



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/29874/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 20 April 2017

Decision &

Promulgated

On 3 May 2017

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

DAVINDER SINGH

(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Unrepresented

For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 22 April 1988. He entered the UK on 20 September 2009 on a Tier 4 Student visa. He was subsequently granted leave to remain as a Tier 4 Student, most recently from 6 March 2013 until 5 November 2014. On 4 November 2014 he applied for leave to remain in the UK on the basis of his family and private life with his partner and her son (whom I shall refer to as the appellant's "step son"), both of whom are British citizens.
2. On 24 August 2015 the application was refused. The respondent's position was that the appellant had, in respect of a previous application, obtained test results from Educational Testing Service ("ETS") by deception.

Consequently, it was concluded he did not meet the suitability requirements for consideration to be given to his claim under the Immigration Rules. The respondent also determined that there were not exceptional circumstances to warrant allowing his application under Article 8 ECHR outside the Immigration Rules.

3. The appellant appealed to the First-tier Tribunal where his appeal was heard – and dismissed - by First-tier Tribunal Judge Whitcombe. The appellant now appeals against that decision.

Decision of First-tier Tribunal

4. The judge, firstly, considered whether the appellant had used deception to obtain test results from ETS and concluded that he had.
5. The judge then turned to the question of whether removal of the appellant from the UK would be contrary to Article 8 ECHR. The judge found that, because the appellant had used deception to obtain test results, he fell foul of the suitability requirements in the Immigration Rules and therefore his appeal could only succeed outside the Rules under Article 8 ECHR.
6. The judge directed himself that there would need to be compelling circumstances to justify a free standing Article 8 assessment, and concluded that there were none. He stated that the suitability requirement relating to false information has a very obvious public policy justification. He noted that it was accepted by the appellant that he could return to India to make an application for entry clearance without encountering “very significant obstacles” and that he has the language and cultural knowledge to live in India whilst making an application. The judge then concluded that *“there do not appear to be any compelling circumstances that would justify a free-standing Article 8 assessment.”*

Grounds of appeal, permission to appeal and submissions on error of law

7. The grounds of appeal argue that:
 - a) the judge misapplied the burden of proof in considering whether there was deception in obtaining the English language test result; and that
 - b) the judge, in assessing the appellant’s family life, failed to give consideration to the relationship between the appellant and his step son.
8. Permission to appeal was not given in respect of the deception issue and was limited to the alleged error in respect of Article 8. In granting permission, Upper Tribunal Judge Lindsley stated that it was arguable the judge had failed to make findings on the relationship between the appellant and his step son and to apply s117B(6) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).
9. The appellant’s representative did not attend the hearing due to sickness. I gave the appellant the option of adjourning the hearing. However, he

decided to proceed. The appellant's case, in sum, was that the judge had not taken account of the relationship between him and his step son.

10. Mr Jarvis stated that no issue was taken in respect of there being a genuine relationship between the appellant and his step son. He accepted the judge had not dealt in detail with the relationship between the appellant and his step son but argued that the judge had dealt with the case as put to him by the appellant's representative and had balanced Article 8 in an appropriate way, given the weight that should properly be given to the appellant's deception.

Error of Law

11. There are, in my view, two clear errors of law in the decision.

12. The first error is that the judge has failed to consider whether it would be reasonable for the appellant's step son to leave the UK.

13. Judges are required statutorily to take into account the enumerated considerations specified in Section 117B of the 2002 Act. This includes Section 117B(6).

14. Section 117B(6) of the 2002 Act states that:

(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.

15. The decision does not include any consideration of Section 117B(6). It was common ground between the parties that the appellant was not subject to deportation, that his step son was a qualifying child, and that he had a genuine and subsisting relationship with him. What was at issue was whether it would be reasonable for the appellant's step son to leave the UK. Failure to consider this factor was a material error of law.

16. A second error of law arises from the failure of the judge to consider the best interests of the appellant's step son. It is well established that the best interests of a child affected by a decision must be taken into account. See, for example, Makhlouf (Appellant) v SSSHD [2016] UKSC 59. At no point in the judge's assessment of the appellant's private and family life, either under or outwith the Immigration Rules, are the best interests of the appellant's step son considered or is an explanation given as to why, in these particular circumstances, such an assessment is not required. This, too, is a material error of law.

Remade decision

17. The factual matrix is not in dispute and my findings of fact are as follows:

- a) The appellant is in a genuine and subsisting relationship with his partner, with whom he lives. She is a British citizen.
 - b) The appellant's partner has a son (the appellant's step son), born on 27 December 2010. The appellant's step son has known the appellant for most of his life and considers him to be his father. He does not have a relationship with his natural father.
 - c) The appellant has a close relationship with his step-son and is his primary 'day to day carer', whilst his mother goes to work (at Heathrow Airport). For example, the appellant gets his step son ready for school and take and collects him from school.
 - d) The appellant's parents and wider family live in India.
 - e) The appellant's partner is originally from India but her close family live in the UK.
 - f) If the appellant were removed from the UK, his partner and step-son would remain in the UK.
 - g) The appellant entered the UK in September 2009 on a student visa and subsequently extended his right to remain (remaining in the UK lawfully) before applying for leave to remain on the basis of his relationship with his partner and step son.
 - h) The appellant obtained test scores through ETS on 26 June 2012 as a result of deception where a proxy sat the test for him.
18. The appellant cannot succeed under the Immigration Rules. The deception used when applying for leave to remain in the UK as a student in 2012 means that he does not satisfy the "suitability" requirements under the Immigration Rules. Consequently, the Immigration Rules relating either to private life or family life are not available to him as a basis upon which to be granted leave to remain in the UK.
19. Accordingly, the only basis upon which the appellant is able to succeed in his appeal is if he is able to establish that removing him from the UK would be contrary to the UK's obligations under Article 8 ECHR.
20. As the appellant lives with and is in a genuine relationship with his partner and step-son in the UK, it is clearly the case that he has a family life in the UK which engages Article 8. It is also clear that the appellant's removal would be in accordance with the law and in pursuit of a legitimate aim. The issue in contention, and upon which this appeal turns, is whether his removal would be proportionate.
21. My starting point is to consider the interests of the appellant's step son, whose interests are "a" (but not "the") primary consideration.

22. I am satisfied that it is undoubtedly in the appellant's step-son's best interests for the appellant to remain in the UK. The appellant's step-son views, and treats, the appellant as his father. They have a genuine parent/child relationship. The appellant looks after and provides care to his step-son. In these circumstances, I am satisfied that it is in the appellant's step-son's best interests for the appellant to remain in the UK so that this relationship can be maintained.
23. The fact that it is in the appellant's step son's best interests for the appellant to remain in the UK is not determinative of the appeal but is a factor – and an important one – in the assessment of whether the appellant's removal would be proportionate. Other factors, either individually or cumulatively, can outweigh the best interests of a child.
24. Section 117B of the 2002 Act sets out mandatory considerations in the proportionality assessment under Article 8 ECHR. I apply the relevant parts of that section to this appeal as follows:
25. Section 117(B)(1): Maintenance of effective immigration controls is in the public interest. This is important in all cases. However, where, as here, an appellant has used deception when making an application for leave to remain, particular weight should be given to this factor. Accordingly, as a result of the deception used by the appellant, the public interest weighs heavily against him.
26. Section 117(B)(2 and 3): The appellant speaks English and, through his relationship with his partner, is financially independent.
27. Section 117(B)(4 and 5): The appellant's relationship with his partner was entered into when his immigration status was precarious. Although section 117B(4) of the 2002 Act only refers to private life, I am of the view, having regard both to the Strasbourg jurisprudence and the facts of this case, that only little weight should be attached to the appellant's family life with his partner. The relationship commenced, and developed, at a time when the appellant was in the UK as a student. There was no basis for him, or his partner, to have had, at that time, any expectation that the appellant was entitled to remain permanently in the UK. The appellant and his partner entered into a relationship in the full knowledge that the appellant did not have a basis to remain in the UK, other than temporarily as a student. I therefore attach little weight to the relationship.
28. I now turn to consider Section 117B(6).
29. It was common ground that the appellant is not liable to deportation, is in a genuine and subsisting relationship with his step son, and that his step son is a qualifying child. The only issue under Section 117B(6), therefore, is whether it is unreasonable to expect the appellant's step son to leave the UK.
30. MA (Pakistan) concludes that the reasonableness test in this context is wide ranging, effectively bringing back into play all potentially relevant

public interest considerations, including the matters identified in section 117B. Accordingly, when considering the reasonableness of the appellant's step-son's removal, a relevant factor is that the appellant used deception in an application for leave to remain, conduct which weighs heavily against him and strengthens the public interest in his removal.

31. However, regardless of how egregious the conduct of the appellant may have been in using deception, I am not satisfied that it would be reasonable to expect his step-son to leave the UK. The appellant's step-son is a British citizen with a mother who is a British citizen. The respondent's own guidance recognises that it would not normally be reasonable to expect a child who is a British citizen to leave the UK. See the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes" dated August 2015.
32. It might be reasonable to expect the appellant to leave the UK without his step-son, but that is not the issue Section 117(B)(6) requires to be considered.
33. I do not underestimate the strength of the public interest in the appellant's removal, but the language of Section 117(B)(6) is clear. As clarified in MA(Pakistan) [2016] EWCA Civ 705
1. *In my judgment, therefore, the only questions which courts and tribunals need to ask when applying section 117B(6) are the following:*
 - (1) *Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.*
 - (2) *Does the applicant have a genuine and subsisting parental relationship with the child?*
 - (3) *Is the child a qualifying child as defined in section 117D?*
 - (4) *Is it unreasonable to expect the child to leave the United Kingdom?*
1. **If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed.** (emphasis added).
34. This is a case where the answer to first question is no and other three questions is yes. Accordingly, in accordance with MA (Pakistan) and applying the plain meaning of Section 117B(6), it follows that that conclusion must be that Article 8 is infringed. I therefore allow the appeal.

Decision

- A. The decision of the First-tier Tribunal contains a material error of law and is set aside.
- B. I remake the decision by allowing the appellant's appeal.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 28 April 2017