Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/25700/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunals	**Decision & Reasons Promulgated**
On 11th September 2018	**On 05th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MUHAMMAD [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Brooks (Counsel)
For the Respondent: Ms H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M A Hall, promulgated on 15th November 2017, following a hearing at Birmingham on 7th November 2017. In the determination, the judge allowed the appeal of the Appellant whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 1st December 1986. He appealed against a decision of the Respondent dated 5th November 2016, refusing his application for indefinite leave to remain in the UK as the spouse of a British citizen.

The Appellant's Claim

3. The Appellant's claim is that he has undergone an Islamic marriage on 14th July 2012, and a civil marriage on 7th November 2012, with a British citizen, who originally is from Pakistan, but has been a naturalised British citizen since 12th December 2013. The couple have a son born on 18th June 2015 who is also a British citizen. The reason why the Respondent had rejected the Appellant's application was on the basis that he had exercised deception to obtain an ETS English language certificate. The Appellant had sat two such tests at Colwell College in Leicester. The first was on 21st August 2012 and the second on 18th September 2012.

The Judge's Findings

4. Judge Hall concluded that, having heard the recording in the Tribunal itself of the test, for the September 2012 occasion, it was accepted by all that this recording did not refer to the Appellant. This being so, the Appellant was unable to provide "an innocent explanation" as to why his test scores in relation to September 2012 were invalidated because of the use of a proxy test-taker (paragraph 42). However, the judge also found that the Appellant had not submitted the September 2012 test result with any application for leave to remain (paragraph 44). Therefore, whatever the position in relation to the September 2012 test, it was not a material issue in relation to the Appellant's application. However, the August test result was the one which was submitted in the Appellant's October 2012 application for leave to remain as an unmarried partner (paragraph 44). Yet, the judge was firm in his conclusion that, "it has not been proved that the August 2012 certificate was obtained by deception" (paragraph 46). Accordingly, the Respondent Secretary of State could not have discharged the burden of proof in relation to paragraph 322(2) because it had not been proved that the Appellant had made any false representation in the application or failed to disclose any material fact for the purpose of obtaining leave to remain.

5. Even so, the judge did go on to say, as far as the September 2012 test was concerned, that, "I found that the Appellant took part in a planned deception in relation to the ETS test in September 2012. The Appellant allowed a proxy to take the test on his behalf which is an extremely serious matter". This was despite the fact that "the Appellant did not subsequently use the ETS test certificate obtained by deception" (paragraph 57).

6. The judge held that the Appellant could not satisfy the Immigration Rules in relation to his private and family life (paragraph 53) because he could not satisfy paragraph 276ADE. However, the Appellant would succeed under free-standing Article 8 jurisprudence. This was because "it is not the case that the Appellant entered the UK

unlawfully. He entered with leave as a student and subsequently was granted limited leave to remain as the spouse of a British citizen" (paragraph 56). In addition, the Appellant had a son who was a "qualifying child because he is a British citizen" and the judge was satisfied that "the Appellant has a genuine and subsisting parental relationship with his son" (paragraph 59). The judge went on to conclude that there were "no adverse factors in the sponsor's immigration history" (paragraph 63).

7. The appeal was allowed.

Grounds of Application

8. In the grounds of application, the Appellant appealed on the basis that the judge was wrong to have concluded that the Appellant had used deception with respect to the September 2012 test (although this was not material to the application he had made). This appeal by the Appellant was dismissed by the Tribunal on 21st December 2017. However, at the same time, the Respondent Secretary of State also appealed the decision of Judge Hall on the basis that it had been allowed, when it ought not to have been. The basis of the challenge was that the judge had failed to adequately consider that the Appellant had a poor immigration history given his finding that deception had been used to obtain an English language certificate irrespective of whether it was submitted in support of the application under appeal. Obtaining leave to remain by deception is a criminal offence and is evidence of criminality, even if there is no conviction as yet.

9. On 4th July 2018, permission to appeal was granted to the Respondent Secretary of State to challenge the decision of Judge M A Hall.

10. On 8th August 2012, the Appellant's Counsel, Mr M Brooks, furnished extensive and detailed grounds by way of a Rule 24 response, objecting to the grant of permission.

Submissions

11. At the hearing before me on 11th September 2018, Ms Aboni, appearing on behalf of the Respondent Secretary of State, relied upon the grounds of application. She submitted that the judge found that the Appellant had used deception in September 2012. When the Appellant had appealed against that finding, IJ Holmes had, on 21st December 2017, rejected that application, and found that Judge M A Hall had properly concluded that the Appellant had used a proxy in the language test on his behalf in September 2012. If that was the case, then the decision of IJ Hall, in allowing the appeal, could not be sustained. This was particularly given that he had come to the conclusion that, "I found that the Appellant took part in a planned deception" (paragraph 47). If the Appellant had exercised deception, even in September 2012 with respect to a test which was not material to the application, this was the commission of a criminal offence. There were no powerful reasons to render it reasonable for family life to continue from abroad.

12. For his part, Mr Brooks submitted that the Appellant had entered legally as a student. He had subsequently married. He had even been granted an extension of

stay on the basis of his marriage to a British citizen. Against this background, it was incongruous now to not give the Appellant a further extension of leave to remain on the basis of a more permanent grant, which was the natural next step for him. Second, although much has been made of the September 2012 test, any "deception" inherent in that was not material to the Appellant's immigration application. This was important because if one looks at paragraph 322 of the Immigration Rules, it makes it clear that the deception has to be used. It was not in this case. Third, there was a British citizen child. The child was entitled to remain in the UK with access to his Appellant father. Mr Brooks relied upon his skeleton argument to make the point that the Respondent had not even identified any error of law, still less a material error of law. It was not clear at all how it was said that the judge had misdirected himself. He referred to the generalised and non-specific nature of the grounds, which he said only served to show that the Respondent was simply disagreeing with the decision, but was unable to point to any specific error on the part of the judge within the decision.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

14. First, the Respondent states that the judge ought to have given more weight to the deception. This was quite a different matter from saying that the judge gave absolutely no weight to the deception. Given that this was so, what weight the judge gives to a "deception" is a matter for the judge, to be exercised judicially. There is nothing to suggest that Judge Hall did not do exactly that. If anything, the determination shows a meticulous and highly thoughtful approach to the evidence before the Tribunal. In the circumstances, this was nothing more than a disagreement with the judge's findings. The point is not bettered by saying that deception is a criminal offence, because the burden and standard of proof is significantly higher in criminal matters and it cannot be said, on the basis of simply what appears in the determination here, that the deception exercised here equates to a criminal conviction. In point of fact, the judge correctly identifies the weight to be given to cases of criminality and very poor immigration history (see paragraph 52).

15. Second, the judge considers the proportionality of family life being made to continue from abroad under Section 117B(6). The judge found that the Appellant had a genuine and subsisting relationship with his British citizen child. He had a genuine and legally valid marriage. He had in fact been granted an extension of stay precisely on the basis of his marriage. The Section 117B factors, when weighed in the balance, did not, according to the judge, demonstrate that the balance of considerations fell in favour of the Secretary of State against the Appellant. It is not at all clear how the judge is said to have misdirected himself in law with respect to the proportionality exercise.

16. Finally, insofar as it has been said that the Appellant could apply from overseas to join his British citizen child and his wife, it is not for the judge to speculate as to the outcome of any such application, and as to whether this would be temporary or more long-term. Moreover, the availability of an entry clearance application has little or no bearing on the reasonableness of the removal of a child under Section 117B(6). Ultimately, this was a question of proportionality, and the judge decided, in a comprehensive and detailed determination, that the balance of considerations fell in favour of the Appellant. There is no error of law.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

The Secretary of State's appeal is dismissed.

Signed	Date
Deputy Upper Tribunal Judge Juss	28th September 2018