



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05497/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7 August 2018

Decision & Reasons Promulgated
On 22 August 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JATINDER [K]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr D Ayodele (Goodfellows Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of India born on 3 April 1986, as the appellant herein. The appellant arrived in this country on 28 September 2010 as a Tier 4 Student with leave to remain until 28 January 2013. Further applications to remain as a student were refused on 9 July 2013 and 10 December 2013 respectively. The appellant left the UK and re-entered on 31 May 2014 with entry clearance as a spouse with leave until 21 February 2017. On that day he applied for further leave to remain as the spouse of a British citizen but this

application was refused on 20 March 2017. The couple have a child born on 8 October 2015.

2. The basis for refusal was that the appellant failed to satisfy the suitability requirements of the Rules on the footing that he had fraudulently obtained a TOEIC certificate from Educational Testing Service (ETS) in an application dated 16 August 2013. The Secretary of State was accordingly satisfied that the appellant had used deception in his application on that date. The appellant could not meet the relevant requirements of the Rules and there were no exceptional circumstances warranting a grant of leave outside the Rules.
3. The appellant's appeal came before a First-tier Judge on 25 April 2018. It was the appellant's case that he had not cheated in his English language test and that the respondent's own guidance did not require his removal given that he enjoyed a genuine and subsisting parental relationship with his British citizen child.
4. The judge in a lengthy analysis carefully considered the evidence relied upon by the Secretary of State in respect of the deception allegation as well the oral evidence of the appellant and his wife. The judge concluded in paragraph 48 that the Secretary of State's evidence was sufficient to substantiate the allegations made against the appellant – he was not satisfied that the appellant had actually taken the test as he had claimed. The Secretary of State had accordingly been right to refuse the appellant's application on general suitability grounds. As he did not meet the suitability requirements the appellant's application for leave to remain as a partner under R-LTR had to fail.
5. The judge however went on to allow the appeal under Article 8 for the following reasons:
 - "51. That is not the end of the matter, however. It is necessary to consider whether Article 8 outside the Immigration Rules provides a basis upon which this appeal may succeed. It is clear that the Appellant's removal from the United Kingdom would be an interference with his private and family life of such gravity to engage the protection of Article 8. Such an interference would be in accordance with the law, and would, in principle, be necessary in the economic wellbeing of the United Kingdom, through the maintenance of effective immigration controls. The question is whether such removal would be proportionate. Section 117B(6) of the 2002 Act is relevant to that assessment.
 52. In the course of both sets of witness evidence, an account emerged of the Appellant's genuine and subsisting relationship with his British son. This account was not challenged by the Respondent. He is an active father, living with his wife in the family home with their son. In his statement, he describes the loss he would feel if separated from his son, and how he wants to be here for his son's education. He would experience loss if he moved to India alone, he writes, as his family would be unable to replace his wife and son. He has very real concern about bringing up his son in India, given the basic amenities it lacks. The Appellant's wife writes of the bonds

experienced in their family following the birth of their son, and specifically how the Appellant has a close bond with their son. There are a number of character references in the Appellant's bundle which underline the nature of their relationship (I attach less weight to these accounts as they are not in statement form; although they are of some evidential value). Despite the concerns that I have outlined concerning the witnesses' credibility, I have no basis not to accept this aspect of their evidence. I find that the Appellant has a genuine and subsisting parental relationship with his British son.

53. In light of this finding, when considering the proportionality assessment for the purposes of Article 8(2), I am bound by section 117B(6) of the 2002 Act. The Respondent's own guidance (*Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*, published for Home Office staff on 22 February 2018) states at page 76:

"Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal."

54. The guidance outlines some "particular circumstances" when it may be appropriate to refuse a grant of leave where the parent or primary carer's conduct gives rise to public interest considerations of such weight as to justify their removal. None is applicable here; the examples given greatly exceed the seriousness of the conduct of this Appellant. For example, the commission of significant or persistent criminal offences, or repeatedly and deliberately breaching the Immigration Rules. By contrast, this Appellant used false representations in support of a single application five years ago. For my own part, I agree with the approach in the guidance. It is in the best interests of this British child to remain in the United Kingdom, with his British mother, and his Indian father. Both mother and child, as British citizens, are entitled to the full panoply of State services, and a particular importance attaches to the ability of a child to remain in the country of which he is a citizen. To her credit, Ms Solomon accepted that the Respondent's own guidance is that it is unreasonable to require a British child to leave the United Kingdom in the circumstances.
55. I find, therefore, that the Appellant is a person who has a genuine and subsisting parental relationship with a British child, and because the child is British, and bearing in mind his best interest and British nationality; it would not be reasonable to expect the child to leave the United Kingdom.
56. This Appellant, of course is not a person liable to deportation. The Respondent did not refuse this application on conduciveness grounds, or take any other decisions which could give rise to a finding that the Appellant is a person "liable to deportation".
57. That being so, the public interest in the Appellant's removal is not made out. The Appellant has met the requirements of section 117B(6). I must conclude that the public interest does not require his removal, even weighing against it the findings against the Appellant I have made in relation to his TOEIC test. His removal would be disproportionate for the purposes of Article 8 ECHR on this account.

58. This appeal is therefore allowed on the basis of the Appellant's genuine and subsisting relationship with his British child."
6. In the grounds of appeal the Secretary of State argued that the judge had erred in restricting his consideration to whether it would be reasonable to expect the appellant's wife and children to accompany him to India given his fraudulent activity in employing a proxy to take his TOEIC examination. He had failed to consider the alternative of the child remaining in the UK with his mother. He had not applied the correct weight to the public interest and there was a need to deter others who might be persuaded to use a British child as a "trump card" in securing status. He had conflated the two considerations required – that of the child's best interests and the proportionality exercise required. He had not considered all aspects of Section 117. There was no compulsion on the appellant's wife and child to return to India with the appellant. That was simply a choice for the family to make. The deception had continued for a number of years and was not simply an act a number of years ago as the judge had said at paragraph 54 of the decision. It was a prolonged and sustained act of deception over a period of five years. The relationship had been formed when the appellant's status was at best precarious if not illegal given the deception. There had been no assessment of whether the appellant was financially independent and he had continued to practice deception for a number of years. The balance had clearly shifted in favour of removal.
7. The appellant filed a response on 27 June 2018. It was pointed out that the appellant had left the UK in March 2014 following the refusal of his student visa. The disputed test had been taken prior to his departure. He had left the country and returned on a spouse visa - he had not used his relationship with his British partner to extend his leave. His departure had been voluntary. The idea that he was using a child as a trump card was emphatically rejected. Indeed the appellant's wife was pregnant with their second child and the couple were expecting a baby in December 2018. The appellant and his wife had met the financial test required in line with Appendix FM-SE of the Rules and were financially independent. In the light of ZH (Tanzania) v Secretary of State [2011] UKSC 4 the best interests of the child should be regarded as a primary consideration and it would be wrong in principle to devalue what was in the child's best interest by something for which they could in no way be held responsible. It was pointed out that the Presenting Officer, Miss Solomon, had agreed with the judge that the appellant should be granted leave on human rights grounds based on the Secretary of State's policy.
8. At the hearing Ms Everett relied on the grounds of appeal and submitted that the judge had conflated the issues in paragraph 55 of his decision. In concluding that it was not reasonable to expect the child to leave the United Kingdom he had not had regard to the option the appellant had to leave and apply from outside the UK to return. The child would not be required to leave the UK. Further the judge had found against the appellant on the ETS issue and that was an ongoing deception and not simply one five years ago. If an error was made out it would be a material error. The judge had not engaged properly with the suitability issue and had conflated that issue with the proportionality exercise. She submitted that the judge had said in paragraph 56 that

the appellant was not liable to deportation and had started paragraph 57 by stating “that being so, the public interest in the appellant’s removal is not made out ...”. The deception had not been one-off but was ongoing. Ms Everett did not seek to go behind what had been said by the Presenting Officer but it was not the Secretary of State’s case that all the family were required to go back to India.

9. Mr Khan drew attention to the skeleton argument (of which he was not the author) and the Rule 24 response. Issue was not taken for the purposes of the hearing with the judge’s ETS findings. It was submitted that the judge had not materially erred in law. What the judge had said in paragraph 50 had to be seen in the context of the preceding paragraphs. Despite the judge’s findings in respect of the deception issue he had accepted the appellant’s genuine and subsisting relationship with his son in paragraph 52. He had correctly approached Section 117B(6). He had accepted that the relationship was genuine. Reference was made to what was said in MA (Pakistan) v Upper Tribunal [2016] EWCA Civ 705 at paragraph 47:

“... what could not be considered however, would be the conduct and immigration history of the parents.”

Counsel also referred to the skeleton argument at paragraph 24 and the reference to Treebhawon (Section 117B(6)) [2015] UKUT 674 (IAC) – if the criteria in Section 117B(6) were met then Article 8 would be infringed and no further balancing consideration was needed.

10. The judge had been entitled to rely on the policy in paragraph 54 of his decision and indeed the matter had been accepted by the Presenting Officer. The appellant was not a persistent offender.
11. Counsel submitted that what the judge had said in the opening words of paragraph 57 did not simply relate to paragraph 56 but had to be seen in the context of the preceding paragraphs as well. There had only been one incidence of deception. Counsel referred to the guidance applicable at the time of the respondent’s decision at page 259 of the bundle. The guidance addressed the question of how a decisionmaker should consider whether it was reasonable to expect a child to leave the UK. Various examples are set out including the case where a child does not live with the applicant parent. Reliance is placed on the following paragraphs:

“If the departure of the non-EEA national parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances paragraph EX.1.(a) does not apply.

However where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with their child. For that reason, the decisionmaker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the circumstances of the case, taking into account the best interests of the child as a primary consideration and the impact on the child of the applicant’s

departure from the UK. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances.

If the decisionmaker is minded to refuse an application in circumstances in which the applicant would then be separated from a child in the UK, this decision should normally be discussed with a senior caseworker.”

12. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the determination if the First-tier Judge erred in law.
13. In relation to the points made about the guidance, the judge took into account the more recent guidance published on 22 February 2018. The judge agreed with the approach in the guidance, noting the Presenting Officer’s acceptance that the respondent’s guidance was that it was “unreasonable to require a British child to leave the United Kingdom in the circumstances”.
14. Of course it is not the case for the Secretary of State that the British citizen child will be required to leave the UK. However the guidance which I have set out at paragraph 11 above does cover the issue of a case where there is a genuine and subsisting parental relationship between the applicant spouse and the child.
15. The judge plainly gave consideration to what is set out in the February 2018 guidance. It was open to the judge to draw a distinction between the appellant’s behaviour and the examples in the guidance. His description of the appellant’s offending in paragraph 54 does not in my view indicate an erroneous approach as contended. It may be that another judge would have interpreted matters differently but I am not satisfied that what the judge said was materially flawed in law.
16. Counsel makes what is in my view a fair point that the appellant left the country and came in on a properly issued spouse visa. The issue of precariousness would need to be seen in that context: see Secretary of State for the Home Department v Barry [2018] EWCA Civ 790 at paragraphs 62-63 where Singh LJ considered Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803:

“62. In my view, the facts of the present case were not on all fours with those of Rhuppiah. In the circumstances of the present case, the fact is that the Respondent was not merely a student at all relevant times. He married a British citizen in 2009. Although that would not have guaranteed him the grant of leave to remain, and other provisions in the Rules would have had to be satisfied, nevertheless, that factor did entitle the FTT to take the view (as it did at paras. 151-152) that the Respondent’s position was not entirely precarious. Further, the FTT was careful to draw a distinction between the situation at the time of the marriage and the birth of the first child, on the one hand, and what happened later, at the time of the birth of the second child, on the other, when the Respondent’s situation was indeed precarious.

63. It might have been preferable if the FTT had not included this point in the side of the balance sheet where it set out factors in favour of the Respondent but, when read in context, it is clear that what it was saying was that the fact that his

situation was not entirely precarious at all times meant that the positive factors which it had set out in his favour at points one, two and three had undiluted force.”

17. As is pointed by counsel in relation to the question of financial independence in 117B(3), the issue would have been resolved in the appellant’s favour prior to the grant of an entry clearance. On the point that the judge “conflated” issues the judge made clear findings in paragraphs 53 to 58 of his decision. Ms Everett pointed to the opening words of paragraph 57 “That being so, the public interest in the Appellant’s removal is not made out. ” indicating a reference simply to the preceding paragraph but I accept counsel’s point that paragraphs 54ff need to be read as a whole. It is quite clear that the judge had in mind and gave appropriate weight to the appellant’s behaviour – after all he gone into the question of deception with great care in 13 pages of a 15 page determination and indeed makes express reference to his findings against the appellant in paragraph 57. I do not find that the judge neglected to take into account the public interest when considering the question of reasonableness - in accordance with MA (Pakistan) - when these paragraphs are read as a whole. To adopt the words of Keene LJ in Y v Secretary of State [2006] EWCA Civ 1223 at para 24: “Particular passages in his decision should not be analysed as though they emanated from a Parliamentary draftsman.”
18. There was discussion at the hearing about precisely what the Presenting Officer was to be taken as accepting in the final sentence of paragraph 54. It may be that she was saying no more than that it was accepted that it was unreasonable on the guidance for the child to be required to leave. Whatever was intended I do not find that the judge was deflected from reaching a properly reasoned and lawful decision. While another judge might have given different emphasis to different matters it was open to this particular judge to decide as he did. There is no material error of law.
19. Accordingly this appeal is dismissed and the decision of the First-tier Judge is confirmed.
20. The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed

Date 14 August 2018

G Warr, Judge of the Upper Tribunal