



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

Appeal Number: HU/00643/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 18<sup>th</sup> May 2017**

**Decision & Reasons**

**Promulgated**

**On 22<sup>nd</sup> May 2017**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**MD RASHID AHMED  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr D Balroop of Counsel

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Gribble promulgated on 18 October 2016, in which his appeal against the decision to refuse his application for leave to remain on the basis of private and family life dated 22 December 2015 was dismissed.

2. The Appellant is a national of Bangladesh, born on 24 May 1990, who first entered the United Kingdom on 14 November 2009 with valid entry clearance as a Tier 4 Student to 31 December 2011. He made a further application for leave to remain as a student on 14 November 2011 which was unsuccessful and his appeal against that refusal was dismissed in 2012. On 20 April 2015, the Appellant applied for leave to remain in the United Kingdom as a parent.
3. The Respondent refused the application on 22 December 2015 for the following reasons. First, that the Appellant did not meet the suitability criteria in S-LTR.1.6 as his presence was not conducive to the public good by reason of his conduct, character and associations such that it is undesirable for him to stay in the United Kingdom. The Respondent was satisfied that the Appellant had fraudulently obtained ETS English language certificates from tests on 21 February 2012, 20 March 2012 and 18 April 2012.
4. Secondly, the Appellant did not meet the eligibility criteria for leave to remain as a partner or as a parent as it was not accepted that he was in a genuine and subsisting relationship as claimed. Thirdly, the application was refused on private life grounds under paragraph 276ADE(1) of the Immigration Rules on the same suitability grounds as above and on eligibility grounds that there were no very significant obstacles to his return to Bangladesh where he has resided for the majority of his life and where he has retained knowledge of life, language and culture.
5. Finally, the Respondent considered whether there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules but did not find any. The Respondent considered the Appellant's child, a British Citizen, with whom it was accepted he had a parental relationship, and her best interests in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 but considered it reasonable for her to remain in the United Kingdom with her mother.
6. Judge Gribble dismissed the appeal in a decision promulgated on 18 October 2016 on all grounds. Judge Gribble was satisfied that the Appellant used deception in the English language tests he took between February and April 2012 and that he had not given a plausible or innocent explanation for the invalid test results. The reasons given were the Appellant's lack of a coherent account, including a change from stating that he took a genuine test to having not attended the hearing centre or taking the test at all.
7. In relation to family and private life, Judge Gribble was satisfied that the Appellant was in a genuine and subsisting relationship with Ms Begum and that they had a daughter together. There was little evidence of any significant private life. Overall Judge Gribble found that the Appellant's removal from the United Kingdom would not be a disproportionate interference with his right to respect for private and family life, by reference to the factors in section 117B of the Nationality, Immigration

and Asylum Act 2002 and the best interests of the Appellant's daughter, which were to remain in the care of both of her parents.

8. For the purposes of section 117B(6), Judge Gribble found that it would be reasonable for the Appellant's daughter to leave the United Kingdom due to her young age and that she would be moving with her parents; that there were no medical needs which could not be met in Bangladesh; that both parents were capable of working in Bangladesh, speak the language and are familiar with the culture so could assist their daughter in language skills; that there are wider family members in Bangladesh and support from UK family members and finally that she would retain her British Citizenship and could return to the United Kingdom in the future.
9. The other factors taken into account under section 117B were that the Appellant could speak English, that he was not financially independent and that he had remained unlawfully in the United Kingdom since 2012 and therefore less weight was to be attached to his family and private life. Separately, significant weight was given to the Appellant's use of deception in the United Kingdom; his ability to reintegrate in Bangladesh and that he could make an application for entry clearance to return to the United Kingdom.

### **The appeal**

10. The Appellant appeals on two grounds, first, that the Respondent had not met the burden of proof in the allegation that he had applied deception in his English language tests and that the Respondent had not acted in accordance with her own guidance as to evidence required. Further, that the First-tier Tribunal failed to give reasons for the findings made on this point and failed to take into account that he had passed an English language test in 2011. Secondly, that the First-tier Tribunal had failed to take attach sufficient weight to his daughter's British Citizenship and that it would be unreasonable for her to leave the United Kingdom. In this regard, Judge Gribble failed to undertake an assessment of best interests in accordance with **EV Philippines v Secretary of State for the Home Department [2014] EWCA Civ 874**.
11. Permission to appeal was granted by Judge Appleyard on 6 March 2017 on both grounds, albeit with a view that the first ground of appeal was much weaker than the second.
12. At the hearing, Counsel for the Appellant relied on the written grounds of appeal only on the first ground and in relation to the second round relied in oral submissions primarily on the Respondent's 'Immigration Directorate Instructions on Family Migration: Appendix FM Section 1.0 B, Family Life (as a Partner or Parent) and Private Life: 10-Year Routes' from August 2015. It was submitted that the First-tier Tribunal had not taken this into account when reaching the decision on the reasonableness of the child leaving the United Kingdom. It was however accepted that neither party had submitted the guidance to the First-tier Tribunal in the course of this

appeal. In any event, reliance was placed on paragraph 11.2.3 to the effect that other than in cases of criminality it is not usually reasonable to expect a British Citizen child to leave the EU with a parent or primary carer; although it may be appropriate to refuse to grant leave when the conduct of the parent gives rise to considerations of such weight as to justify separation. The examples given are criminality falling below the threshold set out in paragraph 398 of the Immigration Rules and a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules. In the present case, it would need to be assessed as to whether the Appellant's actions by overstaying and applying deception in the English language tests (if he is unsuccessful on the first ground of appeal) amounted to a very poor immigration history with deliberate and repeated breaches of the Immigration Rules. In any event, a decision-maker and therefore the First-tier Tribunal, must consider the impact on the child of any separation in such cases.

13. Overall, it was submitted that there was a material error of law in the First-tier Tribunal's assessment of the reasonableness of the Appellant's child going to Bangladesh with him. The consideration of the alternative by Judge Gribble that the Appellant could make an application for entry clearance also did not take into account that any such application could be refused under the general grounds of refusal in paragraph 322 (11) of the Immigration Rules.
14. In response, the Home Office Presenting Officer submitted that there was no material error of law in the decision. On the first ground of appeal, it is clear that as in **SM and Qadir v Secretary of State for the Home Department ETS - Evidence - Burden of Proof** [2016] UKUT 00229 (IAC), the Respondent had discharged the initial burden of proof to establish deception and the conclusions reached by the First-tier Tribunal that no plausible and innocent explanation had been given in response by the Appellant was a lawful and rational one to reach on the basis of the evidence before it.
15. The findings on deception and on the first ground of appeal set the context for the second ground of appeal and reasonableness of the Appellant's child leaving the United Kingdom must be assessed within this context. It was submitted that the Appellant has a very poor immigration history and has deliberately breached the Immigration Rules as shown by the finding of deception. The decision of Judge Gribble took into account all of the relevant factors and circumstances, including that the child was a British Citizen and gave sufficient weight to that factor. However, in all of the circumstances, the Appellant's removal from the United Kingdom was proportionate and the best interests of the child were outweighed for the reasons given. It was submitted that there was no material error of law given that on the facts this was the only lawful conclusion that could have been reached on the appeal.

### **Findings and reasons**

16. In relation to the first ground of appeal, the Respondent has, in **SM and Qadir v Secretary of State for the Home Department ETS - Evidence - Burden of Proof** [2016] UKU 00229 (IAC), been found to have satisfied the initial evidential burden of proof with deployment of generic evidence about ETS testing and evidence by way of the results from the ETS look-up tool that specific certificates are invalid. The Respondent relied both on the generic evidence and the ETS look-up tool showing the Appellant's test was invalid in this case and there was no further requirement at this stage for her to provide audio file evidence or further analysis of test records to establish deception. The burden then shifted to the Appellant to provide a plausible innocent explanation for the outcome. Judge Gribble found that he failed to do so having given two fundamentally inconsistent alternative explanations, first in his original grounds of appeal and draft witness statement that he had genuinely undertaken the English language test and provided details of that test (which I note was the position that appeared to be maintained in the grounds of appeal to the Upper Tribunal) and the position presented orally at the First-tier Tribunal appeal hearing that he simply did not attend the tests at all. Judge Gribble gave sufficient and lawful reasons for finding that the Appellant's evidence was confused, vague and inconsistent such that he had not provided a plausible explanation for the test result, nor discharged the burden he faced on this.
17. Further, there was no material error of law in failing to attach positive weight to the Appellant's English language test passed in 2011 given that there are in any event other reasons why a person may have used a proxy test taker and this could not in any event outweigh the other significant problems with the Appellant's evidence as to the tests in 2012.
18. For these reasons, I do not find any error of law in the First-tier Tribunal's assessment and reasoning in upholding the Respondent's decision on suitability under the Immigration Rules in Appendix FM for reasons of deception.
19. As to the second ground of appeal, I do not find that there is any material error of law by the First-tier Tribunal in assessing the best interests of the Appellant's daughter, the reasonableness of her leaving the United Kingdom nor in the overall assessment of proportionality for the purposes of Article 8 of the European Convention on Human Rights. Judge Gribble clearly recognised that the Appellant's daughter was a British Citizen and therefore a qualifying child for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, in paragraph 34 of the decision. It was further specifically recognised that she would not lose her citizenship if she moved to Bangladesh with the Appellant and that she could return for visits to extended family and United Kingdom and return permanently when she was older. Although there is no express statement to the effect that significant weight is attached to the fact that the Appellants child as a British Citizen, it is clear that that has been taken into account alongside a detailed consideration of all of her circumstances in the United Kingdom and her best interests. As a primary finding, her

best interests were to remain in the care of both of her parents but there were no overriding reasons as to why that should be in the United Kingdom as opposed to in Bangladesh. There is no inconsistency in the assessment of best interests with the factors to consider set out in **EV (Philippines)**.

20. There is nothing to suggest that the Respondent's guidance relevant to this point was brought to the attention of the First-tier Tribunal by either party, however I do not consider that the failure to have reference to it makes a material difference in the circumstances of this appeal. The Appellant's daughter is not being required to leave the United Kingdom and may remain here with her mother if they so choose such that she could continue to enjoy the benefits of British Citizenship from within the territory. That possibility of the family being split was expressly considered by Judge Gribble in paragraph 35 the decision.
21. However, in all of the circumstances, lawful and rational reasons were given as to why it would be reasonable for her to leave the United Kingdom with both parents and this is clearly a case which falls within one of the examples of circumstances given in the Respondents guidance about where leave to remain may be refused to an applicant. The assessment of reasonableness for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 was in accordance with the Court of Appeal's decisions in **MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705** wherein it was confirmed that the assessment of reasonableness required regard to be had to the conduct of the applicant and any other matters relevant to the public interest.
22. As found by the First-tier Tribunal, this Appellant does have a very poor immigration history. He has remained unlawfully in the United Kingdom since 2012 and failed to leave despite being served with a IS151A notice on 24 October 2013. He has been found to have applied deception in English language tests in 2012 which is a clear deliberate breach of the Immigration Rules. These are significant factors in favour of the public interest in maintaining immigration control which outweigh the argument that family life established in circumstances in the United Kingdom when the Appellant was here unlawfully should prevail, as per the findings in paragraph 36 of the First-tier Tribunal's decision. For these reasons, I do not find that there was a material error of law on the second ground of appeal.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed  
2017



Date 19<sup>th</sup> May

Upper Tribunal Judge Jackson