



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05610/2017

THE IMMIGRATION ACTS

Heard at Field House
On 24th September 2018

Decision & Reasons Promulgated
On 02nd November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR PAWANKUMAR KRISHNA CHANKAPURE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: RW Anderson and Co, Solicitors.

For the respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of India who came to the United Kingdom on 9 February 2011 as a student. He was subsequently granted further leave outside the rules until 1 June 2013. He was then granted leave as a spouse of a British citizen, Mrs Ashwarthy Ashwarthy from 15 July 2013 to 15th January 2016. On 23 December 2015 he applied for leave to remain as a spouse. This was refused on 19 March 2016 and the refusal was maintained on 27 March 2017 following a reconsideration.

2. His application was considered under appendix FM and refused on suitability grounds. This was on the basis that when he applied for further leave as a student he submitted an English language test result as part of the requirement. The respondent concluded that the test had been taken by a proxy. The respondent did accept that he was in a genuine and subsisting relationship with his wife. She was originally from India and they both spoke English and Hindi. He had not been in the United Kingdom a particularly long time and it was felt that they both could live there and enjoy family life. There were also family members there. The couple had no children. No other exceptional circumstances were identified justifying the grant of leave.
3. The grounds of appeal state that the appellant came to the United Kingdom to study for a Master's degree in pharmaceutical science at the London Metropolitan University. He met his wife in 2012 and they married in May 2013. The grounds referred to the decision of Qadir -v-SSHD (IA/36319/2016). The grounds argue that the appellant has a command of English and had no need to cheat. Included with the grounds was a psychiatric report on his wife.
4. Paragraph 56 of the Upper Tribunal decision in SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof) [2016] UKUT 00229 (IAC) states:

... the Secretary of State, in all of these cases, is making the positive case that the student concerned dishonestly obtained the English language qualification by the use of a proxy test taker. Second, the Secretary of State seeks to make good this allegation to the requisite standard by adducing in evidence, in addition to the generic evidence noted above, a flimsy spreadsheet emanating from ETS which, in a single line, contains, in substance, only the name of the student concerned and the categorisation of either "questionable" or "invalid".

5. The Upper Tribunal then referred to the decision of Shen (Paper Appeals: Proving Dishonesty) [2014] UKUT 236 (IAC), and the changing burdens of proof:

(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is *prima facie* deceitful in some material fashion.

(b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.

(c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's *prima facie* innocent explanation is to be rejected.

The First tier Tribunal

6. His appeal was heard by Judge of the First-tier Tribunal NMK Lawrence sitting at Hatton Cross on 4 May 2018. In a decision promulgated on 23 May 2018 it was dismissed.
7. The respondent had accepted that he was in a genuine and subsisting relationship with his wife. The view was that family life could continue outside the United Kingdom. The appellant had provided a psychiatric report which indicated that his wife was suffering from depression. The judge did not see her medical condition breaching the high threshold of article 3 judge took the view was treatment available in India. The appellant's wife is originally from India and became a British citizen in July 2012.
8. Regarding private life and paragraph 276 ADE, the judge concluded that they were both familiar with Indian culture, language and lifestyle and returning would not amount to a very significant obstacle.
9. The judge then went on to consider the public interest factors set out in section 117 B of the Nationality, Immigration and Asylum Act 2002. It was accepted that the appellant spoke English but was not economically active. Furthermore, his private life and family life had been established whilst this time here had been precarious.
10. The refusal of his claim under appendix FM of the rules was on the basis of suitability. The judge recorded that appellant's representative had accepted the respondent had discharged the burden of proof is to raise the issue of dishonesty on the part of the appellant. It was then him to dispel this. The appellant said that he spoke good English and had passed previous examinations in English and did not need to use a proxy test taker. The judge was not impressed by this and took the view that this amounted to mere rhetoric.
11. The only analysis of the appellant's explanation is at paragraph 7 of the decision. The application for permission to appeal sets out at paragraph 11 the claims made by the appellant about taking the test. This included describing the test centre, how he got there and the subsequent visit to the test centre seeking an explanation from the college. In themselves such factors may or may not address concerns. For instance, a person may well have knowledge of English but for whatever reason resort to a proxy test taker. However, it is important for the judge to analyse and evaluate the explanation. It is my conclusion the judge has failed to do this.
12. Ms Isherwood makes the point that the appellant has a restricted right of appeal which is concerned with his protected human rights. She said that the appellant's representatives have not challenged the judge's findings in relation to his article 8

rights. These included the fact his wife originated in India and the family could relocate there. However, the rules are meant to be article 8 compliant. The respondent had accepted the appellant's marriage was genuine and subsisting. But for the allegation of personation his application may well have succeeded. Consequently, although dealing with article 8 the judge's assessment is through the prism of the rules, including the question of the appellant suitability. It is my conclusion the judge materially erred in law by failing to set out and evaluate the appellant's claim in answer to the allegation.

Decision

The decision of first-tier Tribunal Judge NMK Lawrence materially errs in law. The matter is remitted to the First-tier Tribunal for a de novo hearing.

Francis J Farrelly
Deputy Upper Tribunal Judge

Directions.

1. Relisting before the First-tier Tribunal at Hatton Cross for a de novo hearing excluding First-tier Judge NMK Lawrence.
2. The finding that the appellant's marriage is genuine and subsisting is preserved.
3. A hearing time of not more than 1 ½ hours is anticipated.
4. The appellant's representatives are to advise if there is any need for an interpreter.
5. Up-to-date appeal bundles are to be prepared by the parties. The appellant's bundle should be provided not later than 3 weeks before the date of hearing.

Francis J Farrelly
Deputy Upper Tribunal Judge