



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10383/2018

THE IMMIGRATION ACTS

Heard at Field House
On 14 January 2019

Decision & Reasons Promulgated
On 14 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAHID [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr S Tariq of Messrs West London Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of Judge of the First-tier Tribunal E M M Smith who in a determination promulgated on 2 October 2018 dismissed the appellant's claim on asylum grounds but allowed his appeal on human rights grounds.
2. Although the Secretary of State is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the First-tier Tribunal.

Similarly I will refer to Mr Shahid [M] as the appellant as he was the appellant in the First-tier.

3. The appellant arrived in Britain as a student on 26 May 2011 and received a further extension of stay in that capacity in September 2013, that extension being valid until 24 February 2015.
4. In June 2014 the Home Office was informed that his TOEIC certificate from Educational Testing Service submitted with his leave to remain application had been fraudulently obtained by the use of a proxy taker.
5. In August 2014 form IS151A was issued and sent to an address in Nottingham from which it was returned as undelivered. It was subsequently reissued on 2 September 2014. The appellant failed to report on 21 August 2015 (that is before the reissuing of the form IS151A), and subsequently form ISE343 was issued. He did not attend an asylum intake unit appointment on 7 September 2017 and was served with form IS151A on 18 September that year. However, it is recorded in the papers that the applicant's claim for asylum was not made until 26 January 2018.
6. It is unclear from the papers before me the exact chronology although I have used the dates set out in the letter of refusal.
7. The application for asylum was refused on 26 July 2018. In the letter of refusal not only was the appellant's asylum claim refused but it was also stated that he had engaged in deception, in that he had fraudulently obtained his TOEIC certificate and furthermore it was not accepted that his rights under Article 8 of the ECHR would be infringed by his removal. In reaching that decision the Secretary of State considered the appellant's marriage to Miss Kanisha Alam Khan, a British citizen and stated that he had not produced evidence to show that the relationship with his wife was genuine and subsisting. It was also considered that his wife, who was a British subject by birth, could choose to relocate to Pakistan with him.
8. The grounds of appeal argued, *inter alia*, that the decision of the Secretary of State regarding the appellant's right under Article 8 of the ECHR was in error.
9. The judge first considered the issue of the appellant's TOEIC certificate and then considered the asylum claim and finally the claim that the appellant could not be expected to return to Pakistan because of his marriage.
10. When considering the issue of the TOEIC certificate the judge set out the appellant's evidence and referred to the generic evidence produced by the Secretary of State. The judge found that the respondent had discharged the initial burden of proof and therefore went on to consider the appellant's account of taking the test.
11. The judge noted that the appellant placed weight on the fact that he had a rail ticket for the appropriate day and the judge considered that some weight should be placed

thereon but that that was not determinative. The judge clearly had in mind the report from Professor French on which the respondent has relied in other cases but pointed out that that was not before him.

12. He referred to relevant case law stating that where the respondent had provided sufficient evidence to raise the issue of fraud, the burden then moved to the appellant with the burden of raising an innocent explanation which satisfied the minimum level of plausibility and therefore it was for the respondent to show the appellant's account should be rejected.
13. The judge considered that the appellant's evidence was not undermined by the examination by the Presenting Officer and stated that the appellant's evidence was plausible and credible. He gave further reasons for that decision in both paragraphs 30 and 35 of the determination. He did however comment that the appellant could have produced evidence that his college had closed but had not done so and by not doing so damaged his evidence.
14. The judge also noted that when the ISI51A had been served the appellant was not living at the address which he had provided to the respondent and therefore that he was unaware of the fraud allegation.
15. The judge then considered the appellant's claim to asylum and having referred to relevant case law and considered the evidence clearly found that the appellant's claim to have a well-founded fear of persecution was not credible. Finally the judge considered the appellant's rights under the ECHR and in paragraphs 54 onwards considered the appellant's rights under Article 8 outside the Rules.
16. In paragraphs 52 onwards he gave reasons for concluding that Article was engaged and that it would be disproportionate to remove the appellant. These reasons were that he found that the relationship between the appellant and his wife was genuine – in paragraph 54 he said:

“having heard Mrs Khan and the appellant I am satisfied the relationship is both genuine and subsisting”

And that he placed weight on the fact that the appellant's wife was fourteen years older than the appellant, that she had recently miscarried and that there was evidence that she and the appellant were receiving advice about fertility treatment, as well as the fact that the appellant's wife had been born in Britain and lived her entire life here and had not visited Pakistan since 1999 because she suffers from chronic intermittent vertigo. He referred to a medical certificate at page 36 of the bundle in that regard. He noted that the appellant's wife said that she could not fly and said that that evidence had not been undermined. He also noted that the appellant's wife was a carer for her mother and was in receipt of a carer's allowance.

17. The judge noted that little weight should be given to a relationship formed with a qualifying partner which was established by a person at a time when the person is in the United Kingdom unlawfully.

18. Having referred to the judgment of the House of Lords in **EB Kosovo (FC) v SSHD [2008] UKHL 41** the judge noted the dictum that the Tribunal should:-

“Recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot be reasonably expected to follow the removed spouse to the country of removal”.

19. He also quoted that judgment as stating:-

“The critical issue will generally be whether, giving due weight to the strength of the public interest in removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control”.

He also referred to the judgment in **Agyarko [2017] UKSC 11** which said that in general in cases concerned with precarious family life a very strong or compelling claim is required to outweigh the public interest in immigration control.

20. In paragraph 62 the judge stated he accepted the appellant was an overstayer who had claimed asylum on the basis that the court had rejected but that he was in a subsisting relationship with his wife who was a British subject and could not travel to Pakistan. He stated that there was undisputed evidence that the appellant’s wife could not live in Pakistan because she could not fly and travel would create a discord with her family in Britain and she was the carer of her mother which although was not a primary point was a matter he must consider.
21. Having balanced these facts the judge stated that he was satisfied it would be disproportionate to remove the appellant.
22. The Secretary of State appealed, stated that the judge had failed to give full reasons for finding in favour of the appellant on an Article 8 basis. He stated that the conclusion was lacking in reasons as there were no clear finding nor reasons given in relation to the ETS element of the case, and that it was unclear that although the judge had found that the appellant was credible and plausible with regard to the test, his credibility had been damaged by his lack of supporting documentation from the appellant with regard to his loss of fees.
23. It was also argued that the judge had not given proper reasons for his decisions and that he had failed to look at the evidence holistically given that the appellant had failed to make out his claim for asylum which had been found lacking in credibility: that clearly should have been factored in to the issue of the appellant’s credibility with regard to the ETOIC test.
24. Finally it was stated that the judge had erred when considering the issue of the Article 8 rights of the appellant in not taking into account the fact that the appellant had employed deception with regard to the TOEIC certificate and similarly with

regard to the claim to asylum. It was also argued that the judge had erred in finding that the appellant's wife would be unable to travel without any evidence of such and whether or not other members of his wife's family could support their mother. On these bases permission to appeal was granted.

25. At the hearing of the appeal before me Mr Bramble relied on the grounds of appeal. He argued that there was a lack of clarity in the judge's decision regarding the obtaining of the ETOIC certificate and lack of evidence as to why the appellant's wife could not go with him to Pakistan or whether another member of the family could not look after her mother should she do so. It was confirmed that the Secretary of State had considered the marriage despite the fact that no valid application had been made under the provisions of Section FM.
26. In reply Mr Tariq argued that the judge when considering the certificate had identified correct law and applied the burden of proof correctly, firstly on the respondent and then on the appellant. Clearly, he argued, that the judge had properly issued relevant reasons for his decision.
27. He argued moreover that the judge's findings regarding credibility were limited in effect to the consideration of the appellant's asylum claim and that the judge had applied the relevant legal test when assessing the relationship.

Discussion

28. I have considered first the judge's consideration of whether or not the judge was correct to consider whether or not the appellant had discharged the burden of proof upon him to show that the test result had not been obtained fraudulently. The judge clearly considered that issue using the appropriate logical steps: he accepted that on the generic evidence the Secretary of State had discharged the burden of proof upon him and indeed it is clear from the determination that the judge was aware of Professor French's report. However the judge set out in paragraphs 30 and 35 a number of reasons why he reached the conclusion in paragraph 34 that the appellant's evidence was credible and plausible. I find that that finding is not unseated by the comment at the end of paragraph 35 that the lack of supporting evidence damaged the appellant's account as I consider that that comment related to the previous sentence which was about the lack of evidence supporting the appellant's claim of events surrounding the closure of his college and the payment of fees that was lost. I would comment that that remark of the judge indicates that he may well have had in mind the fact that an issue in this case was that of the appellant's overstaying and clearly the judge came down to the conclusion that the appellant had been aware that he had overstayed before dealing with the asylum application.
29. With regard to the appellant's claim to asylum the judge clearly found that it was not credible and gave clear reasons for doing so. Again I see that that claim - that the

issue of the claim to asylum and the finding that it was not credible - is a separate issue from that of the obtaining of the TOEIC certificate.

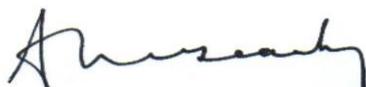
30. Finally the judge considered the issue of the appellant's rights under Article 8 of the ECHR. He clearly found that the appellant was in a subsisting relationship which was genuine and said so in terms. He then gave reasons for finding that there would be unsurmountable obstacles to the appellant's wife accompanying him to Pakistan and in that regard he referred to relevant case law.
31. I do not consider that his conclusions on that issue was based on a lack of evidence. I have referred to the report from the appellant's wife's doctor regarding her vertigo and I note also that the carer's allowance for her mother is in her name. I consider that the judge had just sufficient evidence for reaching a conclusion regarding the issue of unsurmountable obstacles which could not be characterised as perverse. I note that the Secretary of State did not consider the detailed question of whether or not the appellant might meet the requirements of Appendix FM as a spouse and in that regard that there is nothing in the papers to indicate the level of income available to the appellant or his spouse which would be required to meet the requirements of the Rules. Similarly although it is the case that the judge noted that the appellant was an overstayer he does not appear to have placed particular weight thereon.
32. Nevertheless taking all the factors into account I find that the judge did reach a conclusion which was open to him and that he gave sufficient reasons for his decision. I therefore find that there is no error of law in the determination such that the decision should be set aside. The judge's decision allowing the appeal on human rights grounds shall stand.

Notice of Decision

The appeal of the Secretary of State is dismissed.

No anonymity direction is made.

Signed:



Date: 29 January 2019

Deputy Upper Tribunal Judge McGeachy