



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19597/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10 July 2018

Decision & Reasons Promulgated
On 19 July 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ASIF SHAFI
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss J Isherwood

For the Respondent: Mr R Rai of Counsel, instructed by Geeta Patel & Co Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Pakistan born on 10 June 1989, as the appellant herein. The appellant entered the United Kingdom on 18 May 2011 as a Tier 4 (General) Student and was granted further leave to remain until 20 February 2015. That leave was curtailed to expire on 30 August 2013 and he was thereafter granted further leave to remain as a Tier 4 (General) Student until 30 January 2016. Although it had been claimed by the Secretary of State that leave had been curtailed to expire on 7 October 2014 it was the appellant's case that he had never been served with notice of this and accordingly the only effective curtailment of leave was the one that had expired on 30 August 2013 and

this had been subsequently renewed by the Secretary of State. On 2 August 2016 the Secretary of State refused the appellant's application for leave to remain on human rights grounds on the basis of his residence in this country and his family life with his wife and young child.

2. The Secretary of State noted that the appellant had submitted a TOEIC certificate from the Educational Testing Service (ETS) in his applications dated 25 September 2012 and 31 August 2013. ETS had confirmed that there was significant evidence to conclude that his certificate had been fraudulently obtained by the use of a proxy test taker and his scores resulting from the tests taken on 22 August 2012 at Elizabeth College had been cancelled by ETS. Accordingly the Secretary of State was satisfied that his certificate had been fraudulently obtained and that he had used deception in his applications. The Secretary of State was satisfied that the appellant's presence in the UK was not conducive to the public good and his application was refused under S-LTR.1.6. of the Immigration Rules. It was not accepted that the appellant met the eligibility requirements of paragraph R-LTRP.1.1.(d)(ii) as the appellant was in breach of the immigration laws his leave to remain having expired on 7 October 2014. He therefore failed to meet the requirements of paragraph E-LTRP.2.2.(b) as paragraph EX.1 did not apply to his case. The appellant's application under the partner Rules was refused under D-LTRP.1.3. and he failed under the suitability grounds in relation to his claim as a parent. In relation to paragraph 276ADE(1) the appellant's period of residency fell short of the period required under the Rules and there were no very significant obstacles to his integration in Pakistan. His parents and siblings remain there. He had lived in Pakistan up to the age of 23. There were no exceptional circumstances. Attention had been given to Section 55 of the Borders, Citizenship and Immigration Act 2009. The appellant had obtained an English language test fraudulently. The child could remain with the appellant's wife who was a British citizen.
3. The appellant appealed the decision and his appeal came before a First-tier Judge on 28 December 2017. The judge noted that the parties had got married on 6 September 2014 and that there was evidence from Swindon College confirming that the appellant had completed a diploma course in business and enterprise at level 5. The course had been completed in English. He had also undertaken a graded examination in spoken English at entry level ESOL entry 1 level with merit at Trinity College London. The First-tier Judge made the following observations on the evidence provided by the Secretary of State and the appellant's case in relation thereto as follows:
 - "13. I also had regard to the respondent's evidence namely the further statement of Mr Vaghela a civil servant employed by the respondent who described the ETS evidence initially set out in expensive [sic] statements by Peter Millington, Rebecca Collings and the subject of expert evidence submitted in the generic ETS cases on behalf of the respondent. The appellant's test score was set out within that bundle and noted that at Elizabeth College on 22nd August in the morning that 21 percent of oral tests taken were questionable, namely 16, and 79 percent of test taken including the

appellant's were scored as being invalid on the basis of the evidence produced.

14. I have also had regard to the leading cases in relation to ETS Tests submitted by the respondent which set the parameters of the case law in relation to these cases namely the Report by Professor Peter French from francize comparison of test taken by ETS; the case of **SM & Qadir vs Secretary of State for the Home Department (ETS) - Evidence - Burden of Proof 2016 UKUT 00229** and **the Secretary of State for the Home Department vs Shehzad & Another 2016 EWCA CIB 615** and the case of **MA (ETS - TPEIC Testing) 2016 UKUT 00450** of the bundle.
15. The appellant's case is that in oral and written evidence he said that he did take the test and took the test in Tooting as that is where the Elizabeth College is near to him. He also described the fact that he had his photograph taken and that there were approximately 15 to 20 people in the room but there were two invigilators of the test one white British and one Asian British individual who overseeing the test. He said he has taken a 77 bus to the test center at Union Road, people had laptops that were being used and that was a valid test taken. He said that there were photographs that appeared together with multiple choice questions and that his English is about the same now as it was at the material time as he has spent most of the time together at home in the last two years with his wife and young daughter, he said that in answering general questions he would face undue hardship returning to Pakistan because of the persecution of Christians notwithstanding that his family is Christian and is continuing to live in Pakistan."
4. The appellant said that he had undertaken studies since the disputed test successfully and it would be unduly harsh for him and his partner if they were separated and any period of overstaying after August 2013 was without his knowledge as he had not received the second letter for his curtailment. It would be extremely harsh for his daughter to be forced to resettle in Pakistan where he had no accommodation or employment or other means of support although it was accepted that his extended family was still there. His daughter was attending nursery one day per week and he took her there and collected her. If he were removed from the UK his wife would be unable to work in the service station where she worked for 42 hours a week and would "in all possibilities" become a burden upon the state while he was out of the country. She would face some dangers in Pakistan as a Christian.
5. The judge found that the Secretary of State had discharged the initial burden on him to shift the burden of proof back to the appellant. The judge in relation to this made the following findings:
 - "21. I found that the appellant here gave his evidence about the circumstances of his taking the test without hesitation and clearly. It is clear that before me and considering the documentary evidence he was able to understand

English reasonably well and simply preferred to give his evidence through an interpreter. This is not necessarily an indication of people's ability to speak English to the level that it was tested in the ETS but simply an awareness that people often find it far more comfortable to have the full range of vocabulary and understanding that an interpreter brings during a court hearing. I therefore accept it is more probable than not given the level of detail and the lack of hesitation with which the appellant gave his evidence that he was the test taker and that the deficiencies such as they are in the overall analysis were not as full proof as could allow permitted determination that the appellant was not the genuine test taker and did not obtain that score.

22. The expert data obtained in relation to the leading cases does generally engage a degree of speculation but I have before me hard evidence that there is an innocent explanation explained which is that the appellant himself had sufficient command of English in order to undertake his studies, has since satisfied me that he has a reasonable command of English in terms of the qualifications obtained both prior to the test being taken and subsequently. I therefore find that the appellant has discharged the burden of proof that rest upon him to establish that it is more probable than not that he was the test taker of the ETS test in any event."
6. The judge then went on to consider paragraph EX.1 notwithstanding his conclusions in relation to the ETS test. He found that the appellant would face insurmountable obstacles if he were removed and the family were forced to continue their family life outside the UK. He considered that these factors were:
 - "1. The appellant's spouse will lose her job.
 2. The appellant and his spouse will lose their accommodation.
 3. Their daughter will effectively lose the benefits of her UK citizenship as set out and defined by Lady Hale in the case of **ZH (Tanzania)** where it is clear that there was importance placed on the benefits of UK citizenship for a child notwithstanding that child's age and that those benefits would therefore be lost should the appellant be removed from the jurisdiction."
 7. The judge referred to Section 117B of the 2002 Act and noted that the appellant did have a genuine and subsisting parental relationship with a qualifying child and the judge considered it would not be reasonable to expect the child to leave the United Kingdom where she was attending nursery for one day a week. Although the child was very young she nevertheless had rights and it was considered that she could not simply be removed with the appellant and there were grave consequences for her best interests should she be removed with both her parents. He found that the hardship would also mean that the child "would be losing her UK citizenship". The judge concluded his determination as follows:

“32. I find that considering Article 8 matters outside the Immigration Rules I find that the applicant and his daughter do enjoy a significant family and private life together with his wife. I find that his removal from United Kingdom would interfere with that family and private life and that the removal of the family as a unit cannot take place without there being undue hardship for the reasons set out. I find that the appellant’s removal whilst being in accordance with the law with legitimate aim of maintaining and fair but firm immigration policy does trigger a proportionality and balancing exercise between the right to respect for private life and in particular public interest of maintaining immigration control.

33. For the reasons I have already set out I find that the balancing act has to be performed in the circumstances falls in favor of the appellant. One consideration is that the appellant would have to remove himself to Pakistan and make another application for entry clearance there on exactly the same factual basis that he does whilst in the United Kingdom. The difficulty for the appellant is that his presence in the United Kingdom does enable his wife to work and therefore satisfy the financial criteria for his continued residence in the United Kingdom.

34. If the appellant were to be removed the likelihood is that his wife will have to give up work and therefore would fail to meet the financial criteria upon which he could readmitted and therefore as a family they face either the prospects of removing themselves together as a family unit to Pakistan with undue hardship that would entail and the loss of citizenship rights of the appellant’s daughter and the settled status for the appellant’s spouse but would also mean it would be less likely that the appellant if on his own could return to the United Kingdom. That combination of circumstances means that the balancing exercise would have a disproportionate impact on the appellant taking into account the case of Agyarko and the relevant ECHR jurisprudence as set out in the case law such as EB (Kosovo) vs Secretary of State for the Home Department 2008 UKHL 41. At that time the parties in their relationship had their daughter it would not have appeared to the appellant that his immigration status was precarious and therefore I can have regard to that private and family life. I also take the view that the application of word exceptional does not mean unusual or unique. I therefore find that this application falls to be allowed both under the Immigration Rules Appendix FM exception EX.1 but also in any event outside the Immigration Rules on the facts of the case under Article 8.”

8. The judge then purported to allow the appeal under the Immigration Rules and also allowed the appeal under Article 8 of the ECHR.
9. The Secretary of State applied for permission to appeal. It was noted that it had been accepted that the evidential burden fell on the appellant to offer an innocent explanation but this had not been adequately addressed. It was not clear why the appellant’s evidence would preclude the use of a proxy test taker during the test. He

had simply offered a description of how he claimed the alleged test had been carried out and no explanation as to why the test had been considered by ETS to be fraudulent. Even at the date of the hearing the appellant chose to give his evidence through an interpreter.

10. The Tribunal had relied on the appellant's English language ability demonstrated by other English qualifications but the test was not whether the appellant spoke English but whether on the balance of probabilities the appellant had employed deception. Reference was made to MA (Nigeria) [2016] UKUT 450 at paragraph 57. The judge had erred in allowing the appeal under the Immigration Rules. Given the date of the application the appellant had only an appeal against the refusal of his human rights claim on the ground that the decision was unlawful under Section 6 of the Human Rights Act 1998. The error could have potentially affected the proportionality assessment under Article 8.
11. In relation to Article 8 it was not an exceptional case and family life had been created at a time when the appellant and his spouse were aware that the appellant's status was precarious and reference was made to Agyarko v Secretary of State [2017] UKSC 11. Reference was made to VW and MO (Uganda) v Secretary of State [2008] UKAIT 00021 at paragraph 34:

"Again and again the court has emphasised that an applicant cannot normally succeed if all he can show is that he or she would prefer to conduct his family life in the host member state. More must be shown than that relocation abroad would cause difficulty or hardship."
12. It had not been made clear why there would be grave consequences for the child – the judge had referred to disruption of her attendance for one day a week at nursery. The maintenance of effective immigration controls was in the public interest under Section 117B of the 2002 Act. The appellant did not meet the Immigration Rules and the interference with his right to family life under Article 8 was justified. Permission to appeal was granted by the First-tier Tribunal on 30 April 2018.
13. Miss Isherwood relied on the grounds of appeal and took me to paragraph 57 of MA where the Tribunal had referred to the claim that the appellant had no reason to engage in deception and the fact that there might be a range of reasons why persons proficient in English might engage in fraud such as lack of confidence, fear of failure, lack of time and commitment and contempt for the immigration system. It was clear that the appellant's status was precarious in the light of Agyarko. There was nothing exceptional about the circumstances of the appellant. He and his wife were second cousins and had a link to Bangladesh. Paragraph 24 of the determination had not been properly reasoned. There was nothing exceptional about loss of accommodation or employment. The judge had not assessed the Article 8 case properly and had erred in finding he had jurisdiction to determine the ETS case.
14. Mr Rai submitted that it was a question of fact in every case as was made clear in MA at paragraphs 45 to 46. The judge had been aware that the case involved the allegation

that the appellant had used a proxy test taker. At paragraph 15 of the decision the judge had taken into account relevant matters. He had referred to the appellant's evidence in paragraph 21 of his decision. He had taken into account the question of the use of an interpreter.

15. Counsel accepted there were issues about the question of precariousness at paragraph 34. In relation to Section 117B the issue of precariousness was not relevant to family life as opposed to private life.
16. At the conclusion of the submissions I reserved my decision. I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.
17. It is plain that the judge had no jurisdiction to allow the appeal under the Immigration Rules. It is also acknowledged that the judge appears to have misdirected himself in relation to the issue of precariousness. The appellant's stay was precarious throughout whether the appellant was aware of it or not. It is unclear how the judge could identify "grave consequences" from the thin material relied upon in paragraph 24. There is nothing exceptional about the factors identified. The child is only engaged in nursery one day a week. There is no question of the appellant's daughter losing her UK citizenship as claimed in paragraph 29 of the decision if the family choose to live together outside the UK. As Miss Isherwood pointed out the couple are related and have family in Pakistan. They would be familiar with life there.
18. It is not apparent what the "hard evidence" to which the judge makes reference in paragraph 22 led him to conclude as he did. The fact that the appellant had sufficient command of English is not sufficient as explained in the case of **MA**. It can hardly be described as "hard evidence" particularly given that the appellant elected to give his evidence through an interpreter. As is agreed the judge had no jurisdiction to allow the appeal under the Rules.
19. I find that the Secretary of State has made out her grounds and the determination is materially flawed in law. The appeal must be reheard afresh on all issues. Having regard to the extent of fact-finding required it is appropriate in this particular case in the light of the Presidential Direction to direct a fresh hearing before the First-tier Tribunal before a different First-tier Judge. The appeal is accordingly remitted to be re-determined afresh.

Notice of Decision

Appeal allowed to the extent indicated.

The First-tier Judge made no anonymity direction and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made a fee award in this case. It is inappropriate to make a fee award at this juncture. Whether an award is paid or not will have to await the outcome of this matter.

Signed

Date: 18 July 2018

G Warr, Judge of the Upper Tribunal