aside and remade.

28. I have considered whether any findings can be preserved. There has been no challenge to the FTT finding that the Appellant could adequately financially maintain himself and his dependants. That finding is preserved.

29. Although the appeal was brought by the Secretary of State, and the Appellant did not apply for permission to appeal, (Mr Ahmed's stance was that had he been made aware of this decision he would have advised an application for permission to appeal should be made) I do not find that it is safe to preserve the finding made by the FTT that the Appellant exercised deception in obtaining the TOEIC certificate, as the evidence appears to indicate that his result was recorded as questionable rather than invalid. That issue therefore needs to be considered again.

30. I have considered whether this appeal should be remitted to the FTT. I have decided against that course of action and considered paragraph 7 of the Senior President's Practice Statements. I take into account paragraph 7.3 which indicates that the normal course, following the setting aside of an FTT decision, is to remake the decision in the Upper Tribunal even if some further fact-finding is necessary. There will therefore be a further hearing before the Upper Tribunal so that the decision can be remade. The only preserved finding is that the Claimant can adequately financially maintain himself and his dependants."

14. The hearing was adjourned so that evidence could be given to the Upper Tribunal, in order for the decision to be remade.

Remaking the Decision – Upper Tribunal Hearing 9th March 2018

Preliminary Issues

15. I made the parties aware of the documentation held on the Tribunal file. This consisted of the Home Office bundle with Annexes A – E, the supplementary Home Office bundle indexed 1 – 7, a bundle lodged on behalf of the Claimant comprising 88 pages and a skeleton argument submitted on behalf of the Claimant.

16. Both representatives indicated that they were ready to proceed and there was no obligation for an adjournment.

The Oral Evidence

17. The Claimant gave oral evidence in English without the need for an interpreter. There were no difficulties in communication. He adopted his witness statement dated 14th February 2017.

18. The Sponsor gave oral evidence in English and adopted her witness statement dated 14th February 2017.

19. The Claimant and Sponsor were questioned by the representatives and I have recorded all questions and answers in my Record of Proceedings. It is not necessary to reiterate them in full here. If relevant I will refer to the oral evidence when I set out my conclusions and reasons.

The Secretary of State's Submissions

20. Mrs Aboni relied upon the reasons for refusal decision dated 23rd March 2016. I was asked to find that the Secretary of State had submitted sufficient evidence to prove that the Claimant had exercised deception by having a proxy undertake the English language speaking test for him on 17th April 2012. Therefore, refusal of the application pursuant to paragraph 322(5) was appropriate.

21. Mrs Aboni referred to Appendix FM (although both representatives expressed the view that the correct Immigration Rule was paragraph 287) submitting that if Appendix FM was considered, there were no insurmountable obstacles to the Claimant and Sponsor continuing their family life outside the UK, and it would be reasonable for the Claimant's British son to leave the UK. It was submitted that there were no exceptional circumstances which would justify granting the appeal pursuant to Article 8 outside the Immigration Rules.

The Claimant's Submissions

22. Mr Ahmed relied upon his skeleton argument. He maintained that there was no evidence to justify the Secretary of State's conclusion that the Claimant had used deception in obtaining the TOEIC certificate following the test in April 2012. ETS

had not declared the test result invalid but had declared it questionable. Mr Ahmed submitted that there was a distinction between those results which were declared invalid and those declared questionable. There were therefore no grounds to justify the Secretary of State relying upon paragraph 322(5).

23. Mr Ahmed therefore submitted that paragraph 287 was in fact satisfied. I was asked to note that the Appellant has a British spouse and British son and reliance was placed upon section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in that the Claimant had a genuine and subsisting parental relationship with a British child, and it would not be reasonable to expect the British child to leave the UK. I was asked to allow the appeal on the basis that the Claimant's removal would breach Article 8 of the 1950 European Convention on Human Rights.

24. At the conclusion of oral submissions, I reserved my decision.

My Conclusions and Reasons

25. I have taken into account all the evidence placed before me, and taken into account the submissions made by both representatives.

26. The Claimant argues that the Secretary of State's decision is contrary to section 6 of the Human Rights Act 1998 and relies upon Article 8. In deciding this appeal I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53.

27. The burden of proof lies on the Claimant to establish his personal circumstances in the UK and why the decision to refuse his human rights claim interferes disproportionately in his private and family life rights. It is for the Secretary of State to establish the public interest factors weighing against the Claimant. The standard of proof is a balance of probabilities throughout.

28. I find that Article 8 is engaged on the basis of family and private life. The Claimant has resided, with leave, in the UK since 25th November 2009. He has been married since May 2012. I find that he has a genuine and subsisting relationship with the Sponsor, and both have a genuine and subsisting parental relationship with their son. The Secretary of State has not challenged the genuineness of the family relationship.

29. Although this is a human rights appeal, it is important and appropriate to examine the relevant Immigration Rules. Paragraph 322(5) is one of the general Grounds of Refusal, and the burden of proving a general ground rests upon the Secretary of State on a balance of probabilities.

30. When considering the ETS test I have followed the guidance in SM and Qadir [2016] UKUT 00229 (IAC), Shehzad [2016] EWCA Civ 615 and Majumder and Qadir [2016] EWCA Civ 1167. In summary the legal burden rests upon the Secretary of State who bears the initial burden of furnishing proof of deception, which is an evidential

burden. If the Secretary of State provides prima facie evidence of deception the burden shifts onto the Claimant to provide a plausible innocent explanation, and if that is done then the burden shifts back to the Secretary of State.

31. In this case the Secretary of State's evidence is contained in the supplementary bundle, with the addition of an interview record dated 28th October 2015.

32. The evidence in the supplementary bundle is in the main generic, containing a statement from a Home Office senior caseworker, by way of explanation of the evidence, generic witness statements from R Collings and P Millington, both dated 23rd June 2014, the generic expert report of Professor French, a summary of Project Façade dated 15th May 2015, which is a criminal enquiry into abuse of the TOEIC at Westlink College, Essex, which is the college where the Claimant took his test.

33. I do not find that the Secretary of State has discharged the evidential burden in relation to the ETS test result. The result was not declared invalid but was declared questionable by ETS. The Claimant was interviewed on 28th October 2015, but he was answering questions about a completely different test that he undertook in Manchester in March 2015. He was not asked any detail about the test he undertook in April 2012. He was simply asked if he had taken an English language test, other than the test in Manchester which was the B1 test and he confirmed that he had taken a test he believed in January or February 2012 at "one of the East London colleges." At that point he could not remember the name.

34. Rebecca Collings in her witness statement at paragraph 29 makes the following comment;

> "29. ETS explained, at the time, that those categorised as questionable (as opposed to cancelled/invalid) were inconclusive in terms of being certain of impersonation/proxy test-taking."

35. The case law referred to above indicates that an ETS printout showing an individual's results as invalid, together with the generic statements of P Millington and R Collings, was sufficient to discharge the evidential burden. That is not the case here. ETS evidence does not show the Claimant's test result to be invalid, but shows it to be questionable. The initial evidential burden has not been discharged. Therefore there is no burden upon the Claimant to raise an innocent explanation. The evidence submitted by the Secretary of State fails to prove that the Claimant exercised deception in relation to the English language test in April 2012. Therefore, the application should not have been refused with reference to paragraph 322(5). This also means that the refusal under paragraph 287(a)(vii) falls away. As the FTT found that the Claimant could be adequately financially maintained without recourse to public funds, and that finding was not challenged and is preserved, the requirements of paragraph 287 are satisfied.

36. That does not necessarily mean that the Claimant's appeal must be allowed at this is an appeal against refusal of a human rights claim.

37. The best interests of the child of the Claimant and Sponsor must be considered as a primary consideration, but not the only consideration. I find there is no doubt that his best interests would be served by being brought up by both his parents. Because he is a British citizen, I find that his best interests would be to remain in the UK.

38. I must have regard to the considerations contained in section 117B of the 2002 Act. Subsection (1) confirms that the maintenance of immigration control is in the public interest. Subsection (2) confirms that it is in the public interest that a person seeking leave to remain can speak English as this assists integration into the community. The Claimant can speak English. He spoke English at the Tribunal hearing without any need for an interpreter.

39. Subsection (3) confirms that a person seeking to remain should be financially independent. The FTT found that the Claimant could be adequately financially maintained without recourse to public funds.

40. Subsection (4) confirms that little weight should be given to a private life or a relationship formed with a qualifying partner established by a person when in the UK unlawfully. This does not apply to the Claimant as he has not been in the UK unlawfully.

41. Subsection (5) confirms that little weight should be given to a private life established by a person when in the UK with a precarious immigration status. The Claimant has had a precarious immigration status in that he has only ever had limited leave to remain, so this does apply to him. This relates to private, as opposed to family life.

42. Subsection (6) confirms that in the case of a person not liable to deportation, the public interest does not require his removal if he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. The Claimant is not liable to deportation. He has a genuine and subsisting parental relationship with a qualifying child. His child is a qualifying child as defined in section 117D as he is a British citizen.

43. I find it would not be reasonable to expect the child to leave the UK. I have considered the guidance in SF Albania [2017] UKUT 00120 (IAC) which refers to the Secretary of State's guidance on whether it would be unreasonable to expect a British citizen child to leave the UK. In brief summary that guidance indicates that where a decision to refuse an application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer. The only exception would be where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer. Examples of such conduct is criminality falling below the threshold set out in paragraph 398 of the Immigration Rules, or a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

44. This is not a case where the Claimant has any criminal convictions. I do not find that he has exercised deception. He does not have a very poor immigration history. His immigration history, as set out earlier in this decision, indicates that he has resided in the UK, with leave, since 2009.

45. I therefore conclude with reference to section 117B(6) that the public interest does not require the Claimant's removal from the UK.

46. Having considered a balancing exercise, I find that the Claimant has resided in the UK with leave since 2009, he married in May 2012 and has a genuine and subsisting relationship, and his wife is a British citizen, as is his son. The requirements of paragraph 287 are satisfied. There is no criminality or poor immigration history. I therefore find that the weight to be attached to the maintenance of the Claimant's private and family life in the UK outweighs the weight to be attached to the public interest. In fact, I do not find that there is any public interest in the Appellant's removal. Therefore, the Secretary of State's decision to refuse his application for leave to remain is disproportionate and breaches Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The appeal of the Secretary of State is dismissed. The Claimant's appeal is allowed.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity order.

Signed Date

Deputy Upper Tribunal Judge M A Hall 14th March 2018

TO THE RESPONDENT
FEE AWARD

Although the Claimant's appeal is allowed I do not make a fee award. I find that the appeal has been allowed because of evidence considered by the Tribunal that was not before the original decision maker.

Signed Date

Deputy Upper Tribunal Judge M A Hall 14th March 2018