Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10776/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th of February 2018	**On 21st February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR ASGHAR ALI
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Nicholson of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 3rd of January 1979. He appeals against the decision of Judge of the First-tier Tribunal Beg sitting at Nottingham on 23rd of February 2017 in which she dismissed the Appellant's appeal against a

decision of the Respondent dated 21st of October 2015. That decision was to refuse to grant the Appellant leave to remain in the United Kingdom.

2. The Appellant entered the United Kingdom on or about 31 of May 2005 using someone else's passport which had a visit visa in it. In 2009 he formed a relationship with KY and the couple married on 2nd of October 2012. The Appellant had earlier applied on 1st of June 2012 for limited leave to remain as the unmarried partner of KY which was granted on 12th of November 2012 valid until 12th of May 2015. On 11th of May 2015 the Appellant made a human rights application for further leave to remain in the United Kingdom on the basis of his family and private life with his spouse KY and her son M. It was the refusal of that application which gave rise to the present proceedings. The Appellant and his wife now have a son, H, who was born on 20th of August 2015.

The Appellant's Case

3. The Appellant's case was that he was in a genuine relationship with his wife who was a British citizen. The couple now had a British citizen child, H and had established a family life together. The Respondent refused the application because she was satisfied that the Appellant had previously submitted an English language certificate which was fraudulently obtained. The Appellant's application dated 1st of June 2012 for leave to remain had enclosed a TOEIC certificate from the Educational Testing Service (ETS). Using voice verification software ETS were able to detect when a single person was undertaking multiple tests. Having checked the Appellant's test they confirmed there was sufficient evidence to conclude that the Appellant's English language certificate was fraudulently obtained by the use of a proxy test taker.

4. The Appellant's May 2015 application was refused under paragraph S-LTR.1.6 of Appendix FM of the Immigration Rules, that an application will normally be refused if the presence of the applicant in the United Kingdom is not conducive to the public good because of that person's conduct, character, associations or other reasons making it undesirable to allow them to remain in the United Kingdom. As the Appellant's application had fallen for refusal under the suitability requirements which were mandatory the Appellant could not benefit from the criteria set out at EX.1. The Appellant could not meet the requirements of paragraph 276 ADE of the Immigration Rules. He had not lived in United Kingdom for at least 20 years, and could resume his life in Pakistan.

The Decision at First Instance

5. The Judge gave her reasons at [22] to [51] of the determination. She found the Appellant had not been able to rebut the evidence that his English language test certificate was obtained by fraud and that as a result the Appellant's conduct made his presence in the United Kingdom not conducive to the public good. She did not find the Appellant to be a credible witness finding that he had lied to his own

solicitors about whether he had arrived in United Kingdom on a genuine visit visa. It was not credible that the Appellant had been given fake documents without his, the Appellant's, knowledge. The Appellant was complicit in arranging fake documents to come to this country through an agent using someone else's passport which had a visit visa in it. The Appellant made no attempt to declare to an immigration officer on arrival that the passport he was using was fake.

6. The Judge accepted that the Appellant was in a genuine relationship with his wife who had a son by her previous husband, who was 16 years old at the date of hearing. There were a large number of stamps in the Appellant's passport demonstrating that the Appellant visited Pakistan on a number of occasions. The Appellant had close family members there and there were no significant obstacles to the Appellant's reintegration into Pakistan.

7. As the Judge found the Appellant could not succeed under the Immigration Rules she proceeded to consider the matter outside the Rules. She set out the provisions of section 117B of the Nationality Immigration and Asylum Act 2002. The Appellant had established a private life in this country in the full knowledge that he was here unlawfully. Little weight could be attached to that private life in the balancing exercise. In assessing the proportionality of any interference with the Appellant's private and family life the Judge noted the particular importance of assessing the best interests of any relevant child. The best interests of a child were to live with his or her parents. Removing the child with the parents did not involve any separation of family life. The child's early years were focused on itself and its caring parents.

8. The Judge envisaged that the Appellant would leave the United Kingdom and that the two children M and H would remain here since she found that M was old enough to keep in contact with the Appellant and to visit him in Pakistan and that the Appellant would be able to keep in contact with H from Pakistan as H grew up. The Appellant's wife could choose to remain living in the United Kingdom or relocate to Pakistan with the Appellant. It was argued that the Appellant would be unable to apply for entry clearance from Pakistan because his wife would be unable to meet the £18,600 financial threshold as she only worked part-time. The Judge found that was a financial requirement which had to be met by all applicants and that any interference in the Appellant's Article 8 rights would be proportionate. She dismissed the appeal.

The Onward Appeal

9. The Appellant appealed against that decision in rather muddled grounds arguing that Judge had failed to apply the correct legal approach to the case. The Judge had failed to apply the Upper Tribunal decision of **Kaur [2017] UKUT 14**. The Respondent's guidance to her decision-makers on what factors to take into account when excluding someone on conducive grounds did not include the use of a false identity to facilitate illegal entry. The grounds disputed the finding that the Appellant had employed a proxy test taker.

10. Permission to appeal was refused by Judge of the First-tier Tribunal Black on 12th of September 2017. She considered that the decision and reasons of the Judge had dealt with all of the issues raised properly and fairly. The grounds amounted to a disagreement with the decision and failed to disclose any arguable errors of law. The Judge had carried out a balancing exercise of all relevant factors under Article 8 and there were no arguable grounds.

11. In grounds of onward appeal now settled by counsel who had not appeared at first instance but who appeared before me the Appellant renewed his application for permission to appeal. The first ground argued that the Judge had failed to apply part 5A of the 2002 Act specifically section 117B (6). The Appellant was the father of a child who was British (H) and the public interest did not therefore require the Appellant's removal from the United Kingdom unless it was reasonable to expect H to leave the United Kingdom. Nowhere in the determination had the Judge said that it was her view that it was reasonable to expect H to leave the United Kingdom. Instead the Judge had proceeded to dismiss the appeal on the basis that the Appellant was one of H's caring parents and it would not be reasonable to expect H to leave the United Kingdom. The Tribunal had erred by failing to allow the Appellant's appeal because there was no public interest in the Appellant's removal.

12. The 2nd ground was that the Judge had failed to ascribe sufficient weight to the Appellant's relationship with his British citizen wife incorrectly applying subsection 117B (4) (b) of the 2002 act. This provides that little weight should be given to a relationship formed with a qualifying partner established by a person at a time when the person is in the United Kingdom unlawfully. The Respondent had granted the Appellant leave to remain in 2012 as his partner's spouse and H was conceived during the currency of the Appellant's leave to remain.

13. The 3rd ground challenged the Judge's finding that the Appellant had employed deception in presenting his English language test certificate. The Judge had criticised the Appellant for not contacting ETS or his college to challenge the allegation of a proxy test taker but it was not ETS who had alleged the Appellant had perpetrated fraud it was the Respondent in her refusal letter. It was for the Respondent to have obtained the voice recording from ETS and obtain a sample of the Appellant's voice in order to ensure that it was not his. The Upper Tribunal had been informed in **SM and Qadir [2016] UKUT 229** that ETS had communicated its unwillingness to provide any voice recordings in the absence of judicial compulsion. There would be no value in the Appellant approaching ETS in those circumstances.

14. The further application for permission to appeal came before Upper Tribunal Judge Kekic on 5th of December 2017. In granting permission to appeal she found it arguable that in assessing proportionality the Judge did not give consideration to section 117B (6) with respect to the younger child and the Judge appeared to have proceeded on the basis that the Appellant's stay was precarious at a time when he

had leave on the basis of his relationship. Judge Kekic indicated she was less impressed with the English language test certificate ground. There was no reply to the grant of permission from the Respondent

The Hearing Before Me

15. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the Judge's determinations such that it fell to be set aside and the decision remade. If there was not then the decision at first instance would stand. Both parties handed to me some case law, counsel handed in extracts from the Respondent's Immigration Directorate Instruction and some further submissions. These argued a point not raised in the grounds. When the Appellant made his application in 2012 (submitting the false English language test certificate) he had not needed to submit any evidence of the English language requirement given the particular settlement route he was applying under at that time.

16. In oral submissions counsel indicated he relied on the Upper Tribunal decision of **Kaur**. In the proportionality balancing exercise, the best interests of a child had to be assessed in isolation from other factors such as parental misconduct. The best interests' assessment should normally be carried out at the beginning of the balancing exercise. The Judge had not applied the provisions of section 117B (6). The Judge had not stated anywhere in the determination that she found it reasonable that either or both of the children should leave the United Kingdom. The Respondent was satisfied the Appellant had a genuine and subsisting relationship with a partner who was settled in United Kingdom and had one child within that relationship who had been born in the United Kingdom (M).

17. The Appellant was granted leave under section D-LTRP.1.2. Under this provision limited leave was granted for a period not exceeding 30 months with an eligibility to apply for settlement after a continuous period of at least 120 months with such leave. Under section R-LTRP.1.1 an applicant must not fall for refusal under suitability grounds but must meet either all of the requirements for eligibility or some only of the eligibility requirements and section EX1 applies. As the Appellant was exempt from meeting all of the eligibility requirements he only had to meet some. In particular he did not need to meet either the immigration status requirement, being in United Kingdom in breach of immigration laws, or the financial requirements nor the English language requirement. Section EX.1 would apply to the Appellant because it would have been unreasonable [as at 2012] for the Appellant's stepson M to be expected to leave United Kingdom.

18. The grounds also argued that there were insurmountable obstacles to the Appellant and his family life with KY continuing outside the United Kingdom. Judge Beg rejected that argument at [50]. She held that there was no credible evidence before her that the Appellant's wife would be unable to legally live in Pakistan with the Appellant. The overall submission in relation to the 2nd ground was that the

Appellant did not need to submit an English language test certificate in 2012 since that was not an eligibility requirement and as such it did not matter even if the Appellant had submitted a false certificate.

19. The 3rd ground related to the English language test certificate itself. The Judge had taken against the Appellant that he had not gone back to his college to query the certificate but the college had been closed down in 2013 before the Respondent's refusal. The Appellant should not have been expected to go back to ETS because the Upper Tribunal in **SM** had confirmed there would difficulties with ETS issuing the voice recording.

20. For the Respondent it was argued there was no material error of law in the decision. The Appellant had entered the United Kingdom on a false passport and submitted a false test result. The Appellant's wife could relocate to Pakistan, the child was not a trump card, the Appellant's leave was precarious. Whilst the best interests of a child were to be given significant weight it was not the end of the matter, other factors had to be considered. Little or no weight could be given to the Appellant's private life or family life with his spouse. The children would not be required to leave the United Kingdom it was a matter of choice for the Appellant's wife who could stay and look after the children here. The Judge was entitled to reject the Appellant's evidence about the English language test certificate.

21. In conclusion counsel argued that there had been no findings that it was reasonable to expect either of the two children to leave the United Kingdom. Any determination which did not apply the contents of section 117B displayed a material error of law. There were no findings as to the children's best interests. One could not read into the determination that the Judge thought either child should go to Pakistan.

Findings

22. There were a number of issues in this appeal which the Judge had to decide. The first was whether the Respondent could establish her allegation that the Appellant had sought to deceive the Respondent in 2012 when he submitted an English language test certificate in circumstances where ETS subsequently confirmed it was false. The arguments raised against the Judge's finding that the Appellant had indeed employed deception are largely a disagreement with those findings. It is significant that when granting permission to appeal Upper Tribunal Judge Kekic was less impressed by the Appellant's challenge to the determination on this ground.

23. The Judge was entitled to draw an adverse conclusion from the failure of the Appellant to respond to the allegation that he had employed a proxy test taker. Even if there were difficulties in obtaining a voice recording and even if that might have involved judicial proceedings as the Upper Tribunal noted might be necessary in **SM [2016] UKUT 229** that was no reason for the Appellant to sit back and do nothing. It may well be that the Appellant's college had been struck off the register

by the time the Appellant was informed of the Respondent's investigations into the English language test certificate but that does not detract from the main point. The Appellant appears to have made no effort to contact the college. Had he done so he would have been able to answer questions about what steps he had taken to contact the college. He would have been able to reply to the Judge that he was unable to contact the college because the college was no longer in existence. Instead he could not answer the questions. What is clear from [32] is that the Appellant did nothing.

24. It is not sufficient for the Appellant to say it would have made no difference because there was no college to contact. The important point is whether the Appellant wished to demonstrate that, for example, he was shocked and surprised by being told his English language test certificate was false. The Appellant's inaction confirmed in the Judge's mind that the Appellant was not shocked because he the Appellant knew he had not undertaken the test himself. It followed from that that the Appellant could not meet the rules in the 2015 application because he failed the suitability requirements because of his use of a proxy test taker.

25. The Appellant's argument is that one can disregard the submission of the false English language certificate in 2012 because the Appellant did not need to submit an English language certificate. This argument is founded on the basis that the Appellant was applying for limited leave to remain and was therefore exempt from some of the eligibility requirements, including the English language. He was not however exempt from the suitability requirements. Had he written to the Respondent at the time of his application in 2012 to say that he was including with his application a false English language certificate fraudulently obtained, it would be no surprise to find that the Respondent would refuse the 2012 application on suitability grounds. The Appellant was careful not to tell the Respondent that the certificate he was submitting in 2012 was false.

26. It is not important whether the submission of the false certificate was or was not material to the application, the important point is that it was false. The Appellant could not therefore meet the Immigration Rules and the Judge was correct to go on to consider the matter outside the Immigration Rules under Article 8. She correctly directed herself in line with the **Razgar** step-by-step approach and she indicated her awareness of section 117B by setting it out in full at [44].

27. The Appellant's argument, ground one of his grounds of appeal, is that once it was established that neither of the two children, the stepson now aged 17 and the Appellant's natural son now aged 2 years were going to be required to leave the United Kingdom the appeal should have been allowed outright at that point. The Judge did not indicate that she considered it was reasonable to expect the children to leave the United Kingdom indicating that it was a matter of choice whether the Appellant's spouse decided to join him.

28. However, there was one further important factor which had to be weighed in the balance and that was the Appellant's past conduct in seeking to deceive the

Respondent by obtaining and thereafter submitting a false English language test certificate. It is not the case that provided the proceedings are not deportation proceedings (as these were not) that it is simply enough to say that a person has a parental relationship with the British citizen child who cannot be expected to leave the United Kingdom. That is not the end of the matter (as was submitted to me). The Tribunal still has to consider the wider public interest in an assessment of reasonableness, see the case of **AM Pakistan [2017] EWCA Civ 180** approving the dictum in **MA Pakistan [2016] EWCA Civ 705**.

29. In the former case the parents had shown a blatant disregard for immigration law choosing to remain illegally on the expiry of their visas. They had not sought to regularise their status for many years and even when they did they had remained illegally in the country after their applications had been refused. In the present case before me the Appellant's misconduct is arguably worse than that since he has actively sought to deceive the Respondent. The Court of Appeal decided that it was inherent in the reasonableness test in section 117B (6) that the court should have regard to wider public interest considerations and in particular the need for effective immigration control. The wider public interest considerations can only come into play via the concept of reasonableness contained in the subsection.

30. Judge Beg had to consider a number of matters when assessing the reasonableness of the interference with the Appellant's family life. She considered the best interests of the children as she was bound to do, looking at them at the outset of her Article 8 considerations. She bore in mind the Tribunal's duty under section 55 of the 2009 Act and quoted with seeming approval at [49] that the best interests of the child would be to live with his or her parents.

31. The Judge was aware of the arguments being made on the Appellant's behalf relating to the family life because she summarised them at [49]. The stepson M, would be 17 in April 2017 (and thus 18 in two months' time). H's primary focus was on his primary carer, his mother with whom he lived. This demonstrated that the Judge did consider the issue of best interests in isolation. The Judge noted at [48] that the best interests of the child could be outweighed by the cumulative effect of other considerations, that is wider public interest considerations. The Judge had considered the allegation against the Appellant of submitting a false document at some length and evidently considered that it was a serious matter.

32. The Appellant had been granted leave in 2012 and the child H was conceived during the period of that grant of leave but that grant had been obtained by deception since if the Appellant had been honest with the Respondent in 2012 it is difficult to see how the Appellant would have been granted leave. The proportionality assessment was a matter for the Judge. Another Judge might have come to a different view on the same factual matrix as was before Judge Beg but neither be wrong. Had there been no misconduct by the Appellant then it might have been sufficient for him to say that this was not a deportation appeal and it was unreasonable to expect either child to leave the United Kingdom. However there

had been misconduct by the Appellant, which fundamentally undermined the system of immigration control as the Judge was aware. She had specifically found that the Appellant did not meet the suitability requirements of the Rules and that his presence in the United Kingdom was not conducive to the public good. She had to balance that finding against the arguments being made by the Appellant as to his relationship with his stepson and his own son. Although one might argue that the Judge could have spelt the matter out more clearly the Judge gave adequate reasons for her findings in this case.

33. I do not consider that the Judge materially erred in law in finding that any interference in the Appellant's Article 8 rights (and by extension the other members of the family) would be proportionate. The interference with the Appellant's wife's family life also involved an assessment of the weight to be attached to it. The Judge was concerned that the Appellant had established his family life with his spouse at a time when his immigration status was precarious and/or unlawful. The Appellant had limited leave to remain which needed to be extended. Given that he had broken the suitability requirements by submitting a false English language certificate he could have had no reasonable expectation that he would be granted further leave to remain.

34. His family life established with his spouse was at best precarious if not unlawful given that it had been granted because of the concealment by the Appellant of a relevant fact. Deception had been employed and thus little weight could be afforded to that family life. For all their length the grounds of onward appeal in this case amount to no more than a disagreement with the findings of the Judge which were open to her on the evidence before her. I do not find that there is any material error of law in this determination and I uphold the dismissal of the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 19th of February 2018

Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 19th of February 2018

Judge Woodcraft
Deputy Upper Tribunal Judge