



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/10913/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 23 January 2018

**Decision & Reasons
Promulgated**

On 19 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MD PABEL HUSSAIN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

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

For the Respondent: Mr R Parkin of Counsel instructed by Allied Law Chambers

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 28 April 2017 brought with the permission of First-tier Tribunal Judge Hollingworth granted on 27 November 2017.
2. Although before me the Secretary of State for the Home Department is the Appellant and Mr Hussain is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Hussain as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Bangladesh, born on 1 September 1992. He entered the United Kingdom on 13 June 2012 as a Tier 4 (General) Student with entry clearance valid from 31 May 2012 until 12 November 2013. On 23 October 2013, before the expiry of his leave, he applied for further leave to remain as a Tier 4 Student which was granted, valid until 30 May 2017.
4. However, on 26 September 2014 the Appellant was served with an IS151A. This informed him that a decision had been taken to remove him from the United Kingdom. This decision had been made on the basis of the Respondent's conclusion that the Appellant had used deception in the course of his application for variation of leave to remain made on 23 October 2013. The deception was alleged to be by way submitting in support of the application an English language certificate issued by Educational Testing Service (ETS) pursuant to a test taken on 17 September 2013 at Eden College International, which had been verified to have been obtained by deception through the use of a proxy tester.
5. The Appellant lodged a judicial review against this decision. I am told today, however, that the judicial review application was withdrawn before a decision had been made on whether or not to grant permission to apply for judicial review in order for the Appellant to make the instant human rights application, the refusal of which is the subject of this appeal.
6. On 14 April 2015, by way of form FLR(M), the Appellant applied for leave to remain on the basis of his marriage to Ms Razia Sultana Ahmed, a Bangladeshi citizen, born on 10 August 1996 and settled in the United Kingdom. It was said in the application that Ms Ahmed had obtained settlement as the dependant of her British citizen father and had lived in the United Kingdom for approximately four and a half years at the time of the application. The Appellant and Ms Ahmed were married on 6 October 2014 in a civil ceremony and had been cohabiting since February 2015. Information was also provided in respect of Ms Ahmed's income which exceeded the threshold required under the Immigration Rules.
7. The Appellant's application for leave to remain on the basis of his marriage, which it was acknowledged amounted to a human rights claim, was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 3 November 2015.
8. The Respondent gave consideration to the application under Appendix FM of the Rules. The Respondent noted the history of the Appellant's case and that he had been found by the Respondent to have used deception in respect of an earlier application. On that basis it was considered that the Appellant did not satisfy the 'suitability requirements' in respect of leave to remain as a partner, with particular reference to S-LTR.1.6 - "*The*

presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs SLTR.1.3-1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK”.

9. It was otherwise accepted that the Appellant met the eligibility requirements of paragraph R-LTRP.1.1.(d)(ii). It is to be noted that this particular provision in respect of eligibility relates to E-LTRP.1.2-1.12 and E-LTRP.2.1. It is clear that this provision was being looked at by the Respondent instead of the provision under R-LTRP.1.1(c) because the Appellant could not satisfy all of the requirements of E-LTRP because he was in the UK in breach of Immigration Rules by reason of the curtailment of his leave. He could only therefore succeed in his application under the Rules if he could satisfy the Respondent in respect of the exception of paragraph EX.1. In this regard the Respondent found that there were no insurmountable obstacles to family life with the Appellant’s partner being continued outside the United Kingdom.
10. I emphasise at this stage - it will become apparent later why - the Appellant had to satisfy EX.1 only because he could not bring himself within the eligibility requirements in respect of ‘immigration status’, because he had no immigration status at the time that he made his application. This circumstance had its origin in the cancellation of the Appellant’s earlier leave.
11. The Respondent also decided that there were no exceptional circumstances in the case to warrant a grant of leave outside the Rules whether by reference to Article 8 or otherwise.
12. The Appellant appealed to the IAC.
13. Before the First-tier Tribunal much of the focus of the appeal was in respect of the allegation that the Appellant had employed deception by using a proxy tester in his ETS examination at Eden College. The Judge found in the Appellant’s favour in this regard. The Judge was not satisfied that the Respondent had discharged the evidential burden upon her of establishing deception. In those circumstances, of course, it would not therefore have been incumbent upon the Appellant to offer anything by way of an ‘innocent explanation’.
14. In respect of Article 8, the First-tier Tribunal Judge concluded that there was no evidence of any insurmountable obstacles to family life continuing in Bangladesh; taking this into account, and with regard to the public interest considerations, the Judge found that requiring the Appellant to leave the UK would not be disproportionate.

15. Notwithstanding this latter conclusion, the Judge allowed the appeal. This was a curious outcome given that the appeal was a human rights appeal. Irrespective of the favourable finding in respect of the allegation of cheating, the Judge's conclusion that the removal of the Appellant would not be disproportionate should logically have resulted in the appeal being dismissed. It is entirely unclear why the Judge determined the matter in this way. Nothing is discernible by way of explanation. Moreover, it is not apparently a mere slip: the Judge went on to consider that a fee award was appropriate in light of the fact that the appeal had been allowed. One can only speculate that the Judge was in some way 'wrong-footed' in the overall conclusion by reason of the favourable finding with regard to the allegation of cheating, or perhaps lost sight of the fact that this was a human rights appeal and not an Immigration Rules appeal against the decision to curtail student leave.
16. The Respondent challenges the decision of the First-tier Tribunal with primary focus on the Judge's approach to the question of the allegation of using a proxy tester. The Respondent's Grounds of Appeal emphasise the case of **SM & Qadir** and associated litigation, and that in general terms the evidence provided by the Respondent in cases such as these is considered to be sufficient to discharge the evidential burden and thereby shift the onus onto an applicant to offer an innocent explanation. In some 14 paragraphs of grounds it is only almost incidentally, at paragraph 13, that the Respondent pleads that the Judge found that there were no insurmountable obstacles preventing family life from continuing in Bangladesh and that the removal of the Appellant was not disproportionate.
17. In preliminary discussions before me today Mr Parkin very fairly and properly acknowledged the nature of the apparent error on the face of the Decision in respect of Article 8 - that is to say the Judge's conclusion on the appeal being dissonant with his evaluation of the Article 8 claim. Nonetheless, Mr Parkin argued that had it been the case that the Judge was correct to conclude in the Appellant's favour in respect of the allegation of cheating, then that would effectively have altered the framework upon which the Article 8 consideration should have taken place. I return to this aspect of the case in due course: suffice to note for the moment that Mr Parkin's position thus adopted necessarily indicated that he relied upon the substance of the finding with regard to the ETS test, and to that extent it was necessary to give consideration to the Respondent's primary basis of challenge.
18. With regard to the ETS testing, the Judge made detailed reference to the materials that were before him in this regard - which for the main part were in a generic format with the usual supporting witness statements from various officers within the Home Office as regards the scandal that

had taken place in respect of ETS testing. There is nothing in the Decision to suggest that the Judge was not familiar with the manner in which these cases have been considered by the upper courts, or was in any way overlooking the generic materials that had been provided. Indeed, the Judge makes express reference to the case of **Qadir** within the body of his Decision.

19. However, on the facts of this particular case the Judge identified an apparent discrepancy between the documents that had been produced that were said to relate to the Appellant's testing - i.e. in respect of the case specific materials rather than the generic materials. In particular, the Judge identified that an ETS TOEIC test centre lookup tool had been produced for 17 September 2013 in respect of Eden College International showing the summary of the tests taken both on the morning and the afternoon of that day. The tests were divided into categories of 'released', 'questionable', and 'invalid'. In the morning session there had been 5 tests taken. None of them had been characterised as 'invalid'; all 5 had been characterised as 'questionable'. In the afternoon there had been 11 tests, all of which had also been characterised as 'questionable'; not one was characterised as 'invalid'.
20. However, there was also produced an ETS SELT source data document in respect of the Appellant with the test date given as 17 September 2013 and the test centre stated to be Eden College International: this showed a result of 'invalid'.
21. Plainly, there was a discrepancy between the notion of all tests being taken at the centre on that day being returned as only 'questionable', and yet the Appellant's particular test being returned as 'invalid'.
22. In the absence of any materials that reconciled the discrepancy, or otherwise tended to suggest that there may have been subsequent evaluations that might have converted a questionable test into an invalid test, it seems to me that it is entirely understandable why the Judge considered that overall the evidence produced by the Respondent in respect of this particular Appellant was not satisfactory - and not sufficient to discharge the evidential burden on the Respondent.
23. I have attempted to explore the matter in some detail with the representatives during the course of the hearing. Mr Tarlow acknowledged that he was not able to identify anything in the materials that would reconcile the apparent discrepancy. In those circumstances, as Mr Tarlow indeed in due course acknowledged, the Secretary of State's challenge to the decision of the First-tier Tribunal Judge in respect of the testing must fail.

24. That then leaves the issue of Article 8. Plainly, as I have indicated, the Judge must have fallen into error in allowing the appeal in circumstances where his analysis showed that he had reached a conclusion that did not show a breach of Article 8 - i.e. where no human rights ground had been established.
25. Mr Parkin, in substance, simply invites me to consider either that this error was ultimately not material or otherwise to set aside the Decision and remake the decision in the appeal by allowing the appeal on the basis that the circumstances would indicate that the Appellant complied with the requirements of the Rules but for the curtailment of his leave. He submitted that given that the appeal is under Article 8 and not under the Rules, and moreover given that the curtailment of his leave was found to have not been justified on the findings of the First-tier Tribunal Judge (because the evidence did not establish that he had cheated), the only reasonable conclusion would be that the removal of the Appellant was, and is disproportionate.
26. In this regard I accept and acknowledge that, but for the decision to curtail his leave in September 2014, the Appellant would have continued to enjoy leave up to the point of his marriage and indeed up to the point of his application and the decision on his application. In those circumstances he would have met the suitability and eligibility requirements of the Rules by reference to the so-called '5 year partner route', and would not have had to resort to reliance upon EX.1, under the '10 year partner route'. Accordingly, I acknowledge and accept the premise of Mr Parkin's submission to the effect that focus on 'insurmountable obstacles', or any consideration analogous to EX.1, was misplaced.
27. When this analysis was put to Mr Tarlow he acknowledged that he did not really have an answer for it. Although he did not make any express concession on the appeal, he did no more than to indicate formal reliance on the fact of the refusal, and advanced no further submissions as to why the decision in the Appellant's appeal should not be remade in his favour.
28. In all of the circumstances it seems to me that the public interest considerations of section 117B of the Nationality, Immigration and Asylum Act 2002 are in substance subsumed within the requirements of the Immigration Rules. The Appellant meets the substance of those Rules save, as I have indicated, for the circumstance of him not having leave to remain at the date that he made his application. The only reason he did not have leave to remain at that date was because of the erroneous decision of the Respondent that he had used deception in an earlier application. In all such circumstances in my judgment it would indeed be a disproportionate interference with the family life established between the Appellant and his wife in the United Kingdom if he were to be required now to leave. I reach this conclusion, notwithstanding the fact that it is

clear that his wife is familiar and indeed relatively recently familiar with the circumstances of Bangladesh, and indeed is a national of Bangladesh. However, for the reasons given, I am satisfied that the appeal should be allowed.

Notice of Decision

29. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.
30. The decision in the appeal is remade. The appeal is allowed.
31. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reason given at the conclusion of the hearing.

Signed:

Date: **15 February 2018**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and in all the circumstances make a full fee award.

Signed:

Date: **15 February 2018**

Deputy Upper Tribunal Judge I A Lewis