Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01991/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 1st August 2019	**On 20th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MASUM [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N. Ahmed (Counsel)
For the Respondent: Ms H. Aboni (Senior HOPO)

DETERMINATION AND REASONS

This is an appeal against the determination of First-tier Tribunal Judge O'Hagan, promulgated on 14th August 2018, following a hearing at Birmingham on 20th June 2018 and on 16th July 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

The Appellant is a male, a citizen of Bangladesh, and was born in on 31st January 1986. He appealed against the decision of the Respondent dated 20th December 2017 refusing his application to remain in the UK on the basis of his private and family life rights. The basis of the Appellant's refusal is that he took two TOEIC tests for his English language certification, in both of which he cheated, such that he cannot succeed in terms of the rights that he claims, on the basis of "suitability" considerations. His removal is conducive to the public good.

The Appellant's Claim

The essence of the Appellant's claim is that he is married to a Mrs Bibi, a British national, born on 5th November 1974, and has three stepchildren, two of whom are now adults, and the youngest one is now nearly 16 years of age. The Appellant maintains that if he had returned to Bangladesh there would be very significant obstacles to his integration into that society.

The Judge's Findings

The judge considered that the Respondent, in relation to the fraudulent conduct of the Appellant in taking his TOEIC tests, had furnished generic statements and an Excel spreadsheet. This discharged the initial burden for a refusal on the basis that the Appellant had displayed a flagrant disregard for the public interest. The judge then considered the Appellant's "innocent explanation" as required under the law.

He observed that the Appellant relied on "his own memory of the events. He was able to identify what exams he took, on what dates, where he took them, how he travelled, and how much he paid" (paragraph 34).

On that basis, the judge concluded that, "I find that the Appellant has provided an innocent explanation that meets the minimum level of plausibility". The judge then went on to make it clear that the burden would shift then on the Respondent before that innocent explanation could be rejected. Here, the judge concluded that the Appellant's test results were found by the ETS to be invalid not once but twice.

Even if he might have wrongly been found to have cheated once, "it would require more than the usual run of misfortune for that to have been found to be the case on two separate occasions, and at two separate venues, were it not true" (see paragraph 36(iii)).

The Appellant had also not contacted ETS to question them about his failed test (paragraph 37). The judge concluded that the Appellant could not succeed on the basis of "suitability".

Second, the remaining question was whether the Appellant could succeed on the basis of paragraph EX.1. The judge explained that, "the Appellant cannot succeed under that because it is not a freestanding provision, but an integral part of Appendix FM". In the same way, "the Appellant cannot satisfy the

provisions of paragraph 276ADE(1)(vi). As the judge explained, he falls for refusal under both for the same reasons" (paragraph 43).

Finally, the judge turned to the "issue of proportionality". Here the judge considered the latest Article 8 cases. Consideration was also given to "the best interests of the children" (paragraph 45). The judge held that the Appellant "does not share parental responsibility for the children" because it is the mother who did so and "it is not said that she would have to leave" (paragraph 47).

In the end, the judge concluded that,

> "there is an additional factor here of the application having fallen for refusal on grounds of suitability, and the actions of the Appellant that gave rise to that. The Appellant's actions in cheating in his English language tests on two separate occasions for personal advantage are very serious. I have set out the reasons why I take that view in my discussion of paragraph S-LTR.1.6. I do not need to repeat that material here. Suffice it to say that such conduct gives rise to a strong public interest to his removal …" (paragraph 50).

Thereafter, consideration was given to whether the Appellant could re-integrate into life in Bangladesh, and for the reasons given by the judge (from paragraphs 52 to 58) it was concluded that the Appellant could not succeed here either.

Grounds of Application

The grounds of application state that the judge applied the incorrect burden of proof in relation to the allegations of deception; that he failed to consider properly the claims that the Appellant's presence was not conducive to the public good; and that he failed to apply Section 117B(6) of the 2002 Act.

On 17th September 2018, permission to appeal was granted on the basis that it was arguable that the judge erred in concluding that Section 117B(6) of the 2002 Act did not apply, having found, that the Appellant had a genuine and subsisting parental relationship with qualifying children (paragraph 45).

The other Grounds of Appeal amounted to little more than a disagreement. Despite this, permission was granted to argue the other grounds as well.

On 11th October 2018 a Rule 24 response was entered by the Secretary of State. This was to the effect that it was open to the judge below to find that Section 117B(6) does not apply on the basis that the children are not expected to leave the UK and their best interests are to remain in the UK with their mother, who was their primary caregiver.

The judge considered that a family split was justified in this case, given the fact that the Appellant used deception to remain in this country. Therefore, the public interest factors outweighed his individual interests.

There were no unjustifiably harsh consequences to the result.

Submissions

At the hearing before me, Mr Ahmed, appearing on behalf of the Appellant, engaged in extensive and protracted submissions, which were not confined to the grant of permission. In short, he made the following arguments. First, that if one looked at the refusal letter (at page 3 of 7) it is stated that, in the Appellant fraudulently obtaining a TOEIC certificate,

> "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".

Mr Ahmed submitted that on this basis, it could not be said, as the refusal went on to declare, that "your presence in the UK is not conducive to the public good". Indeed, the judge went on to then state, in relation to the Appellant's claim for family life, that "under paragraph R-LTRP.1.1.(d)(ii), you meet the eligibility requirements of Section E-LTRP of Appendix FM" (see page 3 of 7 of the refusal letter).

Second, he submitted that the judge had actually not demonstrated that had rejected the Appellant's evidence that he would rely upon his own memory of the events, so that he was able "to identify what exams he took, on what dates, where he took them, how he travelled, and how much he paid" (paragraph 34). Given that the judge had referred to this on the basis that, "I find that the Appellant has provided an innocent explanation that meets the minimum level of plausibility" (paragraph 35), it was then incumbent upon the judge to demonstrate how the Respondent Secretary of State had discharged the legal burden of proof that was upon him. He had not demonstrated this. Accordingly, the decision simply could not stand.

Third, Mr Ahmed submitted that he would rely upon his latest skeleton argument, which drew attention to the case of **Ruhumuliza (Article 1F and "undesirable") [2016] UKUT 00284**, which states that the test under paragraph 322(5) goes beyond looking at the past (see paragraph 3(b)(xi) of Mr Ahmed's skeleton argument). He submitted that apart from the alleged deception of the Appellant for obtaining two TOEIC results back in 2012, there was no further evidence adduced by the Secretary of State to demonstrate that, "at the time" of the decision by the judge below he was a person whose character, conduct and associations made it undesirable for him to be granted leave to remain.

Finally, Mr Ahmed had a fourth point, and this was that if one looked at the refusal letter (at page 3 of 7) it is recognised that the Appellant had satisfied the EX.1 requirement, because it was stated "it is accepted that you have a qualifying relationship contained within EX.1 and therefore meet the requirements of R-LTRP.1.1(d)(iii)".

For her part, Ms Aboni submitted that it was not the case at all that the judge did not firmly conclude that the legal burden upon the Respondent Secretary of State had not been discharged, after finding that the Appellant had been able

to provide an innocent explanation for his conduct. This is because if one looks at paragraph 36(iii), the judge goes on to make it clear that the Appellant's test results were found by the ETS to be invalid not once but twice and could not be explained in terms of "the usual run of misfortune". That was an acceptance that the Respondent Secretary of State had discharged the legal burden that was upon him.

Second, it must not be overlooked that the Appellant failed at the first hurdle of "suitability". Therefore, he could not succeed under the Immigration Rules.

Third, that left the question of whether the Appellant could succeed under freestanding Article 8 jurisprudence. Here, Ms Aboni submitted she could do no better than draw attention to the Rule 24 response, which makes it quite clear that, because the older two children were adults, and the Appellant was not the primary caregiver for the remaining child, the splitting of the family in this manner was justified.

The Appellant was a stepfather. It is true that he lived with his wife and her children. This was a case where

> "there is no question of the Respondent seeking the removal of the children with the Appellant. ... Although a stepfather, he does not automatically have parental responsibility. There is no suggestion that he had acquired through, for example, the making of a parental responsibility order, or a child arrangements order" (paragraph 45).

In his reply, Mr Ahmed submitted that there was a discrepancy in the judge's finding of the role played by the Appellant in relation to his family. Whereas it was true that the judge had stated (at paragraph 47) that "the Appellant does not share parental responsibility for the children", this sits ill at ease with the judge's earlier finding that, "the Appellant is the children's stepfather, and has lived in the same household as them for six years. In those circumstances, I accept that he does enjoy a parental relationship with them".

Second, he drew my attention to the case of **JG (Section 117B(6): "reasonable to leave") Turkey [2019] UKUT 00072**. This makes it clear that Section 117B(6) "requires a court or Tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so". In the instant case, of course, it would not be reasonable to expect either two of the older children, aged now 20 and 17, or the youngest child, who was nearly 16, to leave the UK.

Furthermore, submitted Mr Ahmed, such a conclusion can be reached even if, as the case of **JG** demonstrates, the Appellant "is both dishonest and unscrupulous, each to a high degree" and has "flagrantly defied the law of the United Kingdom by overstaying her leave for a large number of years ..." (see paragraph 80 of **JG**).

Finally, Mr Ahmed submitted that the decision was irrational because the Secretary of State had in any event accepted that there would be "insurmountable obstacles" by virtue of the fact that the decision letter (at

page 3 of 7) had firmly stated that "it is accepted that you have a qualifying relationship contained within EX.1 and therefore meet the requirements of R-LTRP.1.1(d)(iii)".

He asked me to allow the appeal.

Error of Law

I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law. My reasons are as follows.

First, however, I should make it clear that it is not the case, as Mr Ahmed submitted, that the judge, after finding that the Appellant had provided an innocent explanation that met the minimum level of plausibility (see paragraph 35), did not then go on to consider whether the Secretary of State had discharged the legal burden of proof upon him. Plainly, he did do so, because the judge states in the next paragraph (at paragraph 36), that the evidence presented by the ETS were for examinations for two dates, and this was troubling, because the test results were found by the ETS to be invalid not once but twice, and this could not be explained on the basis of a "usual run of misfortune" (see paragraph 36(iii)).

Second, indeed, I should equally make it clear, that the judge did correctly begin by saying that the starting point to consider is paragraph S-LTR.1.6. Proper consideration was given to the issue of "suitability". The judge set out (at paragraph 42) why the dishonesty here was not an isolated lapse, but a concerted pattern of misconduct. He concluded that the Appellant's case fell for refusal under paragraph S-LTR.1.6 (paragraph 42).

Third, there is a question of EX.1. Mr Ahmed had submitted that the refusal letter accepts that there is a qualifying relationship within EX.1 and that it accepts that it meets the requirements of R-LTRP.1.1(d)(iii). However, as the judge explains, paragraph EX.1 is not a freestanding provision but an integral part of Appendix FM. It is parasitic on the Rules in Appendix FM that otherwise grant leave to remain. The same applies to paragraph 276ADE(1)(vi). The judge concluded that this Appellant "falls for refusal under both for the same reasons" (paragraph 43).

On the other hand, there is reason to believe that the Judge did not correctly consider the issue of proportionality (at paragraph 44). This is because there is some inconsistency in the conclusion of the judge in relation to the role that he plays as a stepfather in the household. It is said at first (at paragraph 45) that "I accept that he does enjoy a parental relationship with them" because he has lived in the same household as them for six years (paragraph 45). It is later said, however, that "the Appellant does not share parental responsibility for the children" (paragraph 47). The inconsistency here is apparent. It is arguable that in the first case, the judge is saying that the Appellant enjoys a parental relationship but in the second case, the judge is making it clear that he does not share this responsibility in terms of the primary care that he gives, because this is a matter that is left for Mrs Bibi, his wife, to do. The Appellant's wife did say that if she has to work she would be unavailable to care for them.

Although, the judge did reject that argument on the grounds that these were not young children, and that they did not suffer from any physical or mental disabilities (paragraph 47), paragraph 6 of his determination raises a question mark about their true age as it does appear that of the youngest children were under the age of 18 at date of hearing at the time. When this is considered in conjunction with the Judge's finding that there was a "parental relationship" that the Appellant enjoyed with the children (at paragraph 45) it raises a question as to whether the decision on proportionality was right. I have come to the conclusion that it does not.

Ultimately, in this case what was given controlling weight by the Judge was the public interest considerations whereby the Appellant had cheated in his English language tests on two separate occasions "for personal advantage" and this the judge regarded as being very serious. As he said, "Suffice it to say that such conduct gives rise to strong public interest in his removal. It is not determinative, but it would take particularly compelling countervailing factors to outweigh the impact of such behaviour". Had the two facts above, namely, that the two children were minors and that he had a parental relationship with them, been determined with greater clarity the balance of considerations may have fallen the other way.

I am aware that the judge then went on to say in the same breath that "I will explore whether there are such factors below" (paragraph 50). The judge then went on to consider the test in paragraph 276ADE(1)(vi). He expressly considered the question of "very significant obstacles". He analysed the case on integration by reference to **Kamara [2016] EWCA Civ 813** and concluded that the evidence did not show that there would be very significant obstacles to the Appellant's integration in Bangladesh. He had arrived in this country when he was 23. He was only 32 now. He would retain the usual ties "that most people do form during the years of his life in Bangladesh" (paragraph 53). I am aware that the judge did consider the weight to be given to Section 117B by reference to the case of **AM (Section 117B) Malawi [2015] UKUT 0260**, and concluded that, "whether his wife knew or not, he was aware that he had cheated in relation to the English language tests. It follows that he must have had some inkling of the potential consequences should the truth come out" (paragraph 53). In the light of the reasons I have given above the judge was not entitled to conclude as he did, and not least given that in the application of section 117B(6) NIAA 2002 the decision of the Upper Tribunal in **JG (s 117B(6): "reasonable to leave" UK) Turkey [2019]** UKUT 00072 (IAC) is now one that must be considered.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. This decision is set aside (see S. 12(1) of TCEA 2007). I remake the decision as follows. This appeal is remitted back to the First-Tier Tribunal to be made by a judge other than O'Hagan pursuant to Practice Statement 7.2(B) of the Practice Directions.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 17th August 2019