



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08462/2015

THE IMMIGRATION ACTS

Heard at Field House
On 13 July 2017

Decision & Reasons Promulgated
On 27th September 2017

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LONGCHENG CHEN

Respondent

Representation:

For the Appellant: Mr P Singh, Senior Home Office Presenting Officer

For the Respondent: Mr S Muquit, Counsel instructed by Farani Javid Taylor Solicitors

DECISION AND REASONS

1. Although the Secretary of State is the appellant in these proceedings, for convenience I refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant's appeal against the respondent's decision dated 2 October 2015 to refuse leave to remain as the civil partner of a British citizen came before First-tier Tribunal Judge Callender Smith ("FtJ") on 11 November 2016. The FtJ allowed the appeal.

The respondent's decision

3. The respondent's decision to refuse the application for leave to remain was made on the basis that the appellant had used deception in relation to an English language test taken on 18 July 2012 which he used to support an application for further leave to remain dated 11 December 2012. The respondent considered that the appellant did not meet the suitability requirements of the Rules and the application was therefore refused with reference to D-LTRP.1.3. and S-LTR.1.6. (presence in the UK not conducive to the public good).
4. It was also concluded that there would not be insurmountable obstacles to the appellant and his partner continuing family life in China. In terms of the private life requirements of the Rules, given that the appellant failed to meet the suitability requirements, had not lived in the UK for the requisite period, and the conclusion that there would not be very significant obstacles to his integration on return to China, it was concluded that he did not meet the requirements of the Rules in that respect either.
5. It was decided that there were no exceptional circumstances warranting a grant of leave otherwise than under the Rules. A decision was also taken to curtail the appellant's leave as a Tier 1 Entrepreneur, so as to expire on 2 October 2015, with reference to paragraph 323(ia), because he had used deception in seeking leave to remain or a variation of leave to remain.

The FtJ's decision

6. The FtJ referred to the decision letter in terms of the refusal on suitability grounds, and set out the appellant's case on that issue, including a detailed summary of his oral evidence.
7. At [31] he said that the issue of the respondent's reliance on the appellant having taken a fraudulent TOEIC test lay at the heart of the appeal and at [38] that he did not believe that the appellant had used any kind of fraud when he took the test in question. In the next paragraph he said that the appellant's previous and current use of the English language was clearly proficient and more than adequate for the requirements of the Immigration Rules.
8. The FtJ also referred to the evidence from the appellant and his partner that was given at the hearing. He referred to there being substantial supporting documentation about their relationship. Part of their evidence was that living in China would mean living in a country that did not recognise gay rights and would not recognise their same-sex partnership. The appellant had said that he did not wish to have to return to China, simply to reapply to rejoin his civil partner in the

UK. China did not recognise same-sex relationships and it would be a long process. He would have to give up his work in the UK without knowing when he would be able to come back and resume it and resume his relationships with his partner. His partner would not be able to accompany him to China because they would not be able to continue their relationship there openly. The appellant had also said that they would be at risk in China.

9. The FtJ concluded at [32] that theirs was a “subsisting and enduring” relationship. He went on to state that if the couple returned to China simply for the appellant to reapply to join his partner in the UK, that would put the two of them at risk. Further, to require the appellant to go to China to perfect an application that he has already made in the UK “is a disproportionate act” because it would require him to expend considerable finances, give up his job and be away from his partner, to subject himself to a procedure that could in fact properly lawfully be dealt with in the UK.
10. He said that he found it completely unreasonable to expect the appellant and his civil partner to leave the UK and to live and work in China where the nature of their relationship would not be accepted at all.

The grounds and submissions

11. The respondent’s grounds take issue with the FtJ’s conclusion that the appellant and his partner would be at risk in China, the contention being that that finding is completely unreasoned. The FtJ had made no reference to any background evidence which led him to that conclusion.
12. The grounds go on to refer to background evidence which suggests that 73% of settlement applications made from Beijing are concluded within 30 days, and 100% within 60 days of the application. Even if the FtJ was not referred to that evidence, he was under an obligation to consider “the guiding cases” on that issue. The grounds then refer to *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 and the Court of Appeal’s decision in *Agyarko & Ors v Secretary of the Home Department* [2015] EWCA Civ 440 (but see now the decision of the Supreme Court, [2017] UKSC 11).
13. The issue of the appellant’s family life being precarious is also raised in the grounds. It is further contended that the FtJ had not made a correct assessment of the issue of insurmountable obstacles to their continuation of family life in China.
14. Lastly, the grounds suggest that the FtJ had not adequately considered the deception issue in relation to the English language test certificate. It is suggested that the FtJ appeared merely to accept the appellant’s assertion that he had never exercised any deception or made any false representations in any of his immigration applications. The grounds assert that there had been “a plethora of judicial activity” on that issue and a number of decisions of the Upper Tribunal and the Court of Appeal existed. However, the FtJ had not engaged with any relevant case law. It is said that the respondent is able to discharge the burden of proof with the limited generic evidence

and the onus thereafter is on the appellant to provide an explanation, which he had not done.

15. For reasons which will become apparent, it is necessary to refer to the terms of the grant of permission to appeal. The First-tier Judge who granted permission to appeal said that it was arguable that the FtJ's findings in terms of insurmountable obstacles were not based on any evidence, and that no sufficient reasons for his conclusions were given. It was also said to be arguable that the FtJ's findings lacked any properly structured analysis of the issues arising for consideration. Further, the FtJ did not refer to, or apply, the insurmountable obstacles test. In addition, in so far as the FtJ may have intended to consider the appeal outside the Rules, and it was not apparent that he did, there was no finding as to whether the circumstances of the case were compelling or exceptional.
16. In relation to the fraud/deception point in relation to the English language test, the judge who granted permission stated as follows:

“...This ground is not arguable. While it is true that the Judge did not refer to the jurisprudence concerning ETS tests, and while the generic evidence relied on by the Respondent has been held to be sufficient to establish a prima facie case, in the present case the Judge received evidence from the Appellant as to the taking of the test and as to the standard of his English and found that he was not guilty of any kind of fraud. That was a finding the Judge was entitled to make on the evidence and for which he gave sufficient reasons. Although the Judge did not spell it out, the inevitable consequence of that finding was that the Respondent had not discharged the burden of proving on the balance of probabilities that the Appellant was guilty of fraud (see *SM & Qadir [2016] UKUT 229 (IAC)* and *Shehzad & Chowdhury [2016] EWCA Civ 615*), and there was therefore no basis for the Respondent to have decided that the presence of the Appellant in the UK was not conducive to the public good. However, the Appellant was not entitled to succeed in the appeal simply on this point”.
17. In submissions, Mr Singh sought to persuade me that he should be allowed to rely on the ground of appeal in relation to the deception/fraud point, notwithstanding what the judge granting permission had said. He referred to the decision in *Ferrer (limited appeal grounds; Alvi) Philippines [2012] UKUT 304 (IAC)* and reliance was placed on paragraph 2 of the guidance in the headnote, to the effect that the proper notice informing the parties of the limited grant of permission should have been sent. Such a notice contains the invitation to renew the application for permission on grounds upon which it had been refused. It was submitted that it was unfair that the respondent was not put on notice that permission was not granted on the fraud/deception ground.
18. Furthermore, it was submitted that it would have been clearer if the grant of permission had been more explicit in terms of which grounds permission had been granted on.
19. Mr Muquit submitted that it was clear from the permission decision that permission was not granted on the fraud/deception ground. It was thus evident to both parties what could and could not be argued.

20. I indicated to the parties that I would hear submissions on the fraud/deception point pending my consideration of its arguability in the light of the permission judge's decision. I informed the parties that my doing so should not be taken as any indication that I had decided in favour of the respondent in terms of the arguability of that ground.
21. Mr Singh submitted that the FtJ's decision was silent on the evidence of the respondent in relation to the alleged deception. There was a bundle of documents before the FtJ in relation to that issue. It was submitted that the evidential burden had been discharged but the FtJ had not referred to that evidence at all. Although he had noted the evidence at [8], there was no engagement with it.
22. At [13] - [29] the FtJ had gone through the evidence given by the appellant but it had not been explained why the appellant's evidence was acceptable.
23. The respondent's grounds otherwise were relied on. It was submitted that there was no evidence from which the FtJ could conclude that there would be harm to the appellant and his partner on return to China.
24. After submissions on behalf of the appellant, it was accepted by Mr Singh that if the fraud/deception argument for the respondent fell away, the appeal would succeed with reference to the Article 8 Rules.
25. Mr Muquit referred to [8] of the FtJ's decision where he had identified in the respondent's decision the basis of the refusal on suitability grounds and the evidence relied on in that context. The FtJ had said at [13] that he had considered the information that was before the respondent at the time of the decision. It was submitted that it was wrong to suggest that the FtJ did not consider or have regard to that evidence.
26. He had evaluated the evidence of the appellant which suggested that he had considered that there was a case to answer. Reliance was placed on behalf of the appellant on the decision in *Majumder v Secretary of State for the Home Department* [2016] EWCA Civ 1167, in particular at [32]. It was submitted that the appellant's case was in the third category of cases which were those where it was held that the generic evidence had not discharged the initial evidential burden on the Secretary of State, and was thus erroneous in that respect, but that other evidence meant that the Secretary of State would not have been able to discharge the legal burden. The Secretary of State indicated that she was minded to concede those appeals and abandon them.
27. It was submitted that even if the FtJ was wrong not to confront "in form" the evidence of the respondent, he had still looked at the individual evidence and said that he believed the appellant, for the reasons he gave. If there is an error of law it is of no substance. Furthermore, the FtJ had before him a skeleton argument in relation to these issues.

28. With reference to the Rules, it was submitted that if the fraud/deception argument fell away, the appellant's appeal would succeed because he met all the requirements of the Rules. Taking out the issue of the suitability requirements, there was no other basis upon which leave to remain as a partner would be refused. The FtJ had decided that the relationship was genuine. There was evidence of the relevant level of income. The immigration status requirements were met, and the English language requirement was also met if the fraud/deception point is not a valid one. Paragraph EX.1 would only apply if the other requirements were not met.
29. It was submitted therefore, that the FtJ was correct to state at [35] that the application for leave to remain would have been approved without any further difficulties had the respondent not believed that there had been some kind of fraud in the English language test.
30. It was conceded on behalf of the appellant before me that it was an error for the FtJ to find as he did in relation to the risk to the appellant and his partner in China, and in relation to insurmountable obstacles, but it was submitted that the error was not material.

Conclusions

31. The guidance in *Ferrer* that is material to this appeal is as follows:

"(1) In deciding an application for permission to appeal the Upper Tribunal against the decision of the First-tier Tribunal, Immigration and Asylum Chamber, a judge of that Chamber should consider carefully the utility of granting permission only on limited grounds. In practice, such a limited grant is unlikely to be as helpful as a general grant, which identifies the ground or grounds that are considered by the judge to have the strongest prospect of success. In this way, the judge identifies the likely ambit of the forthcoming Upper Tribunal proceedings, which – if that Tribunal concurs – can then form the backdrop for the Upper Tribunal's subsequent case management directions.

(2) Where the First-tier Tribunal judge nevertheless intends to grant permission only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision under rule 25(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and by ensuring that the Tribunal's administrative staff send out the proper notice, informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal.

(3) If an applicant who has been granted permission to appeal to the Upper Tribunal on limited grounds only applies to the Upper Tribunal on grounds in respect of which permission has been refused, the Upper Tribunal judge considering that application should not regard his or her task as merely some form of review of the First-tier Tribunal's decision on the application.

(4) Whatever may be the position in other Chambers of the Upper Tribunal, in the Immigration and Asylum Chamber the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 is unlikely to be advanced by adopting a procedure whereby new grounds of appeal can be advanced without the permission of the Upper Tribunal under rule 5 of those Rules.

..."

32. The pertinent facts of that appeal can be seen from [16] – [17]:

“16. On 8 September 2011, a Designated Judge of the First-tier Tribunal granted permission on ground 3 (Article 8) but not on grounds 1 and 2. The Designated Judge considered that ground 1 had “no merit at all” as the First-tier Tribunal Judge had “pointed out the rule change applicable to this appellant occurred four weeks before she made her application”. The “legitimate expectation” argument in ground 2, according to the Designated Judge, ignored the fact that “guidance is regularly issued to ensure that applicants are not being paid at a lower salary rate than those set out in the code of practice. It was incumbent upon the appellant and employer to ensure that she was paid at the appropriate hourly rate”.

17. In an undated letter received by the Upper Tribunal on 3 October 2011, the appellant’s solicitors contended that they did not agree that the grant of permission to appeal to the Upper Tribunal should be restricted to ground 3, as had been done by the Designated Judge. In the circumstances, the Upper Tribunal treated that letter as an application “to review the grant of permission on limited grounds”. Having done so, Upper Tribunal Judge Storey was “satisfied that the grant of permission should be varied so as to make clear that all three grounds are arguable”. In deciding to accept the letter, rather than an application made in form UT1, the Upper Tribunal noted that the Designated Judge had not helped matters “by not making clear expressly that his grant was on limited or restricted grounds”. Had he made that clear, the grant would have been accompanied by a notice – IA68 – which stated in terms that “you may apply to the Upper Tribunal for permission to appeal on a point of law arising from the First-tier Tribunal’s decision on any ground on which permission has been refused”.

33. At [20] the Tribunal referred to rule 25 of the Procedure Rules that then applied. The relevant Procedure Rules are now the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (“the First-tier Rules”). In this context, rule 34 contains an equivalent provision to the former rule 25 to the effect that if permission to appeal is granted on limited grounds, notification to that effect must be provided. Rule 34(4) provides as follows:

“(4) If the Tribunal refuses permission to appeal it must send with the record of its decision –

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the manner in which, such application must be made.

(5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.”

34. As is clear from [21] of *Ferrer*, in that case the judge granting permission failed to make it clear that the grant was on limited grounds only. The Tribunal said that had it been made clear, the applicant for permission would have realised that she needed to apply to the Upper Tribunal for permission to appeal on the other grounds.
35. *Ferrer* does not decide, nor indeed could it, that permission cannot be granted on limited grounds. Further, I do not interpret the Tribunal as saying that a failure to send the appropriate notice, which is still the form IA68, renders a grant of permission on limited grounds either invalid, or as requiring to be interpreted as a grant of permission on all grounds. The overriding consideration, it seems to me, is that the permission decision should be clear as to on which grounds permission has been granted and which not. It is also worthwhile pointing out rule 6(1) of the First-tier Rules which states that an irregularity resulting from a failure to comply with any requirement in the Rules, a practice Direction or a Direction does not of itself render void the proceedings or any step taken in the proceedings.
36. In the appeal before me, it is clear that the judge granting permission refused permission on the fraud/deception ground. Albeit that the notice to the parties stating that permission had been granted is on a form IA66, which does not indicate that the grant of permission was on limited grounds, and therefore does not notify the respondent that she may apply to the Upper Tribunal for permission to appeal on any ground on which permission had been refused, it cannot realistically be said that anyone reading the permission decision could have been misled by it. Although Mr Singh suggested that the grant of permission should have been clear in terms of identifying explicitly the grounds on which permission was granted/refused, the application for permission was not itself expressed in terms of separate grounds. It consisted of nine paragraphs, not being enumerated as separate grounds.
37. Whilst the guidance in *Ferrer* remains applicable, applying it to the facts of this appeal does not lead me to conclude that the grant of permission was on the basis of anything other than on limited grounds. This is readily discernible from the permission decision.
38. In those circumstances, it is not open to the respondent to rely on the deception/fraud ground upon which permission was refused.
39. Accordingly, the refusal of leave to remain on suitability grounds falls away. There was no need for the FtJ to consider paragraph EX.1 because, as submitted by Mr Muquit, the appellant met the eligibility requirements of the Rules. Such was conceded on behalf of the respondent before me, and is any event evident from the decision letter. Again, Mr Muquit was correct to suggest that the FtJ's conclusion at [35] that the application for leave to remain would have been approved but for the fraud/deception contention, was accurate. The respondent's only ground of appeal therefore falls away.
40. Neither party touched on the issue of curtailment of the appellant's leave, set out in the last paragraph of the respondent's decision. The FtJ stated that the appeal was

allowed “under the Immigration Rules”. However, there was no ground of appeal before him confined to the Immigration Rules, that no longer being a permissible ground of appeal. Nevertheless, it is clear that the human rights appeal with reference to Article 8 encompasses the decision to curtail leave. On that basis, this is not an issue that requires further consideration.

41. It was conceded on behalf of the appellant before me that the FtJ had erred in law in terms of his conclusions on insurmountable obstacles and the conclusion that the appellant and his partner would be at risk on return to China as a same-sex couple, there having been no evidence to support the appellant’s assertion in that respect. However, in the light of my conclusions, any error of law in that regard is not material.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. However, that error of law is not material to the outcome of the appeal and accordingly the decision of the First-tier Tribunal is not set aside. Its decision to allow the appeal therefore stands.

Upper Tribunal Judge Kopieczek

24/09/17