



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

Appeal Number: HU/27002/2016

THE IMMIGRATION ACTS

**Heard at Birmingham Priors Decision & Reasons Promulgated
Courts
On 5 March 2019 On 22 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MERZA RAHAT ULLAH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr. D. Mills, Home Office Presenting Officer

For the Respondent: Mr. A. Hussain, Counsel, Trent Chambers

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Ferguson, promulgated on 28 February 2018, in which he allowed Mr. Ullah's appeal against the Secretary of State's decision to refuse leave to remain on human rights grounds.
2. For the purposes of this decision I refer to Mr. Ullah as the Appellant, and to the Secretary of State as the Respondent, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:
 - (i) it was arguable that although the Respondent had conceded at the hearing that there had not been shown that the Appellant had submitted a TOEIC certificate from ETS in a previous application to the Respondent of 31/01/2014, that contrary to the Judge's assessment, that matter was not the only determining matter under App FM, and that nevertheless there had remained at large the Respondent's assertion of the use of deception, the obtaining of the said language certificate by the use of a proxy test taker;
 - (ii) arguably the Judge erred when appearing to conflate the conceded issue of the certificate having been sent with the previous 2014 application with the App FM requirement, in play, para S-LTR.1.6., when arguably in real terms that suitability provision under the Rules was altogether wider i.e: *The presence of the applicant in the UK is not conducive to the public good because of their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.) character, association or other reasons, make it undesirable to allow them to remain in the UK;*
 - (iii) and accordingly, when concluding that the Appellant had met the requirements of the Rules for leave to remain as a partner, that the Judge arguably erred in omitting to address a material matter in the appeal and/or provide an adequacy of reasoning overall under Art 8."
4. The Appellant attended the hearing.
5. In submissions, Mr. Hussain accepted that the decision involved the making of an error of law given that the Judge had failed to deal with how the Appellant had obtained his TOEIC certificate. He accepted that the Judge, in considering whether S-LTR.1.6 applied, should have also considered whether the certificate had been obtained by deception. However, he argued that this error was not material with reference to the cases of KO (Nigeria) [2018] UKSC 53, and JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC).

Error of Law

6. It was accepted by Mr. Hussain on behalf the Appellant that the Judge should have considered whether the Appellant had obtained the test by deception. Ms. Simbi, the Respondent's representative at the First-tier Tribunal hearing, had accepted that the evidence before the Tribunal did not show that the disputed TOEIC certificate had been provided with an application made to the Respondent. However, I find that this was not the end of the suitability issue given the reasons set out by the Respondent in the reasons for refusal letter, on which Ms. Simbi relied.
7. The reasons for refusal letter states that the Respondent was satisfied that the TOEIC certificate was "fraudulently obtained". In the fifth paragraph on page 3 the Respondent stated:

“In fraudulently obtaining a TOEIC certificate in the manner outlined above, you willingly participated in what was clearly an organised and serious attempt, given the complexity of the test centre itself, to defraud the SSHD and others. In doing so, you displayed a flagrant disregard for the public interest, according to which migrants are required to have a certain level of English language ability in order to facilitate social integration and cohesion, as well as to reduce the likelihood of them being a burden on the taxpayer.”

8. The Respondent’s case was not limited to the issue of whether the certificate had been submitted in an application, but included the manner in which the certificate had been obtained. I find that the Judge failed to deal with this issue, which is relevant to the assessment of the suitability requirements in Appendix FM. I find that this is an error of law.

9. However, I find that the error is not material. At [4] the Judge states that the Appellant was the father of a British child. At [10] the Judge states:

“But the marriage is accepted by the Respondent and the relationship to his son born in January 2016 is established by DNA evidence so if it had been necessary to consider the circumstances outside Appendix FM of the rules the appeal would also have been allowed because Mr Ullah meets the requirements of Section 117B(6) which is a complete answer to the balancing exercise between the rights to a family life and the public interest in maintaining effective immigration control (*MA Pakistan [2016] EWCA Civ 705*).”

10. I have carefully considered the case of JG. The headnote states:

“Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.”

11. It was accepted by Mr. Mills that, as the caselaw stood, his submission that it was a material error was not so strong. However, he submitted that the Respondent’s position was that, prior to asking the question of whether it would be reasonable to expect a child to leave the United Kingdom, the Tribunal had to ask whether there was actually any prospect of the child leaving. He submitted that the Respondent’s position was that, having first asked the question whether or not there was any prospect of a child leaving, if the answer was that there was not, which he submitted that it would be in the Appellant’s case, there was then no need for a Tribunal to proceed to consider the reasonableness issue.

12. However, while this may be the Respondent’s position, and while it was submitted that the issue was due to come before the Court of Appeal soon, as it stands, this is not what the caselaw says. JG fully considered the Respondent’s position with reference to the IDI, and gave careful consideration to KO (Nigeria). JG held that a Tribunal is required to hypothesise whether the child would leave the United Kingdom “even if

this is not likely to be the case". I find that, in the case of a British child, it would not be reasonable to expect him or her to leave the United Kingdom, and indeed it was not submitted by Mr. Mills that it would be reasonable for the Appellant's child to leave the United Kingdom. I therefore find that there is no material error in the Judge's decision. He allowed the appeal on human rights grounds, having made a finding at [10] that section 117B(6) applied in the Appellant's case.

13. I therefore find that, although the decision involves the making of an error of law in failing to consider fully the Respondent's case in relation to the suitability requirements under Appendix FM, this error is not material given the application of section 117B(6) to the Appellant's case.

Decision

14. The decision does not involve the making of a material error of law, and I do not set it aside.

15. The decision of the First-tier Tribunal stands.

Signed

Date 20 March 2019

Deputy Upper Tribunal Judge Chamberlain