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Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/44106/2014

THE IMMIGRATION ACTS

At Field House
On 29th October 2015

Decision and Reasons Promulgated
On 21st December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

MR MUHAMMAD UMAIR SAEED
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Hosein, Counsel, instructed by Simon Noble, Solicitors.

For the Respondent: Mr C. Avery, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. Although it is the respondent who is appealing for convenience I will continue to refer to the parties as they were in the First-tier Tribunal.
2. The appellant is a national of Pakistan born on the 16th August 1987. He came to the United Kingdom as a student on 23 June 2011. His leave was

extended until 30 October 2014. Meantime, on 18 December 2013 he married a UK citizen, Ms Priest.

3. On 29 August 2014 he applied for leave to remain as a spouse. This was refused on 20 October 2014. The respondent accused him of arranging personation for an English test taken on 21st August 2012. In support of this the respondent relied upon two generic statements from officials in relation to personation at English tests and a screen-print of a spreadsheet stating the appellant's test results were invalid or questionable. Consequently, the application was refused on the basis of suitability-S.LTR 2.2 of appendix FM.
4. It was accepted the appellant's marriage was genuine and subsisting and his wife was a British citizen. Consequently, he met the eligibility requirements. EX1 was considered and the conclusion was there were no insurmountable obstacles to the relationship continuing overseas.
5. Regard was had to his private life under paragraph 276 ADE (1) (vi) and the respondent did not accept there would be very significant obstacles to his reintegration into Pakistan.
6. The respondent did not find any exceptional circumstances. Reference was made to the alleged personation as well as the fact he had been arrested for handling stolen goods on 30 January 2014.

The First-tier Tribunal

7. The appellant's appeal was heard by Judge of the First-tier Tribunal Povey at Newport on the 27 February 2015. Mr Hosein represented the appellant, as he does now. In a decision promulgated on 13 March 2015 the appeal was allowed on freestanding article 8 grounds.
8. The judge did not find the claimed personation established. The judge found as a fact that the appellant did take and pass the English test in 2012 and did not engage in deception.
9. The judge set out the caring responsibilities of the appellant's wife towards her father. She also works as a full-time carer and her mother and the appellant cared for her father in her absence. She has lived in the United Kingdom all her life; is close to her parents, whom she supports practically and emotionally. However, the judge concluded the circumstances did not meet the high threshold of EX1. Similarly, 276 ADE (1)(vi) did not apply.
10. The judge then went on to conduct a freestanding article 8 assessment. Family life was found to exist not only between the appellant and his wife but also between the appellant and her father. In considering the reasonableness of the appellant's wife leaving the United Kingdom the judge referred to a lower threshold than under the immigration rules. The conclusion was that the respondent's decision was disproportionate. At paragraph 45 the judge referred to section 117 B of the 2002 Act stating

the appellant spoke English and believed he would be financially independent.

The Upper Tribunal.

11. Permission to appeal to the Upper Tribunal was sought on the basis First-tier Tribunal Povey did not apply correctly the burden of proof in relation to the respondent's allegation of personation. The judge had said that the burden of proof was upon the appellant whereas the respondent correctly states that the initial burden of showing deception was on her. It was also contended that the evidence of personation was strong and that the judge's reasoning and conclusions on this were unsafe. Furthermore, it was contended the judge had failed to adequately set out section 117 considerations.
12. Permission to appeal was refused by a judge of the First-tier Tribunal and the application was renewed to the Upper Tribunal. Permission to appeal was granted in relation to the question of burden and standard of proof in light of the judge's reference to an obligation upon the respondent to act fairly. Permission was also granted on whether the judge was right to think that section 117 applied a lower threshold than the immigration rules.

Consideration

13. The judge did not set out the shifting burden of proof which applies where the Secretary of State claims deception. The judge does refer to the obligation on the respondent to act fairly. I believe this is a reference to the respondent not providing details of the alleged personation to the appellant other than the two generic statements and the screen-print. Paragraph 32 indicates the judge concluded the respondent did not provide sufficient evidence to support the allegation.
14. The judge introduced the public law concept of fairness. This is different from setting out the burden of proof. The judge has not indicated that there is a burden upon the Secretary of State to demonstrate deception. All the judge states is that the burden of proof is on the appellant. Consequently, the judge did not set out clearly the shifting burden of proof in play.
15. It might be implied from the reference to fairness the judge was indicating some burden on the respondent. However this requires some speculation and had the appellant lost his appeal a challenge in relation to the failure to set out the respective burdens clearly has greater force. Supposing the judge did err I cannot see how it made a material difference when the appeal is allowed. The person who could have lost out from the failure was the appellant not the respondent.
16. Regarding the judge's comments about the thresholds: as I read the decision, this is not a reference to section 117 in relation to the immigration rules. Rather, the comment relates to the wording of EX1,

namely, the need to show insurmountable obstacles and paragraph 276 ADE and significant obstacles to reintegration. The judge deals with these at paragraph 38 and 39. The judge, whilst acknowledging difficulties, found the threshold of significant difficulties or of significant obstacles to reintegration was not met. The judge then turned to the freestanding article 8 assessment and at paragraph 43 refers to the proportionality test. I understand the judge as alluding to all of the factors involved in this, making it a wider test than that in EX1 or 276 ADE (1)(vi). The proportionality assessment can include not only his wife's relationship and support for parents and her career in the United Kingdom. Consequently, I see no error in law in this.

17. The judge does not refer in detail to section 117 B but does indicate an awareness of the need to consider it. In Dube (ss.117A-117D) [2015] UKUT 90 (IAC) it was held that Judges are duty-bound to have regard to the specified considerations. It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test according to its terms; what matters is substance, not form. In the present case there is no dispute that the appellant was here lawfully when he met his wife. The judge refers to his command of English and his likely financial independence.
18. In conclusion, I do not find any material error of law in Judge Povey's decision allowing the appellant's appeal

Decision.

The decision of Judge Povey allowing Mr Saeed's appeal on human rights grounds shall stand.

Deputy Upper Tribunal Judge Farrelly