



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02254/2016**

THE IMMIGRATION ACTS

**Heard at : Field House
On : 29 May 2019**

**Decision & Reasons Promulgated
On : 11 June 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

RUBI BEGUM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M West, instructed by Kalam Solicitors

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh, born on 1 January 1989. She entered the UK on 10 May 2011 with entry clearance as the dependant of a Tier 4 Migrant valid until 30 October 2012. She applied for, and was refused, leave to remain as the spouse of a settled person. On 29 May 2015 she applied for leave to remain on family and private life grounds under the ten-year partner route, on the basis of her family life with her husband and her British child.

2. The appellant's application was refused on 11 January 2016. Her relationship with her partner was accepted but it was considered that the

suitability provisions in S-LTR of Appendix FM of the immigration rules applied on the basis that ETS considered that she had fraudulently obtained her TOEIC English language certificate by using a proxy test-taker. Accordingly it was not accepted that the appellant met the requirements of paragraph R-LTRP.1.1(d) (i), although it was accepted that she met the requirements in paragraph R-LTRP.1.1(d)(ii) and (iii). The respondent considered that the appellant could not meet the requirements in paragraph 276ADE(1) on the basis of her private life and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

3. The appellant appealed that decision and her appeal was heard in the First-tier Tribunal on 20 February 2017 by First-tier Tribunal Judge Devittie. Judge Devittie considered that the respondent had discharged the burden of proving deception and that the appellant could not meet the requirements for leave to remain under the immigration rules. He accepted that the appellant had a genuine and subsisting marriage and that she and her husband had two British daughters, but he considered that it was not unreasonable to expect the children to leave the UK and that there were no compelling circumstances justifying a grant of leave outside the rules. He accordingly dismissed the appeal.

4. The appellant sought, and was granted, permission to appeal to the Upper Tribunal. The appeal came before Deputy Upper Tribunal Judge Renton who found no error of law in Judge Devittie's decision and upheld the decision.

5. Permission was then sought to appeal that decision to the Court of Appeal. The grounds before the Court of Appeal were that the First-tier Tribunal and Upper Tribunal had erred in the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002; that the Upper Tribunal had erred by upholding the First-tier Tribunal's findings on proportionality and that the First-tier Tribunal and Upper Tribunal had erred in relation to the interpretation and application of paragraph S-LTR.1.6 of Appendix FM and the test concerning fraudulently obtained TOEIC certificates. Permission was granted in the Court of Appeal on all three grounds and the case was remitted by consent to the Upper Tribunal.

6. The matter then came before me to consider whether or not Judge Devittie had made material errors of law in his decision.

7. Mr West relied on the Court of Appeal judgment in Secretary of State for the Home Department v Shehzad & Anor [2016] EWCA Civ 615 in submitting that the Secretary of State had failed to meet the burden of proving deception and the judge had erred by finding that he had. As for the second and third grounds, Mr West relied on the cases of EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874 and KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53 in regard to the correct question to ask in assessing reasonableness, namely whether it was reasonable to expect the children to follow the parent with no right to remain to the country of origin. He submitted that the judge erred by

only considering whether it was reasonable for the whole family to leave the UK. Mr West referred to the respondent's concession, in the refusal letter at page 3, that the requirements of paragraph EX.1 were met and therefore the question of reasonableness was satisfied. He submitted that in any event it was not reasonable to expect the two British children to accompany their mother to Bangladesh as it would separate the family and it would be a denial of their rights as British citizens, as found in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. Mr West submitted that the respondent was wrong, in the Rule 24 response, to compare the appellant's case to that of NS in KO (Nigeria), as neither of the parents in NS had leave to remain and both were in the UK illegally. He also relied on the case of Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661 in submitting that it was irrelevant to rely on the fact that in reality the children would not be expected to leave. Finally Mr West relied on the case of MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 where it was said that strong reasons were required to refuse leave to remain where a child had been in the UK for seven years.

8. Mr Lindsay denied that there was any concession in the refusal letter on the issue of reasonableness. He submitted that the suitability provisions were irrelevant when considering section 117B(6) and that that was therefore the only issue. He submitted that the appellant had not claimed in her statement that it would be unreasonable for the family to relocate to Bangladesh and the judge was bound to consider the evidence before him. MA had been overruled by KO (Nigeria). The judge's decision was entirely in line with KO (Nigeria). The judge had applied the right test and considered the matter in the real world. The circumstances were similar to those of NS in the case of KO (Nigeria) and were stronger in this case as the appellant's children were younger. In this case the children were only three and five years and there was no evidence of significant ties to the UK outside the family home. The case had always been put on the basis that the family would relocate to Bangladesh together and the judge was entitled to consider it on that basis. The judge's decision should be upheld.

9. Mr West reiterated the points previously made in response. Both parties agreed that if I set aside the judge's decision by reason of error of law, I was able to re-make the decision on the papers before me.

Consideration and Findings

10. I turn first to the grounds relating to the suitability provisions in section LTR.1.6. Mr Lindsay submitted that the case of Shehzad, relied upon by Mr West, had not been pleaded in the grounds. However the case is clearly relevant to the issues raised and I see no reason to exclude it, considering in particular that it is a well-known authority. I accept the point taken by Mr West in relying upon [30] of the judgment in that case and I also note [25] where the Court of Appeal emphasised the difference between cases categorised as "questionable" and those categorised as "invalid". At [30] it was said that "*in circumstances where the generic evidence is not accompanied by evidence*

showing that the individual under consideration's test was categorised as "invalid", I consider that the Secretary of State faces a difficulty in respect of the evidential burden at the initial stage." That is particularly relevant as Judge Devittie proceeded at [10] on the misunderstanding that the evidence at Annexure A referred to in Hilary Rickshaw's statement was that the appellant's test result had been considered invalid, whereas the evidence, which appears at Annex D1 of the respondent's appeal bundle, was that the results were questionable not invalid. In light of what was said in Shehzad, such a misunderstanding was material and fatal to the judge's decision. It seems to me that the respondent cannot be justified, on the evidence in this case, to conclude that deception was employed by the appellant and that the suitability provisions in S-LTR.1.6 applied. Other than the generic evidence there is little more from the respondent. The refusal letter refers to an interview of 7 October 2015 where the decision-maker concluded that the ETS certificate had been obtained by deception, but all that the respondent has produced is an "ETS Invalid Test Analysis" which in itself is unclear and uninformative, provides no details and is inconsistent with the fact that the appellant's test results were found to be questionable rather than invalid. In the circumstances, and in light of the observations in Shehzad, I can not see how the respondent has met the burden of proving deception.

11. As for the grounds challenging the conclusions on reasonableness in regard to the children, I agree with Mr West that the judge's assessment was not in line with the findings in KO (Nigeria). Although that case had not been decided at the time the judge made his decision, it dictates the way in which the law should have been considered and applied. Although the judge was aware that the appellant's husband and children were British citizens, this did not appear to be a matter taken into consideration when assessing reasonableness at [23] and [24]. The relevant question, as Mr West submitted, was that set out at [19] of KO (Nigeria), quoting EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874, namely is it reasonable to expect the two British children to accompany their mother to Bangladesh? As Mr West submitted, that would entail consideration of the separation of the family unless the father, a British citizen, felt compelled to leave with them, and also consideration of the denial of the right of British citizens. I agree with Mr West that this is an entirely different scenario to that of AN in KO (Nigeria) where neither parent was legally resident in the UK. Furthermore, the decision cannot be made on the basis that the children would not be expected to leave the UK as they could remain in the UK with their father, as that was not the relevant test, as the Court of Appeal held in AB (Jamaica).

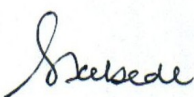
12. In addition there is the matter of the respondent's "concession" in the refusal letter which the judge did not consider. Mr Lindsay submitted that it was not a concession that the requirements of EX.1 were met, but went no further than an acceptance that EX.1 was engaged. However I cannot agree. The refusal letter specifically accepts that the requirements of R-LTRP.1.1.(d) (iii) are met, namely that paragraph EX.1. applies. Given the wording of section EX.1, which states that EX.1 applies if there is a qualifying relationship and it

would not be reasonable to expect the child to leave the UK, the clear implication is that the respondent accepted that it would not be reasonable for the British child (the respondent referred only to the older child) to leave the UK. Not only does that resolve the proportionality exercise in Article 8 outside the immigration rules under section 117B(6) irrespective of the suitability issue under S-LTR, but given the observations above in regard to S-LTR.1.6, it also provides an answer within the immigration rules, on the basis that the appellant is able to meet all the requirements of R-LTRP.

13. Accordingly Judge Devittie's decision suffers from material errors of law and has to be set aside and re-made. Both parties agreed that the decision could simply be re-made on the information and evidence already available with no need for a further hearing. On the basis of the respondent's concession, when taken together with the conclusion that the respondent has not, on the limited evidence available, discharged the burden of proving deception, it is clear that the appellant has succeeded in making out her Article 8 claim both within and outside the immigration rules. In any event, the unchallenged facts are that the appellant's husband is a British citizen who has lived in the UK since birth, Judge Devittie found that the best interests of the children were to remain in the UK where they have strong family ties aside from their parents and where there is a lack of immediate family in Bangladesh, the two children are British citizens and the appellant's departure from the UK would result in the children having to depart the UK in order to remain with their primary carer. In such circumstances, and in light of the recent case law, it seems to me that it would be unreasonable to expect the children to leave the UK and accordingly, and for the reasons already given, the decision in this case can simply be re-made by allowing the appeal on Article 8 grounds.

DECISION

14. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision and re-make it by allowing the appellant's appeal on Article 8 human rights grounds.

Signed: 
Upper Tribunal Judge Kebede
2019

Dated: 4 June