



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33331/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18th June 2018

Decision & Reasons Promulgated
On 06th July 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

BALWINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

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

For the Respondent: Mr Z Malik of Counsel, instructed by Lawise Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Ross promulgated on 2 March 2018, in which Mr Singh's appeal against the decision to refuse his application for leave to remain in the United Kingdom on human rights grounds dated 12 October 2015 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Singh as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of India, born on 15 July 1990, who first arrived in the United Kingdom on 9 January 2010 with leave as a Tier 4 (General) student until 10 February 2012. The Appellant made a further application for leave to remain in the same category which was refused on 17 July 2012. He subsequently made an application for leave to remain on human rights grounds which was refused on 12 October 2015 and that refusal is the subject of this appeal.
3. The Respondent refused the application on the basis that the Appellant failed to meet the suitability requirements in paragraph S-LTR.1.6 of Appendix FM of the Immigration Rules, as his presence in the United Kingdom was not considered to be conducive to the public good due to his conduct, character, associations or other reasons making it undesirable to allow him to remain. This is because the Appellant, in his application dated 24 March 2012, submitted a false TOIEC certificate from ETS, fraudulently obtained by the use of a proxy test taker and the Appellant's test results had been cancelled.
4. Further, the Respondent did not accept that for the purposes of Appendix FM of the Immigration Rules, that the Appellant was in a genuine and subsisting relationship with his partner, the marriage certificate was not recognised and there was no evidence of cohabitation for two years prior to the date of application. As to whether the Appellant qualified under the parent route in Appendix FM, although it was accepted that he had a genuine and subsisting parental relationship, he did not have sole parental responsibility for them and did not meet the exceptions criteria in paragraph EX.1.
5. In relation to private life, the Appellant did not meet the requirements for leave to remain in paragraph 276ADE of the Immigration Rules, in particular, as there would not be very significant obstacles to his reintegration to India. He has spent the majority of his life there and had not lost all social, cultural and family ties.
6. Finally, there were no exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules, by reference to the best interests of the children in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 or otherwise.
7. Judge Parker initially dismissed the Appellant's appeal in a decision promulgated on 23 November 2016, however that decision was set aside by Upper Tribunal Judge Craig and the appeal remitted to the First-tier Tribunal to determine. The findings made by Judge Parker that the Appellant failed to meet the suitability criteria for grant of leave to remain under the Immigration Rules because he had fraudulently obtained a TOIEC English language test certificate by deception.
8. Judge Ross allowed the appeal on human rights grounds in a decision promulgated on 2 March 2018. Having noted the previous finding that the Appellant had exercised deception in obtaining an English language certificate, the appeal was determined on human rights grounds, primarily on the issue of whether it was reasonable to expect the children to leave the United Kingdom or whether in any event the Appellant's

removal from the United Kingdom constituted a disproportionate interference with his right to respect for private and family life contrary to Article 8 of the European Convention on Human Rights.

9. Judge Ross found, as was not in any event disputed, that the marriage between the Appellant and his wife was genuine and subsisting and that he had a genuine and subsisting relationship with his two children, aged four and two who were also British Citizens. It is necessary to set out the relatively brief findings which follow in full:

"13. I am satisfied that the best interests of the four-year-old child, is to remain in the United Kingdom and continue with his schooling without disruption. I also accept the evidence that the appellant is the primary care of his two-year-old child, given that he is with the children every day as his wife is a breadwinner. I find that it is not reasonable to expect British Citizen children to leave the United Kingdom in order for their family life to continue abroad. Such was actually conceded by the Secretary of State in submission on her behalf in the case of Sanade and others (British children – Zambrano – Dereci [2012] UKUT 48. For these reasons, I find that the best interests of the appellant's children are that the status quo is maintained, and they remain being looked after by the appellant and his wife in the United Kingdom.

14. In relation to the appellant's wife, who is the mother of two British Citizen children whose best interest to remain in the UK, I find that she would not be able to relocate to India, nor would it be reasonable to expect her to do so. I accept her evidence that she has no surviving relatives in India. She also has a good job and secure accommodation the UK. Notwithstanding that she would return to India with her husband, she has resided in the UK for most of her life in the settled here.

15. I have also had regard to the section 117B(6) of the Nationality, Asylum and Immigration [Act 2002] which provides that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.

16. It is not disputed that the appellant's children are both qualifying children since they are British Citizens. I have already found that it would not be reasonable to expect them to leave the UK. Whilst there is a public interest in removal of a person who has used deception in an application for leave, having regard to Trebbawon and others (section 117B(6)) [2015] UKUT 00674 (IAC), I find that the section 117B(6) public interest prevails.

17. For all of the above reasons, I find that the refusal of the application for leave on suitability grounds is not necessary, and is disproportionate."

The appeal

10. The Respondent appeals on the basis that the First-tier Tribunal has materially erred in law in its application of Sanade and of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. In particular, the First-tier Tribunal failed to take into account any of the public interest factors when assessing the reasonableness of the children being expected to leave the United Kingdom and has essentially equated the best interests of the children with reasonableness. Further, that the First-tier Tribunal was not entitled to find that the Appellant was the primary carer of his children, which

does not automatically follow from the fact that he provided childcare duties due to his inability to work due to lack of status in the United Kingdom.

11. Permission to appeal was granted by Judge Pickup on 10 May 2018 on all grounds.
12. At the oral hearing, Mr Tarlow behalf of the Respondent relied on the written grounds of appeal and made the point that the children could remain with their mother in the United Kingdom. The Appellant could not rationally be found to be the children's primary carer. Overall, he emphasised that the decision failed to give sufficient weight to the public interest, failed to provide adequate reasons and was not in accordance with MA (Pakistan) v Secretary of State for the Home Department [2017] EWCA Civ 705.
13. Mr Malik, on behalf of the Appellant stressed that although the Appellant did not accept that he had used deception in obtaining his TOIEC English language certificate, he accepted that his appeal had to proceed on the basis of the findings of Judge Parker in this regard.
14. As to the actual grounds of appeal, it was suggested that the Respondent could not show that the finding of fact that the Appellant was the primary care of the children was perverse and in reality, the children have no choice as to where they reside and would have to live with the Appellant to maintain family life.
15. Mr Malik carefully took me through the decision of Judge Ross, highlighting the express references to recognition of the Appellant's refusal on suitability grounds for reasons of deception and the Respondent's submissions as to the public interest in immigration control in these circumstances. It was submitted that reading the decision of the First-tier Tribunal as a whole, the public interest in removal had been adequately taken into account and sufficient reasons were given without repeating earlier references to this in the findings.

Findings and reasons

16. I find that the First-tier Tribunal has materially erred in law in its decision in the assessment of whether it is reasonable to expect the Appellant's two children in this case to leave the United Kingdom, in accordance with section 117B(6) of the Nationality, Immigration and Asylum Act 2002.
17. As the Court of Appeal confirmed in MA (Pakistan), when considering the question of reasonableness under section 117B(6), regard should be had not only to the best interests of the children but also to the conduct of an appellant and other matters relevant to the public interest. Lord Justice Elias further confirmed in AM (Pakistan) & Ors v Secretary of State for the Home Department [2017] EWCA Civ 180 that section 117B(6) was a self-contained provision where the wider public interest consideration can only come into play via the concept of reasonableness within the section itself.
18. The First-tier Tribunal's decision in the present appeal makes no reference at all to the Court of Appeal's decision in MA (Pakistan) nor did it apply that approach of

considering all of the factors, including the public interest factors when making an assessment of reasonableness. Instead, it can be seen from the decision that there is an assessment of the best interests of the children, followed by the conclusion that it would be unreasonable to expect the children to leave the United Kingdom because they are British Citizens. It was noted that there was no dispute that the children were qualifying children and given the finding that it would be unreasonable for them to leave the United Kingdom, that was found to prevail over the public interest in the removal of a person who had used deception in an application for leave to remain. The conclusion on reasonableness is reached without any assessment or balancing of the public interest which was required.

19. The First-tier Tribunal has essentially equated the best interests of the children, together with their nationality, as determinative of the question of reasonableness for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. That is a clear error of law and reading the decision as a whole, including the references to deception and the public interest, can not alter the clear findings which fail to take to consider the public interest at all within the assessment under section 117B(6).
20. For these reasons there are material errors of law contained in the First-tier Tribunal's decision such that it is necessary to set it aside and remake the decision on the appeal. Save for one finding as to whether the Appellant is the primary carer of one or both of his children, there is no challenge to the findings of fact in relation to family life or the best interests of the children which can and should be preserved.
21. The Respondent has challenged the finding of fact that that Appellant is the primary carer of one or both of his children on the basis essentially that the evidence before the First-tier Tribunal did not establish that. The finding made is not adequately reasoned, with a short statement in paragraph 13 of the decision that the evidence is accepted that the Appellant is the primary carer of his 2-year old child given that he is with the children every day as his wife is the breadwinner. There is considerable force in the Respondent's submission that the mere fact that a parent, who has no permission to work, looks after the children while the other parent works does not equate to being a primary carer. That analysis would elevate many who provide childcare to being a primary carer when that is clearly not what is meant by the phrase.
22. The question of whether someone is a primary carer is much wider than the day to day practical arrangements of childcare and involves consideration of who a child lives with and who has parental responsibility for them, making decisions as to their care and so on. In the present appeal, there is nothing in the evidence before the First-tier Tribunal to suggest that the Appellant is the primary carer for one or both of his children, as opposed to what would normally be expected where children live with both parents, that both are jointly responsible.
23. I therefore find further that the First-tier Tribunal erred in finding and categorising the Appellant as a primary carer in the absence of evidence supporting such a finding and in any event, failed to give adequate reasons for the finding. However, this error is not material in light of the error of law in the application of section 117B(6) of the

Nationality, Immigration and Asylum Act 2002 which mean that the decision must be set aside for the reasons already given. Further, in light of the best interests assessment and accepted day-to-day care arrangements of the Appellant's children, the finding is unlikely to be material to the assessment.

24. At the oral hearing, the parties were in agreement that if an error of law was found, the decision on the appeal could be re-made on the papers on the basis of the facts already found. Save for the primary carer finding which I do not preserve, I go on to remake the decision on the facts as found. These are that the Appellant is in a genuine and subsisting relationship with his wife and children, aged 4 and 2, all of whom are British Citizens and he looks after the children while his wife works. It is in the best interests of the children to remain in the United Kingdom being looked after by both parents. The Appellant's wife has resided in the United Kingdom for most of her life and is settled here, with employment and secure accommodation and no surviving family in India where she spent the early part of her life.
25. There is no dispute in this appeal that Article 8 of the European Convention on Human Rights is engaged, nor that the Appellant's removal would interfere with his right to respect for private and family life. The decision is in accordance with the law and in pursuit of the legitimate aim of protecting the economic well-being of the United Kingdom through immigration control. The issue is whether the Appellant can benefit from section 117B(6) of the Nationality, Immigration and Asylum Act 2002 or whether in any event his removal is a disproportionate interference with his right to respect for private and family life.
26. As set out above and confirmed in MA (Pakistan), for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, it is necessary to balance the best interests of the children with the public interest in removal to determine whether it is, in all of the circumstances, reasonable to expect them to leave the United Kingdom.
27. In paragraph 47 of MA, Lord Justice Elias held that "*Even where the child's best interests are to stay, it may still not be unreasonable to require a child to leave. That will depend upon careful analysis of the nature and extent of links in the UK and in the country where it is proposed he should return.*". He went on to refer to the decision of Lord Justice Christopher Clark in EV (Phillipines) v Secretary of State for the Home Department [2014] EWCA Civ 874 as to how a tribunal should apply the proportionality test where wider public interest considerations are in play in circumstances where the best interests of the child are that he should remain in the United Kingdom, finding that the same principles would apply on the wider construction of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. That decision refers to factors to consider to determine the best interests of a child and then how emphatic an answer falls to be given to the question of whether it is in the best interests of the child to remain, as to how much weight should be given to that compared to the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country, including whether the applicants have no entitlement to remain and if they have a poor immigration history.

28. In paragraph 36 of *EV (Phillipines)*, Lord Justice Clark held, *“The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child’s best interest that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child’s best interest to remain, but only on balance (with some factors pointing the other way), the result may well be the opposite.”*
29. Although the First-tier Tribunal found that it was in the children’s best interests to remain in the United Kingdom with both parents, the only reason given for that in paragraph 13 of the decision was to continue with his schooling without disruption. However, the eldest child is only four years old, not at a critical point in his education and not even well-established in primary education, I find disruption to his education would be minimal as there is nothing to suggest that he would not be able to access and continue his education in India. Similarly, the youngest child has not yet started school but there is nothing to suggest they would not also be able to receive an education in India.
30. The First-tier Tribunal has not made any more detailed findings or considered any further factors as to the children’s likely position on return to India other than to note that they have never been there. There are no identified health or other concerns in relation to the children and nothing to suggest any specific deleterious consequences of their relocation to India other than that they would not, on a day to day basis, be able to take full advantage of their British Citizenship. This is a case where it is not overwhelmingly in the child’s best interests to remain specifically in the United Kingdom.
31. In the present case, the public interest in the Appellant’s removal is significant. First, there is a finding from Judge Parker (which has not been successfully challenged by the Appellant) that he used deception to obtain an English language certificate by using a proxy test taker and relied on that document in his application for further leave to remain as a student made on 24 March 2012. The Respondent clearly identifies the seriousness of this and the public interest in the reasons for refusal letter stated as follows:
- “In fraudulently obtaining a TOIEC certificate in the manner outlined above, you willingly participated in what was clearly an organized and serious attempt, given the complicity of the test centre itself, to defraud the SSHD and others. In doing so, you displayed a flagrant disregard for the public interest, according to which migrants are required to have a certain level of English language ability in order to facilitate social integration and cohesion, as well as to reduce the likelihood of them being a burden on the taxpayer.”*
32. Secondly, the Appellant has overstayed in the United Kingdom since his leave expired on 10 February 2012. His relationship with his wife began in 2011 when he had only a short period of limited leave to remain in the United Kingdom and continued, with them starting to live together in November 2012 and married in a religious ceremony in April 2013; both of which occurred when he was in the United Kingdom unlawfully.

33. Balancing the very strong public interest in the Appellant's removal in this case against his established family life in the United Kingdom and the best interests of his children, I find that it would not be unreasonable to expect the children to leave the United Kingdom such that the Appellant can not benefit from section 117B(6) of the Nationality, Immigration and Asylum Act 2002. In so finding, I have taken into account the best interests of the children as found by Judge Ross to remain in the United Kingdom with both parents, but have also taken into account that the children are very young and although the oldest has started full-time education, he is not at an advanced or critical stage of his education. There is nothing to suggest that either child has any medical conditions or special needs and nothing to suggest that they would not be adequately cared and provided for by the Appellant/their parents on return to India. The children are at an age where it would be reasonable to expect that they would be able to adapt to life in India with the support of their parents.
34. No submission was made on behalf of the Appellant that he could succeed on Article 8 grounds more widely if he did not satisfy section 117B(6) of the Nationality, Immigration and Asylum Act 2002. In any event, I do not find that his removal would be a disproportionate interference. Essentially the same balancing factors apply in this case when undertaking the balancing exercise, with the significant public interest in removal already identified above balanced against the family and private life established at a time his immigration status was precarious, if not unlawful.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remake the decision on appeal.

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed



Date

5th July 2018

Upper Tribunal Judge Jackson