



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05963/2016**

THE IMMIGRATION ACTS

**Heard at Field House
On 12 December 2018**

**Determination Promulgated
On 8 January 2019**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR AKHTAR ALI
(NO ANONYMITY DIRECTION)**

Respondents

Representation:

For the Appellant: Mr P Richardson, Counsel (Direct access)

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

DETERMINATION AND REASONS

Introduction

1. The Appellant (The Secretary of State for the Home Department) appealed with permission granted by First-tier Tribunal Judge Bird on 2 November 2018 against the determination of First-tier Tribunal Judge Bristow who had allowed the Respondent's appeal on Article 8 ECHR grounds. The decision and reasons was promulgated on 24 September 2018.

2. The Respondent is national of Pakistan, born on 20 August 1975. His full immigration history is set out at [3] to [11] of Judge Bristow's determination. On 9 May 2013 the Respondent was granted ILR on the basis of having acquired 10 years' continuous lawful residence in the United Kingdom. But on 13 October 2015 that leave to remain was revoked on the grounds that the TOEIC certificate he had submitted with an earlier application for further leave to remain was obtained by deception because the Respondent had resorted to a proxy test taker. There was no right of appeal against the revocation of ILR decision, however on 19 October 2015 the Respondent made a human rights claim to the Secretary of State for the Home Department, which was followed soon after with an application for limited leave to remain as a partner under Appendix FM.
3. The partner application was refused on 15 February 2016 on Suitability grounds (S-LTR) and also because the Respondent's partner was not settled in the United Kingdom (E-LTRP.1.2). The Respondent's appeal to the First-tier Tribunal was dismissed but a material error of law was found by the Upper Tribunal. Judge Bristow's decision followed the rehearing ordered.
4. As had the previous First-tier Tribunal Judge, Judge Bristow found that the Respondent had resorted to a proxy test-taker (see [39] of his determination). The judge went on to allow the appeal on Article 8 ECHR grounds, finding that it was a disproportionate interference for the Respondent's wife and children to remain in the United Kingdom without him.
5. Permission to appeal was granted to the Secretary of State for the Home Department because it was arguable that the judge had failed to give any or significant weight to the public interest having found that the Respondent had used deception when applying for ILR. The judge had arguably also erred by failing to recognise that the Respondent's conduct was criminal, and that deception had to be considered regardless of whether a charge had been brought. The judge had failed to identify the exceptional or compelling circumstances which outweighed the public interest in the proportionality analysis.

Submissions

6. Mr Lindsay for the Appellant submitted that the decision and reasons could not stand. He relied on the grounds and the grant. At [55] of his determination the judge had made an error of fact by describing the Respondent's conduct as "not criminal". In fact obtaining leave to remain by deception is a criminal offence triable either way under section 24A(1) of the Immigration Act 1971. That went directly to the public interest question which the judge had weighed incorrectly. No

exceptional or compelling circumstances had been identified. On the contrary, the Respondent's deception had enabled him to remain in the United Kingdom and had given British Citizenship to three of his children. These were all significant matters which the judge had not addressed.

7. Mr Richardson for the Respondent submitted that the judge had no need to find exceptional circumstances and had been entitled to allow the appeal. The judge had identified delay by the Secretary of State. There had been no criminal conviction and any conviction had to be to the criminal standard, so the judge was right that there had not been criminal conduct. It was not a deportation case. The exceptionality was that there were four qualifying children whom the Secretary of State had accepted it was not reasonable to expect to leave the United Kingdom. The judge had found an active parental relationship between the Respondent and his children. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 had been correctly applied.
8. In reply Mr Lindsay submitted that there had not been voluntary inactivity by the Secretary of State for the Home Department. The Respondent's ILR had been revoked and he was required to leave the United Kingdom. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 did not apply to the Secretary of State for the Home Department, only to courts and tribunals. It was obvious that the British Citizen children could not be required to leave. Although their citizenship had been acquired by deception, that was not their fault and the Secretary of State's policy was not to revoke in such circumstances. KO (Nigeria) [2018] UKSC 53 did not preclude consideration of parental conduct. It was the family's choice whether to follow the father or not. The judge should have conducted a "real world" assessment: see EV (Philippines) [2014] EWCA Civ 874. The children could reasonably follow their father, or he could apply for entry clearance in due course. All of these matters had been ignored.
9. Mr Richardson sought a rejoinder. He insisted that section 117B(6) as applied by the judge was conclusive. There was no deportation order and questions of conduciveness did not arise. The Secretary of State for the Home Department had conceded that it was not reasonable for the children to leave.

Material error of law finding

10. The tribunal accepts the submissions of Mr Lindsay. It finds that there were a number of material errors of law in the decision and reasons, such that it must be set aside.

11. In the first place, there can be no doubt that the Respondent's conduct in obtaining ILR by deception was criminal: see the Immigration Act 1971:

24A Deception.

- (1) A person who is not a British citizen is guilty of an offence if, by means which include deception by him—

(a) he obtains or seeks to obtain leave to enter or remain in the United Kingdom; or

(b) he secures or seeks to secure the avoidance, postponement or revocation of enforcement action against him.

- (2) "Enforcement action", in relation to a person, means—

(a) the giving of directions for his removal from the United Kingdom ("directions") under Schedule 2 to this Act or section 10 of the Immigration and Asylum Act 1999;

(b) the making of a deportation order against him under section 5 of this Act; or

(c) his removal from the United Kingdom in consequence of directions or a deportation order.

- (3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

12. The fact that there has been no criminal prosecution is immaterial as that is a matter of the executive's discretion, in which resource issues no doubt play a part. Revocation of the Respondent's leave, requiring him to leave the United Kingdom immediately subject to any appeal (including judicial review) might well be seen as an adequate punishment. Nor is the formal standard of proof relevant, the more so because in reaching his adverse credibility findings, the First-tier Tribunal Judge reminded himself that the deception allegation was a serious one. The Respondent has not appealed the judge's adverse credibility findings. The tribunal finds that the First-tier Tribunal judge was wrong not to treat the Respondent's conduct as criminal as well as reprehensible.
13. That error had the effect of unbalancing the judge's proportionality analysis, which proceeded on several false premises. Contrary to the judge's views, the public interest in the Respondent's removal attracts substantial weight. Deterrence is an important element.
14. No compelling or exceptional circumstances were identified by the judge in his determination, although such a claim had been made.

The Respondent had asserted in his evidence in chief that he faced problems in Pakistan (see [22] and [23] of his witness statement dated 9 February 2017). Plainly those assertions were roundly rejected, as they were not considered worthy of mention by the judge in his determination. Hence nothing to prevent the continuation of family life in Pakistan was found.

15. The Secretary of State's position, as indicated by the judge at [44] of his determination, that it was not expected that the wife and children should leave the United Kingdom, left several other voluntary options open and did not of itself mean that the Appellant could remain regardless of his deceitful conduct. Those options were relevant as both the wife and oldest child have Pakistani nationality. All of the children were being brought up in a Pashto speaking household, of shared religion. These were all factors which required consideration but were not. The decision and reasons must accordingly be set aside and remade.

Remaking the original decision

16. For convenience and clarity the tribunal will henceforth refer to the parties by their original titles. Following discussion with the advocates, it was agreed that no further evidence needed to be called, and the First-tier Tribunal Judge's unchallenged findings of fact would stand: see [39] to [42] of the determination. The rehearing proceeded on submissions.
17. Mr Lindsay for the Respondent (the Secretary of State for the Home Department) built on his earlier error of law submissions. The Appellant could not meet the Immigration Rules. Public confidence in the immigration system was important, as was deterrence of immigration offences such as that found to have been committed by the Appellant. KO (Nigeria) [2018] UKSC 53 was not directly relevant to the best interests of the children. It was obvious that there was no reason why both parents could not return to Pakistan. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 was for the courts and tribunal to determine. The children who had acquired their British Citizenship by the father's fraud would not lose their citizenship by going to Pakistan. Their best interests were to remain with their parents and it was reasonable for them to go to Pakistan if that choice kept the family together. The appeal should be dismissed.
18. Mr Richardson submitted that there was no need for any exceptional factors, because the Secretary of State for the Home Department had accepted that it was not reasonable to remove the children. The children were all qualifying children. That was the end of the case.

19. If, however, that was not accepted, alternatively on Article 8 ECHR principles a balance sheet analysis was required. It had to be accepted that the Appellant had engaged in reprehensible conduct and that the Immigration Rules were in consequence not met. Nevertheless, there were compelling reasons in the form of the four qualifying children. Either separation from their father or moving to Pakistan were disproportionate because the level of the father's offending had nowhere near approached the level set for deportation. Why then was more severe treatment required for him? The Secretary of State for the Home Department's position was untenable. The appeal should be allowed.
20. The tribunal's decision was reserved and now follows. The Appellant is unable to satisfy the Immigration Rules and has no leave to remain in the United Kingdom. His ILR was revoked and he was found to have committed fraud. By the nature of that fraud it remained concealed from the Secretary of State for the Home Department for several years. Thus the Appellant cannot be heard to complain of delay on the Secretary of State for the Home Department's part. He might consider that he is fortunate not to have been prosecuted. His presence is not conducive to the public good. Thus he must leave the United Kingdom. He is not, however, being deported and has the opportunity of seeking entry clearance in the future if he wishes, subject to the exercise of the Secretary of State for the Home Department's powers under paragraph 320 of the Immigration Rules. The Appellant cannot complain of severe treatment: he created the situation himself and still has the opportunity to leave the United Kingdom voluntarily.
21. There is no issue with the Appellant's wife and children. They are not subject to removal (in the case of the British Citizen children, *cannot* be removed) and the Secretary of State for the Home Department has stated in terms that he considers it reasonable for them to remain in the United Kingdom with the Appellant's wife (who has limited leave to remain). That means that enforced removal will not be attempted and (as noted above), the British Citizen children's nationality will not be revoked despite the fact that it was acquired as the result of the Appellant's fraud. The Secretary of State for the Home Department's view of course leaves open (a) voluntary departure of the family group so as to remain together with the Appellant in Pakistan and (b) an entry clearance application by the Appellant after his return.
22. The First-tier Tribunal's finding was that "the best interests of the children will be to live with both parents and with each other. In the case of the triplets [who are British Citizens] it will be in their best interests to live in the UK." Those findings do not however require the children to remain in the United Kingdom, as that is a decision for their parents. As noted above, there was no evidence or finding that their welfare would be compromised in Pakistan. None is a teenager or at critical stage of their education. There was no evidence of

illness, infirmity or special needs incapable of being met in Pakistan. The children's education can continue in Pakistan, where English is an official language. Pashto is spoken in the Appellant's family home. Both parents are Pakistani and were educated and brought up in Pakistan, with which country's culture both are familiar. There are no religious issues. There is also wider family in Pakistan: the Appellant's evidence was that he has family there and there was no evidence to show that his wife has no family in Pakistan. The tribunal infers that the wife has family in Pakistan. The Appellant is educated and there was no evidence that he would be unable to find employment in Pakistan to support himself and his family. They will very obviously be far better off materially if he is in Pakistan and working, because the Appellant has no right to be in the United Kingdom at all, let alone to work.

23. Section 117B of the Nationality, Immigration and Asylum Act 2002 applies only to courts and tribunals, not to the Secretary of State for the Home Department. It guides the courts and tribunals when conducting the Article 8 ECHR proportionality assessment, as section 117A indicates.
24. On the facts of the present appeal, it is accepted by the Secretary of State for the Home Department that the wife and children do not have to depart from the United Kingdom. It is also accepted that the Appellant has a genuine and subsisting relationship with qualifying children. He is, however, unable to meet the Immigration Rules. The fact that the public interest considerations do not "require" the Appellant's removal cannot mean that a removal decision of a person who has engaged in criminal and reprehensible conduct can simply be brushed aside by the tribunal. That cannot have been parliament's intention. Immigration control would become non-existent. Crime and deception would be rewarded. The question must be considered by the tribunal. If the answer was always to be that the person affected must invariably stay and that any decision to the contrary taken by the Secretary of State for the Home Department would be set aside as unlawful, the statute would say so.
25. Mr Richardson's submissions on 117B(6) go too far. A "real world" view must be taken, as [19] of KO (Nigeria) [2018] UKSC 53 indicates. In the real world, families move countries and continents all the time, frequently so that the parents can find work. It is unrealistic, outdated, probably overly materialistic and possibly offensive to adopt a view that the United Kingdom is somehow superior in all respects to any other country, and that living in a South Asian country amounts invariably to "punishment". The children are in no way to be held responsible for their parent's misconduct, but as has been said repeatedly, the children are not a "trump card". The children's best interests are not a paramount consideration: see the discussion in EV (Philippines) (above), approved in KO (above). The tribunal must

assess or evaluate the proportionality of the Appellant's removal for itself, before reaching a decision.

26. In the tribunal's view, on the facts found in this appeal, the Appellant's removal is strongly in the public interest, yet not automatically required because of the presence of qualifying children. Deterrence is achieved by enforcement. Such removal is proportionate to the legitimate aims of the prevention of crime and immigration control generally. The problem only arises in this appeal because one parent has leave to remain (albeit limited) and the Appellant does not. The children may miss their father in various ways if the family elects not to follow him to Pakistan, but the fact remains that the Appellant and his family have the choice of remaining in the United Kingdom without their father, who may or may not seek entry clearance in the future, or as living together as a family in Pakistan. There is nothing to prevent them from making either choice. All of the choices are reasonable. Living in Pakistan cannot sensibly be seen as a "punishment" or second best to remaining in the United Kingdom. Nor is the father's support for his family automatically removed because he lives in another country in which he is entitled to live and work. He remains responsible to provide for them and can send them funds from Pakistan. There is no disproportionate breach of Article 8 ECHR. The appeal is dismissed.

DECISION

The Secretary of State's appeal to the Upper Tribunal is allowed

The making of the previous decision involved the making of a material error on a point of law. The decision is set aside, and is remade as follows:

The appeal is dismissed

Signed

Dated 17 December 2018

Deputy Upper Tribunal Judge Manuell