



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/10964/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at: Liverpool

Decision & Reasons Promulgated

On: 17th August 2017

On: 21st August 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**MA
(anonymity order made)**

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Moksud, acting for Lincoln Solicitors
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a male national of Pakistan born in 1986. He appeals with permission the decision of the First-tier Tribunal (Judge IF Taylor) to dismiss his human rights appeal.

Anonymity Order

2. This appeal turns in part on the presence in the United Kingdom of

the Appellant's minor son. I am concerned that identifying the Appellant could lead to the identity of the child being revealed in the public domain. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background

3. The Appellant came to the United Kingdom in 2010 with leave to enter as a student. He duly renewed that leave on more than one occasion. Whilst here he met and married a Ms S, a Pakistani who had settled in the United Kingdom and had been granted indefinite leave to remain. In February 2015 the couple had their first child, a little boy who I shall refer to as G. By virtue of his mother's status at the date of his birth, G is a British national. On the 9th July 2015 the appellant made an application for leave to remain on human rights grounds.
4. The application was refused on the 12th November 2015 for one central reason. The Respondent alleged that the Appellant had, in respect of an application made in 2013, relied on an English language test certificate to which he had not been entitled; specifically it was said that he had used a proxy to take his test and that he was therefore refused for involvement in what has become known as the 'ETS fraud'. This decision meant that the Appellant could not hope to qualify for leave to remain under any of the routes in Appendix FM, nor 276ADE(1) since he fell for automatic refusal on 'suitability grounds'. The 'five year route' was therefore closed to him. In respect of Article 8 'outside of the rules' (or as the Respondent continues to refer to it: "decision on exceptional circumstances") the refusal letter again referred to the ETS fraud. Although it was noted that the Appellant had a British child, the Respondent considered it reasonable to expect the child to remain in the UK without his father, since he could be cared for by his mother.
5. The matter came before the First-tier Tribunal, which in essence accepted the arguments put in the refusal letter.
6. Mr Moksud challenges the findings in respect of the 'ETS fraud' and in respect of the Appellant's Article 8 family life. Before me Mr Harrison

conceded that both limbs of the appeal were made out. In light of that agreement between the parties I need not deal with either ground, or their respective submissions in any great detail.

Ground 1: ETS

7. The reasoning of the First-tier Tribunal appears in the determination at paragraph 8. Referring to the Respondent's evidence, in particular the witness statements of Rebecca Collins and Peter Millington et al, the Tribunal agreed that these were generic, and then said this:

“... the documents are set out in very clear detail the procedure undertaken in respect of the voice recognition software which is then tested by two suitably qualified individuals who are working independently and in the circumstances I am satisfied that the Respondent has established on the balance of probabilities that the tests identified in respect of the Appellant were taken fraudulently”.

The Tribunal then adds:

“It is the Appellant's evidence that he took these exams himself and that he did not engage a proxy exam taker which in the circumstances I do not accept”.

8. The complaint that is made about that paragraph is that the First-tier Tribunal appears to have strayed from the structured approach to the question of fraud set out *inter alia* by the President in SM & Qadir v SSHD [2016] UKUT 229 (IAC). In that decision the President held that the 'generic' evidence submitted by the Respondent can be regarded as sufficient to discharge the *evidential* burden of proof that lies on her, but that the Tribunal must then look with care at the explanation offered by the individual who stands accused. In its final analysis the Tribunal must weigh the two in the balance before reaching a conclusion on the evidence. If the 'innocent explanation' offered by the appellant is rejected, then the Respondent will have succeeded in discharging the legal burden of proof and will have demonstrated fraud has been committed. On the contrary if the Tribunal accepts the evidence of the appellant before it to be credible, that burden will not have been discharged.
9. The parties, and this Tribunal, are in agreement that paragraph 8 does not demonstrate that this methodical approach was adopted here. What appears to have happened is that the Tribunal found the legal burden to be discharged on the basis of the generic evidence, without balancing against that evidence the various points made by the Appellant (the fact that he had passed other, earlier, tests in which no fraud had been detected, his assertion that he attended the

test centre in person, his denial of any involvement, the fact that he speaks excellent English etc). The sentence at the end of the paragraph does not amount to a reasoned evaluation of the Appellant's case. This part of the decision must therefore be set aside.

Ground 2: British Child

10. The reasoning on proportionality in the determination is detailed and canvasses a variety of issues. What it does not do, submits Mr Moksud, is engage with the significance of the fact that the Appellant's child is British.

11. The principle question to be addressed in respect of proportionality was that set out in s117B of the Nationality, Immigration and Asylum Act 2002:

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship

with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

12. By virtue of s117D of the same Act, a British child is a "qualifying" child in the context of s117B(6)(a). It is accepted that the Appellant's child is British.

13. Did the Tribunal ask itself the correct question? At paragraph 11 the determination says this:

"... clearly, both the appellant's son and his wife, who has indefinite leave to remain in the United Kingdom, cannot be forced or compelled to leave the United Kingdom. If the appellant is removed it will be for the appellant and his wife to decide whether to remain in the United Kingdom or follow the appellant to Pakistan".

14. As set out at s117B(6)(b) the question was not whether the child was being *compelled* to leave, but whether it was *reasonable* to expect him to do so in order to preserve his family life with his father. This required the Tribunal to weigh the public interest against the rights of the child, taking into account all relevant matters. In this case that included the fact that the child was British, itself an important consideration: ZH (Tanzania) v Secretary of State for the

Home Department [2011] UKSC 4.

15. It is not evident from the face of this determination that adequate weight was given to that matter. The Tribunal addresses various factors such as the cultural origins of his parents, the fact that G is only young and that in its assessment at [14] he has “no real ties” to this country. I would observe that it cannot be said that this was a child who had no real ties to the UK. He has a British passport and as such is entitled to the benefits of that nationality. That is not however Mr Moksud’s principle complaint. He submits that in addressing the question of ‘reasonableness’ the Tribunal erred in failing to have regard to the Respondent’s now well-known Immigration Directorate Instruction entitled ‘Family Migration: *Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*’ (August 2015). At 11.2.3 under the heading “Would it be unreasonable to expect a British Citizen child to leave the UK?” the following answers are given to caseworkers:

“Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship”.

(emphasis added)

16. It should be noted that the terms “parent” and “primary carer” are distinguished, and separated by an “or”. The clear import of that policy statement is that where a parent of a British child is being required to leave the EU, the case *must always be assessed* on the basis that it would be unreasonable to expect the British Citizen child to leave the EU with that parent. That is because in circumstances such as these – absent criminality where different considerations apply – it can be assumed that the removal of a parent will mean some significant interference with Article 8 family life.
17. I am satisfied that in its assessment of Article 8 the Respondent erred in failing to have regard to the Respondent’s published policy, a

matter plainly relevant to the question of whether it was 'reasonable' to expect this child to leave, or whether it was proportionate to remove his father.

Conclusions

18. This was not a case in which the presence of a British child would inexorably lead to success for the Appellant. The shadow of the accusation of fraud still remains over him and as such that would be a matter that the Tribunal would legitimately be entitled to weigh in the balance. The proper determination of the appeal requires the Tribunal to decide the following questions of fact:

(a) Has the Respondent discharged the legal burden of proof and demonstrated that the Appellant used fraud in the context of an immigration application?

(b) If so is that a matter of sufficient weight to justify interference with his family life with his British family, or put another way would it make, in the particular circumstances of the case, it 'reasonable' to expect this child to leave with his father?

(c) If the ETS fraud is not proven are there any other countervailing factors such that the Respondent's concession, expressed in her policy, would not apply?

19. Before me the parties agreed that the extent of the fact finding required necessitated the remittal of this matter to the First-tier Tribunal.

Decisions

20. For the reasons I have given I am satisfied that the decision of the First-tier Tribunal involved material errors in approach. It is set aside.

21. The appeal is to be heard *de novo* in the First-tier Tribunal.

22. There is an order for anonymity.



Upper Tribunal Judge Bruce
18th August 2017