



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12062/2015

THE IMMIGRATION ACTS

Heard at Field House

On 12 April 2018

**Decision &
Promulgated
On 26 April 2018**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**MR SYED AKBER AHMED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Eaton, Counsel

For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. He was born on 5 June 1985.
2. He appealed against the respondent's decision dated 28 October 2015 to refuse his application as the partner of Imogen Corbett, a British national.
3. In a decision promulgated on 12 May 2017, Judge Talbot (the judge) dismissed the appellant's appeal against the respondent's refusal because he found that the appellant had exercised deception with regard to his application to the respondent, and that the decision was proportionate in terms of Article 8.

4. The grounds claim that the evidence in **SM and Qadir (ETS - evidence - burden of proof) [2016] UKUT 229 (IAC)** was considered to be deeply flawed and with substantial limitations was it deemed to have met the respondent's initial burden of proof. The grounds claim the judge erred in relying on the evidence before him without reservation to create a rebuttable presumption on the appellant. Further, that the judge had failed to consider whether in the particular circumstances of the appellant, the respondent had made out in a "fact specific" way that there was evidence that the appellant had used deception.
5. The appellant also claimed the judge had erred in his analysis of paragraph 320(11) of HC 395 which requires there to be "aggravating circumstances" over and above the specified deception. The grounds made reference to **PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)** and the "great care" in assessing such circumstances.
6. In any event, the judge significantly misdirected himself regarding the applicant's immigration history. Contrary to the judge's findings, the appellant did not receive a decision on 17 June 2014 but rather, was detained by the respondent on 3 December 2014 and given a decision the same day. It was that decision that was based on the assertion of deception by the appellant.
7. The grounds contend that if the judge had directed himself correctly on the appellant's immigration history, with particular reference to the period between 17 June 2014 and 3 December 2014, he might have reached a different decision.
8. Judge Frankish refused permission to appeal in a decision dated 21 November 2017. He said at [3]:

*"Applying **SM and Qadir**, with no rebuttal but for denial ([14]) and the wife now stating both that the appellant speaks good English and she remembers him studying hard for the exam, the conclusion that paragraph 320 applies was open to the F-tJ. The new rebuttal that the appellant left voluntarily as evidence of good faith does not support a submission of an arguable error of law. Full credit is, in any event, accorded ([15]) in respect of eventual voluntary departure once the stay under JR was lifted. No arguable error arises in respect of the Article 8 assessment".*

9. The grounds were renewed to the Upper Tribunal. On 30 January 2018 Judge McWilliam said:

"It is arguable that the judge did not adequately reason the finding that the sponsor's evidence was insufficient (she said that she remembered the appellant preparing for the test and it is recorded at [14] that she recalled him going to the test). Whilst the judge was entitled to reject the evidence or find it not capable of raising an innocent explanation, his reasons for doing so are arguably absent".

Submissions on Error of Law

10. Mr Eaton relied upon the grounds. He said that the history the judge set out at [15] was inaccurate. It is correct that the appellant was appeal rights exhausted as of 5 March 2014 but contrary to what the judge said, he did not receive a refusal on 17 June 2014. Rather, he was detained by the respondent on 3 December 2014 and given a decision that same day. It was that decision that was based on the assertion of deception by the appellant. Subsequently, the appellant voluntarily returned to India. Further, the judge erred in finding previous applications to be vexatious or frivolous merely because they were unsuccessful.
11. Mr Eaton's submission is that the legal landscape has moved on. In particular **Ahsan [2017] EWCA Civ 2009** at [33] emphasised that **SM and Qadir** "..... should not be regarded as the last word". That is because the forensic as well as the legal landscape has changed in the meantime. Mr Eaton stressed that the Upper Tribunal's "lukewarm endorsement" of the evidence in **SM and Qadir** should be considered in the light of later jurisprudence in particular, **Iqbal [2017] EWHC 79 (Admin)** and **Majumder [2016] EWCA Civ 1167**, in particular at [23]. Whether the respondent's initial burden of proof is made out and whether the appellant can then provide evidence of an innocent explanation must be "intensely fact-specific" see **Majumder** at [23].

Conclusion on Error of Law

12. Even if the judge was correct in his initial finding that the respondent had met her evidential burden in terms of **SM and Qadir**, I find that the judge erred in his subsequent assessment of the appellant's credibility. The appellant was out of country but Ms Corbett attended. The allegation of deception had been denied by the appellant and Ms Corbett. Ms Corbett said that the appellant spoke good English, was a law-abiding person, would not commit fraud, and that she recalled him preparing for and going to take the test. All the judge says in response to that is that such comments were insufficient to rebut the allegation. The judge erred because he failed to give Ms Corbett's evidence any analysis. Clearly, the appellant was entitled to know why it was that Ms Corbett was not accepted as a credible witness or alternatively, why it was that if she herself was credible, why the appellant was not credible.

Notice of Decision

13. The making of the decision of the First-tier Tribunal involved a material error of law for the reasons I have set out above. I set aside the decision and remit the appeal for a de novo hearing.
14. No anonymity direction is made.

Signed

Date

12 April 2018

Deputy Upper Tribunal Judge Peart