



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09742/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1 May 2018

Decision & Reasons Promulgated
On 11 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

MR MD RASHED AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Khan of Counsel, instructed by Londonium Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Baldwin promulgated on 20 September 2017 dismissing the Appellant's human rights appeal against a decision of the Respondent dated 23 March 2016 to refuse variation of leave to remain.
2. The Appellant is a citizen of Bangladesh born on 21 June 1989. He entered the United Kingdom on 13 September 2009 as a Tier 4 Student with leave valid until 31 July 2011. He made an application for further leave in this capacity, which was granted until 18 May 2013; he was again granted a further period of leave in the same capacity until 2 July 2014. On 28 July 2014 he made a further application for leave to remain as a Tier 4 Student but this was refused on 16 September 2014. On 23 December 2015 he made the application the refusal of which forms the basis of the appeal before the IAC.

3. The Appellant's application of 23 December 2015 was based on his relationship with Ms Tamanna Akhtar Rahman (d.o.b. 9 May 1991), a British citizen.
4. In the application it was indicated that Ms Rahman was pregnant and was expecting the couple's child. Further details of the relationship of the Appellant and Ms Rahman emerged during the course of the proceedings. It was said that he had met his wife in the United Kingdom in February 2013, but they had known each other previously during childhood. The couple went through an Islamic marriage ceremony on 26 May 2015. It was not until June 2016 that they underwent a civil marriage ceremony - that is to say at a time subsequent to the Respondent's refusal. It was said that at the time of the Islamic marriage that Ms Rahman was not available to marry the Appellant in a civil ceremony because she was still legally married to her first husband, albeit that that relationship had broken down. It was said that she had undergone an Islamic divorce from her first husband prior to the Islamic marriage to the Appellant and so was 'free' to marry the Appellant in the eyes of Islam - although was not at that time free to marry under civil law.
5. In respect of this history it is pertinent to note at this juncture that the First-tier Tribunal Judge identified issues and concerns, in particular: with reference to the lack of any supporting documentation in relation to Ms Rahman's divorce from her ex-husband in Islam (paragraph 15); and with regard to the absence of any evidence from supporting witnesses as to the development of the couple's relationship - e.g. *"It is surprising that not a single friend or relation has provided evidence of their knowledge of the development of a relationship between them and of their marriage."* (paragraph 31).
6. Be that as it may, the Judge accepted that the couple were in a genuine relationship: *"I conclude that the marriage ceremony conducted after the birth of the child is lawful and that it is probably genuine and subsisting"* (paragraph 31).
7. The reference to the child is of course a reference to the child that was expected by Ms Rahman at the time of the Appellant's application. In this regard Ms Rahman was delivered of a son on 16 June 2016, and it was the Appellant's case that he was the father. Again, the First-tier Tribunal Judge identified concerns and issues in this respect, in particular by reference to the fact that at least so far as domestic law was concerned Ms Rahman was not divorced from her husband at the date of the apparent conception of the child. Concern was also identified in respect of a period where the couple had not apparently cohabited, or a period in which their apparent cohabitation had ceased, and Ms Rahman had moved into a hostel.
8. The Judge, it seems, felt unable to make a finding as to paternity, observing: *"[The child's] best interests also lie absent very good reason in him having both parents around to*

nurture him whoever is the actual father." (paragraph 31). Be that as it may, the Judge also observed: *"It is unfortunate that they have brought this situation on a child who may well see the Appellant as a father figure whether or not he is his biological father..."* (paragraph 32).

9. For completeness I note that there was argument before the First-tier Tribunal Judge as to whether or not the Appellant had been put on notice that his paternity was in dispute. In granting permission to appeal to the Upper Tribunal, First-tier Tribunal Judge Hollingworth considered that it was arguable that there had been procedural unfairness in this regard, and that this may have impacted upon a consideration of the best interests of the child and of the overall proportionality question under Article 8. Suffice to say for the moment that since the hearing before the First-tier Tribunal the Appellant has obtained DNA evidence which on its face demonstrates that the Appellant is very likely the father of Ms Rahman's child, as has been his consistent claim. The Respondent's representative, however, only had sight of the DNA evidence on the morning of the hearing and as such the Respondent had no opportunity to give detailed consideration to the adequacy or authenticity of the documents now produced.
10. Some of the matters, and indeed much of the evidence, to which I have referred were not before the Secretary of State at the date of the Respondent's decision.
11. The Respondent refused the Appellant's application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 23 March 2016. The Respondent did not accept that the Appellant met the definition of a partner within Appendix FM by reason of the fact that his claimed marriage - at that time the Islamic marriage - was not recognised as a marriage for the purposes of the Rules, and moreover he had not been living with his partner for at least two years prior to the date of the application.
12. Further, at the date of the Respondent's decision the child had not yet been born.
13. The Respondent also invoked the 'suitability' criteria of Appendix FM on the basis that it was said that the Appellant had been shown to have used a proxy tester to obtain the English TOEIC certificate that was submitted in support of his application for variation of leave to remain made on 17 May 2013.
14. The Respondent was also not satisfied that the Appellant met the requirements of the Immigration Rules with regard to private life under paragraph 276ADE, and that there were otherwise no exceptional circumstances to warrant granting leave to remain.

15. The Appellant appealed to the IAC.
16. The appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Baldwin.
17. The Appellant sought permission to appeal, which was granted by First-tier Tribunal Judge Hollingworth on 8 March 2018. Amongst other things Judge Hollingworth identified that it was arguable that whilst the Judge had given consideration to the obstacles that the Appellant might face upon returning to Bangladesh the Judge had *"not referred to the position in relation to the Appellant's partner in the event of the Appellant's partner going to Bangladesh to continue family life with the Appellant"*. It was in substance pleaded that one limb of EX.1 - EX.1(b) - had not been properly considered.
18. It was also argued in the grounds in substance that the other limb of EX.1 - EX.1(a) - in relation to the couple's child had not been considered in that it was said that the Appellant enjoyed a parental relationship with the child and the Judge had not considered whether or not it was reasonable for the child to leave the UK. (See in this context also paragraph 9 above.)
19. The Respondent does not resist the Appellant's challenge to the Decision of the First-tier Tribunal. By way of a Rule 24 response dated 10 April 2018 the Respondent *"does not oppose the appellant's application... and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider the best interests of the child, whether the appellant plays a parental role in the life of his partner's child and whether it would be proportionate to expect the appellant to leave the UK"*.
20. I acknowledge that the concession with regard to error of law is properly made. It does indeed seem to me that the First-tier Tribunal Judge has not adequately considered the alternative scenarios of the family attempting to establish family life in Bangladesh, and the way in which that may or may not impact upon the extent of interference with family life and/or the issue of proportionality.
21. I note that notwithstanding the dismissal of the appeal, the Judge made a finding in favour of the Appellant in respect of the allegation of having used a proxy tester. I will return to this shortly.
22. In the foregoing circumstances the discussion before me was not so much focussed on error of law, but rather on the future conduct of the appeal. Mr Khan essentially invited me to allow the appeal outright on the bases that paternity was now demonstrated by the DNA evidence, the First-tier Tribunal Judge had accepted that the Appellant was in a genuine and subsisting marital relationship with Ms Rahman,

and the Judge had also made findings to the effect that the child's best interests were promoted by remaining in the United Kingdom - "*The child's best interests probably do lie in her mother being in a country where the mother can secure these entitlements and free NHS care and education for him. His best interests also lie, absent very good reason, in him having both parents around to nurture him, whoever is the actual father.*" (paragraph 31).

23. I am not persuaded that those findings are determinative. There seems to me to have been a failure to make findings of fact, or consider in any great detail the respective circumstances of both the Appellant and his partner if they were to be returned to Bangladesh. In particular in this regard there does not appear to have been any exploration as to Ms Rahman's history. As I have indicated above, there is at least a suggestion that she spent some of her childhood in Bangladesh notwithstanding having been born in the United Kingdom.
24. Moreover, although during the course of evidence before the First-tier Tribunal Ms Rahman had initially asserted that all her relatives were British and settled in the UK, she subsequently altered her evidence by stating that her parents, uncle and aunts were in Bangladesh.
25. The circumstantial matters suggest that Ms Rahman may have considerable ties to Bangladesh. It seems to me that matters that may significantly inform an evaluation as to whether or not this family unit is able to establish itself in Bangladesh with or without any particular difficulty require further exploration. It is not apparent, for example, whether Ms Rahman was a British citizen by birth, or whether she was initially a citizen of Bangladesh and acquired her British citizenship at some later point. More particularly, it is not clear to what extent she has already lived parts of her life in Bangladesh. The reasonableness, or otherwise, of the child leaving the United Kingdom will be contingent upon all of the circumstances of the case, including the backgrounds of the parents and how such backgrounds might impact on each of the parents' abilities to establish themselves in Bangladesh.
26. As such I do not accept that this is an appeal that can be said inevitably to succeed on the simple bases upon which Mr Khan has urged me to allow the appeal.
27. Further and in any event, there was discussion as to whether any of the findings of fact of the First-tier Tribunal Judge should be preserved - and in particular the favourable finding in respect of the TOEIC certificate. Mr Khan pointed out that there was no cross-appeal on this particular issue. It does seem to me, however, that there would not have been a basis to cross-appeal on this issue in circumstances where the Secretary of State was not dissatisfied with the outcome in the appeal.

28. Be that as it may, after careful consideration of the point I am not prepared to permit the appeal to proceed in a manner that would preserve the finding.
29. In the first instance it is to be noted that this is a human rights appeal, and the decision in the appeal made by Judge Baldwin is to be set aside, in effect by consent. That means that the next Tribunal must remake the decision on human rights grounds, which will involve a balance of all of the relevant circumstances at the time. It means that the Tribunal will need to take into account the Appellant's immigration history. Whilst in certain circumstances it would be entirely appropriate to preserve findings of fact, in the circumstances of this particular case it seems to me clear and obvious that the First-tier Tribunal Judge has reached an inadequately reasoned and thereby lawfully unsustainable conclusion in respect of the allegation of using a proxy tester.
30. Consistent with SM and Qadir [2016] UKUT 229 (IAC) the First-tier Tribunal Judge accepted that the Respondent had discharged the 'evidential burden'. It was therefore incumbent on the Appellant to offer an innocent explanation for the deception thus established. However, the Judge's exploration of this matter was not to consider whether or not there was an innocent explanation, that is to say that the Appellant had somehow been party to a deception innocently, but rather to evaluate again whether there had been a deception at all.
31. Moreover, and in any event, it is to be noted that for the main part the Judge reached an adverse evaluation of the various aspects of the Appellant's 'explanation' and evidence, save in one respect: the Judge was satisfied the Appellant had provided adequate evidence to "*the minimum level of plausibility to show he probably could have secured the passes he is recorded as having achieved*" at the date that he claimed to have sat the controversial examination.
32. In my judgment that was not a sustainable basis for overcoming the evidence that was against the Appellant. The mere fact that the Appellant more likely than not - (if that is what is to be understood from the words 'minimum level of plausibility... probably') - had the ability to pass an examination is not evidence that he more likely than not sat the examination himself. There may be many reasons why examinees cheat in their examinations over and above their underlying ability. It is to be recalled that other aspects of the Appellant's explanation were rejected: the Judge found "*it extremely difficult to believe the Appellant had not heard suggestions of impropriety before he went*" to the test centre (paragraph 27); the Judge noted discrepancies in the Appellant's evidence as to the length of an English course in respect of which he produced another certificate, observing "*It follows that either the Certificate - (one not provided until a few days before the hearing) - is not genuine or the Appellant has exaggerated the length of the course*" (paragraph 28). The Judge also rejected the credibility of the Appellant's claim to have been unaware of the refusal of the application he made on 28 July 2014 (paragraph 29).

33. Inherent in Mr Khan's submission that I should preserve the finding of fact favourable to the Appellant in respect of the TOEIC certificate, is an invitation for me to allow to stand what, in my judgment, is an unsustainable finding of fact arrived at in error of law.
34. It is in such circumstances that I am not prepared to preserve the finding of fact in respect of the TOEIC certificate, notwithstanding that there has been no direct challenge to it by the Respondent.
35. I do not issue any specific directions. Standard directions will suffice. I merely observe that it will be necessary for the parties to revisit the issue in respect of the TOEIC certificate, and also to revisit the issues of family life and the potential circumstances in Bangladesh further to the matters to which I have referred above. The Appellant may wish to address those matters where First-tier Tribunal Judge Baldwin thought there was an unsatisfactory absence of available evidence. It is for the Appellant with his advisors to decide what further evidence should be filed and served; however he should be aware that the failure to provide evidence on significant matters where it is reasonable to assume that such evidence would be readily available to him, may result in an adverse inference being drawn.

Notice of Decision

36. The decision of the First-tier Tribunal is vitiated for error of law and is set aside.
37. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Baldwin with all issues at large.
38. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **9 June 2018**

Deputy Upper Tribunal Judge I A Lewis