



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

Appeal Number: IA/28974/2015

**THE IMMIGRATION ACTS**

**Heard at Liverpool**

**Decision & Reasons  
Promulgated**

**On 31<sup>st</sup> January 2018**

**On 21<sup>st</sup> February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**MUHAMMAD ARSHAD  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr O Noor of Counsel instructed by Juris Solicitors  
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant appeals against a decision of Judge Alis (the judge) of the First-tier Tribunal (the FTT) promulgated on 17<sup>th</sup> May 2017.
2. The Appellant is a national of Pakistan born 1<sup>st</sup> June 1986. He entered the UK as a Tier 4 Student on 30<sup>th</sup> December 2010. His leave expired on 25<sup>th</sup>

November 2011. He made a number of applications for leave to remain all of which were unsuccessful. The Appellant has not had valid leave since 25th November 2011.

3. On 7<sup>th</sup> December 2013 the Appellant married a British citizen [AR] to whom I shall refer as the Sponsor. The Sponsor had two children from a previous relationship, a son born [ ] 1997, and a daughter born [ ] 2008.
4. On 20<sup>th</sup> May 2014 the Appellant applied for leave to remain based upon his private and family life. The application was refused on 12<sup>th</sup> August 2015. The Respondent considered Appendix FM, and decided that the Appellant failed the suitability requirements, in particular S-LTR.2.2. as it was contended that he had obtained a TOEIC certificate following a test taken on 18<sup>th</sup> April 2012, by using fraud, as a proxy text taker had been used.
5. With reference to Appendix FM the Respondent accepted the Appellant satisfied the eligibility requirements of paragraph R-LTRP.1.1.(d)(ii). The Respondent did not go on to consider EX.1. because the Appellant did not satisfy the suitability requirements.
6. In relation to the parent route, the Respondent again pointed out that the Appellant could not satisfy the suitability requirements but in any event, it was not accepted that he satisfied the eligibility requirements under the parent route as the child in question, that being the Sponsor's daughter, was not the Appellant's child and the Appellant did not have sole responsibility for her.
7. The Appellant's private life was considered pursuant to paragraph 276ADE(1). It was noted that he had not lived continuously in the UK for at least twenty years. It was not accepted that he had proved that very significant obstacles existed to his integration into Pakistan.
8. The Respondent considered whether any exceptional circumstances existed which would warrant a grant of leave to remain pursuant to Article 8 outside the Immigration Rules. The Respondent noted that the Appellant had only been in the UK since November 2010 and that he had married a British citizen who had children from a previous relationship. The Respondent noted the Appellant did not have any medical conditions or health issues. He had not lost all ties to his home country. Because he had sought to obtain leave to remain in the UK by deception, the Respondent was of the view that his presence in the UK was not conducive to the public good, and therefore there were no exceptional circumstances which would warrant granting leave to remain outside the Immigration Rules.
9. The appeal was heard by the FTT on 11<sup>th</sup> May 2017. The judge found that the Respondent had not proved that the Appellant had used fraud to obtain a TOEIC certificate. The judge went on to consider Appendix FM, and in particular EX.1., but concluded at paragraph 51 that EX.1.(a) is not engaged, and with reference to EX.1.(b) there were no insurmountable

obstacles to family life continuing outside the UK. The appeal was dismissed with reference to Article 8.

10. The Appellant applied for permission to appeal which was granted by Judge Page of the FTT in the following terms;

“2. There were two issues before the judge. The first was whether the Appellant had fraudulently obtained his IELTS language certificate, and secondly whether the Appellant had established an entitlement to remain in the United Kingdom under Article 8. The judge has found that the Respondent had failed to discharge the burden of proof against the Appellant and that the Appellant had not used a proxy test-taker in his IELTS test. That left the remaining issue as to whether the Appellant could succeed under Article 8. I have had difficulty in understanding the grounds of appeal under Article 8 and the judge’s findings under Article 8. The grounds of appeal argue that the Respondent had accepted that the Appellant met the requirements for limited leave to remain as a partner and the judge has misapplied the Immigration Rules. It is not entirely clear why the judge has reached the conclusion that the Appellant could be removed to Pakistan in circumstances where he is married to a British citizen who has two children from a previous relationship. One of these children is 8 years of age, by virtue of a Family Court order the children have contact with their father every weekend. There appears to be family life between the Appellant, his partner and her children. The judge appears to have found that the only person who would be affected if the Appellant had to leave the United Kingdom would be the Appellant himself. At paragraph 61 of the decision he accepts that the Appellant has become a stepfather to these children but makes an adverse view of the family situation because the judge could not ‘overlook the fact the Appellant is a stepfather to these children who came into their lives in the circumstances he did’. In the interests of justice I grant permission to appeal on all grounds. Hopefully the Appellant’s grounds of appeal will become clearer when they are fully argued.”

11. Following the grant of permission the Respondent submitted a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008, contending, in summary, that the Grounds of Appeal failed to show why the judge erred in law in dismissing the appeal under Article 8.

12. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

## **The Upper Tribunal Hearing**

### **Error of Law**

13. At the commencement of the hearing Mrs Aboni indicated that she did not rely upon the rule 24 response, but conceded that the judge had

materially erred in law. Mrs Aboni accepted that the judge had found that the Appellant had a genuine and subsisting parental relationship with the Sponsor's daughter, who is a British citizen child, and found that it would not be reasonable to expect the child to leave the UK, but then erred by concluding section EX.1.(a) was not engaged. Mrs Aboni submitted that because the judge had erred in considering EX.1., the decision was unsafe, needed to be set aside, and should be remade by the Upper Tribunal.

14. I therefore did not need to hear from Mr Noor in relation to error of law, although I had taken into account the skeleton argument that he submitted on that point.
15. I indicated that the decision of the FTT was set aside by reason of material error of law and a written decision would be issued confirming my reasons

### **Re-Making the Decision**

16. Mr Noor submitted that the decision should be re-made by the Upper Tribunal, applying the unchallenged findings of fact made by the FTT. It was therefore not necessary to hear any further evidence.
17. Mrs Aboni agreed that the decision should be re-made on the basis proposed by Mr Noor, and indicated the Respondent did not, in the circumstances, and given the findings of fact made by the FTT which had not been challenged, oppose the appeal being allowed under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
18. I indicated that I would issue a written decision.

### **My Conclusions and Reasons**

19. I firstly set out my reasons for finding a material error of law.
20. The Respondent considered the Appellant's application for leave to remain with reference to Section R-LTRP which contains the requirements for limited leave to remain as a partner, which for ease of reference is set out below;
  - "R-LTRP.1.1. The requirements to be met for limited leave to remain as a parent are-
  - (a) the applicant and their partner must be in the UK;
  - (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
  - (c) (i) the applicant must not fall for refusal under Section S-LTR; Suitability leave to remain; and
  - (ii) the applicant meets all of the requirements of Section E-LTRP; Eligibility for leave to remain as a partner; or
  - (d) (i) the applicant must not fall for refusal under Section S-LTR; Suitability leave to remain; and

- (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2. – 1.12. and E-LTRP.2.1 – 2.2.
- (iii) paragraph EX.1. applies.”

21. The Respondent’s view was that the application made by the Appellant must be refused pursuant to S-LTR.2.2. because the Appellant used deception to obtain a TOIEC certificate by using a proxy test-taker in a test undertaken in 2012. However the judge found that the Respondent had not proved this, and that the appeal should not be dismissed on suitability grounds.

22. The judge therefore proceeded to consider R-LTRP and in particular EX.1. which is set out below;

“EX.1. This paragraph applies if

- (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
  - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
  - (bb) is in the UK;
  - (cc) is a British Citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
- (ii) it would not be reasonable to expect the child to leave the UK; or
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) ‘insurmountable obstacles’ means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.”

23. At paragraph 44 of the decision the judge found that the Appellant, although not the biological father of the Appellant’s children, had a genuine and subsisting parental relationship with them.

24. The judge found at paragraph 45 that the children are British citizens and therefore considered that he must then decide whether it would not be reasonable to expect the children to leave the UK.

25. Having considered this point the judge at paragraph 49 found there “are therefore no circumstances in which I would find it reasonable to require the child and her sibling to leave the country”.

26. The judge has therefore found that it is appropriate to consider EX.1.(a) and the requirements are satisfied, but then goes on at paragraph 50, to state that the children would not have to leave the UK, and the only person who could be required to leave the country would be the Appellant. The judge then concludes at paragraph 51 that EX.1.(a) is not engaged.
27. In my view the error is contained within paragraphs 50 and 51. If the requirements of EX.1.(a) are satisfied, it would seem, in the absence of any countervailing circumstances, that the appeal should be allowed. In my view the judge also errs in considering EX.1.(b) in finding no insurmountable obstacles to family life between the Appellant and Sponsor continuing outside the UK. The judge found the Sponsor to be an honest and credible witness who gave evidence that were it not for her children, she would accompany the Appellant back to Pakistan. The judge noted there was in force, in relation to the Sponsor's daughter, a Family Court order dated 6<sup>th</sup> October 2015. This gave the biological father contact rights with his daughter. The judge found at paragraph 57 that the court order "was not fixed in stone and whilst the court order currently is an obstacle I am not persuaded it is an insurmountable obstacle".
28. In my view if the Sponsor wished to carry on family life with the Appellant in Pakistan, she had a stark choice, either take the daughter out of the UK in breach of the court order, or leave her daughter behind. The court order states that a child may not be taken out of the UK without the written consent of every person with parental responsibility for the child, or the leave of the court. I am satisfied that the existence of the court order means that the Sponsor would face very significant difficulties in continuing her family life with the Appellant outside the UK, which would entail very serious hardship.
29. Having set aside the FTT decision I now turn to re-make the decision.
30. I must take into account that only one Ground of Appeal is available, and that is whether the decision made by the Respondent is contrary to section 6 of the Human Rights Act 1998. The Appellant relies upon Article 8. In deciding this appeal I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of **Hesham Ali v SSHD [2016] UKSC 60**, and in so doing, have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53.
31. The burden of proof lies on the Appellant to establish his personal circumstances in the UK and why the decision to refuse his human rights claim interferes disproportionately in his family life in this country. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.
32. The following findings made by the FTT were not challenged by the Respondent. The Appellant has a genuine and subsisting parental relationship with the Sponsor's children. Both children are British citizens.

It would not be reasonable to expect the children to leave the UK. For the reasons given above, I conclude that EX.1.(a) and (b) are satisfied. This means that the Immigration Rules setting out the requirements for limited leave to remain as a partner are satisfied. These are the rules, as explained in GEN.1.1. of Appendix FM that reflect how under Article 8 of the 1950 Convention the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic wellbeing of the UK, and which also reflect the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, which includes section 117B.

33. There would therefore appear to be no need to undertake a separate consideration of section 117B, which would be necessary if Article 8 outside the Immigration Rules has been considered. In the circumstances however I will consider section 117B of the 2002 Act. This confirms that the maintenance of effective immigration control is in the public interest.
34. It also confirms that it is in the public interest that individuals seeking to remain can speak English, as the Appellant can, and are financially independent. The Appellant does not have permission to work in the UK, and I do not find that he can be described as financially independent. Ability to speak English is a neutral factor. Section 117B confirms that little weight should be given to a private life established when a person has either a precarious immigration status or an unlawful status. The Appellant however does not rely upon his private life. He relies upon his family life with the Sponsor and the children.
35. Section 117B(4) states that little weight should be given to a private life or a relationship formed with a qualifying partner established by a person at a time when the person is in the UK unlawfully. This applies in the Appellant's case, as the Sponsor is a qualifying partner because she is a British citizen, and the relationship started when the Appellant was in the UK without leave.
36. Section 117B(6) confirms that in the case of a person not liable to deportation, the public interest does not require his removal if he has a genuine and subsisting relationship with a qualifying child, and it would not be reasonable to expect the child to leave the UK.
37. In considering the above, there is only the younger child to be considered as the other child is now an adult. However the findings made by the FTT are that the Appellant has a genuine and subsisting parental relationship with a British child, and it would not be reasonable to expect the child to leave the UK.
38. I find therefore that not only does the Appellant satisfy EX.1.(a) and (b) but also section 117B(6) based upon the findings made by the FTT. I have considered whether there are any other relevant public interest factors. The Appellant's lack of financial independence may be solved if he is given

permission to work. It is not the case that he has been involved in any criminal activity. I have taken into account that he has remained in the UK without leave since November 2011.

39. However my conclusion is that very substantial weight must be given to the fact that the Appellant satisfies the relevant Immigration Rules in order to be granted limited leave to remain as the partner of a British citizen. I find that outweighs the fact that the Appellant remained in the UK without leave from November 2011. I therefore conclude, taking into account that the Respondent's stance at the hearing was that there was no opposition to the appeal being allowed pursuant to Article 8, in view of the unchallenged findings made by the FTT, that the Appellant's removal from the UK would be a breach of Article 8 as it would be disproportionate. Therefore the decision made by the Respondent is contrary to section 6 of the Human Rights Act 1998.

### **Notice of Decision**

The decision of the FTT involved the making of an error of law such that it is set aside.

I re-make the decision. The appeal is allowed.

### **Anonymity**

The FTT made no anonymity direction. There has been no request for anonymity and I see no need to make an anonymity order.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

6<sup>th</sup> February 2018

### **TO THE RESPONDENT FEE AWARD**

Because I have allowed the appeal I have considered whether to make a fee award. I make no fee award. The appeal had been allowed because of evidence considered by the Tribunal that was not before the original decision maker.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

6<sup>th</sup> February 2018